



Joint Committee on the Implementation of the Good Friday Agreement

*Opening statement by Professor Colin Harvey, School of Law, Queen's University Belfast
7th November 2019*

Introduction

Thank you to the Chair and Committee members for the invitation to address you today. The focus of this opening statement is on the questions that have arisen, in the context of the implementation of the Good Friday Agreement, on citizenship and rights. In this opening statement I set out the context, and then deal with matters relating to citizenship and voting rights in particular. I conclude with reflections on the way forward.

Context

The current discussions are framed by Brexit, and the ongoing implementation gap with respect to the Good Friday Agreement. Brexit will see N. Ireland being taken out of the EU based on a UK-wide simple majority vote. The region voted to 'remain', a position underlined in the outcome of the European Parliamentary elections this year, with the election of two 'remain' MEPs.

There is a Withdrawal Agreement and Protocol on Ireland/N. Ireland, which attempt to secure an orderly Brexit based on agreed negotiating objectives: avoiding a hard border, defending the Agreement in all its parts, and protecting North-South co-operation. The Protocol contains provisions dealing with rights and equality, with a recognition that the Common Travel Area arrangements may continue. Although the special arrangements agreed for N. Ireland are the subject of ongoing debate, the content was predictable given the unique circumstances on this island and the ambition to limit the scale of the damage.

An outstanding matter, that requires further consideration, is representation for N. Ireland in the European Parliament after Brexit. It will be a region where most will either be or entitled to be Irish-EU citizens who will be living with a distinctive legal arrangement. In light of this, and ongoing concerns about democratic engagement, there is merit in providing a voice for N. Ireland in the European Parliament.

The implementation gap with respect to the Agreement can be easily stated. First, the foundational birthright guarantee (the right to identify and be accepted as British or Irish or both) is not reflected in British domestic law, policy and practice. The decision of the Upper Tribunal (Immigration and Asylum Chamber) in October 2019 confirms this problem. The difficulty emerging is that the British Government's rationale is troubling; their argument is that their interpretation (which separates identity from citizenship) is correct. The Tribunal appeared to accept this, and thus the view that there is not an implementation failure but that the current law reflects the intended approach. This decision is now the subject of an appeal.

The outcome has implications for all those who should benefit, now and in the future, from the protective reach of this guarantee. The Taoiseach, Leo Varadkar, has indicated that the British Government's approach is a misreading of the Agreement.

Second, there is justified concern about the failure to implement reasonable expectations flowing from the Agreement and subsequent promises made on human rights and equality. The N. Ireland Human Rights Commission submitted advice on a Bill of Rights in December 2008 and in June 2011 the Joint Committee of the two Commissions published advice on a Charter of Rights for the island. The lack of progress on both remains a significant problem. It is not widely known that the Bill of Rights advice contains the following provision:

The right to identity and culture (extract)

Provisions should be drafted to ensure that –

1. The right of the people of Northern Ireland to identify themselves and be accepted as Irish or British or both, as they may so choose, with no detriment or difference of treatment of any kind. This right would not be affected by any future change in the status of Northern Ireland.
2. The right of the people of Northern Ireland to hold British or Irish citizenship or both in accordance with the laws governing the exercise of this right, with no detriment or differential treatment of any kind. This right would not be affected by any future change in the status of Northern Ireland.
3. Public authorities must fully respect, on the basis of equality of treatment, the identity and ethos of both main communities in Northern Ireland. No one relying on this provision may do so in a manner inconsistent with the rights and freedoms of others.

The Commission had noticed and anticipated the problems of lack of domestic incorporation of the Agreement. Although the Protocol on Ireland/N. Ireland does include some protections, the region would benefit from a proper 'constitutionalised' and comprehensive rights framework, and a Charter for the island would be a necessary and welcome addition (particularly in ensuring that the concept of 'equivalence' in the Agreement retains its significance). Recall that successive Conservative governments have expressed a desire to repeal and replace the Human Rights Act 1998 and enact a British Bill of Rights.

The failure to address the commitment to enact Irish language legislation also remains a significant problem. Read with the context sketched above, it reinforces the view that core components of the Agreement on mutual respect, parity of esteem and equal treatment have not been advanced. It remains unfortunate that the capacity of the above to offer *solutions* to the problems faced by the region is not more widely acknowledged.

Citizenship and Voting Rights

The publication of the Thirty-ninth amendment of the Constitution (Presidential Elections) Bill and the establishment of a Referendum Commission are the culmination of many years of work on extending the franchise to include Irish citizens resident outside of the state.

Ireland's current system of voting rights places particular emphasis on residency within the state. There is a near blanket exclusion of Irish citizens outside of the state. In September 2013,

the Convention on the Constitution voted in favour of proposals to extend voting rights to Irish citizens who are resident outside the state for Presidential elections. 78% voted 'yes' to a general question on voting rights for all Irish citizens, with 73% answering 'yes' to the question dealing specifically with N. Ireland. This was eventually followed in March 2017 by an Options Paper 'Voting at presidential elections by citizens resident outside the State', prepared by the Department of Housing, Planning, Community and Local Government and the Department of Foreign Affairs and Trade.

There are four points of principle to underline in relation to Presidential elections.

