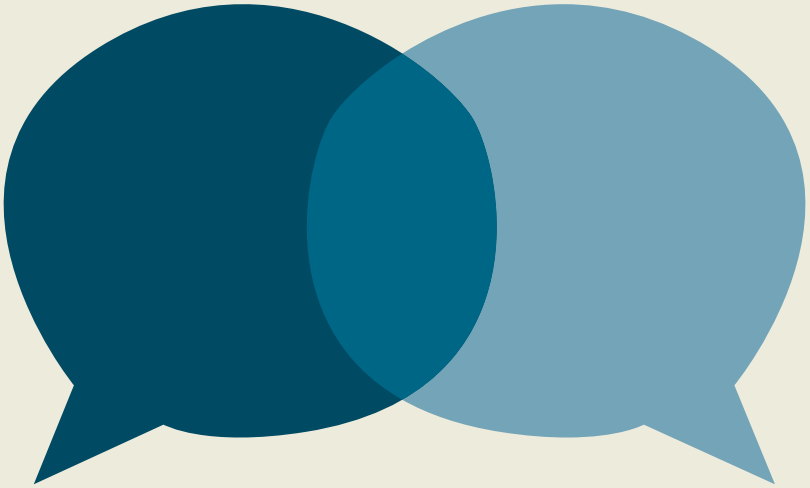

Constitutional Conversations, No. 3 of 6

Northern Ireland at the edge: what's next after Brexit?

CONSTITUTIONS AND THESE ISLANDS: BEYOND BREXIT (PART TWO)

Queen's University Belfast, Thursday, 15 September 2016
Report by rapporteurs Andrew Godden and Conor McCormick

INTRODUCTION

Following the success of the first half of this dialogue on 6 May 2016, this event was held to discuss the implications of the UK's decision to leave the European Union (EU) as a result of the referendum on 23 June. The conversation opened with an appraisal of the complex issues now facing these islands as they grapple with the Brexit scenario, including the fact that the nations of the UK have varying aspirations as regards their future relationship with the EU, and the fact that Northern Ireland requires special attention given its geographical, social and economic ties with the Republic of Ireland. It was seen as unfortunate that the UK government has so far given few details on how Brexit will be achieved and what the post-Brexit landscape will look like. This has created the impression in some quarters that important issues, particularly those relating to Northern Ireland, will fall foul of government ignorance during the withdrawal negotiations. At the same time, it was suggested that the present uncertainty creates an opportunity for interested parties to contribute to the debate in order to shape the withdrawal process going forward.

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INSIDE, OUTSIDE AND THE POSSIBILITIES OF 'SPECIAL STATUS'

The first session began by focusing on the Common Travel Area (CTA) between the UK and Ireland and how this arrangement will fare after Brexit. Attendees were reminded that during the previous conversation in May, the Republic of Ireland's concerns were made clear regarding the post-Brexit implications for British–Irish relations. These concerns were heightened in the aftermath of the referendum, with ministers in Dublin engaging immediately with their counterparts in Belfast, London and Brussels with a view to clarifying, *inter alia*, the continuance of the CTA. Complicating these efforts is the fact that the CTA pre-dates the entry of both countries to the EEC, and the fact it has a unique status in EU law via Protocol 20 TEU and TFEU which has been considered by the UK Supreme Court.[1]

Particular concern emanated from the EU's insistence on equal treatment for all of its citizens as regards their right to free movement in third-party countries. This may prevent the UK from giving preferential treatment to Irish citizens while restricting the rights of other EU citizens to enter the UK. A note of optimism was sounded, however, when it was recalled that Irish citizens have always had a special place in British immigration law that could well continue in a post-Brexit environment, even if the specificities of the CTA require alteration.

Next, an exploration of how Greenland's experience of exiting the EEC may be instructive to the UK took place. Greenland and the UK were distinguished initially in two respects. First, Greenland exited the EEC before the withdrawal mechanism in Article 50 even existed. Second, unlike the UK, Greenland's exit could not be regarded as the secession of a *member state* from the EU, since Greenland is merely a territory of the Kingdom of Denmark, which remains a member state. Nevertheless, Greenland's experience was deemed relevant in one important respect. With warnings of renewed violence in Northern Ireland and the prospect of Scottish separatism in the event of UK independence, a case could be made for a Greenlandic-style arrangement whereby England and Wales are allowed to withdraw from the EU while Northern Ireland and Scotland are permitted to remain. Under this 'reverse Greenland' arrangement the UK would remain a member state of the EU but its voting rights would be reduced to match the aggregated population of Scotland and Northern Ireland. This would have the advantage of placating the 'leave' nations while accommodating those which voted to remain. Yet this course of action would also have far-reaching consequences for the internal constitutional settlement of the UK and leave questions over the future relationship between England/Wales and the EU unresolved. Whether or not the Greenlandic model can or will be implemented as a result of Brexit, it certainly shows that the EU is capable of negotiating novel constitutional settlements.

