

The government has publicly maintained its political commitment to equality after Brexit. Despite these statements, equality-seeking individuals and groups are deeply concerned that equality rights are in jeopardy. 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. After Brexit, and the consequent removal of the binding force of EU law over legislation enacted after exit day, there will be no obstacle to Parliament repealing or undermining the fundamental right to equality.

The EU (Withdrawal) Bill initially excluded the EU Charter—which protects fundamental equality rights—from inclusion in UK law after exit day. This has briefly been reversed by the House of Lords' amendment to the Bill to include the EU Charter while still excluding the preamble and rights designed to uphold EU citizenship. However, the situation remains in flux, as it is likely that some of the proposed amendments from the House of Lords will be reversed when the Bill goes back to the House of Commons. This and other amendments in the House of Lords on the Bill have added a further layer of complexity to protecting equality rights in the UK after Brexit.

On 26 April 2018, the Oxford Human Rights Hub (OxHRH) and The UK in a Changing Europe hosted *The Continuing Impact of Brexit on Equality Rights* workshop to explore legal and policy strategies to promote equality and ensure a positive and mutually beneficial relationship between the UK and the EU institutions on the development of equality post-Brexit. This workshop brought together academics, lawyers, policy-makers, civil servants, members of the House of Lords, representatives from trade unions and the business community to openly and frankly explore these challenges. It built upon the OxHRH workshop *The Impact of Brexit on Equality Rights* held at the British Academy in September 2017.

The workshop explored four pivotal questions:

- How will new legislation on equality be generated without the impetus of the EU?
- How will the EU (Withdrawal) Bill affect equality rights? And can the Equality Act and the Human Rights Act be used to bolster any 'losses'?
- What is the future relationship between UK courts and the Court of Justice of the EU (CJEU)?
- Can labour rights be front and centre in future trade negotiations?

The workshop was held under Chatham House rules. This report provides a brief summary of the day's discussions and includes recommendations from the workshop organisers: Sandra Fredman (University of Oxford), Alison Young (University of Cambridge) and Meghan Campbell (University of Birmingham).

Impetus for Equality in the UK

There were debates around the workshop table on whether leaving the EU will curtail the development of equality law in the UK. A number of participants took the view that Brexit may not have a large impact on the UK in terms of the generation of policies and ideas in the field of equality law. It was in respect of implementation that the difficulties would arise.

This was because the UK has a range of strong institutions which generate clear policies and agendas for achieving equality rights. For example, the UK has a significant number of civil society organisations and governmental departments, as well as general and specific parliamentary committees in both the House of Commons and the House of Lords, who are able to bring forward proposals for equality law to address emerging forms of inequality and discrimination. In any event, some participants felt that the EU has a scattered, infrequent and incomplete approach to equality. There was also the view that fears that the UK equality law may stagnate post-Brexit were thought to be over-rated, as it is important to recognise that the UK has been a key player in driving equality law forward through EU institutions. After exit day, on this set of views, the UK would continue to generate proposals for moving equality law forward but now only directly through UK institutions.

However, it was acknowledged that there would be continuing difficulties with implementation. Whilst there will continue to be a broad range of ideas and specific policies regarding the promotion of equality rights, difficulties arise when transforming the policies into legislation. There have always been considerable pressures on parliamentary time, making it extremely difficult to timetable the enactment of new legislation. These pressures can only get worse given the wide range of Brexit-related legislation and the complexity of ensuring both certainty and continuity as the UK leaves the EU. In this context, innovations in equality law may languish. Further difficulties can arise given that the Equality Act 2010 (EA 2010) is a consolidation statute. This makes that it difficult to modify one specific area of equality law without this having a knock-on effect on other areas of the law. Moreover, the genuine and important concern that Brexit should not erode equality rights may have the unintended consequence of fossilising equality law. Concerns over non-regression may mean that there is no desire to push forward on equality rights.

At the same time, a group of workshop participants were deeply concerned that minority groups in the UK who are vulnerable and politically marginalised will continue to be overlooked in future evolutions of equality law. A good example is the positive role of the EU Charter in the protection of LGBTQI rights in the UK. Without the Charter, there was concern that equality might be eroded.

