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Human Rights Legislation and Practice in Ireland post Brexit

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INTRODUCTION

On 23rd June 2016 56% of the people in the north of Ireland voted to remain in the EU. They did so because it is in their best interests politically and economically. On 29th March 2017 Theresa May ignored that democratic mandate and triggered Article 50, thereby commencing the process of leaving the EU. Whereas she was intent on a hard BREXIT or a Red, White and Blue Brexit, her electoral collapse Thursday and subsequent engagement with the DUP, have rendered such an ambition, obsolete.

There is growing concern in the north and on the entire island of Ireland about the economic and human rights consequences of Brexit, the negative implications of which are already becoming clear. What is certain is there is no good outcome from Brexit and there is no way to manage or minimise the negative impact of Brexit. It runs entirely contrary to Irish national interests.

The North being forced to leave the EU against the expressed wishes of its people will also represent a major set-back for the political process in the north, and directly challenge the integrity of the Good Friday Agreement and will have huge consequences for protections contained within it. It also fundamentally undermines the principle of consent.

Under the terms of the Good Friday Agreement there is an inherent right for those born on this island to Irish citizenship, and by virtue of that right, citizenship of the European Union as well. It is illogical that citizens who enjoy that right would not be afforded the benefits of that citizenship.

Without recognition at Westminster of the changed context we may be heading into a period of (necessary) constitutional confrontation. 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, not least its impartiality obligations, the pretence of adherence to which has now been shredded forever, with the reliance on the DUP.

The impact and the implications of BREXIT for the north, combined 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. 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. NGOs, community activists, lawyers, statutory bodies, politicians, civil servants and others must not acquiesce in a policy agenda that has questionable legitimacy, and is so fundamentally contrary to our interests.

1: 'Who's next?'

Threat to the ECHR

Whilst many have looked on at some attempts to portray the Leave vote in England and Wales as a grassroots uprising I do find this bemusing given the Leave campaign was led by powerful elements of the political and media establishments – including the Daily Mail and Express, and figures including the former Secretary of State Theresa Villiers and others.

On the back of the referendum many of these campaigners are very much in the ascendency, and have a number of other issues in their sights which should concern human rights activists. At the very top of this list and often a twin, conflated and confused demand alongside EU withdrawal, are moves to repeal the domestic incorporation of the European Convention on Human Rights (ECHR).

Theresa May has been clear in her intention to press ahead with plans to essentially dis-incorporate the ECHR.

The threat to the Human Rights Act, is very real. Theresa May, was the Home Secretary during the Brexit Referendum campaign. She described herself as a *'reluctant member of the In Campaign'*¹, but firmly campaigned for reform of Britain's relationship with Europe, advising that it was not the EU that Britons should be concerned about in terms of British Sovereignty and Independence, but the European Convention on Human Rights, stating that the convention added nothing to the UK's prosperity and that reform of human rights laws would only be brought about by leaving the ECHR and *'the jurisdiction of its court'*².

'It wasn't the European Union that delayed for years the extradition of Abu Hamza, almost stopped the deportation of Abu Qatada, and tried to tell parliament that - however we voted - we could not deprive prisoners of the vote. It was the European Convention on Human Rights,' said May³.

The member of Parliament for Maidenhead, who once misleadingly claimed the Human Rights Act had blocked the deportation of an illegal immigrant because he had a pet cat, defended her staunch opposition to the convention and the Strasbourg court by stating she was not 'against human rights'.

May has denied that her pledge, last Tuesday (6th June 2017) to rip up human rights laws to bring in a tougher regime of restrictions on terror suspects and deportations contradicts her manifesto pledge not to withdraw from the European convention on human rights in the next five years or repeal the

¹ https://blogs.spectator.co.uk/2016/04/theresa-may-has-revealed-she-is-a-reluctant-member-of-the-in-campaign/?_ga=2.57809898.1359223545.1497264739-188437287.1475750590

² https://www.gov.uk/government/speeches/home-secretarys-speech-on-the-uk-eu-and-our-place-in-the-world?_ga=2.66739054.1359223545.1497264739-188437287.1475750590

³ <https://www.solicitorsjournal.com/news/public/administrative-and-constitutional/26279/home-secretary-calls-britain-ditch-european-conv>

Human Rights Act before Brexit⁴. May said on Tuesday night: *“If human rights get in the way of doing these things, we will change those laws to make sure we can do them.”*⁵

In this regard May was calling to extend pre-charge detention. Extending to 28 days would put us way out of step with comparable democracies – it’s 48 hours in the US – and in line with oppressive regimes. It is of course totally unnecessary: of 55 people arrested in 2015 on suspicion of being a terrorist, 93% were held for less than a week⁶ and there is no suggestion it would have made any difference in recent months.

