

Written Evidence Submitted to the Northern Ireland Affairs Committee from the Committee on the Administration of Justice

Brexit and Human Rights in Northern Ireland – March 2016

Executive Summary

- The Committee on the Administration of Justice (CAJ) was established in 1981 and is an independent non-governmental organisation working for human rights and affiliated to the International Federation of Human Rights (FIDH).
- The purpose of this contribution is to discuss the effect on human rights protection, in general but in particular in Northern Ireland, if the United Kingdom (UK) votes to leave the European Union (EU).
- The positive case for the EU in this respect rests on two main pillars: the Charter of Fundamental Rights and Freedoms and the development and application of equality and anti-discrimination laws. These are positive additional protections for human rights.
- However, if we look at economic and fiscal policy which emanates from the institutions of the EU, especially during the, so far, eight year long economic crisis, a somewhat different picture emerges. The response of EU institutions to the crisis has materially reduced social and economic rights and in the last year it has also become clear that the EU policies on migration have dramatically failed and we are now seeing wholesale human rights violations along the borders and within the territory of the EU.
- We may take the position that the EU's human rights account is roughly balanced. What position, then, should human rights activists take in the debate around Brexit?
- A human rights approach does not give particular guidance on national identity or boundaries, nor on particular constitutional arrangements.

However, we have to consider both the political context in which the referendum on the UK's membership is taking place and also the constitutional context in so far as it may impact upon human rights protections.

- The UK Government is proposing the repeal of the Human Rights Act from a perspective antipathetic to universal human rights and tainted with xenophobia. Much of the Brexit campaign has a similar approach.
- Constitutional chaos, and especially the unplanned dissolution of a nation state, is not good for human rights or the rule of law upon which they depend. The linked demands for repeal of the HRA and Brexit could lead to just such constitutional chaos.
- Regression on human rights protections will materially threaten the successful continuance of the peace process in Northern Ireland.
- In our view, therefore, a successful Brexit would lead to a “carnival of reaction” with the forces inimical to human rights in the ascendant and the peace process under threat. In practice, in this time and in this place, the exit of the UK from the EU would mean a huge blow to the state of human rights in general and in particular could lead to disaster in Northern Ireland.

Brexit and Human Rights in Northern Ireland

About CAJ

1. The Committee on the Administration of Justice (CAJ) was established in 1981 and is an independent non-governmental organisation working for human rights and affiliated to the International Federation of Human Rights (FIDH). CAJ takes no position on the constitutional status of Northern Ireland and is firmly opposed to the use of violence for political ends. Its membership is drawn from across the community.
2. The Committee seeks to ensure the highest standards in the administration of justice in Northern Ireland by ensuring that the government complies with its responsibilities in international human rights law. Our specific focus is on those human rights issues which are directly relevant to conflict and peace.

This includes relevant economic, social and cultural rights as well as civil and political rights. We are concerned to combat impunity for violations in the past, guarantee non-recurrence by working for contemporary accountability, promote a rights based framework for the exercise of the freedoms of expression and assembly, advocate the application of the fundamental principles of equality and promulgate the benefits of a rights based society.

The EU and fundamental rights

3. The purpose of this contribution is to discuss the effect on human rights protection, in general but in particular in Northern Ireland, if the United Kingdom (UK) votes to leave the European Union (EU). The first task, then, is to examine the extent to which, if any, membership of the EU contributes to the practical protection of human rights in our jurisdiction. In so doing, it is necessary not just to look at the formal legal position, but also at the actual practice and politics of the EU and its institutions.
4. The positive case for the EU in this respect rests on two main pillars: the Charter of Fundamental Rights and Freedoms and the development and application of equality and anti-discrimination laws.
5. The Charter brings together in a single document all the personal, civil, political and individual rights deriving from the “constitutional traditions and international obligations common to Member States” (Charter Preamble) that formed an integral part of European Union law. The Charter was first agreed by Member States as a non-binding declaration in Nice in 2000 and became legally binding and directly effective with the entry into force of the Treaty of Lisbon in December 2009. It is directly effective in the UK by virtue of the European Communities Act 1972 which provides that rights and obligations arising under European (EU) Treaties “are without further enactment to be given legal effect or used in” the UK §2(1).
6. In many respects the rights in the Charter mirror those in the European Convention on Human Rights (ECHR) which, in any event, is seen as a baseline below which EU law and the protections offered under the Charter cannot fall. The Charter extends beyond the scope of the ECHR, however, particularly in the area of social, economic and cultural rights, equality and non-discrimination and some workers’ rights. Some rights, including the right to vote, to good administration and the freedom of movement, apply only to citizens of the EU.