Enforcing Equality Rights

There was unity around the table that regardless of the origin of equality law, the law on the statute books has to be translated into law on the ground.

It was felt that there needs to be more input from local regions so that equality law accurately and sensitively responds to lived experiences. A centralised top-down approach will continue to alienate and generate confusion on the purposes and impact of equality law. A lack of engagement with regional issues was at least one impetus motivating the vote in favour of leaving the EU.

Recommendation: There needs to be wider consultation and engagement with regional issues to maintain a high standard of equality rights post Brexit. It is crucial to engage more with civil society, ensuring a bottom-up as well as a top-down approach to the dynamic development of equality rights.

Equality laws must be monitored and implemented to achieve a more equal and just society. Creating law without considering enforcement and monitoring runs the risk of creating disillusionment with equality. It is imperative to ensure that equality monitoring bodies in the UK, such as the Equality and Human Rights Commission, are properly funded and supported. While this requires an unwavering political commitment to equality, there was a strong desire to see the government's political will translated into legally enforceable obligations.

Recommendation: There needs to be greater investment in Equality and Human Rights Commissions to enable them to monitor the extent to which policy recommendations are transformed into law, in addition to providing general reports on the protection of equality rights in the UK.

There have been considerable recent restrictions on the ability of individuals to enforce their equality rights and access to justice: the rise in tribunal and court fees (recently struck down by the Supreme Court), cuts to legal aid, restrictions on protective costs orders and more stringent requirements both in terms of granting permission for judicial review and available remedies for judicial review. These measures, in combination, make it harder for those who need the protection of equality rights to access the means through which their rights can be effectively protected, either through bringing an action in person or through the work of public interest groups acting more generally on their behalf. Although crowd-funding may plug some of these gaps, this is not an effective human rights-based solution. This is, as yet, an unregulated emerging area of the law. This means that it may also be open to abuse, encouraging legal actions which have little chance of success of protecting equality rights.

Although not caused by Brexit, there may be even less of an incentive to bring legal actions post-Brexit. EU law provided an additional source of equality rights. The Article 267 reference procedure, whereby issues as to the interpretation or validity of EU law can be referred to the CJEU, could provide an effective means of ensuring a dynamic protection of equality rights as references were made directly from tribunals, without having to first exhaust all domestic avenues of the protection of rights.

Recommendation: Urgent action is needed to ensure access to courts and tribunals to ensure that equality rights are protected. This can often best be done through public interest groups who are able to bring actions on behalf of marginalised groups. There needs to be more investigation into the impact of modifications of procedural rules on the right of access to justice on equality rights, which are designed to protect the marginalised who often have insufficient means to fund court actions which may produce a remedy which is small in financial terms in relation to the costs of bringing an action.

In addition, there are still considerable concerns as to the lack of equality protections in Northern Ireland. Whatever the deal reached on the customs union and the need to maintain the Belfast Agreement, tensions may be exacerbated in Northern Ireland.

Recommendation: There is a need for investment in equality protections in Northern Ireland, including urgent action to extend equality legislation to Northern Ireland.

The Role of the EU Charter

There was a general consensus that there was a lack of awareness and education concerning the EU Charter, its origins, and the role of the EU in the protection of human rights. There has been a lot of discussion about the role of the EU Charter post-Brexit, but this has been coupled with a general lack of knowledge as to its content, force and impact. This is true not only of its role in the debate surrounding the EU (Withdrawal) Bill, but has been true since the enactment of the EU Charter, particularly surrounding its incorporation into EU and UK law. Debates and concerns on the EU Charter have been focused more on the supremacy of EU law rather than the content of the EU Charter itself. There have also been criticisms of the Charter which are based on unrealistic expectations of the role and scope of the EU. Whilst it was relevant to be aware of growing human rights problems across the EU—from pressures from emerging radical far-right groups, growing anti-

Semitism and threats to judicial independence—it was also important to appreciate the limited scope of the EU’s ability to intervene in these areas. The EU only has the capacity to act within the scope of EU law and has limited powers to reprimand Member States for persistent breaches of human rights and the rule of law. As such, although it may be true that the EU does not have a perfect record in the protection of human rights and might, to some extent, fail to fully protect rights; nevertheless this may be due to the inevitable limitations of the EU resulting from its specific aims and purposes of the EU.

