Chapter 16: Equality law after 'Brexit' – perverse or reverse "repatriation"?[1]

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1. Introduction

Discussing equality under the overall heading "Repatriation of Competences" in a post-"Brexit" book constitutes a dual challenge. With all its ambiguity, the term "repatriation" allures to the populist slogan to "take back control",[4] indicating that policies which the EU imposed on the UK, will now no longer be imposed. There is some doubt whether this ever applied to anti-discrimination law and policy. First, any repatriation appears as more incomplete than in other areas of law: the UK remains under an obligation to maintain the EU equality acquis in Northern Ireland according to Article 2 of the Protocol Ireland/Northern Ireland annexed to the Withdrawal Agreement, in addition to any obligations which may derive from the level playing field obligations contained in the Trade and Cooperation Agreement. Second, the UK adopted anti-racism legislation in the late 1960s, before it became a Member State, and had started the process of adopting sex equality legislation in parallel to the finalisation of EEC membership in 1973. As a consequence, UK legislation and case law were models for EU anti-discrimination law, rather than EU concepts being imposed on the UK. This raises the question in how far the UK's secession from the EU ("Brexit") may trigger reverse repatriation, in that the EU may be motivated to rid itself from an area in law and policy which has been informed by its former Member State.

Framing the discussion through the dual lens of incomplete repatriation and potential future reverse repatriation, this chapter proceeds as follows: The next section will offer an academic reflection on the different narratives underlying anti-discrimination law in the UK, and its constituent parts, on the one hand, and in the EU's Continental Member States and he EU itself on the other hand. The third section investigates the degree of "repatriation" achieved in the field of anti-discrimination law, starting with Northern Ireland, and progressing to Great Britain (England, Scotland and Wales). The fourth section considers the extent to which the UK's secession may endanger the continuing existence of EU anti-discrimination law as we know it, while the conclusion draws the chapter's achievements together.

The chapter addresses EU anti-discrimination law as the main emanation of equality law and politics in the EU. This body of law is encapsulated in six Directives banning discrimination on grounds of racial and ethnic origin as well as sex in employment, social security, social

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[4] See (Cygan, et al., 2020, pp. 105, 1606)

assistance and access to and provision of goods and services, as well as discrimination on grounds of religion and believe, disability, sexual orientation and age in employment.[5] A draft directive of 2008 aiming to extend the protection from discrimination on these grounds to social security, social protection and access to and provision of goods and services is still pursued by the Commission.[6] We do not submerge anti-discrimination law in human rights guarantees more generally,[7] or treat it as a subsection of employment law,[8] although equality is a human right, and antidiscrimination law is mainly applied in the employment sector. While this edited collection is exceptional in that it does not demote equality to the low politics of 'Brexit',[9] we draw on the small body of literature on the (anticipated) consequences of 'Brexit' for anti-discrimination law in the UK, Northern Ireland and the EU.[10]

2. UK and EU Anti-discrimination law – diverging narratives?

Origins of equality law in the UK – leaning towards US inspiration and liberal values

The origins of equality law in the United Kingdom (UK) of Great Britain (GB) and Northern Ireland (NI) date back to before EEC membership, particularly relating to race discrimination. The Race Relations Act 1965, as the first piece of legislation to address racism, and its successor, the Race Relations Act 1968 banning discrimination beyond public places, was inspired by US North American anti-discrimination legislation that responded to mass protest against racial segregation in the 1960s.[11] While sex discrimination law was adopted congruently with EEC membership, from the 1970s race discrimination and sex discrimination were conceived as a single policy field, which continued to follow

[5] Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services [2004] OJ L 373/37; Directive 2006/54/EC of the European Parliament and the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation [2006] OJ L 024/23; Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin [2000] OJ L 180/22; Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [2000] OJ L 303/16; Directive 2010/41/EU of the European Parliament and the Council of 7 July 2010 on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity and repealing Council Directive 86/613/EEC [2010] OJ L 180/1; Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment between men and women in matters of social security [1978] OJ L 6/24. In literature, the directive on pregnant workers (Directive 92/85/EEC OJ L 348 28.11.1992, p. 1, see on this (Guerrina & Masselot, 2018) and directives on equal treatment for so-called atypical workers (see (Bell, 2011, pp. 623-625) are sometimes included in the notion as well.

