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Equality law, Brexit and devolution

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Introduction

As the UK Government's Brexit negotiations continue, albeit at a snail's pace, and the EU (Withdrawal) Bill (EUW Bill) makes its way through Westminster's parliamentary process, it is perhaps timely to consider Brexit's likely impact on the UK's equality framework and to ask whether the UK's impending exit from the EU provides Scotland with an opportunity to go it alone in this respect. Under the current devolution arrangements "equal opportunities", with some limited exceptions, is a reserved policy area with key EU rights implemented almost exclusively through UK sources, notably the Equality Act 2010 (EA 2010). Human rights, in contrast, are devolved, although the relevant parts of the Scotland Act 1998 must be read alongside the UK-wide Human Rights Act 1998, and the Scottish Government has pledged a commitment to fulfil its international obligations and to "lead by example" (see: https://www.snp.org/nicola_sturgeon_speech_20_years_since_scotlands_devolution_referendum). This article sets out the relevant provisions of EU law, considers their impact on UK equality law and provides an early assessment of Scotland's prospects as a leader in this context.

The EU equality law framework

Equality and non-discrimination are hardwired into the EU's legal order. Constitutional equality guarantees are provided by the Treaty on European Union (TEU) and embedded in the EU's objectives by the Treaty on the Functioning of the European Union (TFEU), which contains articles regarding equality and non-discrimination in respect of nationality (art.18); equal treatment (art.19); free movement of workers (art.45) and equal pay (art.157). These articles provide legal bases for Directives in specific areas such as the Recast Gender Equality Directive (2006/54/EC), which prohibits discrimination in pay and promotes equality of treatment between women and men in employment and training and which is implemented in the UK through Pts 2, 5, 9 and 10 of the EA 2010. Primary EU legislation exists in the related area of work and family reconciliation with two Directives—the Pregnant Workers Directive (92/85/EEC), which covers maternity rights and the Parental Leave Directive (2010/18/EU), which provides leave rights for birth and adoptive parents—implemented by the UK's Employment Rights Act 1996 and Maternity and Parental Leave etc. Regulations 1999.

An additional suite of Directives provide rights to equal treatment in relation to working arrangements. The Part-time Workers Directive (97/81/EC) requires pro rata treatment of part-time workers, the Fixed-Term Workers Directive (99/70/EC) limits the scope of fixed term contracts and the Temporary Agency Workers Directive (2008/104/EC) provides that working conditions of temporary agency workers should at least be those that apply to direct recruits. These Directives are implemented by the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000, the Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2002 and the Agency Workers Regulations 2010.

Article 19 TFEU significantly widens the scope of EU anti-discrimination measures to incorporate sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation and provides the legal base for Directives on race (Directive 2000/43/EC, which covers employment, goods and services, housing, education and social protection) and sexual orientation, disability, age, religion and belief discrimination in employment (Framework Directive 2000/78/EC). In addition, Directive 2004/113/EC extends protection against gender discrimination to the provision of goods and services. These are all now implemented by the UK's EA 2010.

In 2010 the Charter of Fundamental Rights of the European Union (CFR) was given binding effect through its incorporation into the EU's constitutional law. Whilst not in itself guaranteeing any key rights, the CFR sets out and reaffirms the civil, political, economic and social rights of EU citizens and of all persons resident in the EU. The CFR's scope is extremely broad, providing 50 substantive articles, each of which covers at least one—and many several—rights and freedoms, organised into six chapters: dignity; freedoms; equality; solidarity; citizens' rights; and justice. It incorporates and updates the rights contained in the European Convention on Human Rights (ECHR) in line with changing social and economic circumstances. Furthermore, the CFR contains some additional protections in relation to social rights and nondiscrimination, which is given a wide application under art.21 CFR.