First, the extension of voting rights to citizens outside the state is part of a growing international trend, and there appears to be widespread acceptance that Ireland needs to take this step. It is common, for example, in relation to Presidential elections. Methods of voting differ, and may include: personal voting; postal voting; proxy voting; or electronic voting. International experience suggests that it can be done, and that Ireland is an 'outlier'.

Second, the debate can be framed as significant for the advancement of the civil and political rights of Irish citizens. The right to vote is a fundamental human right. Reference can be found (in different forms) to voting rights in many international instruments. There is variation in coverage, for example, the European Convention on Human Rights guarantee is for elections to the 'legislature', and there is recognition that certain conditions and restrictions are permissible. This focus on limits, however, can be contrasted with the recent judgment of the Canadian Supreme Court in *Frank v. Canada (Attorney General)* (2019 SCC 1), which contains a strong majority judgment in support of voting rights (in federal elections) for citizens outside the state without time-limits. The majority judgment, delivered by the Chief Justice, contains the following:

[35] In sum, the world has changed. Canadians are both able and encouraged to live abroad, but they maintain close connections with Canada in doing so. **The right to vote is no longer tied to the ownership of property and bestowed only on select members of society. And citizenship, not residence, defines our political community and underpins the right to vote.** (Emphasis added)

[82] Voting is the cornerstone of our democracy. **Denying citizens the right to vote not only strikes at the heart of their fundamental rights, but also comes at the expense of their dignity and their sense of self-worth ... In other words, denial of the fundamental right to vote, in and of itself, inflicts harm on affected citizens.** This is particularly true where there is simply no convincing rationale to support the denial. In the absence of evidence pointing to a concrete problem, the justification boils down to an argument based on worthiness: the non-resident citizens in question are deemed to be less deserving of the right to vote than the resident majority on the basis that they have voluntarily left Canada and severed their connection to the country. However, this Court has quite properly foreclosed the use of such worthiness rationales to justify restrictions on the right to vote in past cases. Worthiness cannot be used to justify the disenfranchisement of non-resident Canadian citizens in the case at bar. (Emphasis added)

This case involved a challenge to a prescribed time-limit. The rationale could equally apply to the discussion of restrictions in the Irish context, where the exclusion is close to being a blanket

one. Is this really reasonable, objectively justifiable and proportionate in the specific context of Presidential elections? Change is justified and the arguments for reform are compelling.

Third, in the context of the Agreement there is a disturbing lack of political rights for Irish citizens in N. Ireland. This takes on added significance in the light of Brexit, when Irish citizens want to know what their Irish-EU citizenship will mean when they are resident in N. Ireland. Irish constitutionalism speaks directly to the 'Irish nation' and to *all* citizens. It embraces the idea of the unity of all the people who share the island. As a matter of constitutional principle, the exclusion of so many Irish citizens from voting in Presidential elections seems out of line with post Good Friday Agreement constitutionalism. The attempt to accord mutual recognition and respect to citizenship and identity must also extend to an acceptance of enhancing political rights for Irish citizens who are resident in N. Ireland. This may also mean looking again at the voting rights of British citizens who are resident in the state or in the island of Ireland. For example, Irish citizens voted in the EU referendum in the UK. British citizens in Ireland cannot vote in referendums and Presidential elections. Advancing voting rights in Presidential elections is a small way of recognising the value of Irish citizenship beyond the state, and acknowledging, for example, 'people over territory'. It may in fact erode barriers of mistrust by promoting better engagement, knowledge and understanding on the island.

Fourth, the Irish Constitution speaks eloquently to the island, and about the role of the President. There is a recognition that the President represents all Irish citizens, and it is a distinctive role carrying enormous symbolic power and meaning for citizens everywhere. It is constitutionally appropriate to ensure that Irish citizens, wherever resident, are able to exercise the right to vote for their President. The distinctive Irish historical context and experience strongly supports a generous and inclusive approach.

The Way Forward

There are a range of matters under discussion at present that relate to citizenship and rights. Much of what is discussed here can be connected to a desire to implement the Agreement in all its part.

There are four principal recommendations:

First, the Bill of Rights and Charter of Rights must be revisited, particularly as a consequence of Brexit. N. Ireland and this island must commence a renewed conversation about comprehensive human rights frameworks. Proposals are already there, and should be explored again.

Second, the birthright guarantee is supposed to be a constitutional cornerstone of post-Agreement N. Ireland, and it will persist in the event of constitutional change. Emma and Jake DeSouza deserve support for their ongoing efforts, and should be commended. In the context of ongoing negotiations, the British Government must be encouraged to accept that their current approach reflects a misreading of the Agreement. British domestic law, policy and practice must change.

Third, proposals for representation in the European Parliament after Brexit are a logical outworking of the unique circumstances of N. Ireland, and connect to anxieties about democratic participation within the special status that has been agreed. Arrangements to secure a continuing voice for N. Ireland must be explored.

And finally, the main focus today is on the extension of Presidential voting rights. This is a modest constitutional change that will bring Ireland into line with a growing international and European trend. The fact that so many states operate successful systems of external voting suggests that Ireland is also in a position to do so. That progress has now been made is welcome and it is to be hoped that the referendum will be held as soon as possible.

For further information about the points made above see the information available here:

<http://go.qub.ac.uk/charvey>

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