

The Impact of Brexit on Human Rights

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President of the Law Society, Chair and members of the Human Rights Committee, members of the Judiciary, Minister, Excellencies, members of the Law Society, ladies and gentlemen.

It is a great honour for me to be home to give this lecture. No matter how long one is gone (and I have not been gone terribly long) or how far away one is (and I am not very far away) home is always home, and so I am delighted to be here this evening to discuss the important topic of Brexit and its implications for rights, which is an urgent and a personal issue for me as an Irish woman living in the midlands of England, as a lawyer, and as a committed European.

It is a strange time to be an Irish woman in the United Kingdom. With the forthcoming referendum on the 8th Amendment we are engaged with sometimes sympathetically, sometimes as a manifestation of a post-colonial novelty annoyingly termed ‘southern Ireland’. At the same time, whenever there is a European Council meeting at least one person, sometimes more though never many, asks me why Ireland is on a wrecking mission for Brexit; why we cannot just “accept” Brexit, as if it were ours to accept or reject; whether this is all in some way the centennial revenge of a country newly and surprisingly seen as sovereign and powerful. It is a strange terrain to navigate.

Of course, the Ireland Act 1949¹ means that as an Irish person living in the United Kingdom I am not treated as “foreign”. I had a vote on Brexit, and I cast it. But things do not always go as we might wish. Barring what seems an unforeseeable second referendum reversing the first, the United Kingdom will exit the European Union on 29 March 2019. Brexit is a reality, and we must work within that.

¹ s. 2, Ireland Act 1949.

This evening I will try to avoid the temptation to speak about Brexit and rights in solely technical terms. In my view, what we need at this point is to zoom out from the technocratic discourses of Brexit and to ask ourselves a deeper and more difficult set of questions; questions about what a democratic vote to exit the European Union might mean about how compelling the vision of a Europe of rights really is, questions about how we re-make the moral and ethical case for rights, and questions about what a new relationship with the United Kingdom will mean for rights on this island that we call our home.

And so I will proceed this evening by asking three sets of questions: the first is about the protection of rights in the United Kingdom *per se* after exit day. The second is about the protection of rights in Northern Ireland as a particular part of the United Kingdom after exit day. And the third is about the future of a Europe of Rights not after exit day *per se* but in the reality to which Brexit forces us to attend: a reality in which the European project is something for which we ought not to assume widespread democratic support.

The Impact of Brexit on Rights in the United Kingdom

Let me start with the United Kingdom or, as my Grandmother puts it on the envelopes of her letters: “United Kingdom (England)”.

Rights have existed in UK constitutional law for hundreds of years,² but it is only relatively recently that they were framed expressly as human rights law enforceable by the judiciary,³ and that the protection of human rights through law began to be articulated expressly as a part of the Rule of Law.⁴ Although much attention in respect of human rights law in the UK is focused on the Human Rights Act 1998 that, of course, does not emanate from or enforce EU law and the courts do not have the power thereunder to strike down primary legislation from Westminster even if found to be incompatible with the ECHR.⁵

² Magna Carta 1215, Habeas Corpus Act 1679, Bill of Rights 1689.

³ See generally Aileen Kavanagh, *Constitutional Review under the UK Human Rights Act* (2009, Cambridge; Cambridge University Press), and Roger Masterman, *The Separation of Powers in the Contemporary Constitution: Judicial Competence and Independence in the United Kingdom* (2011, Cambridge; Cambridge University Press).

⁴ See Tom Bingham, *The Rule of Law* (2010, London; Allen Lane), and Mark Elliot, *The Constitutional Foundations of Judicial Review* (2001, Oxford; Hart Publishing).

⁵ s. 4, Human Rights Act 1998.

The remedies under EU law, including strike down powers, are markedly stronger and in many cases more effective. That this is so is, perhaps unsurprisingly, at the core of much of the sovereigntist critique of EU law that underpinned the Brexit referendum, fuelling the criticism of so-called foreign courts usurping the role of both parliament and “British courts” to determine and apply “British law”.⁶ The extent to which these claims really were underpinned by a concern to ensure the supremacy of domestic institutions has been called into question by later events. We now know, for example, that for some politicians and commentators, British courts enforcing the UK Constitution to ensure constitutionally appropriate mechanisms of exiting the EU⁷ are “enemies of the people”, and that a house of parliament voting to retain the Charter of Fundamental Rights is made up of pro-EU “fanatics”⁸ who are aiming to give parliament “unprecedented constitutional power”⁹ to steer the Brexit negotiations. However, in spite of this, the Government continues to stand by its policy commitment that withdrawal from the EU will not lead to a reduction in rights in the UK.¹⁰ What is less clear is how this will be achieved.

