The Legitimacy of Exits from the European Union.

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Abstract

Justifications for extending the Union's boundaries to include new Member States have been much discussed. Only since the Brexit referendum have justifications for shrinking the Union's boundaries through withdrawals of Member States received the same attention. This paper uses concepts of historical responsibility to ask whether decisions Member States take together constrain the manner in which any one of them can justifiably exit the Union? It argues that much depends on how far Members States make laws together that are important to the lives of their citizens; that pre-empt their subsequent choices; and which affect their ability to manage collective action problems.

Introduction

Can we distinguish legitimate from illegitimate contractions in the European Union's boundaries (See Bellamy, Lacey & Nicoläidis in this volume for discussion of boundary unbundling)? Would some ways of exiting the Union be wrong or unjust? For sure, exiting states will need to leave in ways that respect their obligations to their own publics. But how far, if at all, should the manner of their leaving also be constrained by responsibilities to other EU democracies and their citizens? Do the Union's component democracies have historic responsibilities to one another that follow from what they have done together as members of the Union? And do those historic responsibilities constrain how any one Member State can exit the Union?

Until the Brexit referendum, the question of what would count as a justified exit from the EU might have seemed an academic parlour game of some theoretical interest but little practical application. Even its author (Lord Kerr) claims the Article 50 procedure for withdrawal from the Union was designed never to be used.

This paper uses the example of Brexit to make some modest suggestions for how we should evaluate what are justified withdrawals from the Union. That might seem to get things the wrong way round. Surely, it might be objected, we should evaluate a process such as Brexit against standards, and not use the example of Brexit to discuss what might be standards for

justified exits from the Union? Yet, I argue, neither the rules of the Union itself nor any existing literature can adequately define normative standards for how a Member State should exit the Union. Thus, there seems little alternative to building those standards from scratch. And particular examples are important in developing more general standards (See Rawls (1993, 45) on a need to establish a ‘reflective equilibrium’ between general principles and judgements on particular cases)

So let us start off by imagining that academic parlour game aimed at identifying what would be a justified exit from the Union. Given that no one seems to be able to say anything about Brexit without mentioning the word ‘divorce’, I suspect the parlour game would start by identifying standards by which terminations of relationships are often judged. Doubtless much will be thought to depend on the motives and consequences of splitting up, as well as any rules that are generally thought to govern the ending relationships of a particular kind. Then, of course, there will be considerations specific to those who are splitting up. The promises they made to one another: the history of the relationship; the things they did together; how hard they tried to make things work; the blazing rows; the collateral damage they inflicted on friends and neighbours. The parlour game would probably keep coming back to a fundamental distinction. Those within a relationship can be justified in splitting up and yet fundamentally unjustified in their manner of doing so. Quitting and the manner of quitting are different things. Standards are needed for both.

But every party has a party pooper. Someone might point out that the rather banal considerations set out in the previous paragraph govern the termination of relationships between individuals. In contrast, an exit from the EU breaks a relationship between states. Indeed, it arguably, breaks a most unusual relationship between states. There are other multi-state, non-state entities that exercise powers from beyond the state. But, unlike the EU, they do not approximate a general-purpose governance structure. They do not cover the range of public policy through a political and legal order that has its own law, public administration, representative institutions and shared citizenship. Exiting the Union, arguably, involves exiting a Union of citizens as well as of states; and, even in so far as it involves exiting a Union of states, it, unusually, involves exiting an association between democratic states which have transformed and reconceived their own statehood together (Bickerton 2012; Cohen 2012). Member States have allowed their shared membership of the Union to influence how they individually operate as welfare states,

as democratic-constitutional states (Fossum & Menendez 2010), as political communities, and as sources of rights and security for their own citizens.

Hence, my party-pooper might continue, it would be a category error to identify what is a justified exit from the EU from any other source than an understanding of the relationship created by shared membership of the Union itself. An exit from the EU does not belong to the same category as individuals exiting a relationship. It does not belong to the same category as sub-states seceding from a state (See Closa in this issue). It is not even clear how far a state exiting the Union belongs to the same category as a state exiting from classic international organizations.

