



Constitutional Conversations, No. 3 of 6

A New Relationship? Brexit, Republic of Ireland and Northern Ireland

CONSTITUTIONS AND THESE ISLANDS: BEYOND BREXIT (PART ONE)

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Report by rapporteurs Andrew Godden and Conor McCormick

INTRODUCTION

This event was the third in a series of six conversations on constitutional developments across the island of Ireland. More specifically, it was the first of a two-part dialogue on the implications of 'Brexit' for relations between the various jurisdictions of these islands. From the outset, participants were made aware of the importance of this particular entry to the conversational series, due to the seriousness of the subject matter and the dangers for British-Irish relations and North-South cooperation of the UK's exit from the EU. It was therefore felt appropriate that a discussion of such salience be undertaken by leading scholars, policymakers and governmental representatives from the Republic of Ireland and Northern Ireland. In addition, it was agreed that the discussion would best be facilitated by a conversational format, where all participants were free to contribute, as opposed to the more restrictive milieu of lectures and presentations.



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SETTING THE SCENE – ALTERNATIVE FUTURES

The dialogue began with a discussion of the overarching issues pertaining to the Brexit debate in terms of its legal and constitutional entailments. To that end, the conversation unfolded in two parts. First, there was an overview of the potential repercussions for the British Constitution – with particular emphasis on relations between the central UK government, the devolved nations and the European authorities – and its reconfiguration in a post-Brexit settlement. Second, there was consideration of the procedural and legal implications of the Brexit scenario under European law.

If one observation can be drawn from this panel, it is that the Brexit debate helps to throw the contours of the British Constitution into sharp relief. This fact was most apparent when considering how withdrawal from the EU may affect the structure of the British state. Essentially, since withdrawal would have consequences not only for the UK but for the devolved regions also, questions arose concerning the situation whereby the devolved regions wished to remain as members of the EU while the UK as a whole opted to leave. In this situation, three outcomes were deemed likely. The first, and least troublesome, involved the smaller regions leaving the EU with the rest of the UK. The second, and more problematic, would see these regions negotiating their own relationships with Europe. In that context, areas such as the Channel Islands, Gibraltar and Cyprus were cited to illustrate how smaller territories can often negotiate arrangements with Europe separate from those of their national governments. Most controversial of all, however, was option three, which involved the secession of one or more of the devolved regions from the UK in order to reintegrate with Europe. Although traumatic for the UK, this scenario was determined to be plausible, at least with regard to Scotland, where the Scottish Nationalist Party remains committed to a second referendum on independence as well as full membership of the EU. Indeed, when one considers that the UK government may have to disturb the Sewel Convention and issue an order under section 30 of the Scotland Act 1998 in the event of Brexit, it is not inconceivable that Scottish separatism could rise to such levels.

The next part of the discussion revolved around article 50 of the Lisbon Treaty. In the course of the debate, it was argued strongly that even though the UK's withdrawal could only be effected under article 50, the provision itself is far from straightforward and the process of secession could be time-consuming. This is because the UK would be compelled to negotiate the terms of its withdrawal within the European Council, along with its future relationship with the EU. The Republic of Ireland would be unable to play a significant role in these negotiations since the resulting agreement between the UK and EU would only require a qualified majority in the Council. Moreover, having concluded the negotiations, the UK would find itself in a weaker position outside the EU, having no input into the rules of the Single Market or wider European policy. It was also suggested that other European states could veto the extension of the treaties to the UK after its withdrawal in order to deter other member states from leaving. Similarly, it was argued that any attempt to rejoin the EU may be thwarted by the Council, as member states would wield the power of veto. In the end, however, the prevailing opinion was that the prospect of the UK rejoining the EU after Brexit, or of its rescinding its withdrawal application pre-Brexit, would only emerge if a serious attempt was made by Scotland to leave the UK.

KEY ISSUES FOR HUMAN RIGHTS – NORTH AND SOUTH

The second conversation was unlike any other in the course of the day's proceedings, as it was almost completely dichotomous in nature. On one side of the debate there was the argument that Brexit would not have any adverse consequences for human-rights protections in the UK, since withdrawal from the EU would have no affect on the UK's membership of the Council of Europe and the European Convention on Human Rights (ECHR). This contention was then extended into a criticism of the Court of Justice of the European Union (CJEU), due to a perceived lack of accountability and an often poor standard of judicial reasoning, as exemplified by Opinion 2/13.¹

¹ *Opinion 2/13 on EU Accession to the ECHR* (18 December 2014).