[6] (European Commission, 2020a), p. 5 with footnote 20

[7] This constitutes a typical approach in the "Brexit" literature, see, for example (Murray & Rice, 2021; Solomon, 2021)

[8] Again, a typical approach, see for example, (Ford, 2016; Moyer-Lee, 2021)

[9] (Guerrina & Masselot, 2018)

[10] See, for example, (Ahmed, 2019; Dustin, et al., 2019; McColgan, 2016; O'Cinneide, 2018; Schiek, 2018a, pp. 383-4, 388-90, 394-5; Suk, 2017)

[11] (Hepple, 2006)

developments across the Atlantic in the US rather than those in the UK's neighbours in the European Communities.[12]

The momentum driving UK and US anti-discrimination law consisted of civil rights movements, demanding equal rights for Black people in US America and for Catholics in Northern Ireland, with the feminist movements adding another dimension, as did the disability movements of the 1980s. In its response to social movements, UK (and US) anti-discrimination law is historically contingent.[13]

Especially in the US, anti-discrimination policy is said to have constituted a peculiar amalgam between welfare policy and civil rights policy. Race and class have been portrayed as inseparable categories in US society,[14] and the aversion of US American politics to referring to class as a basis has been identified as the reason why disability policy followed a civil rights model instead of a social justice model.[15] Historically, anti-discrimination law succeeded on the basis of the liberalistic values informing the civil rights movement, while anti-welfare politics were cut back as early as 1970.[16]

Similarly, the continuing ascent of UK anti-discrimination law after 1974 could be ascribed to its easy alignment with liberal values. This made it acceptable to a government that opposed openly welfarist policies. Nevertheless, anti-discrimination law in the UK is to the present day perceived as an element of social policy. A short paper by the late Bob Hepple encapsulates this view. It argues that, while rights enshrined in the UN Pact on Economic, Social and Cultural Rights are rarely enforceable in national courts, anti-discrimination litigation offers a way to realise economic and social rights by enforcing them against non-state actors.[17]

The origins of UK anti-discrimination law in the United States have been perceived as a mixed blessing. On the one hand, the success of the civil rights and the feminist movement resulted in effective litigation campaigns imbuing those discriminated against with agency against discrimination, and at times even against structurally exclusionary practices. On the other hand, the prevalence of litigation and rights policies also impacted on effectiveness. US anti-discrimination law in particular through the development of increasingly technical definitions. The influence of the more purposive interpretation of concepts by the EU Courts seemed to be all that kept the UK from slipping down the same road.[18] On a more fundamental level, an individual litigation culture was identified as the cause for anti-discrimination law being ill-suited to address the structural problems underlying discrimination.[19]

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[12] (McColgan, 2016)

[13] (Fredman, 2011, pp. 38-108), relating to the British context.

[14] (Koppelman, 1996, pp. 97-100) with reference to Myrdal

[15] (Quinn & Flynn, 2012)

[16] (Abramovitz, 2002)

[17] (Hepple, 2015)

[18] (Búrca, 2012)

[19] (Ahmed, 2019, pp. 523-7)

On both sides of the Atlantic, anti-discrimination law addressed private actors, and thus the markets as the institution distributing opportunities and assets. Neither in the US nor in the UK was the control of discriminatory state action high on the agenda of national policy makers. Further commonalities emerged in the creation of institutions ensuring the adequate enforcement of the legislation, such as the Equal Opportunities Commission and the UK Equality Commission. Partially this was mere necessity considering the extortionate cost of enforcing individual rights in an adversarial legal system where the parties' counsel performs the public service of researching the law. However, this model also has the advantage of generating expertise in anti-discrimination law and policy, facilitate implementation of concepts other than through litigation, and generally promote the relevant legislation to market participants. It was thus viewed as a model for implementing EU anti-discrimination law more effectively in those jurisdictions to which it was alien.[20]

Origins of Equality and anti-discrimination law in Continental Europe

In the EU's continental member states, anti-discrimination law never acquired the same status of prominence as in the UK and the US, and remained an alien element with novelty character well into the 1980s. When it emerged, it was based on a feminist movement preceding any anti-racism movement and disability movement. It was also rooted in two sets of constitutional traditions, which both resulted in anti-discrimination law and policy addressing the state and its institutions with priority over those who factually excluded minorities and women, namely employers, landlords, banks and other financial institutions.

The dominant constitutional tradition is rooted in the fact that most EU Member States today are constitutional democracies characterised by restricting acts of legislators as well as any public authority through constitutionally guaranteed rights. This feature was introduced in the aftermath of the atrocities of World War II and for a number of Member State after the Iron Curtain with its lack of civil rights protection came down.[21] Constitutional guarantees of equality before the law (and the state) were part of this concept.