So, standards for justified withdrawal need to be somewhat particular to the Union. I argue here that some progress can be made by using the example of Brexit to consider how concepts of historic and joint responsibility might constrain justified withdrawals from the Union. The paper proceeds as follows. Section 1 demonstrates just how little can be said about justified withdrawals from the Union from existing theory and literatures. Section 2 uses the example of Brexit to show how the responsibilities of a leaving Member States have none the less been discussed in public debate. Section 3 shows how concepts of historic and collective responsibility can help identify how the behaviour of states as members of the Union may constrain how they can justifiably leave it. Section 4 concludes with some tentative suggestions for how we might think about standards for justifiable exits that are suited to states which co-operate through the Union as democratic states. Just one caveat: my main interest here is not responsibilities exiting states have to their own publics. Rather I am interested in responsibilities they might have to the other democracies of the Union and to the citizens of those other democracies.

1: EU Exits. An under-theorised problem?

It might be thought that there is a simple answer to what would count as a justified exit from the EU. The Union is a Treaty based organization. The Union has a procedure for withdrawal in Article 50 of the Treaties. The Treaties have been agreed by all Member States. A justified exit is, therefore, simply one that follows the procedure in Article 50.

Yet Article 50 tells us rather little. As Christophe Hillion (2015, 135) notes, A50 is commonly criticized as ‘incomplete, unclear’ and even cryptic’. It merely sets out the ‘rudiments of a withdrawal process’. A50 only specifies a procedure for reaching a withdrawal agreement, not what should be included in any agreement, which can seemingly consist of whatever the negotiators want it to’ (House of Commons 2016, 4; UK Government 2016).

In any case, merely following a legally-established procedure to which all have consented may be neither necessary nor sufficient to justify a decision. Even procedures to which all have consented may be unjust (Beetham 2013). Conversely, as David Estlund explains (2008), consent can be wrongly withheld. Actors may, therefore, have responsibilities additional to those to which they have explicitly consented.

Indeed, a withdrawing state could meet all its procedural obligations under article 50 by just notifying its intention to leave and then sitting on its hands for two years after which withdrawal is automatic. The withdrawing and remaining states could, conversely, work tirelessly and amicably to reach a withdrawal agreement within the A50 procedure and still have other responsibilities to one another. Indeed, the European Commission’s chief negotiator, Michel Barnier, has insisted UK has some responsibilities that it must meet *before* it can negotiate anything else under A50. Those include responsibilities to the 5 million individuals who are threatened with loss of residency, family and employment rights once they can no longer benefit from the UK’s commitment to free movement; responsibilities for Northern Ireland; and the UK’s financial liabilities.

If, then, there are limits to what the Union’s own agreed procedure can tell us, maybe the literature can help identify standards for justified exits from the Union. But which literature? To the extent the EU is less than a state and somewhat more than an international organization, it may be unclear whether we should turn to the literature on ‘state-breaking’ or on ‘international organization breaking’? Maybe, up to a point, we don’t need to decide. For both the state-breaking and international organization breaking literatures are helpful and unhelpful in similar ways. Both helpfully raise the question of how far break ups need to be justified at all. Thus ‘remedial rights’ theories assume that parts of states only have a right to secede if they have suffered an injustice and have exhausted other remedies (Buchanan 2013). Primary rights theories assume they have rights to secede even if there has been no injustice. It is sufficient

that bits of states no longer feel a part of the whole, and they want to make their future alone or elsewhere.

Yet both the state-breaking and international-organisation literatures fall along way short of (an albeit demanding ideal) of offering some complete normative conception of conditions where break ups may be justified. Indeed, the IO literature has been criticized for avoiding that question, as if the doctrine of *pacta servenda sunt* should even discourage academic debate on where it might be right to withdraw from treaties establishing international organisations. That, however, poses a huge problem. As Lawrence Helfer (2005) convincingly argues, international co-operation may even require concepts that can distinguish justified from unjustified exits from IOs. As he puts it, ‘exit has both co-operation-detracting and co-operation enhancing attributes. On the one hand, exit can be the ultimate act of disrespect for international rules and institutions’. On the other hand, it may sometimes be better that states should be encouraged to come clean about difficulties in continuing their membership of an international organization: to ‘publicise a withdrawal’; to follow an explicit procedure, rather than withdraw by stealth and by shirking obligations; and to ‘open’ their reasons for withdrawal to scrutiny’ (1587).

