

HLJ Annual Lecture 2018

“One Island, Two Systems: The Future of Rights Post-Brexit”

A series of loose remarks by Professor Conor Gearty inspired (or, one might say, incited) by Brexit

This entire Brexit can be summed up by the section of the EU Withdrawal Act which boldly states “*The Charter of Rights is not part of domestic law on or after Brexit day*” while the next bit of the very same section in essence says “*please can we have it back*”. In essence “*let’s please the fools*” and “*let’s stay the same way as we are*”.

On the notion of Parliament “taking back control”, this nonsensical position was produced by people who may be well-educated but who are in other ways intensely stupid - and stupidity is underestimated as a factor in Brexit – it is the entry point into the public square for puerility, facetiousness and confected passion. The UK Government was forced to explain in a White Paper why they had left the European Union or were proposing to do so. In that White Paper, produced by civil servants desperately trying to square political demands with factual reality, it says that actually, parliamentary sovereignty had not been eroded by the European Union. It just “felt” like parliamentary sovereignty had been eroded and this is literally contained within a government White Paper. It is feelings that drive the suicide of a country.

After a long delay, explanatory Brexit “Notes” were published by the UK Government; these would have gone down well in a cult that had relocated to some inner-Brazilian rainforest so as to kill itself. At the time of this talk, fifty-six such notes have been published and collectively these explain why there is going to be a catastrophe in the case of a Hard-Brexit. The best of the idiotic explanations of the supposed (by Brexiteers) hardening of the Irish Government position as Brexit nears came from the UK Minister whose invention of universal credit has caused such misery in Britain, Ian Duncan Smith MP. This former leader of the Conservative Party (and it is surprising quite how many Brexit leaders are sacked former Tory ministers) said around November last year, when asked about this perception of growing Irish intransigence, that “*it’s all about the Presidential election*”. It was a bizarre position and yet, Ian Duncan Smith MP is one of the architects of Brexit. Presumably he believed it when he said it.

I have four points to make to you on the theme of this Annual Lecture, a more polemical offering I fear than the usual august academic fare with which this usually society is familiar.

The first point is not a point. It is a kind of introductory remark which is a cheat, a type of preface, and it is this. The *Spectator* magazine in the week of this lecture had a front page which I thought was terrific and this included a map of Ireland and Britain, while Jean-Claude Juncker (with his glass of wine) and Michel Barnier were pouring over a map of Ireland moving forces. It was a brilliant image of how Europe has occupied Ireland and is defeating Britain and there was a tremendous anxiety about this. But actually I think it was quite interesting. The relationship between Ireland and Britain has been mediated by European conflict for as long as we all know. It was the threat of Spain that produced the settlements of what has led to what you might describe as “the Northern Ireland problem” after the defeat in the Armada through bad weather, which the British claim was a great victory.

Then it was fear of Napoleon and the occupation of that large island to Britain’s west that caused them to enact the Act of Union in 1800. It was of course conscription that later produced the amazing revolt in Ireland that led in the end to the success of the Sinn Féin movement and a splintering of the island

with two thirds of it going its own way, something which, hardly any of those within the Brexit camp acknowledge. (But then we have had a Brexit Secretary who says he has never read the Good Friday Agreement and a current Northern Ireland Secretary who has admitted that she did not know that unionists and nationalists didn't vote for one another.)

With Brexit what we have seen realized is what has been the nightmare of British policy since not so long after the Norman landings: it has united Europe against the British and Europe has with the agreement of Ireland, occupied Ireland, but Ireland is part of the occupation of itself, as Europeans. The only issue, as I said recently at a British Academy / Royal Irish Academy joint seminar a few weeks ago for the English press (there is a tremendous civic responsibility to try and educate the English on this), the only issue of interest is the terms of the surrender.

A further thread to my first point is the Irish anomaly. For the British Brexiteer we Irish are not European and it has a huge impact on the story that we are telling here. There is this Brexit-inspired eccentricity of the denial of our independence producing such descriptions of our jurisdiction as southern Ireland (David Davis, when Brexit Secretary). The point is a long-standing one, and its effect is that we have been left out of all the British statistics over generations - which is to our benefit now in terms of rights. That is a big win for us because the British do not think we are a separate country. It is aggravating and annoying, but it means that the Common Travel Area is maintained but more to the point, we can pop in to hospitals in the United Kingdom, we can easily apply for jobs and rent within the UK.