Individuals (citizens and those legally residing) in Member States have the right of direct access to the European Court of Justice (if domestic remedies are exhausted). Furthermore, the rights contained in the Charter have supremacy over inconsistent national law, including statutory law, and over decisions of public authorities and, where it is impossible for national courts to interpret primary legislation consistently with such a right, they must disapply the non-compliant provision.

7. There is, however, a basic limitation on the domestic impact of the Charter in that it applies only in cases where Member States are implementing EU law. So, for example, the Charter rights may have a significant impact in cases concerning discrimination in employment but would not be applicable in cases about police misconduct. Having said that, the Supreme Court has held that a broad interpretation of the applicability of EU law should be taken and the Charter would have applicability whenever a State was acting “within the material scope of EU law” (*RFU v. CIS Ltd* [2012] UKSC 55).
8. The relatively advanced state of anti-discrimination law in the EU derives from the exigencies of the early moves to build a common, single market. It was necessary to outlaw discrimination based on nationality and other protections, especially on gender grounds, followed. The Treaty of Amsterdam, which came into force in 1999, gave a general power to the European Council to take action on discrimination in general. Directives followed on particular aspects of discrimination and Directive 2000/78 established a general framework for equal treatment in employment and occupation. These Directives are directly binding on institutions in Member States and give rise to the common view that non-discrimination is a basic value of the EU. The two strands of rights protections come together, in some respects at least, in Articles 21-23 of the Charter which guarantee non-discrimination on a very broad range of grounds. It may well be argued that Northern Ireland only has the current extent of legal protection against discrimination on the grounds of sexual orientation because of EU law. We should also note that legislation passed at Stormont must be compatible with EU law, which can be seen as an important protection in the context of equality.
9. So far, so good; the impact of the EU on UK law has been generally progressive in terms of rights protections and has acted as a positive influence in terms of equality and workers’ rights. However, if we look at economic and fiscal policy which emanates from the institutions of the EU, especially during the, so far, eight year long economic crisis, a somewhat different picture emerges.

10. Last year the International Labour Organisation (ILO) published a report (World Social Protection Report 2014-15) which was highly critical of the economics and politics of austerity, especially as regards Europe. “The achievements of the European social model, which dramatically reduced poverty and promoted prosperity in the period following the Second World War, have been eroded by short-term adjustment reforms,” notes the report.
11. The report argues that fiscal consolidation meant to reduce debt has failed to stimulate the kind of economic growth needed to create jobs. The report says that families in austerity-driven nations like Ireland, Cyprus, Greece, and Portugal have seen their disposable incomes plummet, leading to lower consumption. In Greece, salaries dropped 35 percent since 2008 while unemployment increased by 28 percent. At the same time, social security reforms are being replaced with a system that limits the responsibility of the Greek state.
12. The ILO notes some structural reforms imposed on governments are designed to streamline administration. But the emphasis, it says, has been disproportionately placed on the fiscal objective of balancing public budgets “without due consideration to the objective of adequate benefits to all people”. Europe’s solution to the crisis for the past five years has instead given rise to persistent unemployment, lower wages and higher taxes. All three have boosted poverty and social exclusion rates, which now affects some 123 million people or 24 percent of the EU population. Before the start of the crisis in 2008, the figure was 116 million. Today, around 800,000 more children now live in poverty compared to five years ago. “Some estimates foresee an additional 15-25 million people facing the prospect of living in poverty by 2025 if fiscal consolidation continues,” warns the ILO.
13. This is not the place to debate economic and fiscal policy as such. However, it is clear that the policies of austerity advocated by the central EU institutions and leading politicians have impacted negatively on people’s rights, especially in social and economic areas. Some would argue that the neo-liberal economic ideology that advocates austerity as a response to the economic crisis is “hard-wired” into EU institutions.
14. In the last year, it has also become clear that the EU policies on migration have dramatically failed and we are now seeing wholesale human rights violations along the borders and within the territory of the EU.

Again, this is not the place to debate the migration crisis but it is undeniable that the EU is currently failing to protect the human rights of the hundreds of thousands of people seeking refuge within its borders.