Indeed, the goals and values of European integration may themselves require concepts of justifiable withdrawals. Consider two cases. In one case, an authoritarian government invokes Article 50. In an another, a Member State withdraws because it is no longer convinced the Union is itself the best way of pursuing the values of the Union. Would the Union really be justified in treating these two cases as morally equivalent? Might it even be bound by its own values to accept the second as the kind of withdrawal that could be justified?

2: Responsibilities of Exit.

The existing literature would seem, then, to be of limited help in identifying what obligations a withdrawing state might owe other Member States beyond following the procedure in A50. But maybe the debate provoked by Brexit can itself offer some clues? Without wanting to suggest that they are justified, complete or consistent, the following are some examples of responsibilities to remaining states and their citizens that have been variously attributed to the UK in exiting the Union.

First, are responsibilities that follow from the joint development with other Member States of EU citizenship rights. Brexit deprives 65 million UK citizens of their EU citizenship and 450 million citizens of other Member States of their rights to use their EU citizenship rights in the UK. For sure, in neither case is the action of some in depriving others of their citizenship rights as drastic as secession from a state. Since EU citizenship is additional to state citizenship, EU nationals in the UK are not at risk of being left in an Arendt-like limbo of right-less persons (See Shaw in this volume for further discussion of ‘deprivations’ of EU citizenship rights by Member States leaving the Union). Yet a withdrawal from the Union plainly threatens to disrupt the lives of many. There are 2.9 million EU nationals in the UK (UK Office for National Statistics 2016). Even key cheerleaders of Brexit accept that the UK has strong obligations - that should not be a matter of bargaining - to citizens of other Member States resident in the UK (Legatum 2016, 17).

Second are responsibilities of good neighbourliness. Do withdrawing states have responsibilities to part amicably and in ways that avoid harms to other Member States as well as themselves? Do they have responsibilities to continue to offer fair terms of co-operation to the other Member States? Do they have responsibilities not to frustrate the remaining states in their goals? And if they do have responsibilities to respect the right of remaining states to maintain a coherent association between themselves, does that, in turn, imply a responsibility to leave in reasonable time (Constitutional Law Association Blog 27 June 2016)? Might the UK, for example, have a responsibility to leave before European Parliament elections in 2019 and before the Union starts to negotiate the next multi-annual financial framework which is so important to its own functioning?

Third are responsibilities on exiting states to take on their share of the Union’s wider international commitments. Consider the commitments under the Paris agreement on climate change (Hannay 2016). The agreement was constructed by all participants submitting their ‘Intended Contributions’ to reduced emissions. The EU submitted an ‘Intended Contribution’ on behalf of all its Member States. So does the UK now have a responsibility both to all other EU Member States and to all other participants in the Paris Agreement to propose a contribution to reduced emissions that is at least as ambitious as any to which it would have been bound as a Union member?

Two of the foregoing are historic responsibilities: namely, responsibilities to EU citizens who have come to the UK since 1973 and responsibilities on the UK to assume its share of international commitments concluded during its membership of the Union. However, the most acute historic responsibility entailed by Brexit is surely to Ireland. The UK's historic responsibilities for its membership of the Union 1973-2016 are entangled with its much older historic responsibilities for Northern Ireland and to the Republic of Ireland. Co-membership of the EU has been one way in which the UK has met its historic responsibility to Ireland since 1973. Shared EU membership of the Union contributed both to the Anglo-Irish agreement (1985) and to the peace process. In an article entitled 'Brexit threatens two decades of peace in Northern Ireland', the former Irish Prime Minister, John Bruton, argued: 'The underlying assumption of the Good Friday agreement was that both parts of Ireland would be included in a zone of free movement: an assumption that is being unilaterally reversed by the UK's decision to leave that zone. Brexit will thus devastate trade flows, and human contact, within Ireland, with incalculable consequences' (Financial Times 14 September 2016).

3: Shared and Historic Responsibilities.

However, we can do better than enumerate responsibilities that are often attributed to the UK in public debate on Brexit. Even if those intuitions are widely held, they may be confused, unjustified or even incomplete once we reflect on more general concepts of responsibility. So what more general concepts of responsibility might be relevant to a state leaving the Union? I assume the key question is whether the things Member States have done together in the past now constrain the manner in which any one of them can withdraw from the Union. Hence, we are looking for concepts of where co-operations between democratic states in general – and the Member States of the EU in particular – can create *shared* and *historic* responsibilities between them.

