

Reflections on Human Rights and Citizenship in a Changing Constitutional Context

Speech given by Colin Harvey

Abstract

This presentation will consider the implications of the UK-wide vote to leave the EU for human rights and citizenship, in the context of a profoundly concerning time for human rights protection in general. There continues to be considerable discussion of the potential impact on the distinctive Northern Ireland arrangements, as well as relationships on the island of Ireland and connections between Ireland and the UK, including the Common Travel Area. A climate of hostility to human rights is gaining ground, with 'Brexit' only one aspect of a larger problem. How will the special status of Northern Ireland, including the majority vote to remain, be reflected in any negotiations and what are the human rights implications? How will human rights be respected in any negotiations to come and who will ensure that happens? Thought will also be given to the troubling fate of the human rights agenda, and why it is time to insist once again on a renewed conversation about the Bill of Rights for Northern Ireland and the Charter of Rights for the island of Ireland.

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Reflections on Human Rights and Citizenship in a Changing Constitutional Context*

Introduction

Thank you to CAJ and to TJI for the invitation to speak at this timely seminar today. The aim of this talk is to focus deliberately on *reflections*. This is a moment of considerable uncertainty, and it is essential that we think about, and discuss, ways forward.

I want to stress that the context is significant, and it frames our discussion today. Brexit is plainly linked to a larger and problematic agenda. In my view, it is one part of a sustained attack on the concept and the practice of human rights.

In considering this topic I will concentrate on three themes:

- First, what should the approach be?
- Second, what are the British-Irish implications and tensions?
- Third, how can we reaffirm and renew human rights in the current constitutional context?

I will end with the suggestion that without recognition at Westminster of the changed context we may be heading into a period of (necessary) constitutional confrontation.

What should the approach be?

The appropriate response to what we are facing is not passive acceptance. Despite notional formal adherence to the core concepts of our peace process this is a Westminster government that is in reality hostile to many of the values that underpin our Agreements.

Brexit is only one example; its impact and the implications for Northern Ireland, combined

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with the strong signal that consent is not present here, illustrate how unhelpful and destabilising it is. The detrimental impact for human rights and equality is plain and much was done to draw attention to the consequences. Question marks are now routinely being placed over taken for granted ideas, for example on movement between these islands and on this one.

The response to Brexit, and to the agenda it represents, should not be passive acceptance. There must be a co-ordinated effort to ensure a dedicated challenge function. I would call on NGOs, community activists, lawyers, statutory bodies, politicians, civil servants and others not to acquiesce in a policy agenda that has questionable legitimacy here, and is so fundamentally contrary to our interests.

In reflecting on this, it is essential that the 'Brexiters' hear the arguments from the other side of the negotiating table, and from elsewhere. It is not simply a matter of attempting to persuade the Westminster Government and Westminster Parliament; the task must involve ensuring that the 'special status' arguments for Northern Ireland and this island are known and understood internationally. The Irish Government has a vital role in this project of building a broadly-based coalition of voices in defence of the values that the peace process (at its best) did try to endorse.

In the constitutional legal and political arguments to come there must be recognition and firm acceptance of the 'special status' of what has been achieved here, and what remains unfinished business. In these discussions there must be no retreat from the human rights and equality gains.

What are the British-Irish implications and tensions?

It is well known that the peace process was conducted with common membership of the EU in the background. We are now entering a phase where, for example, the constitutional notion of 'equivalence' of guarantees on this island will be at risk as both states potentially move apart on relevant standards and protections. How will the concept of equivalence be respected in the years ahead?

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There are many complex legal and policy questions that will be raised across a range of areas. A messy and difficult process has now been unleashed that will lead to a multiplicity of institutional and practical problems.

Both states operate a level of generosity (including on voting rights) towards the citizens of the other which will now likely be open to discussion. The rights relating to Irish and British identification, included in the Belfast/Good Friday Agreement and the British-Irish Agreement 1998, will function (potentially) in a context where Irish citizens in Northern Ireland will retain EU citizenship (but will no longer be living in an EU member state). There will be questions to resolve about the guarantees for EU/EEA/Swiss nationals but there will also be the distinctive matter of the British-Irish special relationship. Will it be sustained? Should it be? How will this be done?

Both states have been historically protective of, for example, the Common Travel Area (CTA). Brexit brings with it new and specific challenges on how this particular special relationship will be negotiated in the future. The imperatives of the CTA figured prominently in the joined-up approach of both states to EU immigration and asylum law and policy, for example.