15. If this is the debit side of the EU's human rights account, we must introduce a caveat. Whereas the positive side of the account is contained in explicit legislation and regulations, the economic and migrant policy elements are not as clear-cut. Are they temporary, political responses to a series of crises that could be changed through political developments within the EU, or are they outworkings of fundamental characteristics of the Union that reflect a consistent downward drag on rights protection?
16. The answer to that question will depend on an analysis which will need to go way beyond a concern with basic human rights and will be affected by ideology and particular theories of social and political change. For now, and for the purposes of argument, we may take the position that the EU's human rights account is roughly balanced. What position, then, should human rights activists take in the debate around Brexit?

The context of Brexit

17. A human rights approach does not give particular guidance on national identity or boundaries, nor on particular constitutional arrangements. It is recognised that different structures can provide equivalent human rights protections and, beyond having due regard to the right to self-determination, it is not the direct business of a human rights organisation to take a view on which state entity has jurisdiction where. That is one reason why CAJ takes no view on the constitutional status of Northern Ireland. It may not be, therefore, really our business to take a stand on whether the UK should be a member of the EU in principle. However, when faced with any particular decision or crisis point, it is our responsibility to look at the real world and to take a position on what is likely to be best from a human rights point of view. In this case, we have to consider both the political context in which the referendum on the UK's membership is taking place and also, in spite of what we have just argued, the constitutional context in so far as it may impact upon human rights protections.
18. As well as holding the Brexit referendum, the current government is also intent on repealing the Human Rights Act (HRA) and replacing it with a "British" Bill of Rights of unknown contents and will perhaps also propose changes to the constitutional role of the Supreme Court.

In summary, CAJ argues that the source and context of these proposals mean that they are a threat to human rights protection and it is extremely unlikely that any increase in protection will be possible in course of the process of implementation. The proposals would breach the Belfast/Good Friday Agreement and the international treaty which backs it up. Repealing the HRA would also undermine basic elements of the rights-based governance of Northern Ireland, especially with regard to the vital area of policing. We are therefore facing a major battle to protect the level of human rights protection we already have, irrespective of the prospect of Brexit.

19. In arguing against the repeal of the HRA, one of the points we have made is that we can see clear threats to a proper system of human rights protections in the way the proposals have been argued. Against the universality of human rights is posed the concept of “British” values and principles, seen to be different and inherently superior to “foreign” or “European” impositions. Against the basic principle that human rights accrue to every person by simple virtue of their humanity, the proposals suggest that “foreign nationals” be treated differently and that rights are dependent on the proper exercise of “responsibilities.” Against the principle that everyone – even those declared enemies – are deserving of human rights protection is set the proposal that the ECHR should not bind the actions of British military forces overseas. In this context, the idea that proposals deriving from the present UK Government offer an opportunity to extend human rights protections flies in the face of both the facts and any sensible political analysis.
20. We would argue that there is a similar xenophobic undercurrent to the demand that the UK leave the EU. There are, of course, financial, economic and democratic arguments advanced in favour of Brexit. It is, however, very rare to find these arguments unmixed with the idea of the exceptionality, if not the outright superiority of this particular nation state compared with all others. The centre ground of the Brexit movement displays a fixation with protecting “our own borders” and being in charge of “our own laws;” the more excitable fringe obsesses about immigration and displays a barely concealed racism. The connected movements to repeal the HRA, in the process breaking the link between UK courts and European jurisprudence, and to leave the EU are exceptionalist, xenophobic and antipathetic to human rights. The prospect of their victory should strike fear in the hearts of all human rights defenders.

21. The constitutional context is also deeply worrying. As we have said, different constitutional structures can deliver equivalent human rights protections. Constitutional chaos, and especially the unplanned dissolution of a nation state, is not however good for human rights or the rule of law upon which they depend. The linked demands for repeal of the HRA and Brexit could lead to just such constitutional chaos.
22. We have argued elsewhere that the proposals to repeal the HRA would engage the Sewell Convention, requiring legislative consent motions in the devolved legislatures which, for varying reasons, are unlikely to be forthcoming. If the UK Government nonetheless presses on with their proposals, there will be a constitutional crisis which will threaten the United Kingdom as we know it.
23. With regard to Brexit, figures from recent polls show different attitudes in the various regions of the United Kingdom. Apparently, there is a majority in favour of staying in the EU in all regions but a smaller one in England compared to the other nations and one region. The figures are 52% in favour in England, 55% in Wales, 64% in Scotland and 75% in Northern Ireland (Source: "Disunited Kingdom? Attitudes to the EU across the UK" NatCen 2015). If Scotland, Wales and Northern Ireland voted as these polls indicate, then it would only take a relatively small shift among voters in England before the UK would be faced with one of two potentially constitutionally problematic outcomes.
24. In the first scenario, it has been calculated that if a narrow majority of between 50 and 52.4% of people in England voted in favour of leaving the EU, the UK may nonetheless be kept in the EU by the votes of people in Scotland, Wales and Northern Ireland. Conversely, if the leave vote in England reached 52.5% or more, then England could take the UK out of the EU even though majorities in Scotland, Wales and Northern Ireland voted to remain. Either of these results would put question marks over the stability of the UK as presently constituted.
25. Some people may welcome constitutional uncertainty and even the prospect of the break-up of the UK. However, either of the scenarios above, but particularly where English votes made the UK leave the EU without the consent of the other regions, would have a dangerous impact on Northern Ireland. Our region has the right of secession from the UK, but only through accession to a united Ireland (§1 Northern Ireland Act 1998) subsequent to a referendum.