In his discussion of the historic responsibility of nations, David Miller (2007, 115-20) distinguishes two concepts of shared responsibility. First, he argues, shared responsibility can be attributed to individual members of 'like-minded groups' of those who participate in an action with at least some aims in common. Second shared responsibility can be attributed to 'collective action groups'. Here there is no requirement that 'beneficiaries of a collective action... should have aims in common: participating in the practice and sharing in the benefits may be sufficient to create responsibility'.

Let me now suggest how Miller's concepts of shared responsibility might be adapted to the case of a democratic state seeking to withdraw from the institutions and decisions of a European Union that it has shaped together with 27 other democratic states.

First, given that it is states and not nations which join and leave the Union, we would want to apply Miller's concepts of collective responsibility to states, and not as he does, to nations. Does that matter? I think not. Miller (2007: 120) notes 'like-minded' and 'co-operative action' are general concepts of shared responsibility. Indeed, it is in some ways easier to apply those concepts to states than nations. To see why, consider Miller's observation that his two 'ideal types' of shared responsibility are likely to overlap: a real group may have some features that belong to the like-minded group, and some that belong to the co-operative practice model' (114). Shared responsibility can, as it were, be over-determined. A group can be both a strong 'like-minded group' and a strong 'co-operative action group'. Its members can co-operate with clear aims in common and then qualify a second-time over as a group whose individual members share responsibilities just by 'participating in the practice and sharing in the benefits'. Indeed, I suspect co-operations between states normally meet both standards of responsibility. States do not co-operate absent-mindedly. They don't usually co-operate for any length of time (and certainly not 43 years) without 'participating in the practice and sharing in the benefits'.

Second, it might be thought problematic that I am asking whether Member States have responsibilities to *one another* only to withdraw from the Union in certain ways. In contrast, Miller is interested in where members of like-minded or co-operative action groups have responsibilities to those outside those groups. However, the difference is more apparent than real. For, when Member States decide together in Union institutions there is always one crucially important 'out group': namely, their respective citizens. For sure, the latter can always hold their own governments to account. But they are not at the table. They have slender information and limited voice. And their own governments can, in any case, be out-bargained and out-voted. Hence, the key question is whether the 28 Governments of the Member States ever become enough of a 'like-minded' or a 'co-operative action group' to be jointly responsible for impacts of their decisions on all their citizens? And, if so, does that, in turn, limit how any one Member State can justifiably exit the Union?

Third Miller's models of collective responsibility help us precisely with the question we were unable to answer earlier in discussing how far a state leaving the EU might have responsibilities additional to those set out in A50: namely can actors have obligations to which they have not explicitly consented? As Miller puts it 'The claim that people who belong to like-minded groups or who participate in co-operative practices are collectively responsible for the results of their behaviour' is not limited to what they agree to do. So long as they share in the benefits, members of a co-operative action group can even be jointly responsible for decisions they oppose. Even participants in like-minded groups do not need to have some complete, consistent and identical set of 'specific intentions' which all have knowingly endorsed. To count as a like-minded group that can then be held jointly responsible, it is enough that there should be *some* overlap in the aims of participants; that they should all 'recognise their like-mindedness' and make some 'causal contributions to the final outcomes'. Indeed, many forms of responsibility are not reducible to intention (See also Gilbert 2006). Miller reminds us that people may be thought responsible for clearing up the mess even where they have not even contributed to the outcome let alone intended or consented to it.

Fourth, it will also help adapt Miller's concept of the co-operative action group in particular, if we recall a problem famously identified by Robert Nozick (1974, 90-95). Merely benefiting from a shared activity cannot be enough to create shared obligations. Otherwise it would, absurdly, be possible to impose obligations on others by imposing benefits upon them. Miller anticipates that difficulty by requiring that actors 'participate in the practice' *and* 'share in the benefits' (Simmons 1979). Likewise, H.L.A. Hart (1955, 185) argues that if x is to have an obligation to y it is not enough that x should have benefited. Co-operation must also have been under 'agreed rules' and y's 'liberty' must have been 'restricted' by that co-operation.

Now, EU members plainly co-operate under 'agreed rules' and in ways that 'restrict' choices that are subsequently available to other member state democracies. I now argue, first, that co-operating under the agreed rules of the Union and in ways that restrict choices available to other member state democracies makes the democracies of the Union both a 'like-minded group' and a 'collective action group'; and that, in turn, puts some limits on the manner in which any one of those democracies can justifiably leave the Union. The following points explain.

