

# The Continuing Impact of Brexit on Equality Rights



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## Foreword

Brexit is nothing if not a legal quagmire. And of course it involves several different legal systems – not only British, Scottish, Welsh and Northern Irish, but also EU, and the legal systems of other member states (not least when it comes to the rights of British citizens living and working there). And Brexit throws up unique legal challenges. No member state has left the EU before. There is no legal precedent for the transition period that has been proposed. Nor is there any obvious legal means to extend it if necessary. And that's before we even get to the process of moving existing EU law into UK law. There are estimated to be some 12,000 EU regulations that will have to be translated into UK law—a momentous task that will require Henry VIII powers, the use of which have themselves spawned further legal wrangling.

Equality rights are no exception. Both the government and the opposition have made clear commitments to retain and even extend existing rights after Brexit. Indeed, one of the lessons the Prime Minister seemed to draw from the referendum was that fairness needed to play a greater role in politics and economics in the UK. She said to those 'just managing', "When we take the big calls, we'll think not of the powerful, but you. When we pass new laws, we'll listen not to the mighty but to you." Equality rights will be a crucial area if the Prime Minister is to deliver on these promises.

Yet despite this apparent political consensus, experts and legal professionals remain concerned lest these protections that currently exist be eroded. This briefing underlines the way in which the already complex inter-relationship between EU and UK law will become even more so after Brexit. There is genuine uncertainty about how existing equality law will be interpreted by the courts once the UK Supreme Court takes over as the highest legal authority. I very much hope that both this short briefing and the workshop for which it has been prepared will prove useful to those trying to resolve some of these complex issues.

I'd like to express my heartfelt thanks to Sandra Fredman, Alison Young and Meghan Campbell for producing this fascinating briefing. They also deserve great credit for convening the workshop at which this document was launched and helping to focus greater attention on these crucial yet often overlooked issues. Finally, I am grateful to Matt Bevington who put an awful lot of work into ensuring that the workshop would be a success and masterminded the co-ordination between The UK in a Changing Europe and the Oxford Human Rights Hub. I hope you find this briefing as intriguing and informative as I have.

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## Introduction

*The Continuing Impact of Brexit on Equality Rights* workshop explores legal and policy strategies to protect and promote the right to equality in the UK and ensure a positive and mutually beneficial relationship between the UK and the EU institutions on the development of equality post Brexit. This workshop brings together academics, lawyers, policy-makers, civil servants, governments and representatives from trade unions and the business community from throughout the UK to openly and frankly explore these challenges. This builds upon the Oxford Human Rights Hub (OxHRH) workshop *The Impact of Brexit on Equality Rights* held at the British Academy in September 2017.

Unlike other jurisdictions, the right to equality in the UK is not protected by a constitutional bill of rights, but is instead governed entirely by parliamentary legislation. Currently, this is remedied by EU law, which treats the principle of equal treatment as a fundamental legal norm. EU law requires Parliament to enact legislation to provide specific protection for equality rights and to ensure that equality legislation is interpreted in a way that provides effective protection. Without the binding force of EU law, there is no obstacle to Parliament repealing or undermining the right to equality, currently largely contained in the Equality Act 2010. With the financial pressures that could arise upon leaving the EU, there is deep concern among equality-seeking groups that equality rights will be sacrificed for political and economic interests. The EU (Withdrawal) Bill, the legislation which facilitates the UK's exit from the EU, and the exclusion of the EU Charter, which protects human rights for individuals in the EU, create further layers of complication and confusion.

The workshop will examine the following themes:

- ***Equality and Brexit:***  
How will new legislation on equality be generated without the impetus of the EU?
- ***The EU Charter, the Equality Act and Human Rights:***  
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'?
- ***The Role of the Court of Justice of the EU:***  
Is this an indirect route to bring the EU Charter into the UK? What role can other international and regional courts, tribunals or treaty bodies play in the development of UK equality law?
- ***Equality and Post-Brexit Trade:***  
Can labour rights be front and centre in future trade negotiations?

This briefing document explores these questions to provide a springboard for discussion at *The Continuing Impact of Brexit on Equality* workshop on 26 April 2018 at the British Academy and beyond.