The Government’s plan is laid out in the European Union (Withdrawal) Bill 2017-19, still making its slow and tumultuous way through the Houses of Parliament.¹¹ Broadly speaking, what is proposed is a general retention clause, not dissimilar to what a country tends to adopt when it emerges from colonial law, as Ireland did in Article 73 of the Constitution of the Irish Free State 1922 and Articles 48-50 of *Bunreacht na hÉireann*. The Bill broadly provides for the retention in UK law of three categories of EU or EU-derived law: (i) domestic legislation, previously adopted, that gives effect to EU law, (ii) EU law that is directly applicable, and (iii) rights arising under EU treaties and directives that are directly effective and which have previously been

⁶ On new sovereigntism and Brexit see Fiona de Londras, “The New Sovereigntism: What it means for human rights law in the UK”, (2017) *LSE Brexit Blog*. Available at <http://eprints.lse.ac.uk/85565/1/brexit-2017-10-24-the-new-sovereigntism-what-it-means-for-human.pdf> (24 October 2017).

⁷ *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5.

⁸ See the comments of Lord Lawson on BBC’s *The Daily Politics*, 20 April 2018.

⁹ Quote from Lord Callanan as reported by Faisal Islam (Sky News): <https://twitter.com/faisalislam/status/990991344259739650>

¹⁰ White Paper: *Legislating for the United Kingdom’s Withdrawal from the European Union*, Cm 9446, §2.25.

¹¹ The Bill’s progress can be traced here: <https://services.parliament.uk/bills/2017-19/europeanunionwithdrawal.html>

recognised.¹² So far so good, even though we are not yet quite sure whether they will all be primary or secondary legislation and, if not, how a distinction will be drawn between them. Beyond that constitutional question, which is itself interesting and important,¹³ two matters of rights-related concern arise. The first is what happens or may happen to that retained law. And the second is the omission of the Charter of Fundamental Rights from the category of retained law.

Retained Law

On exit day, the concept of retained law will ensure continuity of law in the United Kingdom. It also makes Brexit manageable; it would have been impossible for the thousands of pieces of EU law in operation in the UK to be assessed and either affirmed or repealed at the moment of exit. Retention buys time and creates certainty. However, retention is transition; it is not a necessarily permanent state of affairs. Retained law can later be amended or repealed. This is all part of the return of sovereignty over these areas from Brussels to Westminster and, seen in that light, is perhaps entirely reasonable. However the concern is the mechanism of subsequent amendment or repeal of retained law. This is the subject of intense political debate, and the final resolution has not yet been reached, but it is clear that secondary legislation will be a big part of it.

Clause 7 of the Bill as originally proposed would have allowed for ministers to amend retained legislation where they considered it “appropriate to prevent, remedy or mitigate” any ineffectiveness or deficiency in retained law; a sweeping power that caused much consternation. Indeed, at the end of January the House of Lords Constitution Committee declared the Withdrawal bill “fundamentally flawed from a constitutional perspective”.¹⁴ The latest pushback against this came in the Lords on April 25th when Peers voted by a majority of 128 that delegated legislation should only be used to amend retained legislation where “necessary”. Given the level of concern with these powers in the Commons this amendment may well be accepted at the next stage, but even if it is there will clearly be substantial scope for at least some

¹² Clause 2, 3, 4 European Union (Withdrawal) Bill 2017-19 (as introduced).

¹³ On this see for example Paul Craig, ‘European Union (Withdrawal) Bill: Legal Status and Effect of Retained Law’, U.K. Const. L. Blog (8th Mar. 2018) (available at <https://ukconstitutionallaw.org/>).

¹⁴ House of Lords Select Committee on the Constitution, *European Union (Withdrawal) Bill*, 9th Report of Session 2017-19 (January 2018).

of the retained laws—which we are told will be the way in which rights will be protected—to be amended with limited or no parliamentary oversight.

The Government has conceded that at least one new parliamentary committee will be needed to consider how statutory instruments are being used to amend retained EU law, and amendments have been tabled to make such a committee particularly rigorous and give it powers to require (rather than merely recommend) parliamentary scrutiny. We may also see the development of both a House of Commons and a House of Lords scrutiny committee of this kind. Of course, other existing committees such as the Joint Committee on Human Rights may well take on roles in respect of this in due course also. The Government has further agreed to propose amendments that would ensure rigorous reporting requirements to Parliament including ministerial statements of why delegated legislation is being used to amend a retained law.