1: Co-legislators. Let us first take up Hart's point that joint decisions can create joint responsibilities where they are taken under agreed rules. Member State democracies are

distinctive in how many laws that are applied to their own citizens are laws those democracies make together with other EU democracies through the agreed rules and institutions of the Union. Around 20 per cent of law in Member States is EU law (Töller 2010).

In coming together in Union institutions to make quite so much law, surely Member States behave as a ‘like-minded group’? Take the single market. Whilst it is possible to question how far the Union’s participating democracies have ‘like-mindedly’ pursued ‘ever closer’ Union, it is hard to doubt that they have ‘like-mindedly’ pursued a single market. In forming a single market, they knowingly and necessarily commit themselves to a massive project in co-legislation. A single market does not just regulate ‘at border’ restrictions to trade. Rather, it uses shared laws to remove ‘behind-border’ obstacles. The joint law-making needed to create a single market necessarily gets into what Douglas Hurd called the ‘nooks and crannies’ of national democracies.

If it is not obvious from its substance that the Union is a massive undertaking in shared law-making under agreed-rules, it is surely evident from its procedures. Large parts of the Union’s political order have been ‘like-mindedly’ designed for making laws in common: its elaborate legislative procedures and, obviously, its court. Indeed, co-authoring laws for application in all 28 of their democracies is, surely, to, use Miller’s term, what makes Member States ‘aware of themselves as a like-minded group’. However diverse their other aims, there is one intention on which they necessarily overlap: namely, to make law for application in all their democracies.

2: *Pre-emption of choices.* Now consider Hart’s second condition for reciprocal responsibility: namely, that decisions are not just taken under ‘agreed rules’. Those who take them also ‘restrict the liberties’ of one another. Now, it might be argued that, whilst EU Member States plainly do act together under ‘agreed rules’, they do not do so much to ‘restrict the liberties’ of other Union democracies and their citizens. Although membership of the Union can sometimes seem very constraining, it mostly seems to work through consensus and voluntary agreement. Treaties require unanimity. Ordinary legislation is usually adopted with the agreement of all Member States, even where majority voting is possible (Mattila and Lane 2001); and, then, when legislation has been passed, its application often seems to be adjusted through continuous deliberation and experimentation to what Member States are willing and able to do on the ground (Sabel and Zeitlin 2008).

Yet, even decisions taken with the agreement of all can drastically reduce choices that are subsequently available to each. Again, consider the example of the single market. The decision of all Member States to create a single market has narrowed their choices of economic models or forms of welfare state. Once made, single market decisions also have strong path dependencies (Pierson 2000). Where large fixed investments are needed or where there are increasing returns over time from creating a single market in a particular way and with a particular set of participants, there will be actual and opportunity costs in switching paths to alternative market relationships or even to continuing with the same market relationships but with fewer participants. The single market has also changed the economic and social responsibilities of each Member State democracy to its citizens. It has changed the life chances of different categories of citizens. And it has tended to lock Member States into particular economic and social solutions.

Hence, the behaviour of Member States in creating the single market fits both of Miller's models of collective responsibility. Member States have participated and benefited enough from the creation of the single market to count as a collective action group. They have been a like-minded group to the point of developing the single market as an 'economic-political constitution' (Pisani-Ferry et al. 2016). The single market has even been understood as an intentional act of joint statecraft aimed at constitutionalizing a particular model of political economy (Bickerton 2012).

I have made so much of the single market, since, of course, its design has been the UK's defining contribution to the Union. The UK has often insisted on high market liberalization where other Member States might have preferred more social protection or more safeguards against market failure. The latter point is of special importance. Erik Jones (2015) has argued that the Euro-crisis may be attributable to flaws in the design of the single market and not just the single currency. Designing a single financial market without adequate safeguards against market failure in the banking system may have been at least as fatal as designing a single currency without an adequate 'lender of last resort'. Yet the single market may not be the only way in which UK membership of the EU may have pre-empted the choices available to other Member States. Maybe the others might have taken a different approach to defence co-operation in the absence of UK membership?

