



The Potential Challenges to Equality Law in the UK

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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 legal academics—Professor Sandra Fredman, Director of the OxHRH and Rhodes Professor of the Laws of the British Commonwealth and the USA (University of Oxford); Professor Anne Davies, Professor of Law and Public Policy (University of Oxford); Professor Mark Freedland, Emeritus Professor of Employment Law (Oxford University); Professor Judy Fudge (University of Kent) and Dr Meghan Campbell, Deputy-Director of the OxHRH and Weston Junior Research Fellow (University of Oxford)—we have come together to explain the legal implications of Brexit to equality and non-discrimination in the UK.
3. This submission addresses the questions posed in a combined manner because of the interrelated nature of the legislation and case-law.

2. Executive Summary

4. Unlike most jurisdictions, the UK lacks a constitutional equality guarantee to underpin statutory equality rights and provide background principles to interpret statutes and develop the common law. Instead, equality law has developed on a statutory basis, culminating in the Equality Act 2010 (EA 2010). Throughout this process, EU law has played a crucial role in protecting against erosion and pushing forward expansion, similar to a constitutional guarantee. Article 14 of the European Convention on Human Rights (ECHR) partly compensates for the gap left by EU law, especially in that it has incorporated important principles of EU law, such as indirect discrimination. However, it is only binding on the state; it does not cover all rights, such as the employment field, and the continued existence of domestication of the ECHR, the Human Rights Act 1998 (HRA 1998), is itself precarious. Some further support is supplied by the commitments the UK has made to the right to equality in international human rights instruments.

5. Without EU law, the right to equality depends entirely on Parliamentary legislation. Although the EA 2010 is primary legislation which does not depend for its existence on EU law, there are now no direct impediments to repealing parts or all of it. We have already witnessed a subtle but substantial undermining of the protections in the EA 2010 through increases in tribunal fees, which have deterred significant numbers of claimants from pursuing their rights. Without recourse to the EU principle of real and effective remedies, the substantive rights in the EA 2010 could be further undermined by other similarly erosive measures, including increasing qualification periods, narrowing the definition of worker, decreasing compensation levels, shortening limitation periods etc. There is also a risk that the Great Repeal Bill will include numerous Henry VIII clauses, allowing government to repeal

primary legislation such as the EA 2010 or the HRA 1998 without recourse to Parliament.

6. To address these deficits, we recommend the following:
 - a. A preamble or purpose clause should be included in the EA 2010 stating the values which should guide interpretation to avoid overly narrow reading of the statute.
 - b. EU jurisprudence already included in the case-law of the UK courts should continue to be binding precedent. After exiting the EU, UK courts should continue to take note of and apply the case-law from the Court of Justice of the European Union (CJEU) on similarly worded laws.
 - c. There should be a principle of no regression, so that rights already granted because of EU law should not be removed.
 - d. There should be a strong presumption that equality law be interpreted consistently with the jurisprudence of the European Court of Human Rights (ECtHR) and the UK's remaining international commitments.
 - e. There should be included in UK law a statutory principle of effective remedies, contained in both ECHR and EU law, and it should be robustly applied.
 - f. Any repeal or amendment of the EA 2010 or HRA 1998 should be subject to full Parliamentary scrutiny and processes, taking into account the need to comply with the UK's international obligations.

3. The Role of the EU in Strengthening UK Equality Law

7. 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 equality rights. While constitutional equality guarantees do not prohibit legislatures from amending equality statutes, they require that governments and elected representatives seriously consider and justify amendments that may derogate from equality rights.¹ A constitutional guarantee of equality rights provides a basis for judges to adopt a principled approach to the interpretation of equality legislation and to eschew a narrow parsing technique to giving meaning to equality statutes.² It also promotes an approach to interpreting the common law and other equality and human rights statutes so that they are consistent with constitutional equality rights.³
8. The absence of a codified constitution in the UK means that a constitutional equality guarantee is lacking. Instead, anti-discrimination and equality law in the UK has developed on a statutory basis culminating in the EA 2010. Throughout this development, EU law has played a powerful role in protecting equality rights against erosion and in pushing forward expansion.⁴ For example, it is due to EU law that there are rights to protection against pregnancy discrimination,⁵ to equal pay for work of equal value,⁶ and to protection against

¹ *Vriend v. Alberta*, [1998] 1 SCR 492; *SEIU, Local 201 v. Ontario (Attorney-General)* (1997), 35 O.R. (3d) 508.