Whether this will protect EU rights effectively will depend to a large degree on continued and concerted parliamentary oversight as well as on the good faith engagement with these requirements by ministers. Lord Callanan clearly considered these new concessions were sufficient to protect principal retained law from amendment without parliamentary scrutiny,¹⁵ although some, including Alison Young, have questioned this, certainly if the ‘necessary’ amendment already mentioned is not accepted by the Government.¹⁶ What is clear, though, is that the protection of EU rights is to be achieved by a primarily parliamentary process: while courts will have some role it will almost certainly be relatively limited.¹⁷ Dicey would be pleased, one imagines, with this revival in parliamentary sovereignty as the guarantor of rights and law.¹⁸

The Exclusion of the Charter of Fundamental Rights

¹⁵ See the contributions of Lord Callanan to the House of Lords debate, 23 April 2018: *Hansard*, Volume 790.

¹⁶ Alison Young, ‘Status of EU Law Post Brexit: Part Two’, U.K. Const. L. Blog (4th May 2017) (available at <https://ukconstitutionallaw.org/>).

¹⁷ See Clause 5 on the supremacy of EU law and judicial interpretation, although Young rightly notes that it is not clear whether this will maintain supremacy or primacy of EU law, and whether it is national courts or the CJEU that will determine the scope of the supremacy of EU law. Young, *ibid.*

¹⁸ AV Dicey, *Introduction to the Study of the Law of the Constitution*, 6th Edition (1902).

However, not all rights-protecting EU law will be retained on exit day. Clause 5(4) of the EU (Withdrawal) Bill expressly states “The Charter of Fundamental Rights is not part of the domestic law on or after exit day”. In other words, the Charter is expressly *not* retained.

The Government claims that this is appropriate because the Charter does not create new rights; it just recognises rights that already existed in EU law, and that this other EU law is already being retained. Combined with the policy commitment that the Government “does not intend that the substantive rights protected in the Charter of Fundamental Rights will be weakened” by withdrawal,¹⁹ the Government claims there is no need to retain the Charter as the relevant rights will continue to be protected through retained law. This is, of course, only partly true.

The Charter has led to the creation of new rights and evolution of our understanding of others, and the Charter protects rights—especially labour, children’s and socio-economic rights—that do not have equivalent protection in other parts of British or European human rights law. And of course the Charter contains important principles that are given effect in its application, such as the principle of proportionality. Most importantly, perhaps, Charter rights are fundamental.

This, of course, is why the Charter is not to be retained.

The fundamental nature of Charter rights means that their violation can lead to the invalidation of laws by the courts, including domestic legislation and administrative actions. There is no similar mechanism in UK constitutional law.²⁰ This raises a clear question about the effective protection of rights after exit day.

Remedies in other parts of UK human rights law, such as the Human Rights Act 1998, are significantly weaker and often inadequate and ineffective. This is well illustrated by *Benkharbouche v Embassy of the Republic of Sudan*.²¹ In this case the

¹⁹ *Charter of Fundamental Rights of the EU: Right by Right Analysis*, 4.

²⁰ As Jason Coppel QC puts it “They cannot be repealed, expressly or impliedly, and domestic legislation and governmental action, past or future, which is contrary to Charter rights must be struck down”: Jason Coppel QC, “European Union (Withdrawal) Bill—EU Charter of Fundamental Rights”, Opinion for the Equality and Human Rights Commission, 5 January 2018, [18]. Available at <https://www.equalityhumanrights.com/sites/default/files/eu-withdrawal-bill-legal-advice-jason-coppel-qc.pdf>

²¹ [2017] 2 WLR 999

Supreme Court found that the barring of employment claims by domestic workers in the Sudanese and Libyan embassies under the State Immunity Act 1978 was incompatible with both Article 6 of the ECHR and Article 47 of the Charter of Fundamental Rights (in respect of the Working Time Regulations). The remedy under the Human Rights Act 1998 for a Convention violation was a declaration of incompatibility which leaves the law intact until and unless Parliament amends it, which it is not obliged to do. It also left the claims barred; the Act continued to operate between the parties. The recognised rights violation could lead to nothing more than a declaratory remedy. In contrast, the Charter violation required the law be set aside so that claims under the Working Time Regulations could be considered. The Charter remedy was more effective and more powerful. After exit day it will be unavailable and, as outlined in the first Schedule to the Withdrawal Bill, “no court or tribunal...[will be able to] disapply or quash any enactment or other rule of law, or...quash any conduct or otherwise decide that it is unlawful, because it is incompatible with any of the general principles of EU law”.²²

Brexit will not cast the UK into some kind of rights-free dystopia, nor does anyone claim that it will. But it will lead to a substantially lower standard of rights protection than is currently enjoyed, to less effective remedies for violations of rights, and to an inescapable reliance on Parliament alone to respect and protect individual rights notwithstanding the clearly hostile environment, to a borrow a Home Office phrase, in which rights have been discussed and considered in Westminster over recent years.

