



# The Impact of Brexit on Equality Law

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## 1. Introduction

1. Equality rights in the UK have been intimately connected to the EU, not only for their impetus but also for their continued content and strength. The withdrawal of the UK from the EU therefore raises serious legal issues for the protection of the right to equality. Unlike other jurisdictions, the right to equality in the UK is not protected by a constitutional bill of rights which would limit the extent to which equality could be eroded or removed by Parliamentary legislation. Prior to Brexit, EU law has performed a similar function to a constitutional guarantee. EU equality law is binding on the UK Parliament. In some cases it can be enforced directly in UK courts, even in the absence of legislation. It can also be used to disapply legislation which fails to meet the standards of EU law. However, after Brexit, and the consequent removal of binding force EU law, there will be no obstacle to Parliament repealing or undermining the fundamental right to equality, currently largely contained in the Equality Act 2010 (EA). Even more concerning are proposed powers to be given to the executive by the EU (Withdrawal) Bill 2017-19 (Withdrawal Bill) to amend primary legislation without full Parliamentary scrutiny (so-called Henry VIII clauses). This could include the power to amend aspects of equality law without full Parliamentary safeguards. Moreover, the Withdrawal Bill specifically states that the EU Charter on Fundamental Rights will no longer be part of domestic law after exit day. Although often overlooked in the discourse in England, these issues become even more pronounced in the context of the devolution of Scotland, Northern Ireland and Wales. Strategies to protect equality post-Brexit inherently intersect with the foundations of the UK constitutional structure, democracy, the rule of law, the role of the judiciary and devolution.
2. This complexity demands sophisticated and considered responses. It is imperative that academics, lawyers, policy-makers, civil servants,

governments and representatives from trade unions and the business community openly discuss these challenges. Professor Sandra Fredman (University of Oxford), Professor Alison Young (University of Oxford), and Dr Meghan Campbell (University of Birmingham) hosted *The Impact of Brexit on Equality Rights Workshop* to bring together these different perspectives to consider legal and political strategies on the future of equality rights in the UK. The workshop was funded by an ESCR Impact Acceleration Award.

3. The workshop focused on five pivotal questions:
  - I. How can the right to equality best be protected and advanced while at the same time respecting Parliamentary sovereignty?
    - a. Should there be a preamble stating the values behind the EA to guide judicial interpretation?
    - b. Should there be a 'non-retrogression' clause to protect existing rights?
    - c. How can the EA be protected in the Withdrawal Bill?
    - d. How can we be sure that the powers devolved to Scotland, Northern Ireland and Wales are preserved in relation to equality, especially in the light of proposals for attempting to regulate trade on a UK wide basis?
  - II. Should the existing case-law from the Court of Justice of the European Union continue to play a role in the development of the right to equality, and if so what role?
  - III. What role should the Human Rights Act 1998 play in protecting

equality rights and should the UK's remaining international commitments on the right to equality be given a more prominent role after Brexit?

IV. How should particular rights be protected, for example rights to equal pay for work of equal value, protection for pregnant workers and parental leave and equal rights for part-time workers?

V. What clauses are needed in future free trade agreements to protect rights?

4. The workshop was held on September 28<sup>th</sup>, 2017 at the British Academy under Chatham House Rules. The round-table structured discussion brought together the Chief Executive of the Equality and Human Rights Commission, the Chief Executive of the Northern Ireland Equality Commission, the Deputy Director of the Government Equality Office, the Chief Executive of the Northern Ireland Human Rights Commission, the Chairman of Research of the Society of Conservative Lawyers, Legal Advisor to the Women and Equalities Commission, members of the House of Lords, several leading academics from several universities, QCs, chief executives from relevant NGOs, the senior lead on Brexit and equality from the Trade Union Congress, the British Medical Association and doctoral students. This report provides a brief summary of the day's discussions.

