

Chatham House Rule Report

Faculty of Advocates Conference: Scotland's Options in Brexit; 10 March 2017

In attendance as panellists

- Lord President Carloway
- Professor Drew Scott
- Professor Catherine Barnard
- Professor Derrick Wyatt
- Professor Halvard Fredriksson
- Dame Mariot Leslie
- Ian Bond
- Professor Brendan O'Leary
- Advocate-General Eleanor Sharpston
- Mike Russell, Minister for UK Negotiations on Scotland's Place in Europe

Discussion Held

- The Scottish Government's Paper: the EEA option

The Scottish Government paper's proposals as advanced are contingent on concessions from the UK government and from other EU states. Attempting not to leave the single market is very different to seeking membership. Brexit would bring about an economic shock, with distributional consequences inevitable. Surveying the current debate, the proposition that no deal would be better than a bad deal is incorrect. A WTO deal would be the worst outcome. Membership of the EEA could be achieved without breaching the UK government's red lines. Scotland could 'dock-into' existing EFTA dispute resolution mechanisms. While a bespoke deal is possible, it would be more difficult. The EEA option has not received the serious consideration by the UK that it merits. Scotland's options would of course raise potential constitutional implications. These could arise out of discrepancies between the rest-of-the-UK and Scotland within the EEA. Further, Scotland would need international legal personality to sign international agreements, and acquire the necessary powers to honour them.

- The dynamics around the Scottish options

Anyone giving a clear line of Brexit probably does not know what they are talking about. Potential obstacles to a deal include the German elections, the need for the EU Parliament to assent and a potential vote by Westminster. There is a distinction between a deal to leave and a subsequent deal covering future relations. The latter would require unanimous agreement of EU Member States and some regional parliaments. Given that the Canadian deal took seven years to conclude, it would probably not be quick. Further, there has been some talk about a patchwork of 500 or so specific agreements rather than a single trade deal.

On the domestic side, there is likely to be an 'extraordinary' breadth of secondary legislation needed during the transitional phase. This would mark a massive transfer of power from Parliament to the Executive, as recognised by the Supreme Court in *Miller*. It is rumoured that the Great Repeal Bill will have a single all-empowering Henry VIII clause. The implications of Brexit on devolution are not yet clear. Will repatriated powers return to Westminster before being devolved down, or will measures be put in place to send them straight to Holyrood? Regarding migration, could there be potential for a regional work visa or permit scheme giving migrants permission to work in Scotland but not in England? The requisite logistical efforts should not be underestimated.

- **Scotland's options short of the EEA: get the best deal through Brexit negotiations**

The Scottish and UK positions may not be quite as far apart as they first appear. UK plans include single market arrangements in areas like financial services. Any UK trade-deal would probably include tariff-free trade in industrial products and virtually all agricultural products. The EU has traditionally found tariff free trade with third party countries unobjectionable. A fruitful avenue for Scotland would be to push for the widening of UK interests beyond financial services and into services generally. If the UK can strike a deal on goods, it may be questionable whether the aims of an EEA agreement would be desirable. Scotland's exports to the EU are growing relatively slowly compared with exports to the rest of the world. There are lots of countries waiting to sign free-trade agreements with the UK, including Australia, India, China, Brazil and the Gulf States. This mitigation could be highly significant for Scotland.

- **The relationship between UK and Scottish governments**

There is a 'democratic conundrum', in that the UK voted for Brexit while a majority in Scotland voted against. The Scottish government had been frustrated by the UK government.

There has been no formal response to the Scottish government's paper, only piecemeal rejection. For example, a Downing Street spokesman has ruled out devolution of migration powers and the Prime Minister rules out membership of the single market. If the UK or Scotland staying in the single market is not possible, the second option for the Scottish government is to go through the EFTA route. There ought at least to be an opportunity to seek this in negotiations. It will be critical to establish whether this possibility will be raised in the Article 50 letter, whatever the contents of that letter may actually be.

- **How is the EEA option viewed ... from the EEA?**

Norway's position has for many years seemed lonely, but – in light of Brexit – it is now potentially less so. Norway does fear UK entry into the EEA, knowing that it would be very difficult to block. Sensitive agreements, for example on fish quotas, would need to be renegotiated. The UK could bring a very short term perspective if EEA membership is seen as a stop-gap.

Looking at Scotland, with regard to the EEA option, there is a democratic deficit arising from lack of control over future developments. There are no voting rights in the EU agencies. Regarding enforcement, while the possibility exists for voluntary referral to the CJEU, this has never actually been used. All EU member states would have to agree to Scotland's entry into the EEA, including Spain. Norway's Foreign Minister has indicated that this would be politically impossible if Scotland were not independent, but this may not be a settled position. A difficulty would arise from the internal legislative competence of the Scottish government given that the EEA is evolving.

- **General points on Scotland's options, against the wider context of Brexit**

The UK stance on Brexit comes across in Europe as completely delusional and arrogant. There is a need for goodwill and 'friends' going into the Brexit negotiation. This had been jeopardised by the failure to exhibit a constructive attitude.