As the constitutional equality clauses were ranked equally with libertarian rights such as right to property and freedom of economic activity, extending anti-discrimination laws to controlling the private sector remains a constitutional problem in continental EU Member States. Further, in the aftermath of World War II, racist discrimination in particular was cast as a criminal offence, which would inhibit proactive employment of concepts such as indirect discrimination.[22] All this limited the effectiveness of anti-discrimination law, if it existed at all.

Further on, and perhaps on the positive side, there is a longstanding tradition of minority rights protection, harking back to the Treaty of Versailles (1919). This tradition still is relevant to Member States acceding from 1994 onwards.[23] It aims at protecting groups not only from discrimination, but also from assimilation. That group dimension, while it has

[20] (Howes & Wank, 2005), in relation to implementing Directive 2000/78/EC.

[21] (Stone Sweet, 2011; Stone Sweet, 2017)

[22] (Möschel, 2014, pp. 120-127)

[23] (Nousiainen, 2011)

disadvantages especially for gender equality,[24] also has the advantage that it can easier accommodate positive action, and in particular compulsory quotas.[25]

On a more fundamental level, anti-discrimination laws US and UK style rankle with Continental welfare states. They pursue the wider aim of enhancing equality between the social classes. This goal did not easily accommodate with policies stressing differences between individuals, as anti-discrimination law does.[26]

The EU's narrative in anti-discrimination law

The EEC's and the EU's narrative on anti-discrimination law and policy rests on both UK/US and Continental traditions, while also entailing specific elements.

It shares with the UK/US tradition the focus on markets, and the ambition to legally compel powerful private parties such as employers, landlords and financial institutions to refrain from discrimination, i.e. unjustified unequal treatment on specific grounds. These grounds are enumerated, rather than retrieved from an open list as in the Continental constitutional tradition, which also is the basis of the ECHR. The EU grounds for anti-discrimination law are racial and ethnic origin, sex, disability, age, religion and belief and sexual orientation (article 19 TFEU). The Continental tradition is reflected in the more recent Charter of Fundamental Rights for the European Union, which features an open-ended equality clause in Article 21 and the general principle of equality before the law in Article 20, while specifying an obligation to realise gender equality in Article 23.

The specific elements of EU equality law consist of its market-focused orientation and its ability to create directly effective justiciable rights on which citizens can rely before national courts. The first element harks back to the EEC's main objective to create a Common Market as a method to improve the living and working conditions of European citizens. Banning discrimination on the basis of national origin of people, services and goods is one of the traditional methods to break down barriers of trade. In the EEC, the combat of nationality discrimination in the framework of free movement of workers was not a priority in the early days, because it was phased in for the second stage of integration, resulting in adopting two regulations in 1968 and 1970 respectively. The ban on pay discrimination against women, then contained in Article 119 EEC (now 157 TFEU), by contrast, required implementation in the first stage, ending in 1966. This initiated the fate of sex equality law becoming the Community's first and most significant engagement in social policy, which at the same time was tied to market-making. While Gillian More, in a seminal piece in 1999, traced the development of equal treatment "from market-unifier to human right",[27] Streeck relegated the EU's gender equality law and policy to an inferior place of "encapsulated" [28] social policy, claiming that national social policy did not view equal treatment as relevant. This argument overlooked how the UK placed anti-discrimination at the same level as other

[24] (Schiek, 2005)

[25] (Henrard, 2011)

[26] Accordingly, EU anti-discrimination law has been caricatured as a merely neo-liberal endeavour (Somek, 2011); for a counter-critique see (Schiek, 2014).

[27] (More, 1999)

[28] (Streeck, 1995, p. 44)

social policies, and also neglected the equal pay movement in German, Belgium and France, as well as at Community level.[29] Nevertheless, sex equality law in the European Union remained focused on enabling women's participation in markets, especially employment markets, even though the ECJ claimed that it also served human rights policies, firing feminist critique in particular emerging from UK based researchers. [30] This fired feminist critique, in particular emerging from UK based researchers, that the

Secondly, EU equality law emerged as one of the main fields where direct effect of citizens' rights under EU law were developed: the principle of direct effect of Treaty provisions derives from the Defrenne-litigation, i.e. the judicial branch of the European equal pay movement of the 1960s and 1970s[31]. The Defrenne litigation also produced the recognition of 'elimination of discrimination on grounds of sex" as "part of the fundamental rights' under Community law",[32] thus confirming the evolution of equal treatment from market unifier to human right as stated by More. Case law on the equal treatment directive (women and men) in the 1980s developed the principle that national courts must derive effective remedies even if these are not specified in national law;[33] and case law on age discrimination under Directive 2000/78/EC repeatedly confirmed the principle that bans on discrimination established in directives are horizontally effective, even if the relevant Member State has not correctly implemented the directive. This was latterly based on the Charter of Fundamental Rights for the EU. [34] All this created legal opportunity structures, enabling strategic litigation in particular in relation to equal treatment of women and men.[35]

