

Speech to launch Centre for Cross-border studies journal –
Human Rights, Equality and Citizen’s Rights, the potential
impact of leaving the European Union
12 December 2018

It was with some trepidation that I agreed to Ruth Tallion’s request to write an article on the implications for human rights, equality and citizen’s rights and the potential impact of leaving the European Union in September knowing the article would not be published until December. They used to say ‘a week is a long time in politics’ currently, an hour is probably an eternity. On Monday, the Commission launched its annual statement on human rights with Lord Duncan the parliamentary under-secretary for Scotland and Northern Ireland. He is a former MEP and a spokesperson on EU affairs in the House of Lords. On meeting him at the Stormont Parliament the vote on the withdrawal agreement had been definitely on when he left London, probably on when he landed and definitely off by the time he gave his speech in the Long Gallery. In that context, writing anything with a three month turnaround time between ink drying on the page and a neatly turned out journal arriving with readers is to take your life in your hands.

So what I want to do today is to look at five specific areas and what they mean for Northern Ireland, namely, leaving the EU Charter of Fundamental Rights, protecting the Good Friday (Belfast Agreement), citizenship rights, the future of the Common Travel Area and security and justice co-operation.

I want to do this keeping in mind two dimensions – first, protecting and preserving existing rights and second,

keeping pace with rights as they develop in the European Union after the UK government has left. EU law has provided significant protections for people living in Northern Ireland. Take employment rights for example, laws covering the maximum number of hours a person is required to work; statutory entitlement to a minimum of four weeks paid holidays, an end to a compulsory retirement age and additional maternity, paternity and parental rights have all stemmed from or been enhanced by EU law.

There have been four key documents (among many) at play since the result of the referendum was announced. The Westminster Parliament EU Withdrawal Act paves the way for the repeal of the European Communities Act 1972 – in effect the legislation which currently provides for the supremacy of European Union Law. European Union Law will be converted into domestic law at the moment of exit (potentially at the end of transition) and the government will then be free to decide what elements of EU law it wishes to preserve or discard subject, to any ongoing commitments negotiated with the EU in a withdrawal agreement or subsequent free trade agreement.

In December 2017 the joint report from the negotiations of the EU27 and UK government was published. This is the document where the backstop was initially agreed to avoid a hard border. This document though not legally binding contained two important provisions – paragraph 52 reaffirmed the Good Friday (Belfast) Agreement and the right of people to consider themselves to be Irish or British or both and be accepted as such alongside setting out that the people of Northern Ireland who are Irish citizens will continue to enjoy rights as EU citizens including where they reside in Northern Ireland. Further at paragraph 53 the report acknowledges the Rights, Safeguard and Equality of

Opportunity in the 1998 Agreement before stating 'the UK commits to ensuring that no diminution of rights is caused by the departure from the EU including in the area of protection against forms of discrimination enshrined in EU law'.

In March 2018, a draft withdrawal agreement was published by the European Commission Task Force which led to negotiations. It was colour coded green for agreed, amber for agreement in principle subject to final drafting and white yet to be agreed. Over 80 percent fell into the first two categories and over the following seven months the negotiations continued to agree a final document between the EU27 and the UK government. This is the agreement that Theresa May is seeking to get through Parliament. This document includes the Northern Ireland/Ireland protocol which addresses a number of rights issues.

Into this fray the Human Rights Commission has worked assiduously in the joint committee – with the Irish Human Rights and Equality Commission (a committee created in the Good Friday (Belfast) Agreement) to seek the strongest possible human rights and equality protections. We have also worked with the Equality Commission to negotiate the concept of a dedicated monitoring mechanism first articulated in the March 2018 draft agreement.

The joint committee has engaged extensively in Brussels, Dublin and London (belatedly), commissioned papers on the wider human rights issues of leaving the EU, a review of the Common Travel Area and its legal underpinnings and will publish early next year an analysis of the cross-border criminal justice and civil justice issues which are at play.

As ever, a fine grained assessment of the potential rights implications is vital as 'the devil is always in the detail' when looking at the fine print of any negotiation. Many of the rights issues at play in the Withdrawal Agreement lead back to the 1998 Agreement. So now on to my five areas.

(i) The loss of the Charter of Fundamental Rights of the EU

The UK government has said it will leave the Charter behind no matter what. In addition, the government has committed to no repeal or reform of the Human Rights Act until we have at least left the EU. The Charter came into force in December 2009 through the Treaty of Lisbon. The Charter incorporates the rights contained in the European Convention of Human Rights but, goes much further including specific provision on protection of personal data, the right to engage in work and start a business, to asylum and protection in the event of removal, expulsion or extradition, the right to cultural, religious and linguistic diversity, children's and older people's rights environmental and consumer protection, health care and social security rights, and the right to good administration among many others. These rights can only be exercised in conjunction with European Union Law. In effect, it goes significantly beyond Convention rights which mainly embrace civil and political rights.