A greater appreciation of the opportunities and limits of the EU Charter is required. The EU Charter provides a strong protection of equality rights. It is important to recognise the process through which the EU Charter was enacted. It emerged from a real participative process: broad consultations and consensus across a range of political actors and stakeholders. Its provisions may be broad, but this is often the case with human rights documents. This breadth can be an advantage, giving rise to clarification through a dynamic process of iteration of rights. Moreover, it was important to read the EU Charter in the light of its Explanations (2007/C 303/02), which provide greater clarification of the content of its rights.

Recommendation: More needs to be done to further knowledge and understanding of the role of the EU Charter, the specific content of these rights, its sources, and the extent to which it has served to further rights in the UK to ensure a full democratic debate surrounding its retention as EU-derived law on and after exit day.

There was also general consensus that it is important not to be dazzled by the EU Charter. Whilst it does play a role, it is not the primary means through which equality rights are protected in practice. Most equality rights have been protected through provisions of the EU Treaties, Regulations and Directives. As such, debate should not just focus on the impact of the EU Charter, but also on the greater impact of Brexit on equality rights protected through EU legislation. Nevertheless, it was important to recognise two ways in which the Charter does have an impact on equality rights. First, the Charter provides for a constitutionally-protected floor of rights protections. It is important to ensure that there is no regression from the current range of equality rights protected in the EU and bolstered by the EU Charter. Second, the EU Charter helps to frame debate, both legal and political. In terms of legal debate, the EU Charter’s provisions help to ensure that equality rights are applied in a manner that promotes and respects the rights of all. In terms of political debate, the EU Charter can help to frame policies and legislation in the field of equality rights. Moreover, this can help to frame future trade agreements, ensuring that future trade agreements not only do not erode, but can also be used to promote equality rights.

The EU Charter may help to frame debate going forward. This is particularly the case concerning transition arrangements, especially as regards the rights of EU citizens currently residing in the UK and the rights of UK citizens residing in the EU. There will be a need for continued dispute-resolution in these areas – either by the CJEU or another organisation. The resolution of these issues would benefit from continuing to be framed in terms of the EU Charter.

Recommendation: The debate surrounding the EU Charter should be broadened, focusing on the content of the rights it provides and the Charter they can be used to frame future political debate, particularly as regards citizen’s rights in the transition period and framing future trade agreements.

If we are to ensure the aim of a continuance of the protection of existing rights in EU law, with the ability for future discussion as to the merits of a continued protection of EU-derived laws, then it is important to ensure that the debate about the content of EU Charter is distinguished from the debate about its legal force. If those aspects of the EU Charter which were capable of being

replicated in UK law were to remain as retained EU-law, they would have the same force as all other aspects of retained EU law. This means that their ability to disapply legislation would only apply to legislation enacted prior to exit day. They could also be used as principles of interpretation when applying EU-derived and other legislation. This would not create a constitutional revolution, but could help to provide a means of framing future legal debate.

Issues may arise as to the future inter-relationship between the EU Charter, the Human Rights Act 1998 and the Equality Act 2006 and the Equality Act 2010, these are best dealt with in future, informed debate post-Brexit. This would enable a full democratic discussion as to the need to protect the scope of each of the EU Charter rights and principles. It would also provide the opportunity for greater clarity as to which EU Charter provisions should be protected as rights – capable of founding legal actions, overriding delegated legislation and disapplying legislation enacted prior to exit day – and those which should be protected as principles, being used to interpret other legal protections. Full democratic decision-making can also take place at a future date as to how best to provide an integrated protection of human rights in the UK, involving the devolved legislatures in addition to the Westminster Parliament.

Recommendation: There needs to be more careful thought about the immediate and long-term future of the EU Charter, as well as recognising the extent to which the EU Charter would have an effect in UK law were it to become retained EU law post exit day.