The House of Lords has now passed an amendment to ensure the Charter will be retained law under the Withdrawal law, but it is doubtful that this will be accepted in the Commons. Even if it were, the Charter as retained law could be amended in the future, potentially by delegated legislation in the future. No amount of technically clever legislative drafting will, ultimately, change the end game of Brexit when it comes to rights in the UK: they will be less protected in substantive, procedural and remedial terms than they are now.²³

The Impact of Brexit on Rights in Northern Ireland

²² Clause 3 of Schedule 1, EU (Withdrawal) Bill 2017-19.

²³ See generally Colm O’Cinnéide, *Brexit and Human Rights*, Brexit: The International Legal Implications, Paper No. 16 (February 2018).

Things get even more complicated when we move to Northern Ireland, as the people in this room know only too well.

Constitutionally and culturally, Northern Ireland has a particular status within the United Kingdom and, of course, it is a place that straddles multiple identities: Irish, British, Northern Irish, European. It is place of pain and of opportunity. But within the British imagination it is often seen as a place apart.

I have nothing but anecdotal evidence for this; my conclusion is based simply on the number of people I speak to who don't realise Ireland and Northern Ireland are different places, the hairdresser who asked me a few years ago whether I was disappointed with the referendum result (he meant the Scottish independence referendum; one nation within the Union is the same as any other sometimes...), the BBC West Midlands radio host who told me off mic that nobody would mind too much if 'we lost Northern Ireland' but losing Scotland would be intolerable... One of the greatest surprises of moving to the UK has been the discovery that Northern Ireland, which loomed so large in my consciousness, is barely a blip on the consciousness of so many of my neighbours and co-denizens now. But that blip is getting inevitably larger as exit day approaches and the awareness that Northern Ireland is a constitutional 'challenge' in the context of Brexit is becoming ever more widespread.

This is understandable. Although many said so, few listened when we said that Northern Ireland was an obstacle to Brexit. The obstacle is not only practical: this is about more than the Border, it is about the constitutional settlement that underpins the condition of peace, which we have enjoyed on this island for twenty years. That peace is fragile, and so too is the constitutional settlement. This settlement is reflected both in instruments, such as the Good Friday/Belfast Agreement and Northern Ireland Act 1998, and in our lived experiences on this island; in the happy reality that frontier living is not only possible, but an utterly quotidian matter for thousands of people. Hundreds of children live in one jurisdiction and school in another, families live and work across the border, healthcare is accessed across the frontier. There may be differences in speed limits, currency and police uniform but the everyday ability to negotiate these differences is absolutely fundamental to our ability to live a life of peaceful coexistence on this island. Jacob Rees Mogg may think talk of a return to terrorist violence is scaremongering, but we know that the conditions of peace and un-peace are close neighbours, and that it takes little to

unsettle us from one to the other. It is the most outrageous nonsense to suggest otherwise. We know also that this is about more than the possibility of a return to violence; it is about the surrenders of nationalisms, on all sides, in the name of peace and togetherness that took place on 22 May 1998; about our collective, consensual embrace of what the President, in a recent speech to the UN General Assembly, called “the promise of the politics of possibilities”.²⁴

Underpinning all of this are, of course, the institutions and human rights commitments that lie at the heart of the Good Friday/Belfast Agreement. Let us not forget the enormity of the act of people on both parts of this island voting to give up our claims on one another and instead to support a condition whereby Northern Ireland is part of the UK by consent,²⁵ and can elect to leave the Union at any time. Seamus Heaney once described Northern Ireland as “land of password, handgrip, wink and nod, Of open minds as open as a trap”.²⁶ This reminds us that our collective commitment to this new normal was an expression of faith; a faith underwritten by the promise that rights would be respected North and south, that the ECHR would have domestic force, and that cross-border institutions would operate to maintain a close and effective operational relationship between all three governments.²⁷ That rights underpinning was not only based on the ECHR but also on membership of the European Union. Recall the Preamble of the British-Irish Agreement:

Wishing to develop still further the unique relationship between their peoples and the close co-operation between their countries as friendly neighbours and as partners in the European Union ...