## 2. Equality and Parliamentary Sovereignty

### (a) Preamble and Interpretative Clause

5. One way of giving the EA quasi-constitutional status might be to include a preamble, requiring courts to take a purposive or value-laden approach to the right to equality. This might act as something of a substitute for the absence of the Charter of Fundamental Rights, the EU fundamental principle of equality, and the Court of Justice of the European Union, which has always taken a much broader and purposive view of the right to equality than UK courts, which have tended to take a technical or black letter law approach. Although the UK does not have a history of using value-based preambles or interpretative clauses to guide the development of jurisprudence, does the removal of EU law re-open the debate on having a preamble or interpretative clause?
  
6. There was significant discussion on this question. On one hand, placing the values of equality front and centre in the Withdrawal Bill and EA could send a clear signal to courts, the executive and legislative bodies of the central importance of ensuring a robust right to equality. It could be an important symbolic gesture on the rooted-ness of equality in the UK. Specifically, its function would be to prompt courts to take a purposive approach, based on broad values, in adjudicating equality claims. On the other hand, four main concerns were expressed. The first was skepticism about any political appetite for inserting a preamble or interpretative clause. The second was the need for a clear and simple strategy. The process of withdrawal has been chaotic and a simple and effective way forward is necessary. The third was that a preamble and interpretative clause could increase uncertainty as the clause itself could be unclear on the direction equality rights should go. Equality is a highly contested concept and defies easy definition. The

fourth was that the UK courts might simply transpose their technical approach to the preamble or interpretive clause. The risk is then that they could become mired in the different potential meanings of the preamble or interpretative clauses.

#### (b) Non-Retrogression

7. There was strong support for a non-retrogression clause. Leaving the EU should not be an opportunity to roll-back equality guarantees. The Withdrawal Bill raises the spectre of retrogression. It does incorporate existing EU law into the UK, but worryingly, it also gives power to government ministers to make amendments to retained EU law that was incorporated into the UK via secondary or delegated legislation.
8. While it was acknowledged that there is a need for secondary legislative powers, it was strongly felt that delegated power should not be used as a back-door to affect equality rights. Without any Parliamentary scrutiny, the executive could unilaterally alter equality law. For instance, equality rights, such as maternity leave with adequate pay, could be easily withdrawn without public debate for being perceived as impractical for British businesses.
9. Different proposals on how to prevent retrogression were discussed. One was to require the relevant Secretary of State to include a declaration in all legislation, similar to that in the Human Rights Act, 1998, that proposed legislation does not reduce equality rights. A second was an express provision in the Withdrawal Bill prohibiting equality rights from being substantially altered by delegated powers.<sup>1</sup> Instead the full Parliamentary process of legislative amendment should be required. The third was to extract a substantive political commitment

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<sup>1</sup> The downside of this is that the Withdrawal Bill allows for the modification of the withdrawal bill itself by delegated legislation in order to implement the withdrawal agreement. This could mean that delegated legislation could remove this restriction.

against regression. There was consensus on the need for increased government transparency and the important role of Parliament in the withdrawal process. Nevertheless some concerns were expressed as to the scope of any proposed non-regression clauses. In particular, how do we identify a proposed change as retrogressive? One person's regression might be another person's equality of opportunity.

(c) Protecting the Equality Act, 2010

**10.** This question was approached from a devolved perspective, specifically Northern Ireland. An overwhelming theme that arose from this discussion was the frustration at the lack of attention to devolution and equality and the lack of clarity on key terms.

**11.** Northern Ireland is in a unique position. Equality and non-discrimination are devolved to Northern Ireland and it is the only region in the UK that will share a land border with the EU. Particularly pertinent is the fact that the Good Friday Agreement has equivalency protections between Ireland and Northern Ireland. How will this be navigated if Ireland and the EU go in a different direction from Northern Ireland and the rest of the UK? On one scenario, the substance of EU equality law will need to be maintained in Northern Ireland after Brexit to fulfil the equivalency requirement. This raises the question of whether there could be different levels of protection in different parts of the UK, which is already the case in a number of areas where the law in Northern Ireland has not been amended to reflect changes made in the rest of the UK. Alternatively, on a hopeful note, future robust equality protections in Northern Ireland might prompt a levelling-up of equality rights in the rest of the UK. There was some discussion as to whether consistent equality rights across the UK are necessary. Or is the goal only for a coherent and harmonious approach that allows for equality rights to be contextualized for local contexts?