This flatly contradicts the commitment in her manifesto not to rip up or amend the Human Rights Act before Brexit, which is at least two years away, or to withdraw from the European convention on human rights for at least the next five years. Derogation, which would be needed, amounts to a temporary and partial withdrawal from the convention.

May has previously argued that the as yet unseen British Bill of Rights would protect convention and *‘traditional British rights not protected by the ECHR’*, such as the right to trial by jury, unless of course you are being prosecuted in Belfast Crown Court for offences under the Terrorism Act 2000...

A British Bill of Rights ? The Conservatives’ previous 2015 proposals were focused on replacing the HRA with a *‘British Bill of Rights’* that will limit human rights to ‘serious’ rather than ‘trivial’ cases and restrict the role and influence of the European Court of Human Rights (“European Court”) in UK law, including by treating judgments of the Court as advisory only. In doing so, the proposals perpetuate a degree of misinformation, disingenuousness and muddying of legal principles.

The fact that there is no clear model, consultation structure or timetable for the repeal and replacement of the HRA means that it is not possible to assess with specificity or certainty the likely impact of the proposed reforms. The delay, uncertainty and lack of a clear model in themselves give rise to process concerns and diminishes confidence that consultation will be adequate.

Repeal of the HRA and its replacement with some more limited form of protection for human rights risks not only breaching the Good Friday Agreement in a technical sense, but infringing its spirit and leading to a loss of faith in the UK Government’s commitment to the peace process, of which human rights were a core feature.

Replacement of the HRA would be likely to affect the scope of the devolved powers of Stormont as well as the Scottish and Welsh legislatures and would require their consent under the Sewel Convention. Even if the British Government did repeal and replace the HRA, it would be within the power of the devolved legislatures to introduce their own human rights statutes in respect of devolved matters, creating a patchwork approach to human rights.

⁴ <https://www.theguardian.com/uk-news/2017/jun/07/uk-would-have-to-declare-state-of-emergency-to-change-human-rights-laws#img-1>

⁵ <https://www.theguardian.com/politics/2017/jun/06/theresa-may-rip-up-human-rights-laws-impede-new-terror-legislation>

⁶ <http://researchbriefings.files.parliament.uk/documents/CBP-7613/CBP-7613.pdf>

Because the Good Friday Agreement constitutes part of an international treaty between the Britain and Ireland, any possible breaches of the Agreement may constitute violations of international legal obligations and may have negative consequences for the uniformity and reciprocity of human rights protections. Further, in effecting the current proposals to treat judgments as merely advisory, the UK may breach its obligation to other State Parties to the Convention to abide by final judgments. It has been observed⁷ that such a step would set the clock back 50 years, and one can only consider the wolfish delight with which Russia, Turkey, Hungary and other authoritarian states will greet a repeal of the Human Rights Act. They will say that if Britain no longer enforces the European convention, why should they?

Threat to the Good Friday Agreement.

This would be a prime facie breach of the Good Friday Agreement and would dismantle, for example, the entire legal framework for human rights compliant policing within the PSNI. Abroad if other countries with worse human rights records than the UK follow suit such a move risks unravelling the whole system of post-WWII human rights protection in Europe.

In addition to being overwhelmingly approved by referendum, in Ireland North and South, was also incorporated as a treaty between the UK and Ireland and lodged with the United Nations. Article 2 of the treaty binds the UK to implement provisions of the annexed Multi-Party Agreement which correspond to its competency.

Indeed paragraph 2 of the Rights, Safeguards and Equality of Opportunity section states:

“The British Government will complete incorporation into Northern Ireland law of the European Convention on Human Rights (ECHR), with direct access to the courts, and remedies for breach of the Convention, including power for the courts to overrule Assembly legislation on grounds of inconsistency.”

This commitment was given legislative effect through the Human Rights Act 1998. The ECHR was regarded as so important that the Agreement also committed the Irish Government to incorporate the ECHR under the “equivalence” provisions.

The Human Rights Act 1998 is also critical to providing the framework for human rights compliance of the new Policing dispensation in the North.

- A key aspect of the Policing Boards oversight role is to monitor compliance of the police under this legislation.
- The PSNI code of ethics for police personnel is also designed around the framework of the ECHR as provided for by the Act.
- The Parades Commission also operates within a human rights framework, while adjudicating on competing rights as outlined in the ECHR.