The effective enforcement of EU equality law as a body of individual rights through the supranational mechanism involving the CJEU distinguishes this field of law from UK law. Elspeth Guild has characterised the notion of rights enforceable against governments and legislators as structurally alien to UK law. [36] While UK equality law is strong in providing institutional and judicial remedies, enforcing rights against governments and legislators clashes with the British conception of parliamentary democracy, which elevates sovereignty of parliament above human rights. As a consequence, the British Human Rights Act only provides for the Supreme Court to declare that legislation violates human rights, without legal consequences. In contrast, in constitutional democracies courts can invalidate such legislation. EU law has thus been perceived as replacing the constitutional protection of

[29] Catherine Hoskyns (1996b) criticised this as "encapsulating feminism", since she had revealed the extent of feminist activity at work from the 1960s in the EEC and its Member States (Hoskyns, 1996a).

[30] For recent critical assessments see from a legal studies perspective (Benedi Lahuerta & Zbyszewska, 2018), from a political science perspective (Guerrina, 2021; MacRae, 2010; Guerrina & Wright, 2016), from an industrial relations perspective (Fagan & Rubery, 2018).

[31] ECJ 8 April 1976 Case 43/75 Defrenne II EU:C:1976:56

[32] ECJ 15 June 1978 Case 149/77 Defrenne III EU:C:1978:130, para 27

[33] ECJ 10 April 1984 Case 14/83 Van Colson & Kamann EU:C:1984:153

[34] ECJ (Grand Chamber) 22 November 2005 Case C-144/04 Mangold EU:C:2005:709; ECJ (Grand Chamber) 19 January 2010 Case C-555/07 Kücükdeveci EU:C:2010:21; more recently ECJ 4 December 2018 Case C-378/17 - Minister for Justice and Equality and Commissioner of the Garda Síochána EU:C:2018:979

[35] (Fuchs, 2013); on the limited scope of legal opportunity structures in relation to racial and ethnical origin see (Evans & Case, 2010); on strategic litigation for EU anti-discrimination law see also (Guerrero, 2020).

[36] (Guild, 2016)

human rights: after all, national law that violates EU law must be disapplied, which constitutes a functional equivalent to invalidation. This is the reason why EU anti-discrimination law had immense effects on UK anti-discrimination law. On the one hand, the strong tradition in litigating for equality in the UK ensured high-quality forensic arguments, also in cases before the ECJ. On the other hand, the more purposive interpretation of legal concepts by the ECJ contributed to overcoming overly narrow approaches which had developed before UK courts.[37]

It is worthwhile remembering that the legislative influence of EU anti-discrimination law on its UK counterpart was also a two-way street. The UK's Sex Discrimination Act 1975 went far beyond the rather timid EEC Directive on equal pay of 1975, and partially served as model for the 1976 Directive, which still remained less detailed. The UK's Disability Discrimination Act 1995 shaped elements of Directive 2000/78/EC,[38] including the concept of reasonable accommodation was derived from UK law, for example.[39] On the other hand, UK legislation banning discrimination on grounds of sexual orientation, religion or belief and age were promoted by that same directive; and it is safe to assume that Northern Ireland would not have legislation banning discrimination on grounds of sexual orientation but for EU law.

"Brexit" dynamics and anti-discrimination law – repatriation or reverse repatriation?

Due to the mutual influence, the UK's secession from the EU potentially impacts on UK equality law as well as EU equality law. Is it realistic to expect a tendency for the UK to repatriate, i.e. to reduce protection against discrimination, or for the EU to slowly withdraw from the field in a move of reverse repatriation?

As regards the UK, the populist, anti-immigrant and racist discourse and politics of the 'Brexit' campaign have raised concerns,[40] and elicited proposals to include class into the anti-racism policy framework in order to address the feeling of "left behind" identified as contributing to the campaign's success.[41] In relation to post-"Brexit" sex equality, it is assumed that rescinding EU derived employment law may negatively impact on areas such as maternity protection and equality of part time employees.[42] There is also a perceived increase of anti-lesbian and anti-gay harassment riding on the wave of the Brexit-campaign, which may revive corresponding conservative policies.[43] Even before the 'Brexit' campaign, a number of 'drag factors' stunting the development of UK anti-discrimination law have been identified, especially a tendency to stall, dilute and divert legal measures strengthening equal pay legislation from the late 1970s to the late 1990s. [44] EU law has been viewed as 'transformative' in countering these, particularly through the approach of the Court of Justice to the

[37] (McColgan, 2016)

[38] See above n 5.