**12.** This discussion ended with a pertinent reminder that equality rights need not only to be protected on paper but must also be implemented and enforced on the ground.

(d) Devolution

**13.** Brexit is throwing the spotlight on inter-governmental mechanisms in the UK and showing that they are not fit-for purpose. There were serious concerns that the Withdrawal Bill has lacked participation from the devolved powers and that Westminster will impose it on Scotland, Northern Ireland and Wales. Without reflecting on the role of devolution, there is a risk of deteriorating relationships, of a break down in trust and alienation from Westminster. The complex constitutional structure raises questions on who has the legal or political power to mediate these issues. It also raises further issues as regards the funding of the devolved legislatures and governments following withdrawal from the EU. Creative and constructive dialogue is needed between devolved governments and Westminster.

### 3. The Future Role of the Court of Justice of the European Union

14. The Withdrawal Bill incorporates past CJEU jurisprudence into domestic law as retained EU law. Going forward, the Withdrawal Bill provides that courts are not required to consider CJEU case law, but may do so when appropriate. When should UK courts look to the CJEU? What mechanisms need to be in place to foster good relations between these courts? One approach is to provide that the UK courts should 'have regard' or 'have due regard' to CJEU jurisprudence when there is doubt or uncertainty on a specific equality issue that the CJEU has previously considered. The feeling around the table was that the future flexible relationship between the CJEU and the UK courts could have benefits for the development of equality law in the UK. One view was that Brexit is a chance to leave behind CJEU jurisprudence that curtails the growth of equality; particularly in the area of affirmative action<sup>2</sup> and that there may be future areas of equality law where the UK can surpass the CJEU.

15. One question which arises concerns the EU Charter of Fundamental Rights (EU Charter), which is specifically excluded in the EU Withdrawal Bill. Given that the EU Charter is binding on the CJEU, it is possible that incorporating past and using future CJEU jurisprudence in UK courts would result in a de facto incorporation of the EU Charter into UK domestic law. The CJEU case law will engage directly with EU Charter. How will the UK courts use and rely on CJEU jurisprudence when it makes decisions on the basis of the EU Charter? The Withdrawal Bill does incorporate the general principles of EU law, and mentions that the references to the EU Charter in earlier case law, which becomes retained EU law, should be read as a reference to a general principle. There is uncertainty on the status of the EU Charter

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<sup>2</sup>Case C-407/98 *Abrahamsson v Fogelqvist* [2000] ECR I-5539.

via the case law of CJEU after exit day. Will this be an indirect method to incorporate the EU Charter? Is this appropriate? It was felt that these complexities had not been sufficiently considered by the government.

**16.** It was recognized that there is political opposition to a close relationship between the CJEU and UK courts. There were warnings that even the label 'European' triggers resistance. This might suggest that it could be beneficial to reframe debates about UK's relationship with the EU by focusing on the values of equality rather than stressing their European origin or legacy. On the other hand, there was some concern that framing or focusing on the domestic aspects of equality would reveal the fragile architecture of equality law in the UK.

**17.** Whatever relationship evolves in the future, it is crucial that UK lawyers and courts are aware of developments in Luxembourg. There needs to be an onus and commitment on behalf of law schools to continue to teach EU law. This can ensure the next generation of lawyers are abreast of equality law in the EU and bring this comparative jurisprudence to the attention of UK courts.