The impact of EU law on UK equality law

EU law's impact on the UK's system of equality law has been substantial. In the absence of a constitutional guarantee of equality in the UK, EU law has protected against the diminution of equality rights, enhancing and extending them in the fields of employment, the provision of goods and services, housing, education and associated areas of social protection. The EU's social and economic agendas have shaped UK policy in areas such as work and family reconciliation.

Alongside the obligation to implement Directives, the UK has had to take account of the Court of Justice of the EU's (CJEU) jurisprudence, which recognises equality and non-discrimination as fundamental principles of EU law. Using the principle of direct effect, UK citizens can claim rights that have not been adequately implemented in domestic law. The UK's courts and tribunals can refer cases to the CJEU for preliminary rulings on the interpretation of EU law (art.267 TFEU) with impacts including the removal of the compensation cap for discrimination claims (*C-271/91 Marshall v Southampton and South West Hampshire AHA (No.2)* [1993] I.R.L.R. 445), the inclusion of transgender people under sex discrimination law (*C-13/94 P v S and Cornwall County Council* [1996] I.C.R. 795), and the introduction of discrimination by association (*C-303/06 Coleman v Attridge Law* [2008] E.C.R. I-5603). The European Commission's powers to bring infringement proceedings against Member States for noncompliance with EU law under art.258 TFEU have led to direct improvements in areas such as equal pay—see Case C-61/81 *Commission of the European Communities v United Kingdom* [1982] I.C.R. 578.

Brexit and equality law

Brexit will not lead to the disappearance of or reduction in equality protections overnight. The EA 2010 is not reliant on the European Communities Act 1972 and will remain in force following the UK's departure from the EU. The rights currently provided by the EA 2010 are fairly extensive and, in many cases, go beyond what is required by EU law. Even where such provisions are underpinned by EU law, their application on exit day has been guaranteed by cl.2, 3 and 4 of the EUW Bill. However, reductions in equality standards could emerge over time as the EUW Bill by no means preserves the current scope and levels of protection beyond Brexit, leaving equality law vulnerable to change and neglect.

The so-called Henry VIII clauses (cl.7–9 of the Bill) raise particular concerns that EU-derived equality laws contained in secondary legislation, such as those outlined above that

provide equal treatment in relation to working arrangements, will be vulnerable to amendment with little or no parliamentary scrutiny. Furthermore, the EUW Bill empowers government ministers to repeal or amend primary legislation in order to decouple UK law from EU law following exit day (cll.7, 8 and 9). This poses certain risks, for example, the exceptions to the EA 2010 (ss.191–197 and associated regulations) and justifications for discrimination (ss.13(2), 15, 19(2)(d)) could be increased or extended. Amendments to UK equality law made as a result of CJEU case law, such as the lifting of the compensation cap for discrimination claims, could also be vulnerable. Furthermore the lack of any constitutional or common law guarantee of equality or express provision in the EA 2010 that “due regard” must be given to equality in the drafting and interpretation of any legislation outside of the Act means that the Westminster Parliament is not prevented from enacting discriminatory legislation.

EU equality law will continue to develop beyond Brexit and this “lost impact” is impossible to determine. Although the EU has undoubtedly been an engine of change in this area, whether that will continue given the critical point it has reached in its own existential journey is difficult to predict. Two obvious channels for future development are the CFR, which is still at a fledgling stage, and the jurisprudence of the CJEU, which has already had considerable influence on the UK’s equality framework.

The CFR has great potential: as well as containing rights that go beyond those of the ECHR, it does not limit its scope in the way that the EA 2010 does by confining itself to a set number of protected characteristics so that its coverage could be extended over time. At the time of writing, cl.5(4) of the EUW Bill expressly precludes the CFR’s application in the UK beyond exit day with opinion divided on the significance of this. Several amendments to the Bill have been tabled which require the CFR’s retention (see https://publications.parliament.uk/pa/bills/cbill/2017-2019/0005/amend/euwithdrawal_rm_cwh_0911.pdf) with the Government’s response being that the CFR *cannot* be retained following Brexit as it “only applies to Member States when acting within the scope of EU law” (<https://www.gov.uk/government/news/david-davisopening-statement-at-the-second-reading-of-therepeal-bill>).