[39] (McColgan, 2016)

[40] (Elliot & Stewart, 2017; Virdee & McGeever, 2018).

[41] (Kahn & Shaheen, 2017).

[42] (Guerrina & Masselot, 2018).

[43] (Dunne, 2019, pp. 280-282).

[44] (Fagan & Rubery, 2018).

interpretation of equality legislation.[45] 'Brexit' is viewed as depriving the UK of the 'legal comfort blanket' provided by the binding effects of EU anti-discrimination law.[46] Even if any detrimental impacts of 'Brexit' for anti-discrimination law will result from gradual erosion of rights protections over time, this still constitutes a risk of creeping repatriation.[47]

The European Union, on the other hand, may fall back onto the constitutional tradition of addressing discrimination and promoting equality. This would strengthen protection against discriminatory acts by states themselves, and prompt proactive, potentially paternalisti policies without the liberating aspect of guaranteeing individual rights. There might also be a return to criminalisation of discrimination, perhaps aligned with a strengthened security discourse overall.

3. Incomplete "repatriation" – retaining EU anti-discrimination law, or at least its equivalence in the UK

At the very least the loss of an effective rights regime which citizens can use to challenge discriminatory legislation or public practice will weaken UK anti-discrimination law in the future, if it is not replaced by equally effective internal mechanisms. In this regard, it is worthwhile considering in how far the "repatriation" of competences for anti-discrimination law was incomplete, and protective layers underpinning British and Northern Irish anti-discrimination law can be maintained. In this regard, the Protocol Ireland/Northern Ireland as part of the Withdrawal Agreement between the UK and the EU is slightly more stringent than the EU UK Trade and Cooperation Agreement, which is decisive for anti-discrimination law in Great Britain. We will thus deal with Northern Ireland first.

Northern Ireland

Equality is a matter that has been devolved to the Northern Ireland Legislative Assembly, and Ministers of the Northern Ireland Executive as transferred matter.[48] Accordingly, NI institutions can legislate on equality matters, but intervention by the UK government or parliament are not excluded, even when the NI Assembly is fully functioning.[49] In so far as equality law is required in order to implement international law, the area is also comprised by UK government's reserved competence. Before the UK's secession from the EU, this was also the case for implementing EU Directives. Accordingly, large parts of NI anti-discrimination law consists of legislative orders made in Westminster, complementing section 75 to 79 of the Northern Ireland Act (also made in Westminster), and resulting in a less than systematic state. Gaps in equality law between Great Britain and Northern Ireland have pre-existed Brexit. While the GB Equality Act 2010 codified, simplified, and modernised anti-discrimination law,[50] Northern Ireland's body of equality and anti-discrimination law remains

[45] (Grogan, 2019; O'Cinneide, 2018).

[46] (O'Cinneide, 2018).

[47] (Fredman, 2018; Honeyball & Manzur, 2019; Solomon, 2021).

[48] Northern Ireland Act 1998, Schedules 2 and 3.

[49] (Murray & Rice, 2021).

[50] (Hepple, 2014).

characterised by inconsistency, incoherence and complexity.[51] Whilst anti-discrimination law may have been developed in Northern Ireland earlier than in Great Britain in relation to religious discrimination,[52] efforts to introduce a Single Equality Act for Northern Ireland have been unsuccessful for several decades.[53] This state of affairs constitutes a slight contrast to the 1998 Belfast Good Friday Agreement, which endorses a strong commitment to equality as a framework for a fresh start, a means of addressing socio-economic disparity and a foundation for peace and reconciliation in Northern Ireland.[54] Accordingly, extensive academic input alongside intense lobbying by the Northern Ireland Equality Commission[55] and the Northern Irish women's sector demanded that reduction of legal guarantees for equality in Northern Ireland should be avoided as a consequence of 'Brexit'.[56]

Article 2 of the Protocol on Ireland Northern Ireland[57] contains the results of this lobbying activity, complemented by Article 14. Under Article 2 paragraph 1. These provisions weave both the 1998 Agreement and EU equality legislation into the Protocol on Ireland/Northern Ireland, which reflects the fact that common EU membership of the UK (and thus Northern Ireland) and Ireland underpinned the 1998 Agreement and the commitments contained therein.[58]

Under Article 2 (1), the UK is under a unilateral obligation to ensure that there is no diminuition of rights, safeguards and equality of opportunity, stressing that this includes the protection against discrimination as specified in the six EU anti-discrimination directives, which are listed in Annex 1.[59] Article 2 (1) further specifies that the UK has to introduce a dedicated mechanism to implement this paragraph. Article 2 (2) obliges the UK to continue facilitating the related work of the Equality Commission for Northern Ireland among others.[60] The dedicated mechanism is established by the European Union (Withdrawal Agreement) Act 2020.[61] Its schedule 3 adds sections 78 a and b to the Northern Ireland Act 1998, empowering the Equality Commission of Northern Ireland to challenge any legislation or administrative activity in Northern Ireland which is not in line with the equality commitment in Article 2. This complements the Commission's power to support individual claims enforcing Northern Irish equality legislation. Ministers of the NI Assembly (and of Westminster's Government) can

[51] (Kohner, 2015).