And so what will happen after exit day? The answer for now is that we do not know, but everyone accepts that Northern Ireland is a particular part of the puzzle. A specific constitutional settlement may be required, not only in terms of customs union and so on (including the so-called ‘fallback’ position of Northern Ireland having a different status vis-à-vis the EU to other parts of the UK) but also potentially in respect of the enjoyment of Charter rights. This is an important point. As already noted, there are real differences between the rights protection available under the

²⁴ Michael D. Higgins, Speech to the UN General Assembly 24 April 2018.

²⁵ s. 1, Northern Ireland Act 1998.

²⁶ “Whatever you Say, Say Nothing” (1975).

²⁷ See also the remarks of Lord Hoffman to this effect in *Robinson v Secretary of State for Northern Ireland and others* [2002] UKHL 32.

Charter and that available in UK constitutional and human rights law more generally, particularly in respect of remedy. In addition, as a result of the entitlement of all people born in Northern Ireland to claim Irish or UK citizenship, or both, almost all are putative or actual EU citizens, and not only citizens and subjects within the United Kingdom.

We also know that the Good Friday/Belfast Agreement includes a commitment to the protection of rights on an *equivalent* basis across the two parts of the island.²⁸ Allow me to dwell on this momentarily: the Agreement's text says that Ireland commits to an equivalent level of rights protection to that available in Northern Ireland, which might be interpreted as saying that there is no obligation of equivalence in respect of the UK. While this understanding of the equivalence commitment may well be one to which the two governments wish to commit as a matter of politics and pragmatism, the standard approach to treaty interpretation in public international law is such that a principle of reciprocity can reasonably be read into it. This is well explained by my colleagues Colin Murray, Aoife O'Donoghue, and Ben Warwick in their discussion paper on Brexit and human rights, published by the Irish and Northern Irish human rights commissions,²⁹ and is indeed reflected in the European Commission's guiding principles for discourse on Northern Ireland.³⁰ If people in Northern Ireland have a substantially lower standard of rights protection as a result of remedial inadequacy to that enjoyed here then there is a strong argument, based in international law, that the UK is not fulfilling its commitments under the Agreement. Whether this will ever go anywhere is a different story, but there is certainly an argument to be made.

More likely is that other parts of the Agreement, currently under explored and not yet realised, might well be revitalised by the realities of Brexit. Two commitments in particular may well return to the agenda: the Bill of Rights for Northern Ireland and the Charter of Rights for the Island of Ireland.³¹ Anne Smith and Leo Green describe

²⁸ Para. 9, 'Rights, Safeguards and Equality of Opportunity', Belfast/Good Friday Agreement 1998.

²⁹ Murray et. al., "Discussion paper on Brexit", (2018), p. 7. Available at <https://www.ihrec.ie/app/uploads/2018/03/Discussion-Paper-on-Brexit.pdf>

³⁰ European Commission, 'Guiding principle transmitted to EU27 for the Dialogue on Ireland/Northern Ireland' (TF50 2017, 15), p.p. 3-4.

³¹ GFA, 'Rights, Safeguards and Equality of Opportunity', paras 4, 16-17

these as the “unfinished businesses” of the Agreement.³² The Charter is referred to in fairly soft terms in the Agreement, which commits the Joint Committee only to considering the possibility of establishing such a Charter, whereas a Bill of Rights for Northern Ireland was considered a fundamental part of the rights settlement. Neither it nor the Charter has ever come to pass, however. Attempts to introduce a Bill of Rights for Northern Ireland were mired in controversy and division, in spite of clear arguments of favour of such an instrument in a divided society,³³ but as the anti-discrimination and equality laws that are so fundamental in the febrile environment of Northern Ireland move into the category of retained legislation under the Withdrawal Bill a new impetus for such a Bill of Rights may well emerge. At the same time, non-EU-related events may begin to unfold in respect of the future of the Human Rights Act 1998 and the potential introduction of a so-called British Bill of Rights. The Prime Minister has said this is not on the agenda of the current parliament, but in the current climate we cannot take that as anything other than a short-term commitment and, in any case, a new general election is never that terribly far away, even if a full parliamentary term elapses. From the perspective of Northern Ireland a so-called British Bill of Rights has always been a staggeringly challenging proposition. This is evident not least from the divergent responses of Sinn Féin and the DUP to the proposal. Sinn Féin has condemned the proposition of repeal of the Human Rights Act 1998 and its replacement with a British Bill of Rights as “a direct attack on the Good Friday Agreement and the international treaty signed by the British and Irish Governments, which gives legal effect to the agreement”,³⁴ while the DUP has been broadly supportive of repeal of the Human Rights Act 1998 and its replacement.³⁵

