

**Seanad Special Select Committee on the UK's Withdrawal from the European Union
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Citizenship Rights

Opening Statement

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Introduction

1. Thank you Chair and Committee members for the invitation to attend the meeting today. The focus is on the question of 'Citizenship Rights' as this relates to the decision of the UK to withdraw from the European Union (or 'Brexit' as it has unfortunately come to be known). In my Opening Statement I will focus primarily on Northern Ireland, and address the following three themes: first, the context, including the *human* rights context; second, the potential impact; and finally, possible solutions.
2. My overriding aim is to suggest that a human rights framework, contextualised to reflect the particular circumstances of Northern Ireland and this island, provides a productive way of considering the rights-based consequences of 'Brexit', including its implications for citizenship rights.
3. I should also mention that I am currently involved in a funded project *Brexit and Northern Ireland: The Constitutional, Conflict Transformation, Human Rights and Equality Consequences* with colleagues at Queen's, Ulster University and CAJ, and we will be exploring these questions in more detail over the next 18 months.

Context

4. First, it is necessary to place this in context. Much is well known and familiar: common membership of the EU has been a working assumption underpinning the peace process; the EU has been a long-standing supporter of the process; the majority of the eligible electorate in Northern Ireland voted to remain; the existing land border on this island is uniquely significant in the 'Brexit' discussions; the constitutional space that is Northern Ireland is governed (or perhaps *should be governed* is more appropriate at this point) by a complex set of interlocking and interdependent arrangements that already reflect its particular status as constitutionally contested ground; the decision to hold the referendum (and the management of the outcome) has been constitutionally destabilising; and the continuing deployment of the rights of EU citizens as negotiable remains problematic. There are many other contexts that could be mentioned.
5. It always was, and remains, silly to talk about the North as if it is purely an example of devolution within a UK constitutional law setting. It is not. The context is therefore *already constitutionally complicated*, the task is getting firm recognition of this more pluralistic understanding at Westminster and within the 'Brexit' negotiations. It is not clear to me that the full implications of the constitutional fundamentals of the Belfast/Good Friday Agreement 1998 and the British-Irish Agreement are understood everywhere. Recent events illustrate the need to place many of the assumed basics on a much more secure legal

footing, and clarify what they are. If ambiguity ever was constructive, it certainly is not now.

6. It is right that the power-sharing and British-Irish elements of the Belfast/Good Friday Agreement 1998 are stressed as part of the 'Brexit' negotiations. However, look again at that document (to which so much lip service is often paid). What you notice is just how much it references *human* rights; and I think that matters in these troubling times. Although the UK is leaving the EU, and the Westminster Government has plans regarding domestic human rights protection (for example, on possible repeal and replacement of the Human Rights Act 1998) it remains bound, as a matter of international law, by significant human rights obligations. Human rights matter not only because both the UK and Ireland are bound by international legal obligations in this area (although both remain firmly dualist in their shared resistance to domestic incorporation), but because the standards can assist in reminding us that *everyone* should benefit from relevant rights guarantees, as one part of any new contextualised constitutional arrangement. It provides a relatively detached frame of global reference, and can also avoid getting drawn into excessively narrow 'us and them' forms of xenophobic nationalism (of a British or Irish variety) by acknowledging that *citizenship* rights (as vital as they are) are one part of a larger picture of *human* rights protection. This need not be either/or; in this profound constitutional moment for this island there is an opportunity to be firmly both/and.
7. It is often said, but should be underlined, that human rights are intended to be at the core of the new dispensation in Northern Ireland. As noted, this is evident in the terms of the Belfast/Good Friday Agreement, and the standards and structures it helped bring to life. This commitment to human rights is also clear in the EU legal order, gaining expression in, for example, the Charter of Fundamental Rights as well as the foundational values of the EU itself.
8. If the Belfast/Good Friday Agreement, and the values, principles and institutions it gave life to are to survive (at the moment that is an open question) then the simplistic presentation of 'Brexit' must be confronted now and during the negotiations. This cannot be, and should not be, a simple constitutional conversation about the mechanics of 'Brexit' (as complex and difficult as that is) but a profound constitutional moment for this island; one where the foundations of the peace process are being eroded and the idea of *human* rights is in question (illustrated in a UK context by the proposals not only to leave the EU but also to repeal and replace the Human Rights Act 1998). For such a complicated and contested constitutional context the solutions must be equally imaginative, creative and legally compelling.