3. Externalities. To complete Hart's conditions for reciprocal obligation, there is an important class of actions that both confers benefits and restricts liberties: namely, the management of externalities. The problem of externalities is familiar. Externalities are negative where actors do not pay the full cost of harms they impose on others, as in the example just mentioned of banks and their host states which do not pay the full cost of negligent regulation of financial transactions. Externalities are positive where actors do not receive the full benefits of their own actions. Negative externalities will be over-produced. Public goods – which are 'very strong' positive 'externalities' (Begg, Fischer and Dornbusch 1984, 352) – will be under-produced. Co-operation to manage negative externalities and provide positive externalities plainly confers benefits. Imposing negative externalities and free-riding in ways that seriously compromise the efforts of others to provide themselves with key public goods plainly restrict liberties. As Richard Bellamy has put it: 'if the domestic policy choices of one state effectively undermine the other, say by one state polluting upstream from another that has tried to reduce pollution, then the behavior of the one reduces the presumptive options of the other in ways that involve illegitimate coercion of one people by another' (2013 504).

Yet, in the absence of means of managing externalities beyond the state, democratic states may be especially prone to creating externalities for their neighbours. If, voters are purely self-regarding, electoral competition within any one democracy may only be in 'equilibrium' (where those competing for power have done everything possible to win votes) at precisely the point that maximises negative externalities and free riding between democracies (Grant & Keohane 2005).

Perhaps, then, it is unsurprising that managing externalities between Member State democracies is an important part of what the Union does (Moravcsik 1998). Environmental co-operation, macro-economic co-ordination to avoid fiscal spill-overs, the use of competition policy to prevent producers in one Member State extracting monopoly rents in another are all examples of co-operation to avoid negative externalities. Security co-operation, and, once again, the use of the single market to create agreed rules of economic exchange are examples of co-operation to produce positive externalities from whose benefits no one Member State can easily be excluded.

Indeed, Phedon Nicolaides (2013) argues that the shared responsibilities the EU-28 have developed for the management of externalities are amongst the foremost challenges of handling the exit of any one Member State from the Union.

There are genuine public goods shared by EU Member States and significant cross-border externalities...The examples that immediately spring to mind are fisheries, atmospheric pollution and ceilings on Co2 emissions, cross border interconnection of trans-european transport networks, energy and communication networks, battling of money laundering, arms trafficking and other cross-border illegal activities' (216).

Now how much this is a problem will depend on the structure of externalities. As Helfer (2005, 1637-8) notes, international bodies 'which regulate private or club goods' can afford to be 'generous' about exits. Withdrawals from public goods have very different consequences. A state that 'denounces a public goods' treaty can free ride, or disrupt the provision of a public good, or just impose negative externalities.

Yet, the European Union is not the only conceivable means of managing externalities between European democracies. It may even be desirable that the Union should be challenged to demonstrate that it is the best means of managing externalities on pains of losing members. But, note, that is a justification for exit that can only be used by a Member State that already accepts that it has a joint responsibility with its neighbours to manage externalities.

Indeed, any Member State that seeks to withdraw from the Union must already also have some share of historic responsibility for the existing means by which inter-democracy externalities are managed in the European area. Returning to Miller's models of collective responsibility, it would be hard to argue that any Member State has not 'like-mindedly' participated in the many 'co-operative practices' by which the Union manages externalities between its participating democracies. Christian Joerges and Jürgen Neyer (1997, 294) argue that Union law, institutions and deliberative practices have developed precisely to manage externalities. Member States have recognised a need to deal with the 'extra-territorial consequences' of their behaviours for their 'neighbours' (Joerges 2006, 789).

4: Mitigations. The last sub-sections identified how Member States may plausibly have shared and historic responsibilities for what they have done together in the past. Those responsibilities may no less plausibly constrain how any one Member State can exit the Union. But, note, that they are also responsibilities of a kind that can be mitigated. If other Member States can just

carry on at little inconvenience to themselves – perhaps making the choices the withdrawing state has previously blocked or managing externalities without it - the joint responsibilities identified here would not be a constraint on how Member States can justifiably leave the Union. Likewise, the withdrawing state might be thought less responsible if it had somehow been wronged; perhaps - to continue with Miller's co-operative practice model - because it had neither a fair share in the benefits of co-operation, nor a fair share in the procedures by which decisions were made. Indeed, the procedure of withdrawing may itself be unfair. Responsibilities for things Member States have done together in the past may be reduced if the withdrawal procedure is unlikely to identify and apportion those responsibilities fairly. Yet, there is a still further form of mitigation. Quite apart from possibilities of everyone adjusting to exits, and of allowances for how the leaver has been treated, a state may be able to demonstrate that it is more likely to achieve the values and purposes of a particular form of political association, such as the Union, by leaving it.

