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Knowledge Exchange Seminar Series (KESS)

Prof Rory O'Connell (Ulster TJI) and Prof Colin Harvey (QUB) - Brexit and Northern Ireland: The Constitutional, Conflict Transformation, Human Rights and Equality Consequences (BrexitLawNI)

This research is part of the ESRC-funded BrexitLawNI project which seeks to identify the constitutional, legal, human rights and equality aspects of Brexit for Northern Ireland, the relevant obligations and the options for going forward. The project focuses on six key themes: the peace process, North-South relations, the Border, xenophobia and racism, socioeconomic rights, human rights and equality law.¹ For the purposes of this presentation we are concentrating on the last two themes of socioeconomic rights, human rights and equality. We will discuss the background and key issues in relation to each of these and then identify some preliminary recommendations. First, we will say a little on the constitutional context.

Context

The withdrawal of the UK from the EU will have a profound effect on the legal and constitutional underpinning of the present arrangements in Northern Ireland, its relations with the Irish state and UK-Ireland bilateral relations.

As in Scotland, the majority of people (56%) in Northern Ireland voted to remain in the EU in the 2016 referendum. However, voting patterns were divided on ethno-national grounds. 85% of those who identified as 'Catholics' voted Remain compared to 40% of those who identified as 'Protestant'. The two major political parties (DUP and Sinn Féin) were also on opposite sides in this debate. Given such clear schisms, and the fact that the Belfast/Good Friday Agreement 1998 was plainly based on the presumption of common membership of the EU, there are serious concerns about the impact of Brexit on the peace process. Although the EU-UK negotiations are in their early stages, the referendum result has already proved destabilising, contributing to the collapse of the political institutions in January 2017. Leaving the EU will throw into sharp relief some of the political and

¹ Full details available at <https://brexitlawni.org/>. Follow on twitter @BrexitLawNI or like on facebook.

social tensions hitherto mediated by EU membership and it has already re-opened the fractures concerning sovereignty in Northern Ireland and enlivened discussions on the possibility of a United Ireland across the island of Ireland. Brexit is clearly having an impact on the wider constitutional settlement, including the peace process, North-South relations and border related issues.

Background and Issues

Brexit and Socioeconomic Rights

Socioeconomic issues and more specifically rights have been central to understanding the Northern Ireland conflict. The conflict emerged against the backdrop of discrimination in housing and employment in particular. It was also most intense in areas of socio-economic deprivation and it exacerbated economic and health problems creating a long-lasting social impact in this jurisdiction.

There have been numerous efforts to introduce reforms addressing these concerns. The Housing Executive was created and adopted an allocation process based on objective need. Fair employment legislation was introduced to address direct discrimination in employment on grounds of religion or political opinion. The Fair Employment laws were gradually strengthened resulting in the Fair Employment and Treatment Order (FETO) 1998. The Fair Employment legislation provides for robust legal intervention in the workplace through monitoring and recent reviews of the labour market show that inequalities in this area have reduced. The 1998 Belfast/Good Friday Agreement 1998 introduced some important provisions in relation to socioeconomic rights and more particularly equality.

The Agreement provides for a (then ground-breaking) equality mainstreaming obligation. This was legislated for in section 75 of the Northern Ireland Act, requiring designated public authorities to have due regard to the need to promote equality of opportunity across nine grounds. The Agreement also provided for a single equality commission to monitor and enforce equality and anti discrimination law including disability law. The equality legislation does not protect socioeconomic rights or prohibit discrimination based on socioeconomic status, but the protection of equality and socioeconomic rights are in practice intertwined. The Agreement also includes commitments on economic, social and cultural 'issues': Commitments on economic, social and cultural 'issues', including regional and economic development and social cohesion, protecting the environment, employment equality reform, linguistic diversity (especially on promotion of the Irish language), and on the use of symbols and emblems.

While the 1998 Agreement and subsequent agreements have provided some support for socioeconomic rights and equality rights, the local political context of the power-sharing system has to be considered. In numerous respects there has either been inaction or actual slippage in the protection of socioeconomic rights and equality.

The EU is relevant to the protection of socioeconomic rights and equality in numerous areas. There is especial importance in relation to equality law. EU support for economic and social development in Northern Ireland, and for cross-border programmes, has also been important for maintain socio-economic standards.

The UK Government position paper on Northern Ireland and Ireland refers to the need to uphold the Belfast or Good Friday Agreement 'in all its parts'; to maintain the Common Travel Area and

associated rights; to avoid a hard border for the movement of goods and to preserve North-South and East-West cooperation, including on energy. The paper refers to the need to be 'mindful of the full breadth of commitments' in the 1998 Agreement. The position paper gives considerable and understandable attention to many important issues. Its focus though on socioeconomic rights and equality is skewed. There is mention of matters such as 'equality, parity of esteem' but these seem intended to refer to the treatment of the ethno-national divide rather than a broader understanding of equality and anti-discrimination rights. There is a recognition that deprivation in Northern Ireland was both a consequence of and a factor in sustaining the conflict, but this does not translate into clear support for socioeconomic rights and equality.

The UK position paper supports the Common Travel Area, which facilitates UK and Irish nationals reciprocal access to a range of rights in each other's country. These include socioeconomic rights such as the right to work, to study, to access social welfare and health services. This understanding of reciprocal rights only protects UK and Irish nationals and does not specify the levels at which these rights are protected. It is under-developed as a legal concept.

On social and economic issues, the UK position paper envisages working with the EU in relation to the Peace IV programme and the role of the SEUPB. Much of the UK approach focuses on cross-border trade and energy cooperation. It discusses agriculture in the context of trade but not the role of EU subsidies to the Northern Irish agricultural sector.

