



The Human Rights Implications of Brexit

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A global perspective on human rights



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The views expressed in this paper are those of its independent authors.

1. Introduction

1. 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.
2. We make this submission under the auspices of the OxHRH. As a group of University of Oxford legal academics—Professor Sandra Fredman, Director of the OxHRH and Rhodes Professor of the Laws of the British Commonwealth and the USA; Professor Alan Bogg, Professor of Labour Law; Professor Alison Young, Professor of Public Law and Dr Meghan Campbell, Deputy-Director of the OxHRH and Weston Junior Research Fellow—we have come together to explain the legal implications of Brexit to human rights protection in the UK.

2. Executive Summary

3. A distinctive contribution of the EU has been in the field of social rights, particularly working time and discrimination law. This is because EU law has direct effect, both vertical and in some cases, such as equal pay, also horizontal (i.e. it binds private employers). Without the protection of EU law, rights are entirely dependent on political will, and can easily be eroded. Furthermore, any progression in rights is unlikely in the present political climate. While international law provides relevant standards, which are binding on the government, the fact that the government is in breach of its international obligations is often taken less seriously in political circles than it should be.¹

4. This submission demonstrates the risks to social rights by specific reference to working time protections and non-discrimination laws. One of the most remarkable legal and political achievements of European law has been Directive 93/104/EC (WTD) concerned with the organization of working time. The removal of the WTD framework may lead to a significant deterioration in the protection of the worker's rights, including the limitation of maximum working hours, to daily and weekly rest periods and to an annual period of paid leave. EU law has also played a fundamental role in the right to equality and non-discrimination in the workplace. In most jurisdictions, the right to equality is found in a constitutional bill of rights, which underpins statutory protection and protects against erosion. The absence of a written constitution in the UK means that such a constitutional

¹ See, e.g. the Ministerial Code 2015, section 1.2, which now refers to the 'overarching duty on Ministers to comply with the law' replacing the wording in the earlier code which referred to the 'overarching duty on Ministers to comply with the law, *including international law and Treaty obligations*' (emphasis added), in addition to the persistent refusal to modify the law to remove the blanket ban on prisoner voting and the recent statement of the Prime Minister to seek to derogate from the ECHR with regard to its application to troops during military engagements.

guarantee is lacking. Instead, anti-discrimination and equality law in the UK has developed on a statutory basis. EU law has performed a similar function to a constitutional protection in other countries as well as propelling positive improvements. Without EU law, the legislature would be free to repeal any parts of the Equality Act 2010 it wished to. This lack of constitutional protection is only partly compensated for by the European Convention on Human Rights (ECHR) as domesticated under the Human Rights Act 1998 (HRA). In any event, the future of the HRA is itself uncertain.

5. We make the following recommendations to ensure that the UK continues to vigorously uphold social rights:
 - a. Non-regression in relation to the social rights currently protected by EU law.
 - b. Increased attention and respect for the UK's remaining international commitments.
 - c. Increased scrutiny by the JCHR.
 - d. EU law should continue to be a source of inspiration for the development of UK law.

3. EU Law and Social Rights

6. EU law has distinct advantages over national and international law protections of social rights. First, EU law provides a better remedy for those whose rights have been breached by legislation. The HRA may be used to interpret legislation in a manner compatible with Convention rights, so far as possible.² However, legislation which cannot be interpreted to protect rights may only be declared incompatible.³ Ultimately, remedies are dependent upon political intervention to protect rights. Directly effective EU law, however, overrides national law and can be used to disapply legislation which contravenes social rights protected by EU law.⁴ It is unlikely that any proposed British Bill of Rights would empower the UK courts to strike down legislation contravening human rights. If anything, debate surrounding the proposed reforms suggest a weakening in the role of courts.
7. Second, directly effective provisions of EU law may impose obligations on private parties, which is of specific importance when protecting social rights against private employers. This is not possible through international law. Although domestic legislation may be enacted which imposes obligations on private individuals, Brexit means that human rights protected by EU law can no longer be used to supplement these obligations when they fall short of the standard of rights found in the EU. The HRA only binds the State and private bodies carrying out public functions.
8. Third, the EU Charter's reference to a wide range of social rights provides a prompt to the EU Commission to initiate legislation to

² Human Rights Act 1998, section 3(1).

³ Human Rights Act 1998, section 4.