² *Ontario (Human Rights Comm.) and O'Malley v. Simpsons-Sears Ltd.* [1985] 2 SCR 536; J. Fudge, 'Dignity, Disadvantage, and Age: Putting Constitutional and Fundamental Rights to Work' in Ann Numhauser-Henning, ed., *Elder Law: Evolving European Perspectives* (Edward Elgar, forthcoming).

³ *Insurance Corp. of British Columbia v. Heerspink*, [1982] 2 SCR 145.

⁴ S. Fredman *Discrimination Law* 2nd ed (OUP, 2011)

⁵ *C-32/93 Webb v EMO Air Cargo Ltd* [1994] IRLR 482

⁶ *C-61/81 Commission of the European Communities v United Kingdom* (1982) ICR 578

discrimination at work on grounds of sexual orientation, religion and age.⁷ Because of its binding nature, courts are required to interpret statutes consistently with EU law. This means UK domestic legislation must be interpreted in a way that provides effective and substantive protection against discrimination⁸ and exceptions to equality rights and justifications for derogating from equality must be narrowly construed and rigorously justified.⁹ Furthermore, Parliament is required to enact appropriate legislation; and, in some contexts, individuals are given direct rights against their employers.¹⁰

9. In essence, EU law has performed a similar function to a constitutional protection in other countries. Without it, the UK government would be free to repeal any parts of the EA 2010 it wished to, subject to Parliamentary approval. Under EU law, the principle of equal treatment is treated as a fundamental legal norm and the provisions of the equality directives should be interpreted in a way that provides effective and substantive protection against discrimination.¹¹

⁷ Council Directive 2000/78/EC

⁸ *Case C-54/07 Centrum voor Gelijkheid van Kansen en voor Racismebestrijding v. Firma Feryn NV* [2008] ECR I-5187 and *Case C 415/10 Meister v. Speech Design Carrier Systems GmbH*, Judgement of the Court (Second Chamber) 19 April 2012.

⁹ *Case C-341/09 Petersen v. Berufungsausschuss für Zahnärzte für den Bezirk Westfalen-Lippe* [2010] ECR I-47, [60]; *Case C-447/09 Prigge v. Deutsche Lufthansa AG*, Judgement of the Court (Grand Chamber) 13 September 2011 at [56] and [72].

¹⁰ *Case 43/75 Defrenne v Sabena* [1976] ECR 455 (ECJ)

¹¹ *Feryn* (n 8); *GmbH* (n 8).

4. The Effect of Brexit on the Equality Act, 2010: The Great Repeal Bill

10. Although the EA 2010 implements EU law and is underpinned by it in the ways just explained, it is an Act of the UK Parliament. Thus, it does not depend for its effectiveness on the European Communities Act 1972 (ECA 1972) and will not be affected by the repeal of the ECA 1972 when the UK leaves the EU. It will remain in force unless and until Parliament chooses to repeal it. However, it seems likely that the government's proposed 'Great Repeal Bill' may contain so-called 'Henry VIII' clauses granting government ministers the power to amend or repeal primary legislation in order to disentangle national law from EU law. While there may be an argument for convenience here, given the scale of the task ahead, parliamentarians should be alert to this risk and its potential to undermine parliamentary sovereignty.