What is the likelihood of a new comprehensive British-Irish Agreement to try to find an agreed basis for a way forward in this context? Should these arrangements be placed on a much more formal and transparent footing? How will the core human rights and equality values (that were intended to be central to the new dispensation here) be reflected in any such new Agreement. How do you ensure, for example, that any negotiations reflect the complexity of the interactions between the British-Irish context, the current and future position of EU/EEA/Swiss nationals, and the importance of upholding the human rights of everyone on these islands? If there is a desire to retain this special relationship then thought will be needed on how to formalise it more effectively, fairly and transparently.

The point is that although the UK will be engaged in negotiations with the EU how will dialogue about the special relationships across these islands be conducted? Will any new British-Irish Agreement attempt to secure political commitments in a legally meaningful way? Who will be included in these (and other) conversations and how do we ensure the

constitutional fundamentals of the peace process are taken seriously? Is the Belfast/Good Friday Agreement model - of intersecting relationships across these islands - of particular note and value? How will the all-island dynamics be respected and reflected? Will any island of Ireland conversation be conducted on an inclusive basis, and will the human rights and equality concerns be understood and taken into account?

How can human rights be reaffirmed and renewed?

I started by underlining that Brexit is part of a wider agenda. Unless that is fully acknowledged we will struggle to develop effective ways forward.

This fact is plain in the well-aired debates around the Human Rights Act 1998, but it is also obvious in areas such as immigration and asylum law. In adopting the challenge function mentioned there are several points to keep in mind.

First, there is supposed to be a changed constitutional context in the UK. The Westminster Parliament is not the only democratic institution; the Westminster Government is not the only government. While the legislative supremacy of the Westminster Parliament remains central as a matter of basic UK constitutional law, to what extent will determined constitutional politics (anchored around progressive values) be of more significance in the time ahead? There are tools and institutions to work with - including, but not limited to, the devolved institutions – this framework should encourage the strategic use of law as well as skilful constitutional politics. Will law and politics respond credibly to the increasingly pluralist and fragmented UK and to the changed constitutional relationships across these islands?

Second, there is an existing and strong base here in Northern Ireland for supporting a challenge function. Effective use continues to be made of the international human rights mechanisms and there is extensive local and international engagement. There is always more that can be done to make better use of the existing machinery, but there is plenty of experience in Northern Ireland to draw upon. Questions of capacity will however arise.

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Third, what might be substantively factored in? Not repealing the Human Rights Act 1998 is a starting point; we know the extensive evidence of how significant it remains here. Be clear also that existing guarantees will be retained, in whatever precise and technical ways are needed to achieve this. Where the Northern Ireland Executive and Assembly can provide the relevant assurances, and promote a distinctive approach from Westminster, they should do so. Does Northern Ireland really want to be associated with some of the language and politics that has emerged around Brexit?

Fourth, it is surely time to re-open the Bill of Rights proposals from the Northern Ireland Human Rights Commission, as well as to revisit the work done on a Charter of Rights for the island of Ireland. The Joint Committee on Human Rights (of the two commissions on this island) has much potential but it remains underused, and its work is still poorly understood. What is too often neglected is that the participation around the Bill of Rights and Charter of Rights, for example, included sophisticated thinking on how (in a human rights based way) some difficult concepts could be reconciled to reflect and acknowledge the particular circumstances of Northern Ireland, and defend an inclusive human rights and equality agenda. This type of multi-dimensional thinking is going to be badly needed again.

Fifth, can the human rights and equality commissions across these islands work together to develop common or mutually supportive positions? What about getting all the democratic institutions to do much more? How can strategic litigation continue to be deployed in an effective way?

There is a clear need for us all to reaffirm and renew our commitment to the human rights of everyone, as well as explicitly address the Brexit-related rights and equality impacts that will emerge. A systematic assault on human rights is currently underway; at times direct but often subtle and hard to spot. Rather than accepting this or finding alternative ways of speaking we do need to oppose it as well as tackle its direct consequences.

Conclusion: A Constitutional Confrontation?

Brexit is one part of a sustained attack on the concept and the practice of human rights, and one further contribution to the attempted erosion of the core constitutional values of our peace/political process. The attitude to this must be one of legal, policy and political challenge and constitutional confrontation. Human rights and equality must remain central to our new dispensation.

In taking this work forward there is a desperate and urgent need for shared positions, common platforms and tactical approaches. These must be based on the idea that our process stands for better and different values; and that these constitutional values provide a basis for questioning, undermining and subverting Brexit and the appalling politics it often represents. This is the work that we need to do in defence of *human* rights.