To illustrate, we might imagine a Brexiter making something like the following plea in mitigation. Right from the start both the UK – and its partners – knew British membership of the European Communities would be difficult. Given British concepts of statehood and self-governing democratic community it was bound to be hard to include the UK in a political association that claimed the priority of its laws and proclaimed a goal of ever closer European integration. Withdrawal is just a form of honesty that acknowledges the incompatibility of the relationship. As for the possibility that historic responsibilities accumulated through the UK's membership of the Union might be mitigated by unfair burdens or procedures, different Brexiter might say different ways. Some might claim unfair financial contributions. Some might argue that free movement had become a real injustice to the UK, depriving it of a right to make its own judgements on how to balance international obligations and self-definition of its own population and political community. Some might claim that a new form of procedural unfairness has developed now that the Euro countries can outvote the rest on single market questions. Some might even argue that the need for the UK to take its share of previous decisions is reduced still further by the way in which Article 50 is stacked against a leaving state: the near automaticity with which a leaving state will exit without a deal two years after triggering Article 50 is designed to enable remaining states to confront a leaving state with a 'take it or leave it choice'. Many Brexiter would also be likely to argue that fair terms of international co-operation are better achieved outside the Union

Indeed, mitigations may be especially important in the case of withdrawals from co-operations between democracies. Notions of collective and historic responsibility are always normatively and conceptually difficult. Worse, shared responsibilities for past decisions are in some tension with democratic ideals. Responsibilities from the past can constrain how democracies operate in the present as self-governing political communities. A current majority may be justified in wanting to withdraw from an international body that it sees as a form of ‘rule by ancestors’: as locking it in to a series of solutions favoured by previous majorities. It may also become increasingly difficult for a group of democracies to work together in the same international body without frustrating the democratic will or democratic community of some of those democracies.

4: Who Judges?

I have shown how concepts of shared and historic responsibility might be used to identify responsibilities on a state leaving the Union to remaining states; and where those responsibilities might be mitigated. But some might object that Union membership is purely transactional and rightly so. Does the Union really need shared norms for justifying exits? Ought it even to have such norms? And even if exit norms are justified, who – in the absence of an over-arching democracy at the Union level – could possibly be justified in judging where those norms are satisfied or mitigated apart from the very democracy that is seeking to leave the Union?

Consider how Brian Barry’s concept of ‘justice as mutual advantage’ (1995) might be applied to the Union. In contrast to the view that bargaining is without normative worth, bargaining to mutual advantage can be defended as having a very special normative quality indeed. It can allow everyone to co-operate for their own reasons of value (Buchanan and Tullock 1962) Not only can actors be expected to get a long way towards resolving their collective action problems by just bargaining together (Coase 1960). But the idea that it is possible to act together, whilst deciding norms and values apart, is especially appealing in the case of co-operation between democracies. After all, core preconditions for deciding questions of value democratically – such as political competition, high levels of voter participation, a well-formed public sphere and political community – may be easier to secure within democracies than between them.

All that implies a kind of ‘liberal intergovernmentalism plus’. Not an analytic prediction that Member States will bargain together to mutual advantage (Moravcsik 1998). But, rather, a normative belief that is what they *should* do. For, in the absence of any over-arching democracy, norms and values should be determined within each Member State democracy. At least, each Member State democracy should be the ultimate judge of where standards are satisfied in practice.

Now, one reply might be that no one is a good judge in their own case. Where actors are judges of their own standards, there are no standards. However, I want to assume, for the sake of argument, that Member State democracies should be the final judges of any standards that should govern their exit from the Union; and of where those standards are satisfied or mitigated in practice. It seems to me that, even under those assumptions, exits from the Union would still be constrained by norms of shared and historic responsibility.

In his discussion of the historic responsibility of nations, Miller notes ‘One cannot, morally speaking, identify with the positive past achievements of one’s nation and take pride in them without at the same time acknowledging responsibility for past actions’ (2007, 158-9). Responsibilities for the past are never purely responsibilities for the past. Rather, the values which actors affirm now and going forward affect what responsibilities they have for the past. Now, I suggested earlier that we distinguish between Member States which exit because they reject values they have previously affirmed through their membership of the Union and those which leave because they believe the Union is no longer the best way of achieving the values of the Union itself. In both cases, exiting involves affirming values going forward. In the one case the exiting state breaks with the values of the Union and affirms some other values. In the other case, the exiting state affirms the values of the Union but implies that it intends, in the future, to pursue those values outside the Union.