ALTERNATIVES TO EU MEMBERSHIP – EEA, EFTA AND SPECIAL ARRANGEMENTS

The next panel began with an overview of how Liechtenstein's dealings with the European Free Trade Association (EFTA) and the European Economic Association (EEA) may translate to the Brexit scenario. In December 1992, despite its membership of EFTA, Switzerland voted to reject membership of the EEA, whereas the Principality of Liechtenstein – itself an EFTA member – voted to join the EEA in 1992 and again in 1995. As a result, the bilateral agreements underpinning the already existing customs union and open border with Switzerland required modification.

In the years since 1995 Liechtenstein's membership of the EEA has been deemed a success. Not only is Liechtenstein able to participate in and benefit from the EEA, with equal representation in the relevant EFTA and EEA bodies, but it does so in the absence of obligations relating to the EU's policies on agriculture, trade and security, for example. It has also been able to opt-out of the normal requirements pursuant to the EEA's policy on the free movement of persons. This arrangement was given 'quasi-permanent' status in 2004 by virtue of its incorporation as a sectoral adaptation to Annexes V and VIII of the EEA Agreement, which govern the free movement of workers and the right to establishment, respectively. Consequently, while the right to free movement of persons still applies to Liechtenstein, people wishing to live in the region must obtain a residence permit, the availability of which is subject to a fixed quota per annum. The Liechtenstein arrangement may therefore hold some appeal for the UK, given the country's well publicised reservations on the free movement

[1] *Patmalniece v Secretary of State for Work and Pensions* [2011] UKSC 11.

of persons. Such a settlement would, however, be contingent upon the UK's willingness to become an EFTA EEA state upon leaving the EU and its readiness to cooperate with the other EFTA countries.

Whereas the Liechtenstein example may be regarded as the kind of arrangement that could benefit the UK if it decided to remain a member of the EEA, Switzerland was highlighted as an example of what the UK could face upon leaving the EEA as well as the EU. As mentioned previously, Switzerland is a member of EFTA; however, instead of joining the EEA or the EU, Switzerland's social and economic relations with the European bloc are governed by a plethora of bilateral arrangements. One of these is the 1999 agreement on the free movement of persons (FMP agreement) which entitles Swiss citizens to free movement across the EU, with European citizens enjoying the same right with regard to Switzerland. This arrangement has been under threat, however, since the Swiss people and cantons voted for greater immigration controls as part of a constitutional amendment in 2014. If enacted, this amendment would require the introduction of more restrictive immigration controls within three years of coming into force, and would therefore be incompatible with the FMP agreement.

As a result of this incompatibility, the Swiss government has been forced to attempt renegotiation of the FMP agreement. These discussions are complicated, however, by two other factors. First, the 120 or so bilateral agreements with the EU are subject to a guillotine clause, meaning that if one of the agreements ceases to apply – in this case, the FMP agreement – then the entire regime will collapse. Second, notwithstanding the threat of the guillotine clause, the Swiss government has announced that it will use a unilateral safeguard clause to introduce the immigration controls even in the absence of agreement with the EU. This constitutional impasse may be indicative of what the UK could face if it remains within the single market after Brexit and attempts to curtail immigration. Indeed, the Swiss experience not only demonstrates the difficulty in *re*-negotiating with the EU, but underscores the problem of *reaching* agreement in the first place. It took seven years, for example, for the FMP agreement to be settled, which is considerably longer than the two years that are envisaged for the Brexit negotiations.

CONCLUSIONS

Of all of the conclusions to be drawn from the conversation, three were of particular importance. First was the acknowledgement from all concerned that the post-Brexit scenario is dangerous and uncertain, owing to its uncharted territory and the paucity of information from the UK government at present. Second, the administrations in Belfast, Dublin and London are committed to working together in order to preserve the integrity of the CTA and the open border between North and South, and will carry these efforts forward at the North–South Ministerial Council and similar fora. And finally, while the EU cannot be described as a 'nimble negotiator', the experiences of countries such as Greenland, Liechtenstein and Switzerland have shown that there is considerable scope for close ties and bilateral relations between the UK and its European allies, regardless of the precise configuration of the post-Brexit landscape.