Of course there are worrying outliers to this. As things are shaping up, the Irish from Northern Ireland (forced into being British) and those who marry or partner foreigners may be caught in the Brexit anti-other net, but even these may be saved after a fight. Not so long ago, when Tony Blair and Gordon Brown held sway over British politics, Lord Goldsmith, a Labour peer, thought it would be a good idea to stop the Irish voting in UK elections. He was promptly taken into a room and told to "pull himself together". Hence the Irish still vote in UK elections and of course, the reason he was told to pull himself together was not only that the Irish were Labour voters but for the same reason they do not even count us in their statistics, because they have no idea where we even are. We are everywhere. We are like some weird spectre. So they ignore us. They ignore us. Bravo!

This first point is clear and straightforward. But we must not be complacent. We do not know how bad it is going to get because this is a revolutionary moment and in revolutionary moments, mad people always get the next stage under way. So you are always trumped and you are always trumped by the madder person beside you and it is not impossible that actually there will be squeezes. There may be a clamp down on the Irish and it is not impossible that the European Union will look at areas like the Common Travel Area and as Union, they might force us to make difficult choices further down the line. We may end up fighting hard to keep the Human Rights Act to protect the Irish as well as other "others"

My second point this evening relates to the Good Friday Agreement. In respect of the Human Rights Act, a crucial part of the Good Friday Agreement, a notable Parliamentary written answer by the UK Solicitor General, when asked about plans to repeal the Human Rights Act, was a rather lame answer saying in essence that "*we have got rather a lot on our plate*". But Caoilfhionn Gallagher QC speaking here before me this evening is right when she says that the UK's Conservative Government is planning its repeal in the future. The Human Rights Act and the European Convention on Human Rights was, after all, the stalking horse for Brexit, the hostile act the anti-European ultras floated when not even they truly believed that they would get leaving the EU (Brexit as it was not then called) on the mainstream political agenda.

(I am not yet fully convinced that Prime Minister Theresa May knew the difference between the European Court of Human Rights and the European Court of Justice and that her bizarre red line "*thou shalt not have the European Court of Justice*" was in fact one which she intended would reach the European Court of Human Rights. I am not sure but I do know that it is not an impossible deduction from the level of political discourse in Britain today.)

The European Union is obviously built into the architecture of the Good Friday Agreement. It is really quite important to note that the DUP wants to break the Good Friday Agreement and the DUP's rationale is an end to cross-border co-operation. Ian Paisley Sr. made his start in life by throwing snow balls at then Taoiseach Seán Lemass and he brought a mob to try and take over when the Good Friday Agreement was being negotiated. So this is in their blood and it is the reason that the DUP is now the most successful Unionist party in Northern Ireland: they have never allowed themselves to be outmanoeuvred by extremists.

However on this second of my four points, I might offer an optimistic observation. I think the DUP may have over-played its hand. One, they announced they were going to bring down the UK Government over the budget but nothing happened and they did not bring down the government. Two, Arlene Foster thought that she could stop the agreement on the back-stop, then stopped it for a few days, yet Theresa May, later went to Brussels and agreed everything. Nevertheless, Theresa May's government is still in post. Somebody had the bright idea when there was an Northern Ireland Assembly of sending some of the rather difficult men off to Westminster to play games but who would have thought there would be no Assembly and that they would have been the people who would matter? They may yet destroy the DUP, especially if they deliver a no-deal Brexit, a disaster in Great Britain but a greater one in Northern Ireland.