[52] (Schiek, 2018b).

[53] (Kohner, 2015).

[54] (Harvey, 2018)

[55] (Equality Commission for Northern Ireland; Northern Ireland Human Rights Commission, 2020)

[56] (Gray, et al., 2020; Powell, 2019; Women's Policy Group NI, 2020)

[57] Protocol on Ireland/Northern Ireland to the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, OJ EU L 29 of 31 January 2020, 101-145

[58] (Schiek, 2018a), s.a. (Hayward & Murphy, 2018).

[59] These are the directives listed in n 5.

[60] All the obligations under Article 2 are coached in terms of general human rights protection, indicating a certain degree of instrumentalization of anti-discrimination law for the wider political aim of a Northern Ireland Bill of Human Rights (see (Harvey, 2018; Murray & Rice, 2021)).

[61] European Union (Withdrawal Agreement) Act 2020, s 23.

legislate on equality matters as long as it is in accordance with the Art 2(1) 'non-diminution' requirement.[62] The Equality Commission of Northern Ireland can challenge such legislation by way of judicial review if there is a violation. Under Article 1

There is some debate what this provision actually means, and to what extent the diminution of rights through the UK's secession from the EU can be avoided.

McCrudden argues that the obligation to avoid diminution encompasses the substantive content of anti-discrimination rights as well as their procedural quality as having "direct effect". He maintains that the 'anti-discrimination clause' in Art 2 of the Protocol on Ireland/Northern Ireland satisfies the requirement for direct effect, and thus has to be treated as directly effective in UK law.[63] Gordon Anthony states, more cautiously, that EU developments in the field could potentially be enforced in NI in a more indirect way than before.[64]

Unsurprisingly, the UK government insists that the commitments under Article 2 Protocol are binding on the UK Government and Parliament, the Northern Ireland Executive and Assembly as a matter of International Law.[65] In accordance with the dualist position to international law, this means that the obligations have no direct effect.

The correct legal assessment arguably lies between those extreme positions. It is correct that all provisions of the Withdrawal Agreement relating to EU law have to be interpreted in line with CJEU case law.[66] Only for the provisions of the Protocol, this obligation extends to future case law, and also is a permanent obligation.[67] This means that those interpreting Art 2 of the Protocol must conform to all relevant CJEU case law, including judgments and references handed down post-transition period, giving the CJEU continued influence on equality and anti-discrimination law in NI even after the end of the transition period. Where courts in NI continue to take into account CJEU case law in this area, the impacts of EU anti-discrimination law may, as stated by Gordon Anthony, continue to exert effects indirectly.

The actual effect depends much on the role of the Court of Justice of the European Union and the European Commission, which in the past could bring infringement actions against the UK on the grounds that Northern Irish law or jurisprudence violated EU anti-discrimination law. In this regard, the Protocol serves as a reminder that the European Union protect market-related rights better than mere anti-discrimination rights: according to Article 12 paragraph 4, the Court of Justice of the European Union as well as the EU Commission have all the powers conferred to them under EU law in relation to enforcing Articles 5 and 7-10 of the Protocol, but not in relation to Article 2. Articles 5 and 7-10, together with extensive annexes, ensure that EU law on free movement of goods, including electricity, as well as VAT rules and state aid law, continue to be applied in Northern Ireland. Accordingly, the UK Government's triumphant declaration that there will be no role for the EU institutions in ensuring direct

[62] Northern Ireland Act 1998, Schedule 3.

[63] (McCrudden, 2020, p. 56).

[64] (Anthony, 2016).

[65] (Northern Ireland Office, 2020)

[66] Withdrawal Agreement Article 4 (4)

[67] Protocol on Ireland/Northern Ireland, Art 13 (2).

effects of Article 2 protocol[68] is accurate. Whether or not direct effect can be construed as a domestic rule of law seems a moot point if that rule of law cannot be enforced with the support of an external reference point provided by the EU institutions.