Impact

9. Second, due to the continuing levels of uncertainty, lack of precision and level of available detail there is a speculative aspect to impact assessment. One thing seems plain based on all the available evidence: a 'hard Brexit' will have appalling consequences for this island. Withdrawal from the EU will have a *potential* impact on the rights of EU citizens (but not only EU citizens) living in Northern Ireland now, and those planning to live there in the future. A hard border *will* have consequences for everyone. Potential is used because of the commitment to hold things in place for now, as outlined in proposals around the Great Repeal Bill. Considerable uncertainty still exists on the impact and implications in terms of rights. What is clear is that EU law has assisted, across a range of areas, in advancing

guarantees. The risk in ‘Brexit’ is that the institutional and normative backup regarding past guarantees is lost, and many protections may then rest exclusively on the UK’s flexible arrangements for legal change. As is well known, the UK’s constitutional flexibility can of course go in several directions, depending on political outcomes. Any government at Westminster with a sufficiently large majority in the House of Commons can achieve quite remarkable constitutional reform. It seems unlikely, however, that the next Westminster Government will be an enthusiastic proponent of expansive human rights guarantees (the current Government has indicated, for example, that it does not plan to give effect to the Charter of Fundamental Rights domestically). From a Northern perspective, the flaws of the Westminster system and the weakness of devolution (including on issues of capacity in a post Brexit world), may well be painfully exposed. The ability of the Westminster Government or the Westminster Parliament to take fully into account the particular circumstances of Northern Ireland has not been much in evidence recently, and it is not immediately obvious that this will change any time soon.

10. In a post ‘Brexit’ world Irish and British citizenship will map onto the divide between EU and non-EU membership (in a context where there is supposed to be a right - ‘the birthright of all the people of Northern Ireland’ - to identify and be accepted as British or Irish or both). It re-opens the sovereignty fracture that the Belfast/Good Friday Agreement did so much to mend (and that EU citizenship with its associated rights did so much to smooth over), and introduces a high level of political instability and uncertainty. Merely noting that the UK intends to freeze existing rights masks the risks and the complications that are ahead.

Solutions

11. Finally, on the question of possible solutions there are two things to consider. First, the need to be clearer on assurances and guarantees on existing rights derived from EU law, the mechanics of holding the Westminster Government to account during this process (in a context where there might be no Northern Ireland Executive or Assembly in place), as well as how the constitutional fundamentals and core principles of the Belfast/Good Friday Agreement 1998 can be secured during and after any withdrawal agreement. Much more focus should be on the detailed design of the 1998 Agreement than has been thus far. What still remains remarkable (nearly 20 years later) is just how much attention is paid in it to all the relationships that exist around these islands, and its creative and imaginative design (skilfully crafted - in reality - over decades). Any solutions flowing from these negotiations must replicate this degree of creativity and must incorporate and respect the fundamentals of the Agreement. The Irish Government has a historic responsibility at this time. These are precisely the moments of constitutional crisis when being a *guarantor* in the public interest of all the people on this island brings onerous demands with it.
12. The partners in this new dialogue include the EU member states, EU institutions, the Irish Government and the Westminster Government. This is not so much the invention of a new category but how all participants give firm legal recognition in any withdrawal agreement to the existing unique situation of Northern Ireland, and its particular constitutional circumstances. If 1998 meant anything at all of constitutional significance then it surely implied that the North was (from then on) intended precisely to have a *special status* guaranteed by both governments? It is the constitutionally negligent levels of grinding disrespect for that *existing special status* that have led us to where we are now. In these negotiations, and as perhaps hinted at in the draft negotiating guidelines, could the EU

become another guarantor of the North's special status in a legally reimagined constitutional space? However it is termed, the imperative in the negotiations is to secure, in a legally compelling way, the North, and this island, as a welcoming space of equivalent protections and guarantees that demonstrate respect for the values that people on this island voted for in 1998 (and in Northern Ireland in 2016). The years of ever closer relationships across these islands should not distort our thinking about what precisely it might take to respect the fundamentals of our peace process in these negotiations. For example, the Irish Government should not, now or in the future, seek to sacrifice the *inclusive values* of the Belfast/Good Friday Agreement in an attempt to hold on to a Common Travel Area that is not worth that name, is based on a lowest common denominator approach and is informed by a Westminster-led obsession with repressive and restrictive migration controls. It is for the Westminster Government and Parliament to demonstrate that it takes its co-guarantor responsibilities seriously in this values-based respect.