5. Reduction by Stealth: The Need for Effective Remedies

12. We have already seen significant undermining of non-discrimination rights through the imposition of tribunal fees, which has deterred very large numbers of applicants. Even without express repeal of the EA 2010, there is a risk of further undermining equality through such devices as increasing the number and scope of exceptions, loosening justifications for discriminatory behaviour, restricting the scope of equality protections, imposing caps on compensation, increasing qualifying periods and narrowing the definition of worker. One of the major rights to be lost on withdrawal from the EU is the right to seek a reference to the CJEU. The erosion of real and effective remedies will therefore not be capable of being appealed to the EU. The HRA, 1998 does not include Article 13 of the ECHR, which requires an effective remedy before a national authority. There is therefore a crucial need for a statutory principle of effective remedies.

6. The UK's Remaining International Commitments

(i) *European Convention on Human Rights*

13. The vacuum caused by the absence of EU law is partially compensated for by Article 14 of the ECHR as domesticated through the HRA 1998. Article 14 has often been regarded as a weak or parasitic right, since it only prevents discrimination in the enjoyment of Convention rights. The UK has not ratified Protocol 12 of the Convention, which does give a self-standing right to equality. However, in recent years, Article 14 has been 'emerging from the shadows.'¹² The ECtHR has begun to develop the conception of discrimination to include some central elements of substantive equality. In *DH v Czech Republic*,¹³ ECtHR, picking up on EU law, held that 'a difference in treatment may take the form of disproportionately prejudicial effects of a general policy or measure which, though couched in neutral terms, discriminates against a group.'¹⁴ Particularly important was its emphasis on the fact that indirect discrimination does not necessarily require discriminatory intent.

14. However, Article 14 is not a complete solution to leaving the EU legal regime. It is weaker in many respects than EU law. As a start, Article 14 does not comprehensively cover workers' rights, which is the primary area of application of EU anti-discrimination law. 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

¹² S Fredman, 'Emerging from the Shadows: Substantive Equality and Article 14 of the European Convention on Human Rights' (2016) 16(2) Human Rights Law Review 273.

¹³ *DH and Others v The Czech Republic* (2007), App no 57325/00 (ECtHR).

¹⁴ *ibid* [184].

an isolated case and only appears to apply in the public sector.¹⁵ 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.¹⁶ Third, the remedies under the HRA 1998 are limited to declarations of incompatibility or interpretation of statutes; whereas EU law can override domestic law. In any event, the future of the Human Rights Act 1998 is itself uncertain.

(ii) *The UN Human Rights Framework*

15. Through a series of United Nations (UN) treaties the UK has committed to ensuring equality in civil, political and socio-economic rights¹⁷ and is required to pay particular attention to ensuring equality for specific disadvantaged groups such as women,¹⁸ racial and ethnic minorities,¹⁹ children²⁰ and persons with disabilities.²¹ Equality at international law is defined as both formal and substantive.²² The treaty bodies which monitor the implementation of the UN treaties have developed a robust conception of equality. They have interpreted equality as requiring states to take positive measures to achieve equal empowerment; to create an enabling environment to achieve equality of results; and to

¹⁵ *Boyraz v Turkey* (2015), IRLR 164 (ECtHR).

¹⁶ *Defrenne* (n 10).

¹⁷ International Covenant of Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171; International Covenant of Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3.

¹⁸ Convention on the Elimination of All Forms of Discrimination Against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 3.

¹⁹ Convention on the Elimination of Racial Discrimination (adopted 21 December 1966, entered into force 4 January 1969) 660 UNTS 195

²⁰ Convention on the Rights of the Child (adopted 20 November 1980, entered into force 2 September 1980) 1577 UNTS 3.

²¹ Convention on the Rights of Persons with Disabilities (adopted 24 January 2007) A/RES/61/106.