The implementation of Article 2 thus, correctly, is limited to procedural rules. Changes to the Northern Ireland Act 1998 ensure that any legislation by the NI institutions in the area of anti-discrimination law most comply the Art 2(1) "non-diminution commitments".[69] This, among other things, prevents the NI institutions from reducing protection against discrimination, including on grounds of sexual orientation, and this is no small feat in the NI context. Procedural mechanisms include powers of the Equality Commission of Northern Ireland to monitor, advise and report on continuing compliance, [70] as well as a competence to lodge judicial review action.[71] The ECNI may also grant an application by an individual for assistance in legal proceedings relating to an alleged breach (or potential future breach) of the 'no diminution' requirement under specified circumstances; those are, if the case relates to a question of principle, if it would be unreasonable to expect the individual to proceed with the case without assistance or if there are special circumstances making it appropriate for the ECNI to provide assistance.[72] Article 14 Protocol provides an additional procedural protection in that the Committee on issues related to the implementation of the Protocol on Ireland/Northern Ireland ('Specialised Committee') set up under the UK-EU Withdrawal Agreement[73] shall consider any matter relevant to the Art 2 'no diminution' requirement brought to its attention by the ECNI.[74] As a reaction, the Specialised Committee may draw up draft decisions and recommendations and refer them for adoption by the UK-EU Joint Committee ('Joint Committee'), whose decisions are binding on both the EU and the UK.[75]

In case of dispute on the UK's compliance with the Art 2 'no diminution' obligation (in other words, the general enforcement mechanisms of the Withdrawal Agreement (WA) apply: if consultation in the Joint Committee in good faith fails to result in a mutually agreed solution within 3 months (Article 169 WA), the EU or the UK may request the establishment of an arbitration panel (Article 170 WA), which must refer questions on interpretation of EU law to the CJEU (Article 174 WA). Failure to comply with any ruling by that panel in a reasonable period of time (Article 175, 176) may lead to temporary remedies in the form of a lump sum (Article 178) and ultimately a temporary suspension of obligations (Article 179 WA). There is no option for individuals whose rights have been violated to receive any damages or other remedy, a stark contrast to the workings of EU law with its direct effect.

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[68] (Northern Ireland Office, 2020, p. 16).

[69] Northern Ireland Act 1998, s 6 (2), 24 (1) as amended by EU (Withdrawal Agreement) Act 2020, Schedule 3.

[70] Northern Ireland Act 1998, ss 78A, 78B, as amended by EU (Withdrawal Agreement) Act 2020, Schedule 3.

[71] Northern Ireland Act 1998, s 78C, as amended by EU (Withdrawal Agreement) Act 2020, Schedule 3. On this specifically see (McCrudden, 2020; Murray & Rice, 2021).

[72] Northern Ireland Act 1998, s 78D, as amended by the EU (Withdrawal Agreement) Act 2020, Schedule 3.

[73] Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community [2019] OJ C384 1/01 (UK-EU WAt), Art 165.

[74] Protocol on Ireland/Northern Ireland, Art 14 (c).

[75] UK-EU Withdrawal Agreement, Art 165.

Nevertheless, persistent violation of the non-diminution rule may not remain without consequences, both domestically and through the procedures under the Withdrawal Agreement.

Great Britain

The state of ongoing protection of equality rights in Great Britain is much less pronounced, as it relies exclusively on the UK-EU Trade and Cooperation Agreement (TCA).[76] The Trade and Cooperation Agreement does not even make explicit mention of anti-discrimination or equality standards. Accordingly, any remaining protection would have to be derived from provisions relating to labour and social rights under the chapters on a 'level playing field' for open and fair competition between the UK and EU.[77] The level playing field was one of the most contentious areas during UK-EU trade negotiations given divergent positions between the UK government and the EU, with disagreement over whether the Parties should be prohibited from lowering labour standards (i.e., non-regression) and whether one Party should be required to raise standards should the other Party raise theirs (i.e., a ratchet clause).[78] The parties settled for non-regression, which has been criticised as basing any obligations to retain EU standards of employment equality in Great Britain on concern for the protection of European (and UK) profits, instead of genuine concern for workers' rights.[79]

The non-regression obligation of Art 387 TCA covers the area of 'fundamental rights at work' (Article 386), which should include anti-discrimination in employment. Non-regression prevents the UK (and the EU) from weakening or reducing levels of protection below the status quo at the end of the transition period, in a manner affecting trade or investment between the UK and the EU (Article 387 (2)). This includes not only direct reductions in labour and social standards but also prevents the Parties from failing to enforce their laws and standards in a manner affecting trade and investment between the Parties.