Assume a Member State feels that the Union is no longer the best way of achieving *demoicracy*. I take *demoicracy* to be a normative commitment to ‘govern together but not as one’ (Nicolaidis 2013): a commitment to solve collective action problems together, whilst valuing separate and plural forms of democratic political community; a commitment to construct a democratic political community of democratic political communities precisely out of the need for democratic political communities to co-operate if any one of those communities is, indeed, to be a self-governing political community (See Nicolaidis and Viehoff in this volume on the

demoicratic deal). Francis Cheneval and Frank Schimmelfennig (2013, 334-5) identify standards of *demoicracy* by asking: if a group of interdependent liberal democracies value their autonomy but acknowledge both their interdependence and their common attachment to ideals of democratic self-government, what terms of ‘fair association’ would those democracies offer one another? We might also ask what fair terms of *disassociation* they would offer one another?

It would be hard for interdependent democracies to avoid *demoicratic* principles in deciding standards for making and breaking international co-operations. Christian Joerges famously argues that some framework for managing externalities between democracies is needed to complete the justification for the democratic state by correcting one of its ‘constitutional defects’: namely, a mismatch between those who are included in its decisions and those who are affected by them. Indeed, interdependent democracies may need to manage externalities between themselves if they are to meet their own obligations to their own publics to secure rights, justice, freedom from arbitrary domination and democracy itself (Lord 2016 & 2017).

All that, I think, justifies the *demoicratic* assumption that managing interdependence just is a part of realizing values of self-governing political community. For sure, frameworks for managing interdependence can become dysfunctional or oppressive. Yet all that proves is that democracies will sometimes have obligations to exit international co-operations for precisely the same reason as they also have obligations to form, join and improve co-operations: they may, to repeat, need to manage externalities between themselves if they are to meet their own obligations to their own publics.

Indeed, even assuming each individual democracy should be the final judge of the standards it should follow in making and breaking international co-operations, that democracy will be doubly constrained. First, by any need for international co-operation if that democracy is to meet its own obligations to its own publics. Second, by ways in which standards for joining and exiting international co-operations are themselves interdependent. Any one exit from any one international co-operation can conceivably affect other international co-operations (actual or potential) for better or worse. For better, in so far as it puts any one international co-operation under pressure to demonstrate that it really is the best way of satisfying particular needs or values. For worse, in so far as international co-operations are fragile. A benign equilibrium in which everyone more or less complies because they believe others will more or less do the same

can easily be replaced by cumulative movement away from that equilibrium as everyone free-rides, cheats or defects for fear that is how others will behave.

That identifies why interdependent democracies will need to offer one another fair terms of withdrawal if they are to offer one another fair terms of co-operation in the first place. As seen, co-operation to manage interdependence between democracies may require shared law, the foreclosing of choices, and heavy investment over time in shared frameworks aimed at managing externalities. There may be practical and normative limits to how far democracies can assume those joint responsibilities in the first place without an understanding of what would happen in the event of any one of them withdrawing from joint undertakings that have involved long histories of doing things together.

Conclusion

I have used concepts of historic responsibility to identify where decisions Member States take together can constrain how any one of them can justifiably leave the EU. I have argued that a significant part of the overall structure of laws that affect the lives of their citizens is made by Member States together. In making so much law together, Member States often pre-empt choices that are subsequently available to each of the Union's participating democracies. They also construct a policy framework on which national democracies depend to manage externalities between themselves. Of course, remaining states might be able to mitigate some harms they suffer from withdrawals from jointly-made policies and laws. Responsibilities on a withdrawing state may also be mitigated if it has suffered injustice. Withdrawing democracies may also need to be the ultimate judges of where their historic responsibilities for Union policies and laws are met or mitigated. However, in making those judgements, a withdrawing state will be constrained by the values it affirms going forward. It cannot easily justify its exit from the Union by affirming its continued commitment to values of co-operation and non-domination in relations between democracies, whilst being indifferent to how far its withdrawal accepts responsibility for past Union decisions in ways that support future prospects of establishing agreed standards for co-operations between democracies.

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