Hyperlinks to cited material can be found online at [www.ukandeu.ac.uk](http://www.ukandeu.ac.uk).

## I. Equality and Brexit

UK equality law has grown in a vibrant interactive relationship with EU law. Some of the gains made in the UK have been incorporated into EU law; and, conversely, particularly in times of austerity, EU law has proved to be a bulwark against government attempts to undermine equality rights in the UK. For instance, the Equal Pay Act 1970 was a hard-won victory for UK women, not least by the determined stance of women workers striking for equal pay at Ford's Dagenham plant in 1968.

But it was from EU law that the UK obtained a self-standing right to equal pay for work of equal value. Moreover, the broad definition of pay used by the Court of Justice of the European Union (CJEU) meant that a wide range of benefits linked to the employment relationship was included. EU law has also been robust in protecting compensation levels, requiring remedies that are real and effective. Similarly, the indirect discrimination provisions introduced in the Sex Discrimination Act 1975 (themselves inherited from the US) had a marked influence on CJEU case law. At the same time, the CJEU went on to use indirect discrimination to fashion robust protection for part-time workers, in particular by the application of the strict justification test for discrimination in the *Bilka* case. It was this strict standard which led the [House of Lords](#) to find a breach of EU law when the Thatcher government imposed a five-year qualification period for employment rights for part-time workers.

This has been complemented by the EU Commission's consistent engagement with the rights of precarious workers, culminating in the Part-Time Workers Directive, the Fixed Term Workers Directive and the Agency Workers Directive. Given the backdrop of flexibilisation of the workforce, for example through zero-hours contracts and the gig economy, it is highly unlikely that these rights would ever have been achieved in the UK alone. Perhaps the most important contribution of the CJEU was the ground-breaking case of *Dekker*, where discrimination against pregnant women was held to constitute sex discrimination. This has led to robust case law from the CJEU protecting pregnant workers, most recently in the *Danosa* case, in which the Court insisted on a broad definition of 'worker' to ensure protection for pregnant women. On the other hand, the right to request flexible working was pioneered in the UK, and is now being considered for adoption in the EU.

A similar pattern can be seen in relation to other grounds of discrimination. The UK was far ahead of the EU in its protection against race discrimination, which was already on the statute books in the 1960s. Similarly, disability discrimination legislation was introduced in the UK well ahead of the EU. However, protection against discrimination on grounds of sexual orientation, religion and belief, and age were only introduced in the UK as a result of EU law.

These interactions have occurred not just at the level of legislation, but also through the active participation of UK lawyers and courts in referring cases to the CJEU; as well as through trade union and business involvement through the process of Social Dialogue, for example in formulating the framework agreement on parental leave. On the other hand, UK involvement has sometimes acted as a brake on developments in equality law in the EU.

This intricate interaction between UK equality law and the EU will end after the UK leaves the EU. Most vulnerable are those aspects of EU law which are not protected by primary legislation: namely protection for part-time workers, fixed-term workers and agency workers, many of whom are women and members of racial minorities. Although discrimination in this respect may still be protected as indirect sex or race discrimination under the Equality Act 2010, this is much more difficult to prove. Primary legislation in the form of the Equality Act 2010 can also be amended or repealed, and although this in principle requires parliamentary amendment, Henry VIII clauses granting ministers power to repeal primary legislation may make it easy to do so, as we explain below. The UK will also lose the benefit of future improvements in EU equality law, such as the new initiative on work-life balance; and will no longer have a seat at the table with the [social partners](#). References from UK courts to the CJEU, which have proved such a vital part of the development of equality law at EU level, will no longer be possible after the transition period, and new legal rulings on equality from the CJEU will not automatically be binding on UK courts, as we outline later in this briefing.



## II. The EU Charter, the Equality Act and Human Rights

On exit day, the EU Charter will cease to be part of UK domestic law. The government has justified this decision on the basis that the EU Charter currently only applies when individuals are within the scope of EU law. This includes a reliance on EU law to protect equal pay or to ensure non-discrimination in the workplace. Whilst the EU Charter is removed, fundamental rights which exist independently of the Charter – those protected as *general principles of EU law* – will continue to be part of domestic law post-Brexit. However, they will not be protected to the same extent. Whilst EU-derived UK law can be used to disapply legislation enacted prior to exit day, this is not the case for general principles of EU law. The general principles of EU law may only be used as principles of interpretation and cannot be used to disapply legislation.