13. It is plain that the Irish Government is working hard with many of these objectives in mind, but it is also evident that much more could and should be done. The messages that emerged from the All Island Civic Dialogue on Brexit on the question of rights seemed to be crystal clear. This is perhaps not so much about the elaborate creation of new mechanism (although this too may be required) but how the constitutional fundamentals of the already unique arrangements are upheld and respected within, during and after the negotiations. This includes the implementation gap that remains and if tidied up legally could allow for more stable forms of respectful power-sharing in future. The EU clearly has a large part to play (in dialogue with both governments) in ensuring that the principled foundations for lasting peace and stability in the North are securely in place. Northern Ireland, and its fragile peace process, would thus become the common heritage of both governments and the EU (and a common inheritance for all on this island) whose constitutional fundamentals would be legally held in place for future generations. In other words, that the North benefits into the future from the constitutionally special status it is already supposed to have.
14. The second, and in many ways directly linked to the first, is to consider how existing work can be advanced to ensure that no backward steps are taken, and to place guarantees on a firm domestic law footing. Here we are fortunate not to be starting from a blank page. One principled solution to the challenge posed by UK withdrawal is to return to existing suggestions for enhanced human rights protections in the North and on this island. There is one 'institution' and two projects that could usefully be revisited: the Joint Committee on Human Rights (of the two Commissions); the Bill of Rights; and the Charter of Rights for the island.
15. A project that is often overlooked is the work done on the Bill of Rights for Northern Ireland leading up to the submission of the final advice in December 2008. Why might this be of relevance and interest again now? What is neglected about this process (and here I declare an interest as a former Commissioner on the Northern Ireland Human Rights Commission) is that considerable thought was given to the complex interactions between the specific British-Irish contexts and the values of respect for *human* rights. Much thought was given in this advice on how the unique bi-national circumstances of the North could be reconciled with inclusive *human* rights guarantees. Look again at how the Commission, for example, addressed the need for legal protection for culture and identity alongside guarantees for everyone. Note the mechanism it proposed for retaining the Human Rights Act 1998 and building on it through legislative guarantees that respect the particular circumstances of the North. There are differing views on the merits of the advice, and it is only fair to

acknowledge that directly. I remain convinced that the effective implementation of the Bill of Rights advice would have made a significant difference, and would have placed the arrangements in Northern Ireland on more secure ground. As noted, there are other examples too. For example, think about proposals for a Charter of Rights for the island of Ireland, and recommendations relating to a Single Equality Act for Northern Ireland.

16. Why not reimagine the role of the Joint Committee on Human Rights, including on questions of composition and appointment? Why should it not gain more autonomy and independence from its host Commissions, including its own independent chair? Could it be tasked with providing an annual ‘equivalence’ statement (on human rights and equality) that speaks to the health of these matters on this island? Should it be reporting to the North-South Ministerial Council? Should it be working on a comprehensive human rights and equality audit that helps to inform the conversations to come? If not, who else might do this? Why not give the Joint Committee a monitoring role? Could its work be tied into the evidence-based and advice giving work of the EU Fundamental Rights Agency? Could the Joint Committee become a ‘hub’ for North-South engagement with the international human rights mechanisms by facilitating dialogue, the exchange of information, and civil society engagement? Recognising, of course, the jurisdictional differences and political contexts is there any real reason of principle why this or related ideas could not be advanced?
17. My point is that where the Westminster Government is increasingly irritated with forms of international or regional oversight or accountability (and even internal UK ones too) on rights, including the rights of EU citizens, then attention must and should turn to domestic implementation (however politically challenging that may prove). I do not wish to underplay sharp political disagreements but it is simply not true to say that principled rights-based solutions are absent. In this area, as in others (such as addressing the legacy of the conflict), Northern Ireland has solutions in abundance.
18. In a global context where human rights are under sustained attack Ireland now faces a choice in this profound constitutional moment: to challenge the EU to live up to its own foundational values on human rights and equality; to ensure the EU follows through on its expressed commitment to peace and reconciliation in Northern Ireland; to engage with (and when needed confront) the Westminster Government at a time when the fundamentals of the Belfast/Good Friday Agreement are so plainly at risk; and ultimately to help to create a space of hope in this island, where we do not turn our backs on human rights and equality. A Northern Ireland where being a British citizen, an Irish citizen or both is a matter of genuine choice with no detriment, and brings with it an acknowledgement that citizens’ rights (including those of all EU citizens) must be securely embedded within a human rights framework. Look again at the Belfast/Good Friday 1998; a way was found there, it can be achieved again, even in these times of constitutional crisis.