For existing members, the option of the UK entering the EEA would be like having an aggressive and restless cuckoo in the nest. From the perspective of an independent Scotland, it might be worth exploring however. Regarding external trade deals, technical barriers are critical. The importance of how Scotland's case is presented should not be underestimated.

Issues arise out of borders, especially in an Irish context given that mutual EU membership is a premise of the Good Friday Agreement. Practically speaking, there is no way to prove length of residency in the UK.

There is no public international law obstacle preventing a binding international agreement at a sub-state level. The critical thing would be ensuring that the sub-state had the power to implement any agreement. Quebec and German Laender are examples of such arrangements. Differentiation for Scotland is contingent on the attitude of the UK government. Other member states would only consider it if raised by the UK, probably in the Article 50 letter.

- **The (Northern) Irish perspective**

It will be easier for Northern Ireland to stay (with the rest of Ireland) in the single market than for Scotland to do so. A distinctive Irish interest is preservation of its right to reunify. The Northern Irish deal is potentially significant for Scotland, as Scotland will be able to argue for the same treatment.

- **The international perspective?**

There is uncertainty over whether the Scottish Government would receive additional powers post-Brexit. There would be resistance from Belgium to a differentiated approach, given the precedent that it could set for Belgian regions. Further, it is presently difficult to discern any political will to include such a position in the Article 50 letter. There will be a need for Scotland to exert influence over the sympathetic and unsympathetic in Europe if an unprecedented differentiated deal is to be achievable. Scottish MEPs can play a part in this. But perhaps the most apt guide to a differentiated deal is Hong Kong, which is a member of the WTO. An alternative would be a veto exercised not just by Scotland but by all of the devolved administrations, including Gibraltar. Such a veto could be relevant to negotiations on migration and aviation systems, and even to a future free-trade deal with the US. Even if a formal differentiated agreement is impossible, there may still be an opportunity for Scotland to acquire more brass plates on doors. For example, the Baltic States had an agreement with Wales under which knowledge was transferred about working within the EU. On security issues, Scotland has an interest in agencies such as Europol, and the most effective solution could be to have liaison officers in the same way as Norway currently does.

Questions and Answers Sessions

Q The First Minister said that the Scottish Government's paper met with positive reaction in Europe, but has yet to be on the table

Due process has to be followed but overall feeling that it has not yet been reciprocated by the

UK Government.

Q If there is a second independence referendum, what would the position be thereafter? Continuing membership of EU or a sub-option of maintaining customs union with UK and single market?

When / if that is the stage, the manifesto will have to be developed. There is a lot of work to be done there. It is not a case of either / or. Just as the UK can say it wants to leave the EU but also wants to be a positive European, if the UK leaves, it will have a new positive set of relationships. That will be positive way in which to approach it. Scotland would go into the second referendum with a positive set of proposals. But Scotland is not there yet.

Q It is rumoured that the UK does not expect to negotiate a settlement and that it will walk away and blame the German and French elections. That would be the 'no deal' scenario. If the UK leaves, there would be no framework to guarantee existence of Scottish Parliament. All that happens is that you have 56 MPs out of 59 saying one thing and other parties would vote it all down? Is it right that when the UK leaves, that is the end to devolution?

Regarding the attitude to devolution, one had to think oneself into the position of the UK Government. It is dominated by the redlines of controlling borders and jurisdiction of courts outside the UK. There is absolute determination that courts outside the UK should not second-guess sovereign Parliament. If that is your view, devolution does not fit that model. Devolution takes place when people are *not* focussed on sovereignty. Potentially the ECHR Strasbourg court could also a court that one does not accept; could it come to the point that we are not even a member of UN potentially?

Regarding repatriation of powers, there has been no talk about the powers going back to Westminster first. There is talk of the UK single market overriding the needs of devolution. The Welsh Assembly feels even more strongly about this. They will not accept the situation where powers are not transferred back to Wales. This is likely to be a very difficult issue. Environmental powers are a potential area in which they could be chipped away. This is a problem that will become clearer as time goes on.

Q The First Minister has hinted at a timeframe for a referendum depending on a better understanding of what Brexit holds. Is that a realistic timeframe and when might we know better?

At the end of the beginning, but one can sequence the next two years. After the Article 50

letter is sent, we will have between 1 month and 6 weeks before we have a response from the EU. It looks as if money will be discussed first. There are big fears. The attitude may be that the UK will not pay a penny. That mindset could cause a problem. If agreement is reached on money by the end of year (2017), one can negotiate whether future trade relations are single-market-minus or trade-plus. By the 18-month period, enough will have been done for the European Parliament to say yes or no. If the European Parliament can say that, there will be enough of a deal for an informed electorate to say.

Q Hypothetically, on the assumption that any second independence referendum were successful, is there an issue as to timing whether Scotland remains in single market? i.e. whether Scotland could apply as successor state? What is the political will for Scotland to remain?

Scotland is not at the stage of being able to answer these questions. If Scotland does not choose otherwise, it will be out of the EU within that two-year period. Does it stay, work its way in, or have another option in the EFTA?