The direction of travel in Westminster is clearly towards de-internationalisation in terms of domestic rights protection. How that will play out in Northern Ireland is anyone’s guess, but the potential for serious difficulties is clear. Of course, this raises a real challenge for us as a country and as a member state of the EU. On the one hand the domestic constitutional arrangements of the United Kingdom are not a matter for the EU to try to influence (much less determine), even in the context of withdrawal

³² Anne Smith & Leo Green, “The Processes of the ‘Unfinished Businesses’ of the Good Friday/Belfast Agreement: An All-Island Charter of Rights and the Northern Ireland Bill of Rights”, *Irish Yearbook of International Law*, forthcoming.

³³ See e.g. Aileen Kavanagh, “The Role of a Bill of Rights in Reconstructing Northern Ireland” (2004) 26(4) *Human Rights Quarterly* 956.

³⁴ Caitríona Ruane MLA, Northern Ireland Assembly Debates, 1 June 2015.

³⁵ Peter Weir MLA, Northern Ireland Assembly Debates, 1 June 2015.

negotiations, but on the other they are clearly relevant to the ability of the UK to make good on its promise to maintain effective rights protections for EU citizens after exit day. For Ireland as a single state it is even more complex, as bilateral engagement does not usually extend inside the constitutional arrangements of one's interlocutor, but the equivalence expectations that underpin the Agreement combined with our state's ethical duty towards Irish citizens in Northern Ireland clearly mean that those arrangements cannot be ignored completely. Treading that fine line between engagement and interference is a delicate exercise, but it is one that must be achieved if the vision of a rights-based peace is to be maintained and secured after Exit Day.

There are ways in which existing practical arrangements might be continued to deliver and secure both rights and goods in Northern Ireland. For example, under current arrangements pediatric cardiac care is an all-island affair, provided now in Dublin for children from across the entire island. If the 8th Amendment is repealed on the 25th of May we might reasonably expect that women in Northern Ireland who, in spite of their UK citizenship enjoy grossly inadequate reproductive healthcare compared to women in the remainder of the United Kingdom, might be able to avail of abortion care south of the border if their health or circumstances mean that going to Scotland or England is not the right route for them. Practical problems can, almost certainly, be addressed with practical solutions but these are responsive, sometimes short-term solutions; they do not get to the deeper issues that Brexit unavoidably raises for Northern Ireland—issues around how a commitment to rights can be guaranteed in a purely domestic setting when the common trust in that commitment was at least partially connected to its being rooted in an international organisation of which the protection of rights is a fundamental constitutional principle.

Brexit, Rights, and the European Union

I want now to turn to that international organisation: the European Union. The tendency has been to try to explain Brexit by reference to the United Kingdom alone; to say that it was an outworking of a particular nationalist moment and sentiment (particularly, perhaps, in England), that it was a political gamble gone wrong, and that it was won through misrepresentations, lies, empty promises, and the exacerbation of existing fears. We are also told that Brexit was won with the votes of those who do not feel the material gains of membership of the European Union; that

its ordoliberal economic model has left too many people behind. This is exemplified by the remarks of Michael Sandel in *The New Statesman* who wrote: “A large constituency of working-class voters feel that not only has the economy left them behind, but so has the culture...The sources of their dignity, the dignity of labour, have been eroded and mocked by...globalization, the rise of finance, the attention that is lavished by parties across the political spectrum on economic and financial elites”.³⁶ Of course, much the same narrative is used to explain Trump as a rebellion against economic and social elites; a reassertion of the working class. However, how accurate is it?

Derek Sayer argues that demographic analysis of Brexit suggests something rather different, and rather darker; it wasn't that people were left behind, or that a vote for Brexit was a protest against de-industrialisation, he says, but rather that Brexit was about *control* and, more precisely, about taking back control in the UK.³⁷ Who from? From ‘the Other’. Brexit, he argues, is fundamentally xenophobic, and if the result “[lies] beyond the horizon of what had previously been deemed politically possible”³⁸ this is because we have allowed ourselves to be seduced by the fantasy of a post-racial, post-identity, European *demos*. For Sayer “identity is the nub of the matter. Brexit and Trump supporters....reject globalization for reasons that are more to do with culture than economics....They have not been duped by demagogues taking advantage of their miseries, even if both Trump and Farage merit that label. They know what they are doing and they know what they want. They are fighting for a way of life and a vision of their country. It is a vision in which, however deprived and demeaned they may otherwise be, they retain the privilege and entitlement that comes with being (indigenously) white”.