A number of submissions were made in response to these arguments. First, withdrawal from the EU could encourage withdrawal from the ECHR. Second, the UK courts would be unlikely to ‘fill the vacuum’ left by repeal of the Human Rights Act 1998 (HRA). Third, the British Constitution is bereft of human-rights values. And fourth, the quality of the CJEU’s reasoning is improving, even though it is not a common-law court, and its accountability lies in its relationship with the other EU institutions. Several discussants also rejected a claim that the CJEU was less amenable to engaging in dialogue with domestic courts and elected bodies than other constitutional courts, making reference to its dialogue with a local German court in *Pfleiderer* by way of example.²

These submissions were met with the argument that the UK has enshrined greater protections for the LGBT community, for example, than is the case under EU law. Further, the British Constitution does contain values, as underscored by age-old institutions such as the royal oath and the Established Church. And, finally, the UK Supreme Court could be regarded as more accountable than the CJEU under the doctrine of parliamentary sovereignty. At the end of the debate it was suggested that there are two views of human rights, one of which holds that they are legalistic rules, while the other sees them as part of a wider dialogue between human beings. Ultimately, it may simply be the case that the former set of arguments belongs to the first camp, while the latter belongs to the second.

Discussion then shifted to the impact of Brexit on human-rights protections in the Republic of Ireland and Northern Ireland, and with respect to the refugee crisis. In each context, the debate was again polarised, albeit unevenly. In the first context, one view was that Brexit would have no impact on human-rights provisions in the Republic of Ireland other than in minor situations involving Irish citizens working in the UK. Against this, it was argued that Brexit could lead to an upsurge in violence in Northern Ireland, which would have massive consequences for the Republic. In terms of the Northern Irish experience, the prospect of a Northern Ireland Bill of Rights was mooted briefly, although it was generally agreed that there is no political appetite for such a bill in the current climate. One discussant believed that the UK’s obligations under the British–Irish Agreement (BIA 1998) in international law would be unaffected by Brexit, suggesting that the relevant terms of the BIA are fulfilled by sections 6 and 24 of the Northern Ireland Act 1998 alone, which could be preserved by careful legislative drafting should the HRA be repealed following Brexit. Another discussant referred to the potential for imperilling good relations between unionist and nationalist communities in the event of Brexit more generally, arguing that the notion of shared sovereignty underlying the Belfast (Good Friday) Agreement was supported by the UK and the Republic of Ireland both being members of the EU. The conversation then ended with a brief examination of Brexit and the European migrant crisis, with one perspective holding that the catastrophe can only be ameliorated by a strong EU, and the other holding that current EU arrangements – including the Dublin Convention – have only exacerbated the problem.

CITIZENSHIP AND FREE MOVEMENT IN A POST-BREXIT REPUBLIC OF IRELAND

As highlighted by one contributor, the socio-economic effects of a vote to leave are of great importance for the Republic of Ireland. This is because the Republic has long-standing reciprocal arrangements with the UK regarding the rights of each country’s citizens. In that context, three issues were identified in the course of discussions: reciprocal travel arrangements between the two states, the implications of border controls in a post-Brexit setting, and access to welfare provisions for Irish citizens based in Britain or Northern Ireland. In the first instance, it was agreed that the UK’s withdrawal from the EU would have little impact on reciprocal travel arrangements between the UK and the Republic of Ireland. Both countries have operated a Common Travel Area for many years, and have opted out of the Schengen Agreement, as reflected by Protocol 20 of the Lisbon Treaty. Consequently, the prospect of a reduction in British–Irish travel was given little weight.

² Case C-360/09 *Pfleiderer* (14 June 2011).

Trepidations were still voiced, however, over the scenario whereby border patrols are reintroduced between Northern Ireland and the Republic.

A common argument from all participants was that such patrols would be extremely difficult to coordinate and would cause unnecessary hardship and division between the two nations, as was the case during the Northern Ireland conflict. Nevertheless, it was agreed that neither country would favour a return to border controls in the event of Brexit.

Greater problems arose when considering the issue of welfare provisions between the two states. British and Irish citizens are treated equally in both countries as regards access to welfare support. Indeed, it was suggested that the UK and the Republic of Ireland provide greater support for each other's citizens than to other Europeans. This arrangement may pose problems if the UK withdraws from the EU. Since the EU insists on EU citizens being treated as well as non-EU citizens in the provision of welfare, any attempt by the Republic of Ireland to give preferential treatment to British citizens after Brexit could result in the country having to extend such arrangements to all EU visitors. Similarly, if the UK decides to remain, British–Irish cooperation on welfare may come under greater scrutiny by the European authorities.

Further points of discussion related to the difficulty of concluding British–Irish trade agreements after Brexit, since the power to negotiate with third-party states lies within the competence of the EU, and not its constituent members. One discussant even broached the benefits of Brexit for the Republic of Ireland, arguing that large enterprises, such as banks and financial institutions, may relocate from London to Dublin in pursuit of better terms. In the midst of these arguments, the dominant view remained constant that the Republic would monitor the Brexit campaign and 'plan for the worst, yet hope for the best'.