In circumstances where the North was suffering from the dislocation of trade and other contact with the South, the loss of EU subsidies and so on, but where there was not an evident majority in favour of joining a united Ireland, serious political conflict would be likely. There would undoubtedly be calls for a Border Poll (referendum), which would be resisted, and the heightened political tension, in circumstances where there was an existential threat to the current constitution, could develop into renewed political violence.

The Northern Ireland context

26. Economically, the EU is especially important for Northern Ireland. Agriculture is a mainstay of the economy and the subsidies to farming are vital. The EU has also contributed to the effective removal of the border with the Republic and continuing economic integration across the island of Ireland. EU Structural Funds have contributed many billions to Ireland North and South over the past 40 years.
27. The EU has been a good friend to the Northern Ireland peace process, both politically and financially. While the United States has had more obvious impact, there has been consistent support from the Commission as well as member states. The Peace Programmes have been operating since 1995 making a contribution of some €1.5 billion to both government and civil society projects.
28. As well as the loss of this inward funding, an exit from the EU would undoubtedly create economic difficulties for Northern Ireland in terms of trade, free movement of people and mutual investment across the Border. Pro-Brexit economists may argue that there would be long term benefits, but there would, at least, be short-term disruption and potential social unrest.
29. However, the main issue in Northern Ireland is that our peace process and the construction of a new, relatively peaceful society depend on a framework of human rights laws and institutions. After a violent political conflict, the vital task is to re-establish faith and trust in the institutions of government and the state in general. We have a power-sharing model of government which means that one community is unable to dominate the other. We also went through a process of change and development designed to put equality and other human rights at the centre of society. While some elements of the peace agreement, such as a dedicated Northern Ireland Bill of Rights, have not been implemented, other reforms have proved vital to this task.

30. Policing is now based around human rights and particularly the European Convention as represented in the HRA. In spite of some problems, police reform is one of the most important successes of the peace process and has gone way further than in any other region of the UK. Increasingly, both in jurisprudence and in the daily practice of state institutions, human rights standards are relied on as the basis for decision making. It is not scaremongering to say that regression on human rights protections will materially threaten the successful continuance of the peace process in Northern Ireland.

Brexit: a carnival of reaction

31. The main legal threat to the system of rights protection in Northern Ireland is the proposed repeal of the Human Rights Act. The protections that the EU affords in legal terms are fairly flimsy compared to the incorporation of the text and jurisprudence of the European Convention into domestic law. However, we have to look at the political and constitutional context we have described above to estimate the practical impact of Brexit on human rights protections and hence on our peace process.

32. As we have argued, much of the impetus both for the repeal of the HRA and Brexit come from a xenophobic nationalism that shades into outright racism at its fringes. Consider the political situation if the result of the referendum is to leave the EU. The racist Right would be cock-a-hoop, the Conservative Party would have been captured by the obsessives of its Eurosceptic wing and the anti-human rights crusade of elements of the state structure would be given full rein. Racism, including sectarianism, which is manifested in daily examples of violent intimidation in Northern Ireland, would be encouraged. Faith in the rule of law, already damaged by the UK Government's attempts to maintain an apparatus of impunity for state crimes of the past, would be undermined by the likely repeal of the HRA and a general roll-back of human rights protections.

33. In our view, therefore, a successful Brexit would lead to a "carnival of reaction" with the forces inimical to human rights in the ascendant and the peace process under threat. In these circumstances, it makes no sense to argue how the profit and loss account of the EU in terms of human rights tots up in theory. In practice, in this time and in this place, the exit of the UK from the EU would mean a huge blow to the state of human rights in general and in particular could lead to disaster in Northern Ireland.