Sheehy-Skeffington Spring School

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Human Rights – What Ireland says, and what it does: the case for an alternative compliance model

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Chairperson, ladies and gentlemen...

I am very grateful for the invitation to speak at this inaugural Sheehy-Skeffington Spring School. The Sheehy-Skeffington name is synonymous with progressive republican politics, unapologetic socialism and selfless commitment to pacifism, feminism and the wider public interest. It is most apt to mark their contribution by holding a spring school such as this, although we would be presuming too much if we were to presume that Hanna, Francis or Owen Sheehy-Skeffington – who disagreed with each other on plenty of issues – would necessarily agree with what any of us have to say here today. Although we honour their memory we do not speak in their names.

Having worked in the area of human rights since I first joined the UCG student branch of Amnesty International in 1985 I am sceptical about human rights for many reasons. That is not the same thing as being anti-human rights or even anti a human rights-based approach. Like most people, I am in favour of some but not all human rights. I like freedom of expression but not if I am the victim of racist abuse; I like freedom of religion but I like freedom from religion too; if I was charged with a criminal offence I would insist on a fair trial but if I was a victim of crime my sense of justice might be more textured. Of course, human rights provide for all of these preferences and are, thus, all things to all people.

Things are complicated when it comes to resolving conflicts between human rights to which we adhere to a greater or lesser extent. Our easy absolutisms give way to pragmatism because they must give way – that is the unavoidable 'problem' of human rights. It is more than a philosophical problem and has profoundly political implications too.

We look to the international system for the protection and promotion of human rights for our bottom-lines of principle but that system is flawed in ways that should not be surprising:

- Why should we be surprised at the disappointing compromises struck by states that are the addressees of international covenants negotiated by them?
- Why should we be surprised at the devious diplomacy that infects the realisation of those rights later, to say nothing of the common law habit of dualism that marginalises and undermines the impact of international human rights in the domestic legal sphere?
- Why should we be surprised at the toothlessness of worthy abstractions that constitute the texts of many of these international instruments when they rub up against the slyness of domestic law that gives full vent to open-ended limitation clauses, to say nothing of interpretative doctrines that allow for the wholesale avoidance of core obligations?
- Why should we be surprised at the relegation of distributive or socio-economic justice to a decidedly second order of justiciability in a world in which social and economic inequality is, arguably, the animating basis of economic order?

I ask these questions starkly to make the point that we should not fool ourselves into thinking of human rights as a coherent ideology nor of the international human rights system as a panacea. This is not a point that goes

without saying. Assumptions about the utility of human rights, or a human rights based approach, need to be challenged not so as to cancel out any interest but so as to foster a proportionate sense of value.

Human rights are at their best as a discursive tool. This is not to dismiss human rights as *merely* a language but rather to call for more precision in its use and more care in its deployment. Human rights language, or what some call the 'vernacularisation' of human rights, must also be open to the influences of other languages and other ways of doing things. It runs into difficulties – intellectual and political – when it asserts itself as the exclusive or dominant discourse. It must always strive to be a civilising discourse.

Human rights are a good way of framing questions but they do not necessarily yield a coherent set of answers. When human rights are used as the answer to everything they begin to look and sound like religion with an over-reliance on belief for authority while merely genuflecting to reason. Human rights activists who use human rights in this way begin to look and sound like clerics of a new civic religion. The moral force of believers' arguments is always more evident to believers than it is to those who remain to be convinced.

Good human rights lawyers (and they do exist) can do good things with good human rights law. Good judges are important too! I will return to the issue of human rights litigation later.

Some still like to think of human rights as being above politics in some way but this is false and monumentally arrogant in its assumption of moral superiority. Human rights are intrinsically political and so are human rights activists. This is as it should be and to pretend otherwise is to seek to avoid engagement in real debate on substantive human rights by hovering above the fray. To be fair, most people acknowledge and are comfortable with the political nature of

rights activism but there are still stubborn residues of the attitude that asserts human rights in a way that seeks to end debate and transcend politics.

It is now widely accepted that there can be no democracy without human rights. President Jimmy Carter made this idea respectable, President Ronald Reagan made it meaningful. Bush and Blair took it so seriously as to revive the dangerous nineteenth-century idea of pre-emption. Therein lies the rub. When human rights are seen as mere instruments or indicators of democratic statehood they are intrinsically 'compromised' and subject to all sorts of limitations deemed 'necessary in a democratic society'. The classic but more benign case in point is the European Convention on Human Rights (ECHR) system which, nonetheless, is held up by most commentators as the outstanding example of a success as a regional system for the protection of (some) human rights.

[Parenthetically, it is worth noting that one of the great ironies about current Tory desires for a so-called 'British Bill of Rights', as an alternative to the ECHR, is that the ECHR was the ultimate British Bill of Rights when drafted in 1950. Churchill saw it as 'the codification of the common law' throughout Western Europe and the drafting process was dominated by British civil servants, with not a little support on most of the essentials from the Irish delegation that included people like Seán Mac Bride and Eamon de Valera.]