The European Commission has set out guiding principles for dialogue on Ireland and Northern Ireland. As part of this it states there can be no retrogression in the enjoyment of anti-discrimination rights in particular.

There is of course much uncertainty about the impact of Brexit on these rights. At certain points in recent history the Northern Irish legislation has been ahead of EU developments (the prohibition of religious discrimination, the adoption of equality mainstreaming). At least theoretically a Northern Irish legislature could maintain or enhance rights in these areas in the exercise of their legislative powers. They have legislative competence in many of these areas, more so than their counterparts in Scotland for instance.

The EU has provided a convenient 'neutral' backdrop for upholding equality laws in particular. Discussions on equality rights (and sometimes socioeconomic rights) sometimes get mired in zero-sum local politics. Rights based on EU law need not necessarily attract the same political tensions. The EU has also acted as a driver for equality law during periods when it has been difficult to envisage much legislative activity in Northern Ireland. The EU has also acted as a leader specifically on sexual orientation equality, where some local politicians have been inclined not to be proactive. EU legislation therefore provides an irreducible minimum level of protection for equality and certain socioeconomic rights.

The EU Withdrawal Bill does not include any explicit saver for equality rights or socioeconomic rights. It is the subject of considerable criticism that it is deeply ambiguous and confers excessive powers to make secondary legislation. There will be possibilities for UK ministers or Stormont ministers to make changes to rights in these areas without adequate democratic oversight. Exit will likely also mean that there will be no access to the Court of Justice. Taken together this has led to considerable anxiety about the prospects for socioeconomic rights in particular.

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The Belfast/Good Friday Agreement 1998 is a major peace agreement, intended to bring an end to the conflict in (and about) Northern Ireland. The Agreement recognises that human rights and equality are fundamental to the peace process. In this regard the 1998 Agreement includes much more elaborate provisions on human rights and equality than were provided for in previous efforts to end the conflict. The section of the Agreement on 'Rights, Safeguards and Equality of Opportunity' is especially significant and some of the equality related issues are addressed in the Report on socioeconomic rights and equality. Brexit is therefore advancing in a context where human rights and equality are accorded a particular and special status (in principle if not always in practice).

The EU provides a set of rights including whenever the EU itself is acting or its members-states are implementing EU law. These include rights guaranteed in the EU treaties, EU secondary legislation in the form of regulations and directives, and the EU Charter of Fundamental Rights.

While limited to the scope of EU law, these rights frequently go beyond what would otherwise be protected in domestic UK law, including going beyond what would otherwise be protected by the Human Rights Act 1998. The doctrine of EU law supremacy means that these rights are binding on all UK authorities including the Westminster Parliament and Northern Ireland Assembly.

The EU rights are binding across the 28 member states and so also ensure a level of equivalent protection of human rights on the island of Ireland, north and south. The EU has provided protections in some areas of particular interest in the Agreement; these include the socioeconomic and equality areas. This also includes matters such as victims' rights and environmental rights. The EU has also played a substantial role in promoting the economic and social development of Northern Ireland and in particular cross-border cooperation in these areas.

Preliminary Recommendations

In order to protect the integrity of the Belfast/Good Friday Agreement and the principles that have underpinned the peace process thus far we make the following preliminary suggestions:

Brexit and Socioeconomic Rights

- The EU Withdrawal Bill should provide explicit protections for EU standards in the fields of equality and discrimination law, workers' rights, environmental rights (both in relation to devolved and UK authorities).
- Brexit will mean that the supremacy of these rights vis-à-vis the devolved authorities and UK authorities is eroded. Providing for supremacy at least as regards devolved authorities requires either further amendment to the Northern Ireland Act or more sensibly an enforceable Bill of Rights (that includes protections for socioeconomic rights). In addition to this consideration should be given to what role the Charter of Fundamental Rights can play in the future, and the provisions of the Withdrawal are particularly unwelcome in this respect.
- The equality law framework in Northern Ireland needs to be strengthened, to address gaps that have emerged and to consolidate and 'level-up' established guarantees. A Single Equality Act for Northern Ireland remains a sensible way forward.
- Section 75 of the Northern Ireland Act provides a framework for considering the equality implications of policies adopted by designated public authorities. Particular attention should be given to supporting section 75 processes and consideration given to whether it adequately covers possible action by UK ministers affecting the law in Northern Ireland. More attention needs to be paid to whether the envisaged 'enforcement' tools around section 75 in the Northern Ireland Act are adequate and whether the grounds under section 75 should be extended to cover socioeconomic status. Provisions under section 75 such as data collection, the ongoing monitoring of impacts of any policies and positive action to address inequalities should be used to inform any public authority decisions through the transition period.

Brexit, Human Rights and Equality Issues

- The position of the Charter of Fundamental Rights (and general principles of law) in the Withdrawal Bill should be the same as for other retained EU law
- The Bill should include specific protections for rights and equality so that secondary legislation cannot reduce EU protections in these areas.
- Given the altered position regarding the supremacy of EU law on rights and equality there is a risk that these will not be guaranteed in the Northern Irish legal system. Furthermore, there is a risk that the equivalent protection of rights on the island of Ireland will be significantly undermined. These suggest that there is a more urgent need to consider the Bill of Rights as a mechanism to ensure Northern Ireland authorities respect the range of rights found in EU law

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- The risk to equivalence also suggests that more attention should be given to the debate on an all island Charter of rights.
- There should be clarity on the support for funding of economic and social development and reconciliation initiatives in Northern Ireland
- The position of the European Convention on Human Rights and the Human Rights Act 1998 in relation to Northern Ireland should be affirmed
- There should be a Single Equality Act for Northern Ireland that ensures that gaps are addressed and that the jurisdiction is well placed to keep pace with international and European best practice in the future.