THE JUSTICE SYSTEMS AND PROBLEMS OF POLICING

In the subsequent discussion, participants argued that a vote to leave the EU would affect the policing arrangements of the UK and the Republic of Ireland at the global and domestic levels. It was agreed from the outset that, in the modern era, criminality is now globalised and stretches across borders. Thus the importance of global security cooperation cannot be underestimated. Against this backdrop, assertions were made that Brexit would have a severe impact on the UK's ability to defend itself, since it could result in the UK withdrawing from Eurojust, the Schengen Information System and Europol, thereby distancing itself from its European allies. It could also undermine the UK's commitment to accede to the Prüm Convention. In a similar vein, participants suggested that the influence of the wider European discourse on UK security measures would wane after a vote to leave the EU. In that event, legislative developments such as the Human Trafficking and Exploitation (Criminal Justice and Support for Victims) Act (NI) 2015 – a bill influenced by European concerns on human trafficking – would become rarer. Not only this, but the UK's ability to influence the European discourse would also be at risk. This, it was argued, would have particular repercussions for British efforts to export its policing and intelligence practices around the world in the hope of raising human-rights standards in poorer nations.

Further security-related problems were identified at the national level. Overall, these related to the EU's ability to supervise the policing practices of the UK and the Republic of Ireland. In the course of this discussion, particular praise was devoted to the ombudsmen's offices in Northern Ireland and the Republic. These institutions were cited as two of the most advanced of their kind, aided largely by European jurisprudence on human rights vis-à-vis the security services, such as *McCann v UK*.³ The opinion was then expressed that institutional safeguards such as these could very well be jeopardised by Brexit, along with more general cooperation between the British and Irish security services – cooperation that has only been possible through

³ *McCann v United Kingdom* (application 18984/91) (1995) 21 EHRR 97.

the painstaking efforts of each country since the days of the Northern Ireland conflict, in tandem with the supervision of the EU. Concerns about such safeguards were supplemented by a granular analysis of other legal processes underpinned by EU law at the national level, including the increased efficiency brought about by EU law in extradition and deportation cases, as well as cross-border small-claims, digital-contract and child-contact proceedings.

The EU was characterised as an ‘external guarantor’ of security and justice systems across Europe throughout these discussions, something which Brexit was said to put at risk. This function has always been of great importance in the British–Irish context, since both countries have experienced significant levels of distrust over the course of their histories. Ultimately, then, any attempt by the UK to secede from the EU could endanger the gains that have been made in recent years, not only in terms of the UK’s ability to contribute to, and benefit from, EU-wide security measures but in terms of the political capital that has been cultivated with its closest neighbour and ally, the Republic of Ireland.

THE WAY AHEAD

In summary, the overwhelming sentiment of the discussants was that withdrawal from the EU would be to the disadvantage of the UK and the Republic of Ireland. Not only would it encumber the ability of Irish citizens based in Britain or Northern Ireland to reap the socio-economic benefits of the Single Market but it could lead to curtailments of their human rights and imperil the national security interests of each country. Indeed, such are the consequences of EU secession that it could even lead to the break-up of the UK itself. In light of this dialogue and the implications that it raises, the participants looked forward with great interest to the next event in the conversational calendar, ‘Part Two: After the Vote’, which will be held at Queen’s University, Belfast on 15 September 2016.

PROGRAMME

Convenor: John Morison MRIA

Introduction and Welcome

John Morison MRIA, Chair of the Ethical, Political, Legal and Philosophical Studies Committee, RIA

Setting the Scene: Alternative Futures

Sionaidh Douglas-Scott, Queen Mary University of London

Gavin Barrett, UCD

Key Issues for Human Rights – North and South

John Larkin QC, Attorney General for Northern Ireland

Christopher McCrudden FBA, Professor of Human Rights and Equality Law, QUB

Chair: Imelda Maher MRIA, Humanities Secretary, RIA; Sutherland Chair of European Law, UCD

Citizenship and Free Movement in a Post-Brexit Ireland

Eleanor Spaventa, Professor of European Law, Durham University

Rory Montgomery, second secretary general, EU Division, Department of the Taoiseach

Chair: Dagmar Schiek, Professor of Law, Jean Monnet ad personam Chair for EU Law and Policy, QUB

The Justice Systems and Problems of Policing

Kieran FitzGerald, Garda Síochána Ombudsman Commission

Claire Archbold, Deputy Departmental Solicitor for Northern Ireland

Georgina Sinclair, Strategic Expertise International (SEI) and Senior Research Fellow, Institute of Commonwealth Studies

Chair: David Phinnemore, Professor of European Politics and Jean Monnet Chair in European Political Science, QUB

The Way Ahead

John Morison MRIA, QUB

ATTENDEES

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Leanne Cochrane	University of Roehampton
Brendan Comyn	Chief State Solicitor's Office
Patricia Conlan	International Law Association – Irish branch
Colm Costello	CIÉ
Mary Dobbs	Queen's University Belfast
John Garry	Department of Justice
Paul Gillespie	Member of the public
Roland Gjoni	University College Dublin
Marie Gobel	Utrecht University
Andrew Godden	Queen's University Belfast
Michael Harkin	Office of the First Minister and Deputy First Minister
Alexandra Henman	European Movement Ireland
Iseult Honohan MRIA	UCD School of Politics and International Relations
Francis Jacobs	European Parliament Office in Ireland
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Gina McIntyre	Special EU Programmes Body
Gary Moloney	University College Cork
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