

# Exit as legitimacy?

## The paradox of a right of exit from the European Union

### Summary

The departure of a member state from the European Union seems like a failure of the Union. But the right of a member state to exit can also be a part of the legitimacy of the EU. This brief explains that paradox. It also asks at what point exit becomes so difficult that it ceases to be a meaningful right that can contribute to the legitimacy of the EU. Exit is constrained by feasibility, and by the obligations a withdrawing state has accumulated throughout its membership. Brexit deepens our understanding of those constraints.

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## How the right to exit confers legitimacy

What gives the European Union (EU) a right to exercise political power? One answer is that member states have conferred powers on the EU using their own democratic procedures and as co-consenters. In other words, much of the value to any one member state in consenting depends on the others doing the same. The EU thus exercises powers with the permission of its member democracies and on the basis of their reciprocal commitments to the laws, rules and procedures of the European Union's legal and political order.

But it is not hard to see the limitations of that answer. EU decisions may cumulate into a vast and interdependent body of law. With time, they may become a rule by ancestors, agreed by previous majorities and generations in member democracies, but experienced by subsequent generations as laws they cannot easily change or control.

One solution is to see the initial conferrals of power as just that: initial. Once powers are conferred on the Union it becomes an autonomous political and legal order in favour of which member states have limited their sovereignty. If autonomous, it must develop its own legitimacy through its own rule of law, system of representation and democratic politics.

Another solution is to develop ways of providing 'living' or continuing legitimization by member states (Lindseth, 2010). But that cannot involve individual control – as opposed to shared control of decisions – if member states are to deal jointly with externalities.

Legitimation through a right of exit responds to these limitations. Although exit is a member

state right, it can be combined with the autonomous or shared legitimization of the Union. Each member can regain control of their own laws by leaving. Yet, for as long as they remain, member democracies make reciprocal commitments to the rules and principles of a shared legal and political order, including to any mutually agreed priority and autonomy in the rules and operation of that order. The Union has ultimate powers of decision within its EU order. Member states have the ultimate power to decide whether to remain a member of the Union.

## Feasibility

The idea that not leaving a political system can be to consent to it goes back at least to John Locke. Yet it was famously mocked by David Hume (1748 [1987: 475]: 'Can we seriously say [...] that a man, by remaining on a vessel, freely consents to the dominion of the master, though [...] he must leap into the ocean and perish the moment he leaves'. A right of exit can only confer consent and legitimacy where exit is feasible and alternatives are available. At what point does exiting a political order become so difficult that it is not a right at all?

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The United Kingdom is a critical test case. As Kalypso Nicolaïdis (2023) has remarked, if the 'Brits' can't do that, can anyone?' The UK is the world's fifth largest single state economy, a permanent member of the UN Security Council, a nuclear power and home to the world's international language. Since it was

not in the monetary union it did not need to tear up a currency on leaving the EU. Ease of exit was also a part of the case for Brexit. ‘We hold all the cards,’ and that leaving would be ‘the easiest negotiation in history’ were among the predictions of Brexiters in 2016, when the Brexit referendum took place.

## Political economy

An obvious question is whether economically viable relationships are available to European democracies outside the EU. The examples of Norway and Switzerland suggest they are. But both participate in the EU’s single market from the outside, comprehensively in the case of Norway and selectively in the case of Switzerland.

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Much depends on what an exiting state wants to exit. Is it just the EU: its constitutional commitments, its decision rules, its aspiration to an ever-closer union between the peoples of Europe? Or is the aim also to leave the single market? A single market is a far deeper form of market integration than a free trade area, which removes only ‘at border’ restrictions to trade. The single market also removes ‘behind the border’ restrictions, notably differences in laws that don’t just regulate markets. They often create them. So, a single market is nothing if not a massive undertaking in shared law-making.

Before 2016, many assumed that the main threat to UK membership of the EU was a single currency it could neither join nor ignore. But what really destroyed UK membership was the

single market the UK had so enthusiastically promoted. The huge increase in EU law needed to create a single market made it possible to win a referendum based on the idea that the UK would need to exit the Union to regain control of its own laws.

So, for Brexiters, leaving the single market is a liberation. It is not, to paraphrase Hume, a plunge into an icy ocean. But much could go wrong. Countries do most of their trade with their neighbours and with those with similar GNPs per capita, and, therefore, similar patterns of supply and demand. The argument that the UK needs to leave the EU to trade more globally may even get things the wrong way around. Building up comparative advantage within a single European market may be important to a member country’s ability to develop more global markets.

It is one thing to trade finished products. Interdependence is of a different order where supply chains and production are integrated across borders. By seeking free trade agreements – and rejecting the shared law-making needed for single markets – the UK is a service economy in pursuit of trading relationships more suited to a goods economy. British governments or producers may also end up unilaterally approximating EU rules. The UK could then end up with even less control of its own laws than when it was a member with full decision rights.