As things stand the possibility of a withdrawal agreement is still in play. It cannot surely be the case that Northern Ireland will accept its collapse when the Backstop is the most astonishing win for Northern Ireland conceivable. The vast majority of people in Northern Ireland voted for Remain parties. The DUP has by no means a majority of the votes. The situation is escalated by the fact that Sinn Féin does not take its Westminster seats of course. But the Backstop does not entail just two citizenships. There are going to be three citizenships involved. Those from Northern Ireland are going to be citizens of Britain when they feel like it, with all the subsidies from Britain; they are going to be citizens of Europe when they feel like it; and if they want to come down to the Irish Republic, they will be citizens of Ireland. They have a fantastic win and they are going to realise it. The head of the CBI Northern Ireland has said that he is moving his business south. The official Unionist leader has said that the DUP has brought unionism into the swamp.

We shall see. There has been very good cross-party co-operation apart from the DUP and in particular, a Joint-Statement on human rights issued in June of this year, by Sinn Féin, the SDLP, the Alliance Party and the Green Party. In addition, there has been a complaint made by the Committee on the Administration of Justice to the European Ombudsman about human rights matters. The departure of Gerry Adams from the Sinn Féin leadership has freed up quite a lot of space in Sinn Féin and Sinn Féin, together with the Alliance Party and Green Party, as a progressive alliance has more votes by far than the DUP. It seems impossible now but change seemed impossible in 1988 and 1989 in Poland and East Germany.

The current situation in Northern Ireland is a fundamentally rotten position and it cannot survive, so I think the Backstop will be protected, whether before or after Brexit, hard or soft. The only rationale for Brexit from a British perspective is a deregulated economy without safeguards and, essentially turning it into a cash haven, a Cayman Islands or something akin to that. There is no other rationale for it. To that extent, the ardent Brexiteers are right, in that mimicking Europe without any influence in Europe is

idiotic. So the problem is that it was such a stupid proposal to start with, that there is no rationale behind it, but if there had been a rationale that would have been it. And if that happens, Northern Ireland needs a Backstop to protect itself from the destruction that will be wrought by a government that does not believe in state subsidies. Northern Ireland needs to be careful about governments, if I may say so politely, that do not believe in state subsidy.

Third point. There are three options that I am going to put before you and they all have direct implications on rights but the issue of rights is inseparable from the whole issue of Brexit. Here are my suggested three options:

One, there is going to be a deal with the backstop. Britain will surrender in that way and the backstop will kick in. Of course, there be no subsequent, fabulous deal. The backstop will continue and over time there will be *de facto* unity. It will be impossible to distinguish Northern Ireland from the Irish Republic and it will be very possible to distinguish Northern Ireland from Britain. There may well be pressure for some type of plebiscite but there may not even be that. Meanwhile, over in Great Britain, there is going to be increased secessionist fury from Scotland but that is not our concern.

Second what happens if there is no deal and Remain? How can this come about? A deal may be rejected by the ruling party or by the UK Parliament. As I speak I think this is a highly likely scenario. This takes us to “no deal” deals and it is interesting how the optimistic view about no deal in Britain has usually hinged on the reason why there is no deal in the first place suddenly disappearing. In essence “we will be able to fly planes because Europe is going to be nice to us about planes” and “we will be able to get Mrs May and other people their insulin because the Europeans will let us have it”. In material Northern Irish terms, it seems nobody will mind about electricity being shared between Britain and Ireland because after all, a no-deal without “no-deal deals” on the margins is impossible, right?

I think what will happen is that when it is apparent that no-deal comes as a “no deals no deal”, I think there is going to be a collapse in Britain in Spring/early Summer 2019, a genuine moral collapse. They have not been prepared for it and I think there is going to be pandemonium. The ECJ will by then have ruled on the application which is being heard this week about the legal possibility of revocation of Article 50 and may come to the rescue of the British in this respect which would be quite comic, wouldn't it? (And of course we now know that it has, in the shape of the *Wightman* ruling.)

If the UK Government does renege on Brexit, in panic, it is very important who does this. This takes me to that much discussed idea, populism. What is populism? Populism is a rejection of all authority. It is rooted in antagonism. “Populism” as understood today is a cipher for anger and hatred. As such populism is not anything positive. Populism has no agenda and that is why there is no populist running the country. It is why they wanted David Cameron to stay on, why all the populists keep resigning from the Cabinet. Populists cannot do stuff. They just wreck stuff. That is the definition of populism. They wreck judges, they wreck executives, they wreck courts. Everything is elite, everything is elite, everything is elite. The scapegoats are all available.