⁷ www.theguardian.com/law/2014/oct/03/tory-plans-european-human-rights-convention-take-uk-back-50-years

Accordingly, any attempt to repeal the Human Rights Act or derogate from the ECHR will have serious consequences for our new governance, policing and parading dispensations, and is detrimental to the integrity of both the Good Friday Agreement and St Andrews Agreement.

Nevertheless we are no so naïve as to expect HMG to abide by its commitments – we saw this with the Bill of Rights for Northern Ireland, a Commitment to implement an Irish Language Act as well as measures agreed at Stormont House and the Fresh Start Agreement to Deal with the Past.

The removal of access to Convention rights will affect citizens here on a tangible day to day basis.

In so many of the cases lawyers here bring to the courts through both public and private law challenges – in the absence of a state sponsored human rights compliant mechanism such as the HIU – it is Article 2 of the ECHR that is core – the right to life and the obligations on HMG to protect the right the life and to investigate violations of it when the state agents were responsible for its breach or could have prevented it.

Repeal of the Human Rights Act 1998 or withdrawal from the EU will not remove the obligations on the state toward the family of Stan Carberry, shot by the British army in 1971 and failed by the HET, for the families of the McGurk's Bar Bombing 1972 failed by the HET, for the victims of the Glenanne Gang or the families of the Dublin/Monaghan Bombings 1974 and the stench of collusion.

The Irish Government has repeatedly expressed concern regarding both the UK Government's proposals to repeal the HRA and its attempts to renegotiate the UK's relationship with the EU.

The Irish Minister for Foreign Affairs, Charlie Flanagan TD, has said that the protection of human rights was a key principle underpinning the GFA, and, *"as a guarantor of the Good Friday Agreement, the Irish Government takes very seriously our responsibility to safeguard the Agreement... The fundamental role of human rights in guaranteeing peace and stability in Northern Ireland must be fully respected."*⁸

The Taoiseach, Enda Kenny TD, has indicated that Northern Ireland would face *"serious difficulty"* if the UK were to vote to leave the EU, and he highlighted the links between the peace process and the UK and Irish Republic's joint membership of the EU⁹, whilst also raising his concerns with Theresa May in a phone call on Sunday¹⁰. Indeed incumbent Taoiseach, Leo Varadkar has today stated

"Our role as governments is to act as co-guarantors, not to be too close to any particular party in the North, whether it's nationalist parties or unionist parties. That's certainly something I will emphasis in any contacts that I have with Prime Minister May".¹¹

⁸ 'Human Rights Act: Irish government 'will protect 1998 Agreement' 14 May 2015: <http://www.bbc.co.uk/news/uk-northern-ireland-32734062>.

⁹ 'Northern Ireland would face serious difficulty from Brexit, Kenny warns,' The Guardian, 26 January 2016: <http://www.theguardian.com/politics/2016/jan/25/northern-ireland-irish-republic-eu-referendum-enda-kenny>

¹⁰ Irish PM expresses 'concern' over DUP deal <http://www.bbc.co.uk/news/uk-northern-ireland-40239664>

¹¹ <http://www.independent.ie/irish-news/politics/varadkars-warning-to-theresa-may-dont-get-too-close-to-dup-35816509.html>

2 Racism: the rise and legitimisation of anti-migrant racism

A second compelling and portending issue is racism and its rise. Things have developed darkly since the Brexit vote on 23rd June. Lord Dyson in his valedictory speech on his retirement on 26th July, spoke of his mixed Lithuanian and Bulgarian heritage, and specifically the six months spent by his mother in Bergen Belsen in 1944. He expressed a fear that British tolerance was at risk.

"I am fearful that it is being put under strain by the xenophobia and dangerous forces of hate that have been unleashed in some quarters".

He concluded that as a fall-back position, he might be entitled to a Bulgarian passport¹².

A number of you will have seen the recent comments of the UN Committee on the Elimination of all forms of Racial Discrimination (CERD), which raised the increased number of hate crimes but also expressed deep concern *"that the referendum campaign was marked by divisive, anti-immigrant and xenophobic rhetoric...which created and entrenched prejudices"*.

Despite a section of the establishment leading the Leave campaign, the bulk of who voted leave in England and Wales were among the more disadvantaged sections of the population who have seen their living standards eroded over the last 30 years. It is more compelling now, than ever before, that legitimate grievances against regression in socioeconomic rights should best be channelled into the politics of collective type-action for improved rights for all. In the alternative there is the risk, that grievances can be turned into the type of politics which scapegoats some other ethnic group for a country's problems. Let us not deny that it is the latter that is clearly in the ascendancy in the context of the referendum.

Fixed passport controls the length of the land border are politically and economically untenable and hence unlikely. However if not a 'hard' border for all we are concerned there is a real risk of a 'racist' border emerging with selective checks which single out persons for questioning and potential detention on the basis of skin colour and other ethnic identifiers.