PROGRAMME

Convenor: John Morison

Opening

John Morison MRIA, Professor of Law, Queen's University Belfast, UK; Chair of the Ethical, Political, Legal and Philosophical Studies Committee, Royal Irish Academy

Introduction

David Phinnemore, Professor of European Politics and Jean Monnet chair in European Political Science, Queen's University Belfast, UK

Inside, outside and the possibilities of 'special status'

Jo Shaw, Salvesen Chair of European Institutions, University of Edinburgh, Scotland, UK
Trevor Redmond, PhD, Assistant Legal Adviser, Department of Foreign Affairs and Trade, Ireland
Ulrik Pram Gad, Associate Professor Cultural and Global Studies, Aalborg University, Denmark
Chair: Dagmar Schiek, Professor of Law, Jean Monnet ad personam Chair for EU Law and Policy, Queen's University Belfast, UK

Alternatives to EU membership—EEA, EFTA and special arrangements

Sieglinde Gstöhl, Professor and Director of Studies at the College of Europe in Bruges, Belgium
Christine Kaddous, Professor of Law and Director of the Centre d'études juridiques européennes (CEJE), University of Geneva, Switzerland
Chair: Dagmar Schiek, Queen's University Belfast, UK

Conclusions

Rory Montgomery, Second Secretary General, EU Division, Department of the Taoiseach, Ireland

ATTENDEES

Claire Archbold	Deputy Departmental Solicitor for Northern Ireland
Carolyn Augspurger	Queen's University Belfast
Anthony Behan	IBM
Ed Boyle	Departmental Solicitor's Office, Northern Ireland
Joanne Brundle	Departmental Solicitor's Office, Northern Ireland
Maurice Campbell	Queen's University Belfast
John Coakley MRIA	University College Dublin
Robert Cope	Northern Ireland Affairs Committee, House of Commons
Sarah Craig	Queen's University Belfast
Patricia Davidson	OFMDFM, The Executive Office
Ruari de Burca	Department of Foreign Affairs
Mary Dobbs	Queen's University Belfast
Stephen Farry	Northern Ireland Assembly
Colette Fitzgerald	European Commission
David Fleetwood	Scottish Government
Yvonne Galligan	Queen's University Belfast
Paul Geddis	Queen's University Belfast
Viviane Gravey	OFMDFM, The Executive Office
Paul Hainsworth	Political Researcher and Consultant
Ciarán Hanna	European Movement Northern Ireland
Claire Hanna	SDLP
John Hardy	Green Party in Northern Ireland
Adam Harkens	Queen's University Belfast
Michael Harkin	OFMDFM, The Executive Office
Greg Harrison	N/A

Patricia Haughan	Departmental Solicitor's Office, Northern Ireland
Katy Hayward	Queen's University Belfast
Cathal Hunter	Department of the Taoiseach
Francis Jacobs	European Parliament
Stephanie Johnston	Queen's University Belfast
Milena Komarova	Queen's University Belfast
William Love	Age Sector Platform/Green Party
Muiris MacCarthaigh	Queen's University Belfast
Shauna Mageean	Northern Ireland Assembly
Louise Mallinder	Ulster University
Michael Martin	School of Political Science and Sociology, NUIG
Dorit McCann	Carson McDowell LLP
Catherine McCourt	Department of Finance, Northern Ireland
Patrick McCourt	St Patrick's College, Maynooth
James McCreight	AIB
John McCullagh	Departmental Solicitor's Office, Northern Ireland
Paul McCusker	Letterkenny Institute of Technology
Alanna McGarry	Queen's University Belfast
Joseph McGowan	AIB
Philip McGowan	Queen's University Belfast
Gina McIntyre	Special EU Programmes Body
P. Gerry McKenna MRIA	University of Ulster
James McKinney	Upper Springfield Development Trust
Elizabeth Meehan MRIA	Queen's University Belfast/University College Dublin
Edward Moxon-Browne	University of Limerick
Kaye Norman	Queen's University Belfast
Donal O'Brolchain	
Margaret O'Callaghan	Queen's University Belfast
Matthew O'Neill	Queen's University Belfast
Paula O'Neill	Department of Justice, Northern Ireland
Michael O'Sullivan	Houses of the Oireachtas
Grace Peacock	National Federation of Self Employed and Small Businesses Limited
James Pow	Queen's University Belfast
Clemens Rieder	Queen's University Belfast
Christine Robinson	NI Assembly
John Roden	
Helen Rogers	Departmental Solicitor's Office
Aoife Rooney	Departmental Solicitor's Office, Northern Ireland
Drew Scott	University of Edinburgh
Denis Stewart	International Futures Forum
Honor Stewart	CELT Associates
Seana Talbot	Sure Start
Etain Tannam	Trinity College Dublin
Ulrike M. Vieten	Queen's University Belfast
Orla Ward	Departmental Solicitor's Office, Northern Ireland
Michael Willis	Department for Communities
Jo Wilson	Department of Justice (NI)
Patrick Yu	Northern Ireland Council for Ethnic Minorities

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