#### 4. The UK's Remaining Human Rights Commitments

**18.** It is important not to pin too many hopes on the Human Rights Act, 1998 (HRA) as it is questionable that it can fill the equality vacuum left on leaving the EU. First, continued political attacks on the HRA and the European Convention on Human Rights (ECHR) are used to suggest that the HRA is a failure. On the other hand, the very fact that it remains on the statute books despite the sustained attacks on its legitimacy suggest that the HRA should be characterized as a story of resilience. Nevertheless, in a post-Brexit landscape, the HRA is vulnerable and it is difficult to predict its future. Second, the HRA has only made modest contributions to equality in the UK mostly in a counter-terrorism context. In any event, the HRA is only binding on the government and on bodies performing public functions, and it is limited to cases falling within the 'ambit' of Convention rights. This means that although it has had significant traction in relation to some rights, such as those in right to family and private life (Article 8 of the ECHR), it does not apply in any straightforward way to employment as current EU law does. Thus, it is important to neither overstate nor understate the role of the HRA in equality law.

**19.** There was also important mention of the UK's remaining international equality and human rights commitments. The UK has voluntarily taken upon these obligations but since the coalition government of 2010, the UK has not had much appetite for external supervision by international human rights bodies. It was felt that with Brexit and the rise of discussion of 'Global Britain' (or perhaps more inclusively a 'Global UK'), this could be a chance to ratchet up awareness of international rights and obligations and bring these rights home. At the same time, there were concerns that this approach might be somewhat constrained by the current sovereignty discourse. Creative thinking is needed on how international equality standards can be operationalised.

## 5. Equality and Worker's Rights

20. Several important concerns were expressed in relation to the continued protection of worker's rights. The first was that there will be a return to the arguments that workers' rights and rights to equality are too costly to protect. It is necessary to be vigilant against this and present counter-arguments that equality is both good for business and that the right to equality is a fundamental, not optional, human right. The second concern was that workers' equality rights, particularly those of flexible workers and pregnant workers are spread among legislation, regulations and case law. There needs to be greater understanding and awareness of these various forms of protection. Although the bulk of equality law is contained in statute in the form of the EA, the flexible workers provisions, such as the part-time and agency workers' directives, are still contained in regulations. There is a worry that without the binding force of EU law these rights can be amended and retracted post-Brexit simply through executive action, and deep concern that the government has not been clear on its position. The third concern relates to remedies. Particularly worrying is the loss of the positive role of the EU and the CJEU in ensuring remedies for the violations of workers' rights. There was some discussion as to how these rights could be protected. The best way forward would be to incorporate them in primary legislation, as happened to other EU inspired regulations, such as the right not to be discriminated against on grounds of age, sexual orientation and religion, which were given statutory force through the EA.

## 6. Future Free Trade Agreements

21. There was discussion on how equality rights could be embedded in free trade agreements. For example, all trade agreements might include a 'social clause' requiring compliance with equality law as a binding contractual commitment. A particularly strong version is found in the European Economic Agreement, in Article 69(1), which replicates the right to equal pay for equal work found in the Treaty itself. Similarly, Article 70 requires contracting parties to promote the principle of equal treatment for men and women by implementing the provisions specified in Annex XVIII. Annex XVIII in turn incorporates almost all the EU legislative provisions on equality. This could have potential to protect equality in the UK. However, there were concerns that Annex XVIII might not provide sufficient protection as the strength and significance of this is unlikely to amount to much. This discussion concluded with a consensus around the table that the potential positive relationship between free trade and equality needs to be further explored.

## 7. Conclusion

**22.** The workshop addressed crucial questions—that are not always getting the attention required—that need to be considered so that Brexit does not result in a diminution of the right to equality in the UK. There are even opportunities in leaving the EU to enhance the right to equality. However, it is imperative that this be done in manner that includes all voices with the UK, including devolved legislative bodies and Parliamentarians at Westminster, and not just members of the executive. Difficult challenges must be addressed openly and given careful consideration. Equality is a right, not a hand-out or a tool for political negotiations. It is a fundamental commitment and it is binding. Only by placing the value of equality at the core of the withdrawal process can Brexit work for all people in the UK. There was general agreement that interactions such as this one were an important part of this process and much interest was expressed in a follow-up, particular in light of the very many amendments to the Bill which are currently being proposed.