The ECHR system, for all of its shortcomings, has been of vital importance to the promotion and protection of human rights in this country. One need only recall the cases taken by applicants of heroic stature such as Josie Airey, the Johnstons, David Norris, Mr. Keegan, the named applicants in the Open Door case and, more recently, the three women known as 'A, B & C' to get a sense of the importance of the Convention and Court of Human Rights in progressing human rights issues of fundamental importance to people in this country. The rights restrictions that they challenged were, thankfully, found not to be 'necessary in a democratic society'.

The Convention is also of increasing value in legal proceedings before Irish courts. Although greater impact could have been achieved through a fuller incorporation of the ECHR into domestic law in 2003, and much more could have been done to embed the statutory duty of compliance for 'organs of the state' contained in Section 3 of the ECHR Act, there are some positive signs of impact in areas such as transsexual rights and housing law.

In the context of Ireland there has been a renewed political commitment to what I would call instrumental human rights since the signing of the Belfast / Good Friday Agreement in 1998. While this has had more noticeable and, I think, more beneficial effects in Northern Ireland than in the Republic of Ireland it has at least helped to make it impossible to avoid human rights discourse on this side of the border. The often-cited 'equivalence requirement' contained in the Agreement has also, at least, served a useful rhetorical purpose.

The downside has been exemplified by a smug partitionism that sees the human rights commitments of the Agreement as being really of more direct importance in Northern Ireland than in the Republic. This is evident in the manner in which we went about giving further effect to the ECHR in Irish law, the rather disappointing experience of the Irish Human Rights Commission (IHRC) over ten years and the obvious shortcomings of the system of police accountability in the Republic by contrast to its counterpart in Northern Ireland. For understandable reasons the all-island dimension of the Agreement embodied in the proposed novelty of a Charter of Rights for the island of Ireland has not materialised nor progressed to any appreciable degree.

One of the difficulties with the proliferation of international human rights instruments and systems since the 1970's is that it becomes increasingly difficult to know with any precision what international human rights law requires of states. Typically, the standards and obligations prescribed, although

covering a multiplicity of themes, are minimalist. As stated already, this is unsurprising as an outworking of multilateral negotiation by sovereign states. Human rights NGOs must make conscious efforts not to internalise the minimalism of international treaties nor, indeed, should they get too excited about new-fangled compliance mechanisms like the Universal Periodic Review (UPR) that are shallow audits by comparison to other international mechanisms.

The co-existence of national human rights institutions (NHRIs) and NGOs can also be complicated. We probably all agree that they exist to do different things but what are the different things that they exist to do? In particular, what are the different things that they do when it comes to participation in the monitoring and compliance activities under the various international instruments? More fundamentally, is it not time that we scrutinised, with the benefit of experience, the *raison d'être* of national human rights institutions if only to adjust our expectations and be more realistic about what they can achieve?

The space occupied by NHRIs between the state and non-governmental players is hazardous and ill-defined. Although NHRIs are emanations of the state that does not mean that they cannot be independent of government. Establishing such independence is a difficult political task and one of the many hazards endured by NHRIs.

The statutory framework under which the Irish Human Rights Commission (IHRC) has existed was too weak to protect its supposed independence. The Commission itself, correctly, called for a more direct relationship with the Oireachtas instead of with the Department of Justice & Equality. This is a well-founded suggestion but it doesn't fully address the design fault that leads to the independence of bodies such as the IHRC being compromised.

I have argued before, and think it is worth reiterating, that an umbrella of constitutional protection is required to ensure the independence of statutory bodies tasked with promoting and protecting human rights and equality. I have suggested that the office of Ombudsman – if given explicit constitutional recognition similar to that given to the Comptroller & Auditor General – could provide a suitable framework within which to organise other specialist bodies and agencies (such as a merged IHRC and Equality Authority). It would be critical to the success of any such arrangement that the function of guarding the public interest, currently given to the office of Attorney General, be reassigned to a constitutionalised office of Ombudsman.

In suggesting this I am not proposing a merger of the Ombudsman and other bodies but, rather, a new parliamentary emanation established at a safe constitutional distance from the Executive with the explicit purpose of making the Executive and its many emanations more accountable – directly and indirectly – to the elected parliament. Despite the rather limiting remit suggested for the Constitutional Convention it might be possible to give this proposal some consideration under its auspices. This would be worthwhile as it would focus discussion on the structural factors that contribute to the weakness of a human rights based approach.

But I acknowledge that we need to be realistic about what can be achieved by statutory bodies in the areas of human rights and equality. We need to be honest about the improbability of any state or any government establishing stautuory bodies with real power to hold such states to account.

The Equality Authority, when led by Niall Crowley, was ambitious in the discharge of its mandate and fearless in the use of its litigation powers. Quite simply, the Equality Authority took equality seriously and it did so for ten years. The crude sundering of its viability revealed an infrastructural fragility that was not lost on the transient and permanent government who used the economic crisis that began to be noticed in 2008 to maximum effect. This was

cynical and opportunistic and was described in such terms by Labour and Fine Gael who were then in opposition. Both parties are now in a position to rectify matters in the context of the impending merger of the IHRC and Equality Authority.