The UK government has argued that the Charter strengthens legal principles rather than creates new rights enforceable in court. Moreover, they contend all these right can already be found in either domestic legislation or in common law (i.e. judge made law). You might wonder if this is the case, why the need to get rid of it.

The answer to this contained in a very helpful legal opinion from Jonathan Cooper QC published by the EHRC in Britain

is that additional rights have been created and the Charter ensures no compromise on retaining existing rights protections. The common law and UK legislation does not comprehensively cover the Charter rights and that retention of the Charter creates legal certainty. Further, placing all the rights in a single Charter provides a more accessible way of promoting the rights available to citizens.

In practice, to date, the rights within the Charter have been argued relatively sparingly in legal cases though this is changing and the loss of the Charter is about the loss of potential rights development and future proofing.

In effect, however, there is a Northern Irish specific argument for retaining the Charter. The Good Friday (Belfast) Agreement still has two missing pieces of the envisaged jigsaw, namely, the Bill of Rights to be introduced through Westminster legislation and a civic forum to provide an institutional link between civil society and political institutions. The Bill of Rights anticipated under the Agreement was to take a 'Convention plus' approach providing rights supplementary to the ECHR, drawing on appropriate international instruments and experience and reflecting the particular circumstances of Northern Ireland. In the absence of the Bill of Rights, the Charter is the nearest thing we have to a Convention plus rights based document.

Therefore, retention of the essentials of the Charter unless or until a Bill of Rights is agreed or as the basis for a Bill of Rights would be one way of providing durable human rights guarantees beyond leaving the EU. There would be a need to iron out some issues, nonetheless, if there was a political will those issues could be effectively addressed.

(ii) The Good Friday (Belfast) Agreement

The importance and value of the Good Friday (Belfast) Agreement has been highlighted in these deliberations around leaving the EU.

Both the UK government and the EU have made it clear that leaving the EU must not adversely affect the Agreement. Between the December 2017 report and the March 2018 EU Task Force agreement the rights protections to be enshrined were diluted from the Agreement as a whole to the specific section headed 'Rights, Safeguards and Equality of Opportunity section of the Agreement'. Translating the wording of this section into what EU law should be protected and developed is not easy. The section covers some specific rights but, goes much further covering victims issues, rural and community development, equal opportunity regardless of class, creed, disability, ethnicity or gender and promoting a woman's role in political and public life among other things. In practice, the Northern Ireland/Ireland protocol agrees that six EU directives will not only be preserved but, keep pace with EU law developments, namely, equal treatment in employment, self-employment, access to goods and services, social security and between individuals regardless of race or ethnic origin. Elsewhere there is a non-diminution of rights commitment tied to the relevant section of the Agreement. The scope of what is covered remains to be determined and may ultimately fall to the courts to decide.

The second dimension is the creation of the Dedicated Monitoring Mechanism which will be the Human Rights Commission, Equality Commission and the joint committee of the Human Rights Commissions, both North and South. From the explainer document it is already clear we will have powers to monitor and supervise the compliance with the non-diminution commitment, provide an enforcement mechanism for alleged breaches and advise on the ongoing

development of rights from the end of the transition period. The two commissions have argued strongly that we must not become the only game in town so that there are separate rights of legal redress for individuals beyond the two Commissions.

The dedicated mechanism also has ways of feeding into the specialised committee on the Northern Ireland/Ireland protocol and the overall joint committee – the architecture to provide oversight of the Agreement.

Both Commissions have been placed in a difficult position in negotiating a document which is ultimately not ours to promulgate while abiding by the confidentiality of the discussions. The government has committed to publishing a version of the document negotiated for public information and the sooner that is done, the better. It will afford everyone including this informed audience to judge the potential value of a dedicated monitoring mechanism.

(iii) The Common Travel Area

The Common Travel Area is a loose arrangement between the UK, Ireland, Isle of Man and Channel Islands that facilitates free movement and confers other advantages to citizens in Ireland, over and above their EU rights. It provides, for example, earlier access to a number of means-tested social security benefits in the UK without satisfying residence tests. It pre-dates the UK and Ireland joining the EU. More recently, it has been utilised in a variety of sensible ways to ensure, for example, seamless cross-border health care arrangements for example. One of the values of the CTA has been that it has been underpinned by EU law including freedom of movement, mutual recognition of qualifications across the EU and many other legal provisions. This long term legal underpinning will be loosened post Brexit and the formal legal protection that remains is scant

indeed. Many of the CTA initiatives are governed by memorandum of understanding and other non-legally binding agreements. There is a need to more effectively future proof the Common Travel Area by negotiating a formal treaty to place the current and future arrangements on a proper legal footing. Now I have no reason to anticipate the two governments readily resiling on the bi-lateral agreements under the Common Travel Area, nonetheless, is it really fanciful to believe that if either country faced an economic crisis or fell out badly over a political issue that individual CTA arrangements would not be reneged on or become a political bargaining chip?