The EU Charter and general principles serve to bolster the protection of equality rights, ensuring that legislation, delegated legislation and directly effective EU law are interpreted and applied in a manner which protects fundamental rights. The EU (Withdrawal) Bill removes a possible constitutional protection of equality rights, weakens the remedies that can be used to protect these rights and creates uncertainty. Although the Human Rights Act 1998, the Equality Act 2010 and the common law may go some way to reduce this negative impact, they do not provide a complete solution and may add to legal uncertainty. These points are elaborated below.

### ***(i) No Constitutional Protection***

In the absence of a codified constitution, EU law operates as a constitutional protection of equality rights. Currently, if Parliament were to legislate contrary to equality rights protected by EU law, then this legislation could be disapplied. The EU (Withdrawal) Bill will partially remove this constitutional protection. Whilst EU-derived laws protecting equality can disapply legislation enacted prior to exit day, this will generally not be the case for legislation enacted on or after exit day. This means that it will be possible to enact legislation narrowing the scope of equality protections. Although the common law may help to prevent erosion, this can only go so far. Clear and specific wording in legislation will override the common law.

Moreover, there is a possibility that the Equality Act 2010 could be amended by delegated legislation. The Henry VIII clauses in the EU (Withdrawal) Bill cannot be used to modify, amend or remove provisions of the Human Rights Act 1998. There is no such protection for the Equality Act 2010. Whilst the common law will ‘read down’ the Henry VIII clause to protect fundamental rights, this is an emerging principle of the common law whose scope of application remains unclear. It may not prevent delegated legislation from overriding equality protections.

### ***(ii) Weaker Remedies***

The loss of the ability to disapply legislation also weakens the remedies available to individuals to protect their equality rights. Whilst the Human Rights Act 1998 may be used to issue a declaration of incompatibility against legislation which breaches the statute – including those protecting equality rights – this does not have the same impact. A declaration of incompatibility may create a political obligation to change legislation, but the legislation declared incompatible continues to have legal force, validity and effect. Moreover, the Human Rights Act 1998 does not provide as strong a protection of equality rights, particularly regarding the protection of equality rights in the workplace.

EU law helps to ensure adequate compensation for those whose rights have been harmed. Article 47 of the EU Charter provides for a right to an effective remedy, as well as providing stronger access to justice rights. Article 6 of the European Convention on Human Rights (domesticated through the Human Rights Act 1998) does not provide the same protection. Although access to justice is an emerging principle of the common law, this is only protected as a principle of interpretation and may only be used to prevent disproportionate erosions of access to justice. It may not provide the same protection, particularly of adequate compensation.

### **(iii) Greater Uncertainty**

Whilst some fundamental rights are preserved, it is much harder to determine their content when compared with the ease and simplicity it takes to read the EU Charter. In this case, it is necessary to read the case law of the Court of Justice of the European Union (CJEU) rather than one consolidated document. Moreover, it is hard to determine which fundamental rights exist independently from the EU Charter, as case law simultaneously refers to both the EU Charter and general principles as a source for the same right. The case law also recognises the EU Charter as a source of general principles. To protect the general principles and not the Charter creates confusion and uncertainty.

The change in remedies adds to these uncertainties. It can be difficult to predict when courts will be able to interpret legislation to protect equality rights. Will it be possible for courts to read words in to legislation, or narrow the scope of application of general terms to protect equality rights? Moreover, it is also hard to predict how legislation will be interpreted to achieve this aim.

## **III. The Role of the Court of Justice of the European Union**

The EU (Withdrawal) Bill also creates an uncertain and potentially confusing relationship between the Court of Justice of the European Union (CJEU) and UK courts. This complexity stems from the differences drawn between EU law before and after exit day.