⁴ See, e.g., *R v Secretary of State for Transport ex parte Factortame (2)* [1990] UKHL 13, [1991] 1 AC 603 and *Benkharbouche v Embassy of Sudan* [2015] EWCA Civ 33.

protect social rights, often through Social Dialogue including trade unions and employers' representatives. This impetus towards continued progress will not be reflected in domestic law. Although the proposed 'Great Repeal Bill' may preserve rights in the short-term, the impetus appears to be towards deregulation and removal of social rights.

9. Fourth, although international law provides protections of social rights, these provisions do not have the same precision and specificity of European legislation.
10. Fifth, EU law is subject to the oversight of the Court of Justice of the European Union, whose rulings are binding on the Member States. Moreover, international law documents designed to protect social rights have been used as a source of general principles of Community law, effectively incorporating these provisions into EU law.

4. Working Time

11. One of the most remarkable legal and political achievements of European law has been Directive 93/104/EC (WTD) concerned with the organisation of working time.⁵ The aim of the Directive is to set down 'minimum safety and health requirements for the organisation of working time'. To this end, the Directive specifies minimum rest periods in the form of daily rest (11 consecutive hours in a 24 hour period),⁶ rest breaks during working days longer than 6 hours (duration to be determined by collective agreements or, failing that, by national legislation),⁷ and a weekly rest period (an uninterrupted period of 24 hours in a seven-day period).⁸ The Directive also posits a maximum weekly working time of 48 hours,⁹ and establishes a right to paid annual leave of four weeks that may not be replaced by an allowance in lieu, except on termination.¹⁰ Article 31(2) of the EU Charter provides that 'Every worker has the right to limitation of maximum working hours, to daily and weekly rest periods and to an annual period of paid leave.' The standards set out in the Directive can be understood as giving precise content to the general social rights set out in Article 31(2).

12. Prior to the implementation of the WTD, the UK model of working time regulation relied upon two principal mechanisms. The first mechanism was the setting of working time standards through sectoral collective agreements on an industry-wide basis. This, however, excluded workers who were not organized, particularly women workers. The

⁵ Council Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organization of working time [1993] OJ L307/18 ('WTD').

⁶ *Ibid* art 3.

⁷ *ibid* art 4.

⁸ *ibid* art 5.

⁹ *ibid* art 6.

¹⁰ *ibid* art 7.

second mechanism was through the common law, and especially the employer's implied duty of care in the contract of employment. Where excessive working hours damages the employee's physical or psychological health, an employee can recover damages for the injuries resulting from the breach. Recovery was subject to strict rules on reasonable foreseeability in the common law.

13. The removal of the WTD framework will lead to a significant deterioration in the protection of the worker's rights, including the limitation of maximum working hours, to daily and weekly rest periods and to an annual period of paid leave. Sectoral collective bargaining has now largely disappeared from the private sector, removing an essential component of the pre-WTD protections.

14. The worker will then need to rely upon her contract of employment as a source of protection. Given the inequality of bargaining power between employers and workers, many workers may be unable to negotiate the necessary level of protection in their contract that meets the fundamental rights standard in Article 31 (2). This would be especially problematic where individuals are engaged in very precarious work, such as on zero hours' contracts. The Court of Justice has adopted a very protective approach in applying the Directive's rights to workers engaged in precarious work.¹¹

15. The fallback in very serious cases will be to sue for damages for breach of the implied duty of care in the contract of employment. This is undesirable for four reasons. First, it is better to avoid the causing of physical or psychological injury in the first place by having a system of effective working time protections that prevent workplace injuries by

¹¹ Case C-173/99 *R v Secretary of State for Trade and Industry Ex p BECTU* [2001] ECR I-488.

establishing healthy working time practices. Second, litigation is expensive, especially in the light of increased court and tribunal fees. This is especially problematic given the legal and medical complexities in claims for psychological injury at work through the common law. Third, there are no implied terms in the contract that enumerate the rights specified as fundamental in Article 31 (2). Finally, the Directive provides for the flexible implementation of social rights. It preserves flexibility in implementation for national governments, and it preserves flexibility for employers and workers in tailoring social rights to particular workplaces through negotiation.¹² Expensive litigation on the contract of employment is, by contrast, rigid and inflexible.