If Sayer is right—and he is far from the only person who has done the statistical and demographic analysis of Brexit to make this argument³⁹—then this should really concern us for it points, fundamentally, to a rejection of the whole European project. It is a far more worrying prospect than what Kalypso Nicolaïdis cleverly terms “the

³⁶ Micheal Sandel, “The energy of the Brexiteers and Trump is born of the failure of elites”, *New Statesman*, 13 June 2016).

³⁷ Derek Sayer, “White Riot—Brexit, Trump, and post-factual politics” (2017) 30(1) *Journal of Historical Sociology* 92.

³⁸ *Ibid*, 92.

³⁹ See, e.g., Ronald Inglehart & Pippa Norris, “Trump, Brexit and the Rise of Populism: Economic Have Nots and the Cultural Backlash” (2016).

Brexit mythology” suggests.⁴⁰ For Nicolaïdis the three myths that are used to explain Brexit—Exodus (the UK was never ‘really’ European so its exit was a matter of time), Reckoning (Brexit is “chastisement for past deeds”, punishment “less for what [the EU] has done than for what it has failed to do: deal with unfair globalization, uncontrolled migration, unfettered enrichment of the few”), and Sacrifice (that Brexit is an heroic sacrifice for a Europe that can now become ever deeper and more integrated)—are revelatory allegories, rather than categorical truths.⁴¹ But even then, even as mere allegories, they fail to get to the potential root causes of Brexit and to address them in a way that, it seems to me, is vital if the European Union is to be sustained.

Some years ago now Susan Marks’ magisterial essay “Human Rights and Root Causes” was published in the *Modern Law Review*.⁴² In it she argued that even though the human rights ‘establishment’ claims to address and excavate the root causes of human rights abuses, it does not go far enough actually to expose those roots. In her words “human rights institutions and officials have grappled only partially and rather problematically with the question of why abuses occur, how vulnerabilities arise, and what it will take to bring about change....attention is directed at abuses, but not at the vulnerabilities that expose people to those abuses. Or there is a discussion of vulnerabilities but not of the conditions that engender and sustain those vulnerabilities. Or the focus is turned to the conditions that engender and sustain vulnerabilities, but not to the larger framework within which those conditions are systematically reproduced. Speaking more concretely”, she writes, “this often manifests itself in an emphasis on technical problems and solutions. The implicit message is that if only bad procedures, rules and ideas were replaced and good ones adhered to, the miseries with which human rights are concerned would go away”.⁴³

Of course, Marks is talking here about human rights abuses, but her logic is of wider application. We must continue to ask questions—to dig deeper—until we find the underpinning explanations, and then resist the temptation to set them aside. We must not treat root causes as things about which we can do nothing. We cannot

⁴⁰ Kalypso Nicolaïdis, “Brexit as Myth: Exodus, Reckoning, or Sacrifice?” (2017) *Standpoint*, available at <http://www.standpointmag.co.uk/features-july-august-2017-kalypso-nicolaidis-three-meanings-of-brexit-exodus-reckoning-sacrifice>.

⁴¹ *Ibid.*

⁴² (2011) 74(1) *Modern Law Review* 57.

⁴³ *Ibid.*, 70-71.

succumb to the “disconnection of explanatory analysis from practical proposals, and of strategies for change from the investigation of material conditions”.⁴⁴ If it is true that what Brexit shows us is the persistence of xenophobia and masculinist nationalism, and the lack of personal connection across the *demos* with a European identity and vision, then this is something about which we ought truly to be concerned. It is not enough to say that Brexit is the left behind voting to spite those who have benefited from the EU; such an explanation does not tell us anything useful if what we want is to sustain *and improve* this political and social community that we call the European Union.

And this is not unique to Brexit and so-called Brexit Britain. As Ronald Inglehart and Pippa Norris show in their analysis of both Brexit and Trump there is a growing “support for populist parties....strengthened by anti-immigrant attitudes, mistrust of global and national governance, support for authoritarian values, and left-right ideological self-placement”.⁴⁵ Populism, understood as being characterised by anti-establishmentism, authoritarianism, and nationalism,⁴⁶ is on the rise across the European Union, and this should be a cause of significant concern.