When considering the interpretation of *retained* EU law in the UK, it is to be decided in accordance with the relevant “retained case law” and “retained general principles of EU law”. Pre-Brexit case law of the CJEU still has, in theory, a role to play in interpreting and understanding EU law that is retained in the UK after exit day. However, at the same time, the Bill is careful to spell out that the UK Supreme Court is not bound by any retained EU case law. The Supreme Court may deviate from EU case law in the manner that it would deviate from its own prior case law. The Court is also free to interpret retained case law and general principles of EU law differently than the CJEU. At this stage, it is unclear how courts will approach the task of interpreting retained EU law. Will they adopt an interpretation that is consistent with prior CJEU case law or will they use this as an opportunity to adopt a new and different interpretation? This could be a potentially fruitful moment to leave behind CJEU case law that curtails the growth of equality, particularly in the area of affirmative action. On the other hand, domestic [legislation](#) and case law on affirmative action have always been more limited than the EU, which does allow measures to advance the under-represented gender in situations in which merit is equal.

After Brexit, UK courts will no longer be able to refer matters to the CJEU, and the case law of the CJEU made on or after exit day will no longer be binding upon UK courts. The current draft withdrawal agreement includes transitional measures to make sure that it is possible to refer to the CJEU during the transition period (up to 31 December 2020) on matters in the transition agreement (citizenship rights and free movement rights may be relevant here). Also, any case started before leaving, or during the transition period, will still be able to be referred to the CJEU post exit day. In the long term, there will no longer be a hierarchical relationship between UK courts and the CJEU. This does not mean that future CJEU case law will be irrelevant to the UK. The EU (Withdrawal) Bill states that a court may consider the rulings of the CJEU “if it considers it appropriate to do so”. Which begs the question: when is it appropriate to consider non-binding case law from an international accountability forum? The Bill has left it for the judiciary to answer this question. This leaves the courts vulnerable to political critiques that they have excessively relied on CJEU case law and undermined national sovereignty.

To avoid these critiques, it is imperative to develop meaningful guidance on when UK courts should turn to CJEU case law. One potential way to breathe life into the phrase ‘appropriate’ is to adopt a modified form of the principle used under the Human Rights Act 1998 to specify the relationship between domestic case law and decisions of the European Court of Human Rights (known as the mirror principle). Currently, UK courts interpret the rights in the Act so they are consistent with the interpretation of the European Convention on

Human Rights by the European Court of Human Rights (ECtHR). The same relationship cannot be constructed between the CJEU and UK courts, as there are different legal features that exist between the ECtHR and the UK. Nevertheless, a modified form of this doctrine could emerge to govern the relationship between the CJEU and the UK courts. Domestic courts should keep pace with the case law on equality from Luxembourg as it evolves over time. On the other hand, there are concerns that there have been occasions in which the mirror principle under the Human Rights Act 1998 has been used as ceiling rather than a floor, preventing the development of human rights. It is important that any relationship between the UK and CJEU does not stifle the development of the right to equality.

Another potential interpretation is to understand ‘appropriate’ as ‘due regard’. When UK courts are faced with a new question on the nature and scope of the right to equality it can be beneficial to consider relevant CJEU case law. This does not necessarily require the UK court to follow the CJEU’s interpretation. Rather, it requires UK courts to examine the CJEU’s reasoning and assess whether to accept or reject their understanding of the right to equality. This process can enhance the quality of legal reasoning and the development of the right to equality in the UK. At the same time, it is also important to explore if this ‘appropriate’ standard should apply to the UK’s other international equality commitments.

The court may also develop the common law in line with principles from the CJEU regardless of whether it is bound to follow the CJEU or not. This is what the UK courts tended to do with decisions of the ECtHR before the Human Rights Act 1998.

One final aspect to consider is the relationship between the UK courts and the CJEU in light of the exclusion of the Charter. As mentioned above, the EU (Withdrawal) Bill specifically excludes the EU Charter but retains the general principles of EU law. Future CJEU case law on the right to equality will likely be based on the EU Charter. Is it appropriate for UK courts to engage with CJEU case law when it engages with the Charter? The Withdrawal Bill has an answer to this. References to the Charter can be seen as references to general principles when this is necessary to ensure the purpose of retaining fundamental rights. Most CJEU cases refer to the Charter and general principles in tandem for the same right. In such cases, it will be necessary to refer to the combined reference to the Charter and the fundamental principle in question.