Turning to the CJEU, its future as an institution of UK equality law is uncertain at the time of writing. The UK Government appears to be holding on to this “red line” in the Brexit negotiations, despite widespread criticism, including from the former head of the Government Legal Department (<https://www.theguardian.com/politics/2017/aug/19/brexit-european-court-of-justice-theresa-may-foolishattack>). If the court does not retain jurisdiction following Brexit, the loss of its impact on the interpretation of equality law will be felt alongside a tangible threat to the erosion of effective and accessible remedies for breaches of equality and human rights law. This is particularly salient as the Human Rights Act 1998 does not currently incorporate art.13 ECHR, which requires an effective remedy before a national authority.

Scotland

Under the devolution settlement, “equal opportunities”, which includes language and social origin or other social attributes alongside sex, marital status, race, disability, age, sexual orientation and religion or other political opinions, is reserved subject to certain limited exceptions. When originally enacted under the Scotland Act 1998 these exceptions gave the Scottish Parliament powers to encourage equal opportunities and to impose duties on Scottish public authorities to perform functions in a way that paid due regard to the requirements of equality law. The Scotland Act 2016 expanded the scope of the exceptions to enable the Scottish Parliament to extend and supplement the EA 2010 in certain respects, for example, in relation to non-executive appointments to the boards of Scottish public authorities, which has recently been

used to introduce gender quotas (see the Gender Representation on Public Boards (Scotland) Bill).

Without EU law, the UK's equality framework does contain some opportunities for enhancement. The public sector equality duty (PSED) provided by s.149 of the EA 2010, which requires public authorities to take action to promote equality of opportunity, although largely procedural in nature, offers some limited scope for improvements. In seeking to be distinctive in this area, Scotland might be best served by furtherance of the PSED, in particular the Scottish-specific duties. Furthermore, the Scottish Government's pledge to enact the socio-economic duty under Pt 1 of the EA 2001, which compels public authorities to give due regard in strategic decision-making to the reduction of socio-economic inequalities, might provide an opportunity to strengthen the equality framework in Scotland. However, the impact of the former remains unassessed and the latter is likely to be severely limited in scope and effect.

The devolution of human rights means that there is some potential for divergence in this respect. Scotland already has its own Human Rights Commission that oversees a Scottish National Action Plan on Human Rights (SNAP), whose redraft in 2017 could contain commitments to implement international obligations possibly through incorporation of international treaties into Scots law. However, unlike EU law, international law does not guarantee specific rights and so any resulting development is likely to be weaker in substance and effectiveness than that which might emerge by way of the CFR. Furthermore, provision is patchy; for example, there are comprehensive instruments in some areas such as gender (e.g. the UN Convention on the Elimination of All Forms of Discrimination against Women) with others such as sexual orientation less well served. This could contribute to a hierarchy of equality protections that EU law has sought to overcome. Perhaps most pertinently any attempt by the Scottish Parliament to enact new equality provisions, whether or not they originate from international law, is likely to be precluded by the current devolution settlement under which equality law remains reserved.

Conclusion

It is apparent that EU law and policy has had a major influence on the UK's equality framework. The main concerns regarding the UK's exit from the EU in this context relate to the potential diminution or reduction in equality protections that will be felt over time without the continuing influence of the EU's constitutional provisions and CJEU's jurisprudence. Despite the fact that the UK has implemented EU equality law relatively well, there is still much at stake and it is impossible to predict at this stage how developments will unfold with regard to this important area of law. Although there appears to be little that the Scottish Government can do in its efforts to distinguish itself from its Westminster counterpart, one possibility does exist. When, having reached agreement with the EU, the Westminster Government seeks the necessary support north of the border to make Brexit a reality, Scotland's 62 per cent remain vote could perhaps be used as a means of exacting enhanced powers for Scotland in social policy areas such as equality.