The Home Secretary's speech and briefing note to the 2016 Conservative Party Conference have been widely interpreted as urging employers to ensure they are prioritising British workers, and providing for a duty to be introduced to oblige firms to disclose the proportion of 'non-British' workers they employ. Such policies, reminiscent of ethnic registration, have already caused deep alarm and if proceeded with would fuel racial prejudice in a northern context where there is already paramilitary involvement in racist violence.

It would be remiss also not to point out that such policies would be incompatible with the Agreement, and would directly clash with Fair Employment legislation and monitoring. Given the strong correlation between national identity and community background here, any preferential treatment of British workers by public authorities or subordinate legislation would appear unlawful under anti-discrimination legislation or in the alternative, Section 76 of the Northern Ireland Act 1998.

¹² <https://www.judiciary.gov.uk/wp-content/uploads/2016/07/mr-lord-dyson-valedictory-address-20160726.pdf>

3 Economic Catastrophe

Whilst the UK is a net contributor to EU funds, the north is by contrast a net beneficiary.

An official paper raises concerns about losing access to

- €862million of structural funds in the (2014-20) period and
- €2.5 billion of CAP funding in the same period.
- The north received £340million in agriculture and fisheries funding in 2015,
- along with £160 million in structural and investment funds and
- £270 million in Peace funding.
- The EU has spent €1.9 billion in 22,000 different projects across the North,
- The North will lose €500 million in EU funding every year.

The massive economic and social benefits of this EU funding consolidated our peace building and must be continued. Do we trust a Tory Govt hell bent on austerity to replace these funds?

- Will they recognise that proportionately there are far greater numbers of farmers at home than over the water, or will pro-rata funding be provided to the devolved institutions regardless? Also who decides the criteria?
- Trade restrictions would threaten cross-border production as well as sales, putting farmers out of business. About a third of milk from cows in the north is transported across the border for production into butter, cheese and infant formula¹³. More than 25% of the region's raw milk went south of the border to be processed but a hard Brexit would close down that flow, not just because of tariffs and customs checks, but because of the burden of paperwork relating to issues including traceability, animal welfare and food standards.
- Brexit could put an extra 10c on the price of a loaf in Ireland, causing job losses in Britain because Irish producers would quickly look to source flour inside the European Union.¹⁴ Eighty per cent of the flour used in the Republic for baked goods and other products currently comes from the UK.
- Britain is Ireland's largest export partner, while Ireland is Britain's fifth biggest trading partner, with €1.5bn (£1.35bn) in transactions each week. The London-Dublin route is Europe's busiest airlinck.
- A mushroom factory in the small rural town of Tipperary that closed in August was an early warning sign, a canary in the coalmine. An estimated 90% of mushrooms are exported to the UK, bringing in about €120m each year. The Tipperary factory relied heavily on British sales and closed with the loss of 75 jobs as a direct result of Brexit, with the owner blaming the drop in sterling against the euro¹⁵.

Matters which were dealt with far away will now be thrown into the local political dynamic, with potential adverse impacts on equality if criteria are not designed around objective need. This is the same with any replacement for peace process funding – where some groups, such as ex-prisoner

¹³ www.theguardian.com/politics/2017/jan/11/brexit-barriers-would-ruin-northern-ireland-dairy-farms-mps-told

¹⁴ <http://www.independent.ie/business/brexit/how-brexit-could-add-10c-to-the-price-of-a-loaf-of-bread-35546551.html>

¹⁵ <https://www.theguardian.com/world/2016/oct/16/irish-pm-calls-brexit-summit-to-confront-looming-crisis>

organisations, have been heavily dependent on EU funding that could now either disappear or be put within the local political-decision making context. The economic implications are multifaceted and will only become clear over time.

4 GFA provisions on citizenship in the north

The passage through the Oireachtas of the Republic of Ireland Act 1948 formally declared Ireland a Republic and removed the last functions of the British monarchy from Executive power in Ireland's external relations. This meant Ireland ceased to be a member of the Commonwealth. In response the Westminster passed the Ireland Act 1949. This essentially ensured that Irish citizens would continue to have the same entitlements as Commonwealth citizens in the UK.