The Report of the Working Group on the Irish Human Rights and Equality Commission (IHREC), published last week, provides a useful basis on which to begin a process of rectification. It is, largely, a good and balanced report with strong recommendations on guaranteeing the independence of the IHREC through a direct reporting line to the Oireachtas and an open and transparent appointments process. It reiterates the importance of adherence to the UN Paris Principles and preserves many of the strengths of the statutory framework that, until now, provided for the IHRC and EA.

On the negative side, the Report over-emphasises the concept of 'dignity' which, in my view, can be interpreted as a dilution of equality. To be fair, it does not call for the replacement of equality with dignity but experience elsewhere warns us of the dangers of conflating these two concepts. Dignity is nice but it is less that equality. While the Report's commitment to strategic litigation is clear it is not at all clear what criteria will be used to determine the strategic importance of litigation, nor what agency or agencies will assist with important but perhaps 'non-strategic' litigation.

Everything will hinge on the people who lead and work in the Commission, the resources provided for it to discharge its mandate and how prudently and effectively those resources are deployed.

Before concluding I want to say something more about human rights litigation and the role of the courts in vindicating rights. One of the languages of human rights is law. Legal norms that give expression to human rights principles are at their most potent when enforced through some judicial or quasi-judicial

mechanism. In this country, as in so many others, we look to the courts as ultimate rights-enforcers. This is largely uncontroversial except when it comes to the vindication of socio-economic rights. The right to equality is a hybrid socio-economic right but it too is controversial, especially when invoked constitutionally or when it rubs up against something as important as freedom of association, as it did in the Portmarnock Golf Club case, the case in which a majority of the Irish Supreme Court championed the fundamental right to play the game of 'male golf'.

The role of individuals and NGOs in vindicating rights through litigation is of primary importance. While statutory bodies can do good things in this area non-governmental organisations are more suited to the task. This is difficult for those NGOs that are dependent on the state for funding and it remains to be seen whether or not private philanthropy will prove to be an enabling force in this area. The work done by the Free Legal Advice Centres Ltd (FLAC), the community law centres and other groups is of immense value as is the know-how provided the Public Interest Law Alliance (PILA), a project of FLAC. Having said that, the scale of the litigation by Irish NGOs and the degree to which this is evident in international fora, such as the Council of Europe's Court of Human Rights and Social Rights Committee, is comparatively low.

Pro bono law is never a substitute for public interest litigation. Private philanthropy should seek to embed and support the latter. While obstacles such as costs, legal standing and judicial opposition to socio-economic rights cannot be ignored, they must not remain lamented but unchallenged. Lawyers exist to shape new legal realities out of challenges to the status quo. The same goes for the impediment of dualism that tends to lessen the impact of international law in the domestic sphere: lawyers must be creative and more willing to use the international legal system.

An independent, suitably resourced and robust non-governmental sector is the best platform from which to make such legal challenges. Private philanthropy

should liberate NGOs from the stifling effects of dependence on state funding so as to resource the independence and robustness required to take on the state and its agents in litigation. Pushing NGOs towards unequal and unrequited partnerships with the state is more often than not a mistake. Forcing them to be more business-like does run the risk that they will simply become charitable businesses, not-for-profits that are not-for-anything-in-particular. NGOs are not enemies of the state merely because they are occasionally the state's adversaries. In a healthy democracy this would be understood.

Concluding remarks

Samuel Moyn, in *The Last Utopia: Human Rights in History* (The Belknap Press of Harvard University Press, 2010), writes:

> "Born of the yearning to transcend politics, human rights have become the core language of a new politics of humanity that has sapped the energy from old ideological contests of left and right. With the advancement of human rights as their standard, a huge number of schemes of transformation, regulation and 'governance' contend with one another across the world. But if in the thirty years since their explosion in the 1970s human rights have followed a path from morality to politics, their advocates have not always forthrightly acknowledged that fact. Born in the assertion of the 'power of the powerless', human rights inevitably became bound up with the power of the powerful."

Moyn argues, quite trenchantly, for a narrower human rights agenda harking back to the days when major human rights NGOs (like Amnesty International and Human Rights Watch) had maximum impact because they focused exclusively on issues like torture and genocide or catastrophe prevention. I do not agree with this.

Human rights activism can make a difference on a broader range of issues – including positive obligations in the area of socio-economic rights – if it is smarter and humbler in its advocacy. It must be intellectually modest and morally continent. It must engage politically and be convincing in its political argumentation. It must be open to the possibilities of litigation while alert to the risks of such an approach. It will never be enough to assert that something is a socio-economic right because it is described as such in a UN covenant, not even if the generality of that obligation is explained in greater detail in a General Comment the content of which is sometimes logically circular. In the absence of compelling economic arguments coupled with political momentum socio-economic rights, even if enshrined in some instrument, remain no more than a pious aspiration towards progressive realisation. They make us feel good when we assert them on behalf of others, but they rarely make 'the others' feel better.

There are a wealth of mechanisms, hard laws, soft laws and other resources available for the advancement of human rights. We can narrow the gap between what the Irish state says and does in the area of human rights if we use these courageously and imaginatively.

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*The views expressed in this paper are personal.