So, I am all for reneging on Brexit as long as it is those people responsible for Brexit that are tasked with the act of reneging and even then, I am not sure. At very least a revocation of article 50 should be accompanied by legislation setting up a public inquiry with wide powers of compulsion into the causes of Brexit – it should run for years and have a power to refer to the Attorney General for the pressing of criminal charges where appropriate.

The third option is no deal and Brexit. In this scenario, we have disaster and I think there will be disorder in the streets. There will be chaos and pandemonium. It will be the Suez economic crisis multiplied by ten. The British public is not aware of what is in store for them. The pound will have

disappeared and the latest reports from the credit agencies say there will be a recession. What happens then? Waves of revolt. And I do not know how this is going to play but it will be one of two things. It will either be more populism of the left or of the right. Indeed, the Labour Party is today led by people who are Brexit people but it could also entail a return to a Macron-type figure in British politics or the great, and much underestimated, Tony Blair. But this is very difficult to achieve in British political culture. I cannot imagine a Macron-type figure gaining any steam in the British system because the British system is so dependent on “first past the post” and its parliamentary tradition but we live and hope, we live and hope.

My fourth and last of my main points deals with underlying problems. I am not keen, as has become obvious, on Britain being saved from itself by elites, courts, referenda and so on. One of the reasons is because I think the country has not even begun to address what I call three underlying problems here. I chaired an amazing LSE event on 23rd June 2016, on the evening of the Brexit referendum when the results were pouting in, and there were about 400 people in the room. We had all these experts in and we had the vote coming through and it was incredibly exciting to be chairing something like that. At about 3am in the morning, I made a little speech about how this was not unexpected and how you cannot undo all this Europhobia in three months. The UK Government had to run “Project Fear” because they had nothing good to say and they could not do anything else. They need to actually stop instrumentalising the EU and firstly, to learn that it is about more than transactions.

What is happening in British politics is that everything is thought to have a price. It is the legacy of Margaret Thatcher. Everything is instrumentalised in monetary terms. And so the majority of the British public cannot understand that there might be anything more to the EU than German cars and they are still nowhere near to understanding that. They need the equivalent of an economic disaster. Unfortunately, on a par with some sort of military occupation, in order to understand the value of partnership. Great Britain is the only country that has not experienced this. Theresa May talked about how awful it would be to have a divided country and pleaded to the European Council not to divide Northern Ireland from the UK. In the same room, was the Taoiseach, whose country was divided in order to get Northern Ireland. Also in the same room was the German Chancellor, Angela Merkel, whose country was divided until 1989. Both Czech and Slovak leaders, Cypriot too, it did not seem to occur to Theresa May that this was something that has happened to other nation. I am afraid that needs to be understood.

The second missing element is that there is an amazing constitutional illiteracy in Britain. The British have been destroyed by the notion of “*taking back control*”. They have made such a song and a dance about parliamentary sovereignty that their word counts for nothing in international agreements – if parliament really is sovereign then it can always change its mind, all the time – there is no constitution to constrain it. It is quite remarkable to observe because the British boast to domestic audiences that they will not obey that which they have just agreed and they seem oblivious of the fact that people in Europe are listening and can understand English. Just because the UK’s political leaders never listen to, or follow, German or French discourse, does not mean that others do not follow theirs. The British really are trapped by that because trust in them is zero.

Ireland is quite unusual as most European Union countries, at least the big ones, have imperialistic pasts, such as Austria, Poland and Sweden. Ireland is quite unusual in being always pretty small. But Britain has absolutely not come to terms with that for complicated reasons related to having never been occupied, thanks to the assistance of the Russians or the Americans to help them win wars (as well as the weather of course, as earlier noted) they then think they won by themselves, including Waterloo. So, there needs to be a really strong critical examination of how small Britain is today. I do not think any of that will be addressed by resiling from the implications of Brexit.

So I am a “returner”. I am a returner and I foresee a situation where there is an application from the UK to rejoin the European Union and we fast-track it. Perhaps Cyprus, and maybe Ireland, and so on, will come as a Troika to assess Britain’s suitability.

Thank you very much.