Moreover, there are some issues not covered by the CTA – one example, is cross-border child care support in working tax credit and Universal Credit. The HMRC will only pay for help provided in HMRC accredited childcare facilities – accredited facilities are only available in the UK and in armed forces bases abroad in places like Germany and Cyprus.

It took a legal argument around the EU Services Directive to establish that it was unlawful not to provide support for cross-border workers in County Cavan, Donegal and Monaghan. So beware the CTA being touted as the panacea for the protection of all economic and social rights.

(iv) Citizen's Rights

I alluded earlier to the ambitions in the December 2017 report to maintain EU rights for people in Northern Ireland who identify as Irish. Those ambitions appear to have been significantly tempered. This was an EU led idea. In practice, it has been pointed out that such an approach is counter-intuitive to the Good Friday (Belfast) Agreement where the right to identify as Irish, British or both should

not carry adverse consequences. That points to an inexorable logic of providing all Northern Irish residents with such rights. Moreover, how will such rights be exercised, will it be the possession of an Irish passport, proof of a Northern Irish address or some other vehicle? The UK government has largely shrugged its shoulders in discussions, acknowledging the practical and political 'asymmetry' of rights without fully acknowledging the potential consequences. What the rights cover have recently been the subject of a statement by Michel Barnier and they fell a long way short of what many anticipated 12 months ago. Whether this is a ceiling or a floor remains to be seen (I suspect it is nearer the former) so while being able to access EU entitlements abroad as someone from Northern Ireland will identifies him or herself will potentially still be important (I suspect) many entitlements will be determined by the citizens' rights negotiated for UK residents as a whole.

(v) Security and justice co-operation

This has proved to be an interesting role reversal in practice. On most other areas of the negotiation the EU has complained about the UK government's lack of clarity. In contrast, on security and data sharing the UK has been quick out of the traps while the EU has played hard to get. The UK government wishes to retain the current information and data sharing provisions, the existing EU wide policing and prosecution co-operative arrangement including the European Arrest Warrant. The UK would also like to remain at the table in as effective and influential way as possible on the EU justice and security bodies. This clarity I suspect reflects the pressures coming from the security services, Association of Chief Police Officers and the National Crime Agency – it is one thing to keep businesses at bay when

they want legal certainty, quite another to keep MI5, MI6 and other law enforcement organisations at arms length.

An interesting set of judgements in the Court of Justice of the European Union and the Irish Supreme Court has thrown the issue into sharp relief. The question of extradition of criminal suspects under the European Arrest Warrants from both the UK and Polish governments have recently been challenged. In the UK case it was based on the uncertainty of what fundamental rights will remain protected after Brexit. The Court of Justice held, in essence, that while EU Law protections prevail the European Arrest Warrant should normally be applied. This provides temporary relief. However, what happens after the end of any transition period remains to be seen. This approach is largely mirrored in the withdrawal agreement which retains existing arrangements and co-operation until December 2020 while any longer term arrangements feature in the political declaration in terms of positive intent leaving it in the box 'still to be negotiated'.

Conclusion

In summary, the full ramifications for human rights and equality remain like almost everything else under Brexit unclear. The withdrawal agreement does provide additional human rights and equality protections based on the non-diminution commitment and the listed directives predicated on the rights and safeguards section of the Good Friday (Belfast) Agreement.

Nonetheless, the loss of the Charter, potential long term further EU law protections and the flimsy legal infrastructure governing the CTA means we need to be sanguine about the future.

It is interesting to observe that the 1998 Agreement created the notion of an equivalency of rights across the Island of Ireland based on the South needing to incorporate legislation to enshrine the European Convention of Human Rights into its domestic law. Effectively, the concern was the South being left behind by the North, where the Human Rights Act was about to enter the statute book. Twenty years on with equal marriage in place and abortion rights about to enter the European mainstream elsewhere in Ireland it is Northern Ireland that is increasingly becoming the place apart on these islands. Occupying such a position is not good for individual rights, for attracting investment and for the UK government when it seeks to portray itself on the global stage as a beacon and champion of rights while significant rights issues remain unresolved in its own backyard. This was one of the arguments in London and Brussels which gained some traction and I don't think we yet have the absolute assurance that Northern Ireland might nor remain a place apart in the years to come so we have to remain engaged and vigilant.

Thank you.