The UK is also leaving a single market that became a key part of the political economy of the British state. The financial single market contributed massively to the UK’s tax base in ways that helped the UK sustain a financial sector that was five times its GNP, not to mention the remnants of the UK’s welfare state and social compromise.

## Constitution and political system.

Another potential brake on leaving is the constitution and political system of the exiting state. Precisely because it started from a strong conception of parliamentary sovereignty, the UK went further than most in using EU membership to transform its own internal political order. The UK used EU membership to develop rights that had previously been hard to guarantee in a system of parliamentary sovereignty and to entrench a new territorial settlement through devolution of powers to Northern Ireland, Scotland and Wales (Bogdanor, 2019).

A political system that had qualified parliamentary sovereignty in relation to the EU could more credibly commit to not using parliamentary sovereignty to alter rights or devolutions of power to Northern Ireland, Scotland and Wales at the whim of changing majorities in the Westminster Parliament. The same constraints on the sovereignty of the British state, which convinced some that the EU was a form of rule by others, came – during the course of the UK's membership – to be understood by some in Northern Ireland and Scotland as necessary protections, if they were to be guaranteed roles in governing themselves within their parts of the UK.

The UK has also had to make choices about Brexit within a system of deeply divided politics. The UK is now divided along multiple cleavages. As well as territorial cleavages between its whole and its parts, the UK now has two distinct left-right cleavages: one preoccupied with markets, the other with immigration and identity. Brexit itself – and how it should be done – are contentious along all the multiple cleavages of the UK's new

politics: on questions of economics, identity and territory. All that has made it hard to identify a stable equilibrium within British politics for any one version of Brexit.

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An agreed democratic process should be able to settle even acute, complex and multi-dimensional disagreements. Instead, the divisions of Brexit have been deepened by the UK's conflictual political system. At 35%-40% – or a mere plurality and not a majority of the vote – a political party can win an overall majority of representatives and undivided control of parliament and government. Below 25%, a party can risk annihilation (unless its support is regionally concentrated). The result is an extraordinarily competitive system with strong incentives to politicise, seek controversy and decide without much compromise where a parliamentary majority can be secured on 40% (or sometimes even less) of the vote. Brexit has not just strained the ability of the British political system to reach compromise. The political system has itself further discouraged compromise by enabling, through the 2019 election, a form of Brexit that was at best supported by a plurality, not a majority.

## Brexit in the world

Without being able to deal with inter-state and inter-democracy externalities, single-state democracies will find it structurally difficult to make adequate choices over security, financial systems, pandemics or climate change. They will struggle to meet their most basic obligations to their own publics to secure

rights, justice and democracy itself. Citizens will also find it difficult to use their own democracies to accord one another rights and obligations, and to control their own laws, as equals (Lord, 2021). It is hard to develop rights and laws against polluters, monopolists, tax evaders or terrorists if the sources of those problems are located in other states.

None of that means Brexit is wrong. On the contrary, if interconnected democracies need ‘beyond-state’ bodies to help them meet their own obligations to their own publics, they may even have a duty to leave or dissolve those bodies if they can identify better ways to manage externalities between themselves. The worry, though, is that Brexit understands the control of laws in ways that rule out a form of sovereignty pooling based on self-binding to shared law-making. Brexit is a risky bet that inter-democracy cooperation will always be enough, without much in the way of shared laws and institutions. Given that everyone else might be wrong, it is important that any one democracy should be able to persuade the rest to cooperate in new ways. Yet, the architecture of cooperation also has to be a matter for all democracies. You can’t play cricket when everyone else is playing football was amongst the most tiresome clichés of Brexit. The only problem is that it is true.

## Obligations

By including Article 50 in the Treaties, the EU acknowledged a right of members to withdraw. By not requiring member states to have reasons for leaving, the Treaties imply it is enough for a withdrawing member to have its own reasons. It may just be that it no longer feels a part of the whole or that it wants to make its future alone or elsewhere. It owes no justifications to others. But that does not mean that the right to exit is unconstrained by

obligations accumulated through membership in the Union. Brexit has been constrained by an obligation to avoid a border on the island of Ireland and by obligations to British and other EU citizens created from UK membership, and then departure from, a Union with free movement.

## Conclusion

A member state democracy can engage in an ambitious pooling of sovereignty through the EU and yet retain ultimate democratic control through a right to exit the Union. But is that right too constrained to amount to much in practice? Although other member states would be constrained in different ways, Brexit provides valuable insights into how a right to exit can be limited by the economy, constitution, political system, international interconnectedness and obligations of a withdrawing state.

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