¹² For discussion of the derogations, see Alan Bogg, 'Working Time Regulation in Europe', in Alan Bogg, Cathryn Costello and ACL Davies (eds), *Research Handbook on European Labour Law* (Elgar, in press 2016)

5. Equality and Non-Discrimination

16. In most jurisdictions, the right to equality is found in a constitutional bill of rights, which underpins statutory protection and protects against legislative attempts to weaken or repeal them.

17. The absence of a written constitution in the UK means that such a constitutional guarantee is lacking. Instead, anti-discrimination and equality law in the UK has developed on a statutory basis culminating in the Equality Act 2010. Throughout this development, EU law has played a powerful role in protecting equality rights against erosion and in pushing forward expansion. For example, it is due to EU law that there are rights to protection against pregnancy discrimination,¹³ to equal pay for work of equal value,¹⁴ and to protection against discrimination at work on grounds of sexual orientation, religion and age.¹⁵ Because EU law is binding, courts are required to interpret statutes consistently with EU law; the legislature is required to enact appropriate legislation; and, in some contexts, individuals are given direct rights against their employers.¹⁶ EU law has performed a similar function to a constitutional protection in other countries. Without EU law, the government would be free to repeal any parts of the Equality Act 2010 it wished to, subject to Parliamentary approval. We have already seen significant undermining of non-discrimination rights through the imposition of tribunal fees, which have deterred very large numbers of applicants. Even without express repeal, there is a risk of further undermining through such devices as the increase in

¹³ C-32/93 *Webb v EMO Air Cargo Ltd* [1994] IRLR 482 (ECJ)

¹⁴ C-61/81 *Commission of the European Communities v United Kingdom* (1982) ICR 578 (ECJ)

¹⁵ Council Directive 2000/78/EC

¹⁶ Case 43/75 *Defrenne v Sabena* [1976] ECR 455 (ECJ)

qualification periods and the narrowing of the definition of 'worker' for the purpose of qualifying for protection.

18. This lack of constitutional protection is only partly compensated for by the ECHR as domesticated under the HRA. Article 14 of the ECHR requires states to ensure the enjoyment of Convention rights without discrimination on a range of grounds. The ECHR is wider than EU law in that it covers a wider list of grounds and applies to all Convention rights. However, it does not reach into the heartland of EU anti-discrimination law, namely workers' rights.

19. This is for three main reasons. First, Article 14 is not a self-standing right but requires proof that the issue falls within the ambit of a substantive right. Although the concept of 'ambit' has been widely interpreted, it remains the case that Article 14 is limited to other Convention rights.¹⁷ There is no express right to work under the ECHR, and although a recent case against Turkey found that sex discrimination against a worker could fall within the ambit of Article 8 (respect for private and family life), this is an isolated case and only appears to apply in the public sector.¹⁸ The UK has not ratified Protocol 12 of the Convention, which does give a self-standing right to equality. Second, the Convention is only binding on the State and not on private bodies except when performing public functions. This excludes private employers. EU law, at least so far as is the right to equal pay is concerned is horizontally directly effective.¹⁹ Third, the remedies are limited to declarations of incompatibility or interpretation of statutes; whereas EU law can override domestic law. In any event, the future of the HRA is itself uncertain.

¹⁷ *Belgian Linguistics (No 2)* (1968) 1 EHRR 252 (European Court of Human Rights)

¹⁸ *Boyraz v Turkey* (2015) IRLR 164 (ECHR)

¹⁹ *Defrenne* (n 16).

6. The UK's Remaining International Commitments

20 Protections under international law, although they exist, are less specific and do not have the same binding power, depending largely on political commitment. However, Brexit does not result in an international legal vacuum. The UK is bound by a series of United Nations (UN) and International Labour Organisation (ILO) treaties. The problem is that these commitments are almost completely ignored in UK legal and political discourse. There are differing opinions on the role of international law in UK domestic courts. The UK is a dualist system, meaning that an Act of Parliament is necessary to give domestic effect to the treaty. The orthodox position is that the unincorporated treaty is non-justiciable and cannot be given direct effect in domestic law.²⁰

21 The core UN treaties all protect a robust right to work. Every person has a right to gain a living by work, to form and join trade unions and to strike.²¹ The UK has an obligation to ensure just and favourable working conditions: fair remuneration that allows for a decent living, equal pay for work of equal value, safe and healthy working conditions, opportunities for training and promotion, limitation of working hours, holidays with pay and rest and leisure.²²

22 The status specific treaties go a step further and protect aspects of labour crucial to different identity groups. The Convention on the

²⁰ *J H Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1990] 2 AC 418.