In relation to the position of the two Governments on citizenship, the British-Irish treaty which forms part of the Good Friday Agreement guarantees that the two governments will:

... recognise the birthright of all the people of Northern Ireland to identify themselves and be accepted as Irish or British, or both, as they may so choose, and accordingly confirm that their right to hold both British and Irish citizenship is accepted by both Governments and would not be affected by any future change in the status of Northern Ireland. [Article 1(Vi)]

Post-Agreement Irish law was amended after the GFA to guarantee an entitlement to Irish citizenship to all persons born in the north, rather than automatically bestowing such citizenship. However, the Irish government regressed this entitlement in 2004 by the two governments agreeing to re-interpret their understanding of the above GFA phrase the "the people of Northern Ireland" to restrict the birthright to Irish citizenship to babies with one parent who was a British or Irish citizen or otherwise a permanent resident in the north.

In contrast UK law providing for British citizenship as an entitlement– the British Nationality Act 1981 - continues to automatically bestow British citizenship on all babies born in NI whose parents are British or otherwise settled in NI, the latter category almost always including Irish citizens. This means that persons born in the north choosing to carry an Irish passport who have never had a British passport are usually also British citizens under UK law. (save in the uncommon event where a fee of £272 has been paid to renounce British citizenship). It is fair to say this is not common knowledge.

Notwithstanding this, the vast majority of persons born in the north are, or are entitled to be Irish citizens, and hence EU citizens Irish citizens have had rights to settle, work and related matters in the UK for some time but much of this is now provided for on the basis of exercising EU treaty rights.

In the post Brexit event of the north being outside of the EU, legislation which grants entitlements on the basis of EU treaty rights will cease to have effect. The direction of travel from government may be to further *link entitlements to British citizenship*. On the face of it this will not per se remove entitlements of Irish citizens who are also British Citizens. However, as alluded to earlier it would not be compatible with the Good Friday Agreement to oblige those who chose to identify as Irish, to identify as British to obtain entitlements.

5 Unintended Consequences – Rights Denied.

Access to the NHS. At present in general terms full free access to the health services is available to those who are 'ordinarily resident in Northern Ireland'. Whilst this test is on residency rather than nationality, in practice it is much more straightforward to meet the test if you can demonstrate you are an EU/EEA national, with more onerous proofs being usually requested for non-EEA/EU nationals. Should this change and the test remain straightforward for those who are and identify as British citizens but not as Irish citizens, then there are compliance questions with the Agreement.

Student Tuition fees — Ireland becomes a 'foreign country'?

In terms of other areas of regulation one of interest will be student tuition fees. At present there is a situation whereby student fees in QUB and UU are charged at around £3k for Northern Ireland residents – and the same rate for Republic of Ireland based students, and indeed any other EU resident nationals. As this is an EU right is likely to end with BREXIT (unless there is a reciprocal agreement) ROI students would fall to be treated as 'overseas' students, and charged at much higher rates.

For example QUB undergraduate annual tuition fees for NI domiciled students are £3,925; the same figure is applied for EU students – whereas the figure for international students is between £13k (classroom based courses) and up to £34k for clinical medical courses.

CONCLUSION

The legislative undertaking to give legal effect to BREXIT is gargantuan and given the tenuous mandate with which Theresa May will attempt to govern, the task might be impossible. The Great Repeal Bill¹⁶ is the proposed law that will repatriate European Union law into British laws as part of British exit from the European Union, repealing the European Communities Act (1972) on the day Britain leaves the EU, copying up to 20,000 pieces of EU law onto the UK statute book, ending the general supremacy of EU law. In March 2017 a report by Thomson Reuters identified 52,741 pieces of legislation that have been passed since 1990.

Brexit and the proposed repeal of the Human Rights Act 1998 is a retrograde step of cataclysmic proportions, not only for those seeking truth recovery and accountability in accordance with Article 2 of the Convention but for all those concerned with open government and accountability.

It should be recalled that the Convention was drafted by British lawyers, some of whom prosecuted at the Nuremberg Trials, determined to spare Europe from the horrors of communism and fascism. Indeed one of the draftsmen of the Convention was David Maxwell Fyfe who was also a Conservative politician. When he worked on the European convention in the late 1940s, he and other European conservatives disposed of early drafts that mentioned the rights of workers, nor does it mention shelter or free education and healthcare. It is not a radical left wing, liberal document.

In a celebrated speech in 2009, the late Lord Bingham listed the liberties the European convention protects.

- The right not to be tortured or enslaved.
- The right to liberty and security of the person.
- The right to marry.
- The right to a fair trial.
- Freedom of thought, conscience and religion.
- Freedom of expression.
- Freedom of assembly and association.

“Which of these rights, I ask, would we wish to discard? Are any of them trivial, superfluous, unnecessary? Are any them un-British?”

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 at home, and what remains unfinished business. In these discussions there must be no retreat from the human rights and equality gains.

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 and 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.

¹⁶ <https://www.gov.uk/government/publications/the-great-repeal-bill-white-paper>