Q Regarding the need for special arrangements, is there any reason to think that the UK government will make reference to those arrangements and what sort of reference would be acceptable?

Scotland is not looking for a special arrangement. It is seeking continuation of the status quo as far as possible. Scotland has gone into negotiations determined to get an agreement. It is not clear if the Article 50 letter is a single paragraph or two pages. Scotland believes that a mention to it is necessary politically otherwise the ability of those negotiating is eroded.

Scotland needs freedom of movement for its economic future and how it sees itself.

Q The *Miller* judgment suggests legal position is as it was prior to the 2016 Scotland Act. Is having independence on the list the second elephant in the room and the UK government feels it has to call bluff?

Regarding the expectations of the UK government, for a long period expectation may have been that there would not be a referendum. May be a different view over the last couple of weeks. There are no complaints over negotiations with David Davis, but otherwise Scotland is dealing with a very centralised government. The reality is that politics enters firmly into this. The Supreme Court judgement on the Sewell convention was not surprising. It covers up a bigger problem that during the Smith Commission, firm promises were made that the convention would be made justiciable. It had been thought at that time that the convention

was meant to obtain greater status. Does make one wonder if it is the work of equals. At the end of 2014 referendum, there was a commitment that this would remain a partnership of equals. If not, one has to draw some conclusions. So the issue of the Sewell Convention looms large.

Q Is there any pressure from European institutions / Member States for the differentiated option? On repatriation of powers, is the Scotland Act going to be amended? Is there any indication what the mechanisms will be that will be in place to redistribute powers?

The atmosphere in the Polish community and others in Scotland has changed since 2014. The issue of EU nationals is important. Using people as pawns is despicable. In the European Parliament, there is growing indication that people want to be part of this process. That will be influential in negotiation as the UK may otherwise want a closed process.

On repatriation of powers, the UK government was not aware that it would have to reopen the Scotland Act. The view was that, because the UK Parliament is sovereign, the powers could be distributed as and how Westminster wished. The Welsh have offered a compromise with repatriation of structures as well as powers – they would establish a UK Agriculture council for example. That is probably optimistic given the experience of JMC process. The JMC always meets in London and is chaired by a UK Minister; it has no decision making powers. There would be a long period of debate and discussion resulting in UK policy which Scotland will have a limited opportunity to change.

Using agriculture as an example, most problematic will be the question of money. Just over 16% of EU subsidies comes to Scotland. If Barnettised, that will be 8.8%, so loss of half of EU payments. That would wipe out vast stretches of agriculture. And yet, Westminster may say that they will not require a legislative consent motion.

Q Question of whether UK has to recognise Scotland. Unlikely that UK will do that. But matter for the EU. Why wouldn't the EU recognise us?

Conundrums get solved in international relations by process of might is right. Kosovo is not recognised by all EU Member States. No EU precedent for collectively recognising sovereignty of a sub-state.

Q Regarding the mention to a sea barrier in Ireland, it would have quite an impact on Scottish goods going to Northern Ireland, would it not?

Regarding the border with Ireland, the preference will be to have the border in the Irish sea. That will be most convenient for citizens.

Q Regarding the Great Repeal Bill, should the Scottish Parliament take into its hands the idea of a Bill. Should they be thinking about doing this?

The question asks whether legislation first goes to Westminster or straight to devolved administrations.

Q Default position is that all powers will fall into parameters of Schedule 5. To stop them doing so, one would have to amend Schedule 5, wouldn't one?

The Scotland Act is liable to change from London, since the Scotland Act will need to be modified anyway.

Q The role of the European Parliament is that it will probably be the last thing Parliament votes on before it dissolves, when MEPs will be in election-mode. Will Spain block Scotland's differential settlement / independent Scotland's accession?

I do not think this is well-founded. Spain has not said that - under all circumstances - it would block independence and membership into the EU.

There is a number of places in Europe where these issues on autonomy come up. I am not sure whether the UK or Scottish governments have been around all of them. The thinking was that Belgium would have fewer problems than most because it is already so federalised, so it was a shock to learn that they were actually opposed to any differentiated deal.

The Irish government is minded to be cautious. It wants to make sure that the right of reunification is included in any deal with the UK.

Q If the UK is open to a differentiated agreement, isn't there a problem with WTO rules

You do not have to be a state to become a WTO member, but you must have sufficient powers to fulfil obligations. Regarding tariff quotas, a deal at one level will not sort out all the tariff quotas and certified schedules.

Q For free movement, there will be an issue of movement from the UK to the EU. Will there be reciprocity?

It is more complex for retirees. For those there for the long term, they benefit from the Long Term Residence Directive and Family Reunification Directive. The UK has not signed up,

but they are already there now. Even if there is no deal, people will probably have some rights. Post-Brexit, once they are in, then the EU rules will kick in. Also seasonal workers, trainees, inter-corporate transfers etc will be affected. Bigger question is what will happen to tourists on the day that EU citizen rights are assured! There are a lot of issues and only little glimpses of light.