²¹ Article 6, 8(1)(a),(d) International Covenant on Economic, Social and Cultural Rights 999 UNTS 3 (entered into force 3 January 1976] (ICESCR); Article 5(e)(i), Convention on the Elimination of Racial Discrimination 660 UNTS 195 (entered into force 4 January 1969) (CERD); Article 11(1)(a), (c) , Convention on the Elimination of All Forms of Discrimination Against Women 1249 UNTS 13 (entered into force 3 September 1981) (CEDAW); Article 27(1) Convention on the Rights of Persons with Disabilities A/RES/61/106 (CRPD); Article 22, International Covenant of Civil and Political Rights 999 UNTS 171 (entered into force 23 March 1976).

²² Article 7, ICESCR.

Elimination of All Forms of Discrimination Against Women guarantees women's equality in all aspects of employment and specifically requires the UK to prohibit pregnancy discrimination, to introduce maternity leave with pay and to promote child-care facilities to enable parents to combine family and work responsibilities.²³ The Convention on the Rights of the Child protects children from economic exploitation and from work that interferes with children's health and education.²⁴ The Convention on the Rights of Persons with Disabilities requires the UK to prohibit disability discrimination, promote employment opportunities for disabled people and ensure reasonable accommodation in the workplace.²⁵

23 The UK has ratified several ILO treaties on various aspects of labour law including child²⁶ and forced labour²⁷, discrimination²⁸, minimum age²⁹ and freedom of association,³⁰ collective bargaining³¹ and equal remuneration.³²

24 It is abundantly clear that the UK is in breach of international law if it does not uphold its treaty commitments. But at domestic level, little or no weight is given to this fact. There is a multi-faceted and sophisticated accountability procedure at both the UN and ILO which allows civil society organisations and individuals to hold the UK to account for its obligations. However, the recommendations from these

²³ Article 11(1) ,(2), CEDAW.

²⁴ Article 32(1), Convention on the Rights of the Child 1577 UNTS 3 (entered into force 2 September 1990) (CRC).

²⁵ Article 27, CRPD.

²⁶ C182 Worst Forms of Child Labour Convention, 1999 (No. 182).

²⁷ C029 Force Labour Convention, 1930 (No. 29); C105 Abolition of Forced Labour Convention, 1975 (No. 105).

²⁸ C111-Discrimination (Employment and Occupation) Convention, 1958 (No. 111).

²⁹ C138 Minimum Age Convention, 1973 (No. 138).

³⁰ C097 Freedom of Association and Protection of the Right to Organise Convention, 1948 (No.87).

³¹ C098 Right to Organize and Collective Bargaining 1949 (No. 189).

³² C100 Equal Remuneration Convention 1951 (No. 100).

procedures still depend on political good will to be implemented in the UK. This is in stark contrast to the ability of individuals to use directly effective provisions of EU law.

Specific Recommendations

25. Any Brexit negotiations should include a strong provision of non-regression in relation to the social rights currently protected by EU law. This would be consistent with existing and ongoing international commitments. The temptation to repeal specific UK legislation protecting social rights, following the coming into force of the proposed Great Repeal Bill, should be resisted.
26. Our existing commitments in international law in relation to social rights should be domesticated. This entails preferably national implementing legislation (subject to devolution issues). In addition, courts should develop the common law and interpret legislation in compliance with international obligations. Lord Kerr is pioneering a new approach specifically in relation to human rights. He argues that there are three ways the treaty can enrich domestic law: as (i) an aid to statutory interpretation; (ii) an aid to the development of the common law; and (iii) a basis for legitimate expectation.³³ Lord Kerr persuasively states that if the government has 'committed itself to a standard of human rights protection...it should be held to account in the courts as to its actual compliance with that standard.'³⁴
27. The scrutinising function of the JCHR should become even more important as regards the protection of these rights, especially in the absence of an EU scrutiny committee in the House of Lords.
28. The EU should continue to be a source of inspiration for future Parliamentary legislation, particularly as regards further developments in the field of social rights. Moreover, judges should take notice of developments in EU law, just as they currently do with Commonwealth

³³ *R (SG & Ors) v Secretary of State for Work and Pensions* [2015] UKSC 16 [235]

³⁴ *ibid.*

law and other comparable jurisdictions (which has included Civilian jurisdictions).