## IV. Equality and Post-Brexit Trade

The impact of the changed status of the UK in relation to trade deals on women’s equality has been given little attention. An important new [report by the Women’s Budget Group and the Fawcett Society](#), however, highlights some of the risks to women’s equality in relation to trade deals after Brexit. This of course depends on what sort of deal the UK reaches with the EU, but in all scenarios there are risks to equality rights. In particular, as the report points out, in addition to negotiating a trade deal with the EU, the UK will need to renegotiate trade deals with the 65 countries which have trade deals with the EU. Given that the UK will be in a weaker negotiating position as a result of being a smaller market, it is possible that these will result in less favourable terms, so far as equality is concerned, to those currently achieved by the UK within the EU. The government has expressed its commitment to maintain labour law legislation post Brexit. However, in order to be more competitive, the UK might agree to roll back minimum rights for workers, such as maternity rights or rights for agency workers.

Although some of these rights are protected under the EU (Withdrawal) Bill, the fact that Ministers have sweeping powers to amend legislation using delegated powers might facilitate such moves. In cases in which the UK has gone further than the EU, for example in relation to the right to request flexible working, there may be no impediment to bargaining away the right in a future trade deal. The report also points to the danger, already seen in other trade deals, such as the now on hold US-EU trade deal, that overseas companies might have the power to sue the UK government if its actions damaged their profitability. Equal pay and parental leave provisions might be vulnerable in this context. There have already been strong indications that the government

will repeal the agency worker regulations. Rights of part-time workers are similarly vulnerable. Certainly, if there is a reversion to World Trade Organisation rules, there is a risk that, as the Women's Budget Group report points out, in order to attract foreign direct investment the government will undercut workers' rights. The report further points out that there is little commitment to or expertise in gender-mainstreaming in relation to trade agreements. This is equally so for other protected grounds.

There is also, currently, [less provision for parliamentary scrutiny over the negotiation](#) and ratification of international agreements than there is over EU legislation. Parliamentary committees sift EU legislative provisions, allowing for debate and scrutiny when needed. Although the Constitutional Reform and Governance Act 2010 requires treaties to be laid before Parliament before ratification, with an explanatory text, ratification is only subject to the negative resolution procedure – i.e. it will be ratified unless either of the Houses of Parliament votes against ratification within 21 sitting days. It is possible for this process to be avoided and for treaties that have been rejected to be re-introduced. There is often little time to debate these treaties and there is no sifting process to push for debate on important treaties. Also, there is often no opportunity for treaties to be subject to debate during their negotiation. Given the plethora of treaties, and the current provision in clause 2 of the Trade Bill 2017-19 to empower the implementation of trade agreements by ministerial regulation, also using the negative resolution procedure, there may be little time or opportunity for Parliament to ensure that new trade deals continue to maintain a high protection of equality rights.

## Conclusion

This workshop will explore how to confront these uncertainties and consider the following questions:

- What reforms to the Human Rights Act 1998 and Equality Act 2010 are required to protect and enhance a right to equality?
- What is an appropriate relationship between the Court of Justice of the European Union and UK courts?
- How can UK courts, lawyers and law students stay abreast of developments in EU equality law?
- How do we improve capacity for equality and human rights impact assessments for future trade deals? This requires attention both to gender equality, and equality on other grounds.
- What safeguards do we expect to be written into trade deals to protect equality rights?
- What should equality impact assessments in relation to future trade deals cover and how can it be ensured that mitigating action is taken?
- What participatory rights should women's organizations and other equality bodies have in relation to future trade deals? For example, what consultation duties should there be?
- Should trade deals include 'social clauses' which make the deal conditional on protection and promotion of equality rights? How should this be achieved?



The Oxford Human Rights Hub (OxHRH) aims to bring together academics, practitioners, and policy-makers from across the globe to advance the understanding and protection of human rights and equality. Through the vigorous exchange of ideas and resources, we strive to facilitate a better understanding of human rights principles, to develop new approaches to policy, and to influence the development of human rights law and practice.



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