²² Committee on Economic, Social and Cultural Rights, 'General Comment No 16 on equality between men and women' (2005) E/C.12/2005/3/

ensure the real transformation of opportunities, institutions and systems.²³

16. Although these commitments are almost completely ignored in domestic sphere, in the wake of Brexit these obligations and the work of the treaty bodies are an important source that can be used to strengthen the interpretation of the UK's equality and human rights statutes. There are differing opinions on the role of international law (both hard and soft 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.²⁴ On the other hand, Lord Kerr is pioneering a new approach specifically in relation to human rights. He argues that the treaties and the development of international human rights law by the treaty bodies should be used as an aid to statutory interpretation and to the development of common law.²⁵ Lord Kerr persuasively holds 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.'²⁶ It must, however, be recognized that the UN human rights framework is not as specific or precise as the EU legal regime.

17. Furthermore, there is a multi-faceted and sophisticated accountability procedure within in the UN framework which has overlooked potential to hold the UK to account for its international equality obligations. Civil

²³ Human Rights Committee, 'General Comment No. 26: Article 3 (The equality of rights between men and women)' (2001) UN Doc. CCPR/C/21/Rev.1/Add.10 [3]; Committee on the Elimination of All Forms of Discrimination Against Women, 'General Recommendation No. 25: Temporary Special Measures' (2004) CEDAW/C/GC/24 [8].

²⁴ *J H Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1990] 2 AC 418.

²⁵ *R (SG & Ors) v Secretary of State for Work and Pensions* [2015] UKSC 16 [235]

²⁶ *ibid.*

society organisations can provide reliable crucial information on the UK's law, policies and programmes during the periodic reporting process. Individuals can submit communications that the UK has breached its equality obligations. The problem is that the recommendations of the treaty bodies are not legally binding and the UK only has a good faith obligation to make any suggested reforms.

7. Conclusion

18. This submission has sought to identify a set of dangers that the fabric of the UK's anti-discrimination law might be eroded as the result of Brexit and has suggested the kind of safeguards which would be needed to avert those dangers. In particular, we have pointed out that those who are concerned to preserve that fabric might be lulled into a false sense of security by the fact that this body of regulation has been embedded in UK primary legislation – in the shape of the EA 2010 – and thus on the face of it does not appear to be immediately affected by Brexit. In fact, as we have argued in this submission, the UK Government's announced intention to propose a Great Repeal Bill indicates a partly concealed vulnerability to this body of regulation. The intention of the Great Repeal Bill is two-fold – on the one hand to transpose the existing dictates of EU law for the UK into the domestic law of the UK as an immediate measure of stabilization, but on the other hand to institute a program of subsequent de-Europeanisation of UK law by means of secondary or delegated legislation. We have pointed out that the UK's equality law might be exposed to such a kind of de-Europeanisation because, although it is already embodied in a UK statute, it has been sustained and in some measure controlled by EU legislation and the case-law of the CJEU. It is especially for that reason that this submission has emphasized the importance of recognizing a principle of non-regression with regard to anti-discrimination law in the face of Brexit, and has drawn attention to the domestic and other non-EU sources and underpinnings of the UK's equality legislation.

8. Specific Recommendations

19. We make the following recommendation to ensure robust equality law in the UK:

- a. At the very least, full Parliamentary sovereignty should be respected. Any repeal or amendment of the Equality Act 2010 should be subject to full Parliamentary scrutiny and processes, taking into account the need to comply with the UK's international obligations.
- b. A preamble or purpose clause should be included in the EA 2010 stating the values which should guide interpretation to avoid overly narrow reading of the statute. An example of best practice would be the preamble to the Ontario Human Rights Code.
- c. Much EU jurisprudence is now included in the case-law of the UK courts. Cases decided until the point of exit should continue to be binding precedent. After exit, it should be treated as a source of inspiration.
- d. There should be a principle of no regression, so that rights already granted because of EU law should not be removed.
- e. There should be a requirement that courts in the UK take note of and apply where appropriate future developments by the European Court of Justice of laws which are similarly worded.
- f. There should be a strong presumption that equality law be interpreted consistently with the jurisprudence of the ECtHR and the UK's remaining international commitments.

- g. There should be a statutory principle of effective remedies, contained in both ECHR and EU law, and it should be robustly applied. The gap left by the non-incorporation of Article 13 ECHR should be filled by such a principle.