Populism is anathema to the vision that underpins the European Union. To quote from the President again, this time in his lecture to the EUI last week, “[t]he objectives to which the Union commits itself...reflect...the inheritance of some of the most egalitarian and humane traditions....[which] yielded an impulse towards the promotion of social justice and protection, equality between men and women, solidarity between generations, economic and social cohesion and solidity between Member States”.⁴⁷ The European Union itself recognises that these values and this vision are at risk, engaging almost combatively now with both Poland and Hungary where the Rule of Law is in grave danger, while people all over the continent—including people here at home in Ireland—continue to feel the material privations of an austerity imposed at European level that gives the lie to any notion of meaningful solidarity for people who cannot feed their children or put a roof over their heads. Populism in Europe cannot be explained as a distinct phenomenon, apart from the European Union. Let us recall the rallying call of Susan Marks. Let us not ignore the

⁴⁴ Ibid, 73.

⁴⁵ Ronald Inglehart & Pippa Norris, above n 25, at 4.

⁴⁶ Cas Muddle, *Populist Radical Right Parties in Europe* (20017, New York; Cambridge University Press).

⁴⁷ Michael D. Higgins, “Solidarity in Europe—Achieving Authenticity in the European Street”, European University Institute, 10 May 2018.

broader socio-economic and political circumstances in which this “planned misery” (to borrow again from that same essay of Marks⁴⁸) of material deprivation, on the one hand, and authoritarian ascent on the other are being played out.

Conclusion

Brexit then acts as an opportunity if not an imperative to re-make the argument for a Europe of rights and to ensure that the European Union operates as such. It can and should inspire us to make once again, and again, the moral argument for European solidarity, and for a post-nationalist solidarity of love and care across our continent. To do that we need to show that a Europe of rights can *work*, even as, as Ban Ki-moon has said, the world has “reached a level of human suffering without parallel since the founding of the United Nations”.⁴⁹ In this, our European Union, many millions of people live in intense suffering: they cannot school their children in their language and cultural traditions, they cannot express themselves freely without fear of persecution, they cannot walk through life without being subjected to sexual and gender-based violence, they cannot access appropriate healthcare including reproductive healthcare, they have no or unsafe homes, they have diminishing security in later life, they experience daily disregard for their dignity especially in sickness and/or old age, and they see around them at all times the deep and deeply rooted inequalities that set the conditions in which European human rights abuses occur.

Remaking the argument for a Europe of rights, thus, requires us to articulate clearly the moral case for rights, even when their protection may require us to give up some sovereignty or when a rights violation in question seems far from our own experiences. It requires us to see a violation in Ljubljana and Limavady as equally injurious to our humanity; to care as much for our fellow European in Ghent as in Galway; to see our land as much as that of our European co-denizens as of our scattered, intergenerational diaspora.

It requires us also to press with urgency for a Europe of rights that goes beyond practical and technical solutions to legal challenges and recommits to the true and rich solidarity that underpins the vision of Europe. That may in turn compel us to move on from a Wilsonian idealism that believes democracy and capitalism are the

⁴⁸ Marks, above n. 28, 75.

⁴⁹

keys to freedom, peace and prosperity. It may require us to question again the ordoliberalism of the Union and its fiscal and economic structures and policies. It may require us to look with more care and more love on our compatriots and enact our esteem for them with more open borders, more supportive socio-economic models, and more welcoming hearts.

This is not to say that some of the challenges thrown up by Brexit are not amenable to technical and practical solutions; of course they are. The nature and status of retained legislation in the UK is a matter, partly, of technical legal design. The operation of an all-island system of rights and a near-invisible border between the two jurisdictions can be resolved with a set of technical solutions. But even these technical and practical solutions will not work without an underpinning commitment to rights between all of the relevant stakeholders: the member states, the European Union, and the peoples of Europe and of these islands.

Technocracy ultimately fails because it conceits to divorce the technical from the political; when it comes to rights these two cannot be separated. If the reaction to Brexit is merely to seek technical and practical solutions without attending to the root causes and their potential persistence within the European Union then the setting for further ‘_exits’ will remain undisturbed, and the price may well be far greater than any us care to consider.

In *Whatever you Say, Say Nothing*, from which I have already quoted, Seamus Heaney closes with words that seem apt for the situation we find ourselves in now:

Competence with pain,
Coherent miseries, a bite and sup,
We hug our little destiny again.

Thank you.

/END/