The Future Relationship Between UK Courts and the CJEU

As a result of government amendments to the EU (Withdrawal) Bill, which were recently accepted by the House of Lords, Clause 6 of the Bill now states that, that, in addition to referring to judgments of the CJEU which were decided prior to exit day, the UK courts ‘may’ also look to decisions of the CJEU post exit day where it is ‘relevant to any matter before the court or tribunal’. This is an important development. There were concerns that the previous wording left the UK courts vulnerable to political critiques that they have excessively relied on CJEU case law and undermined national sovereignty. The new wording makes it clear that UK courts can legitimately refer to later decisions of the CJEU when this is needed to help them decide an issue of equality law. This will help to facilitate the dynamic development of equality law, with UK courts being able to analyse decisions of the CJEU.

The CJEU has positively shaped UK case law on equality in both direct and indirect ways. The UK has also had a role on the CJEU’s understanding of equality and non-discrimination. There is a symbiotic relationship between the UK and the EU. It is inevitable given this close past relationship that there will be a future relationship between the CJEU and UK courts. Each system learns from the other when developing equality rights, both in terms of general policy directions and in terms of specific application through case law. The courts will continue to shape and influence each other. UK law students will continue to learn EU law and lawyers will continue to refer to CJEU case law in arguments in UK courtrooms. The unanswered question is how much weight UK courts will give to arguments based on future CJEU jurisprudence. How authoritative and persuasive will the cases of the CJEU be post-Brexit? And will this new relationship between the CJEU and the UK courts inspire a more robust consideration of other international human rights sources?

Recommendation: UK courts should regularly engage with the equality jurisprudence from the CJEU and other international human rights law bodies. There is no obligation on UK courts to accept CJEU rulings made after exit day, and decisions of the CJEU enacted pre exit day will be treated in the same manner by the UK courts as decisions of the UK Supreme Court. Regardless of whether the UK courts develop equality law in a similar or different manner than the CJEU,

considering their case law will enhance the deliberation and reasoning on equality and non-discrimination.

Using Future Trade Agreements to Protect Equality Rights

Is there a risk that future trade agreements will undercut equality laws in order to gain a competitive advantage, or are trade agreements part of a potential solution to the risk of undermining equality post-Brexit? Participants in the workshop took the view that it is possible for future trade agreements to include provisions that ensure a protection of equality rights. In particular, a requirement for protections of labour rights, wage equality and maternity and paternity protections may help to prevent one party to a trade agreement from gaining a competitive advantage by undercutting costs and prices through removing these protections. The ILO standards may form a relevant basis for incorporation. However, there was concern that ILO standards are much lower than the standards now in place due to EU law. Since the remaining 27 Member States of the EU will continue to be bound by EU law and the EU Charter, any future trade agreement between the UK and the EU would have to be in line with EU law for the EU to be able to agree to its provisions. However, this may not be true of trade agreements with other countries. It is important to bear in mind that, as a State negotiating alone as opposed to negotiating as part of a larger EU market, the UK may not be in as strong a bargaining power when it enters in to trade agreements with other countries. This may have an impact on the extent to which the UK can assure a strong protection of equality rights when negotiating on particular trade deals. Concerns were expressed that equality rights could be sacrificed for economic or financial gain. Moreover, there is currently less scope for parliamentary scrutiny over the enactment and ratification of international treaties than currently exist over the enactment of EU law. This may lessen the ability of Parliament to ensure that future trade agreements protect equality rights.

Concerns were also expressed as to the enforcement of trade agreements. Dispute resolution mechanisms will be needed, particularly if we are to ensure that equality rights as well as trade rights are protected. However, these mechanisms may not be effective, particularly as there is often little incentive for parties to trade agreement to police one another. Moreover, it is almost unheard of for international trade agreements to give rise to a right of individual petition or to create directly effective protections. As such, there may be little ability for other parties to police and protect international trade agreements.

Recommendation: there is a need for greater scrutiny over future trade deals before they are ratified, including Parliamentary scrutiny and a strong political commitment that equality standards will not be compromised in the interests of achieving free trade agreements. This should be aided by greater transparency or greater involvement of stakeholders at an early stage of the deliberation process.