If either the EU or the UK fail to meet obligations to maintain EU standards of anti-discrimination law, this must be addressed by consultations in the first instance – i.e., if the UK has acted in breach of the Art 387 'non-regression clause' described in the previous section – the EU would be expected to request consultations with the UK by written request. (Article 408 TCA). If no mutually satisfactory resolution is achieved within 90 days, a panel of experts can be convened on request of one of the parties. (Article 409 TCA) If the panel report finds that one party (e.g. the UK) has not conformed with the relevant provision (in this case, Art 387's non-regression clause), it is obliged to take appropriate measures to remedy thois finding, monitored by the Trade Specialised Committee on Level Playing Field for Open and Fair Competition and Sustainable Development (Article 409 paragraph 17 TCA). In case of a finding of non-conformity, and refusal to conform with the recommendations, the other party (e.g. the EU) can take recourse to temporary remedies (Article 410 TCA) such as compensation or temporary suspensions of TCA obligations (Article 749 TCA). There is thus the possibility of sanctions being imposed on the UK if obligations to maintain EU standards of anti-

[76] Trade and Cooperation Agreement (UK-EU) (adopted 30 December 2020, entered into force 1 May 2021) CP 426 OJ EU L149, 30.4.2021, p. 10–2539 ('Trade and Cooperation Agreement').

[77] (Solomon, 2021).

[78] (Ares, et al., 2021).

[79] (Moyer-Lee, 2021).

discrimination law fail to be met. However, simple regression on anti-discrimination law would not suffice to trigger these mechanisms. Instead, it would have to be proven that the regression affects trade and investment between the UK and EU. There is some doubt whether rescinding anti-discrimination law will ever pass this high threshold.[80]

Social and labour standards are also included within the scope of Article 411 TCA, concerning 'rebalancing measures'. Should future significant divergence between UK and EU law and policy result in material impacts in the area of social and labour protection, the Parties may take appropriate 'rebalancing' measures to address the situation. Those measures must be restricted both in scope and in duration to that which is strictly necessary and proportionate in order to remedy the situation; and priority will be given to those measures as will least disturb the functioning of the Agreement itself. Should a Party intend to take any rebalancing measures, that Party must notify the other Party without delay of the measures that are intended, providing all relevant information. The Parties shall then enter into consultations, which are limited to 14 days in duration, or will end prior to that if both Parties agree. If no mutually acceptable solution can be found, the concerned party may adopt rebalancing measures, unless the other Party requests the opening of an arbitration tribunal under Art 739 (2) TCA. The threshold for invoking the provision is higher than just proving a regression contrary to Art 387 TCA. It is necessary to demonstrate that 'significant divergence' between law and policy in the UK and the EU has a material impact on trade and investment between the UK and EU. What exactly might constitute a 'material impact' has not been specified. Further, it is not apparent how 'significant divergence' between the UK and EU will be assessed; for instance, whether already existing divergences might be capable of triggering the rebalancing mechanism, or whether it only applies to future changes to labour standards by the UK or EU. The relevant clarification may involve dispute settlement procedures.[81] Depending on how these materialise, the rebalancing mechanism might, through consultations, create some de facto obligations on the UK Government to take measures to maintain EU standards of labour protections in Great Britain (and thus, anti-discrimination law in the employment context) should any divergence between the UK and EU have a material impact on trade and investment between the two parties. Should the rebalancing mechanism be triggered too frequently either Party can initiate a review of the relevant provisions and the trade aspects of the Trade and Cooperation Agreement more broadly, which may lead to an adjustment of the balance of rights and obligations between the parties.

Lastly, there may be some continued residual influence of EU (anti-discrimination law) in Great Britain considering the special arrangements for and obligations on the UK Government with regards to rights, equality and non-discrimination in Northern Ireland (which will be discussed below). Whilst equality is a matter within the remit of the Northern Ireland Assembly, it might create unnecessary and unworkable complexity across the islands should standards in Great Britain to diverge too far from standards in NI; for example, creating practical difficulties for employers who might operate and employ individuals both in Great Britain and in Northern Ireland. Further, significant changes to rights and equality standards in Great Britain might then have effects in Northern Ireland.

[80] (Morris, 2020)

[81] (Ares, et al., 2021, p. 46).

4. Continuing influence of UK anti-discrimination policy in the EU?

Given the reluctance of EU Member States other than the UK to enact anti-discrimination law, there is the potential that the EU may rescale its anti-discrimination law after the UK's secession.

The UK's most significant contribution to the development of EU anti-discrimination and equality law is perhaps as a litigant and through Advocates General.[82] The development of anti-discrimination law – particularly in the field of gender equality – has been heavily reliant on strategic litigation in the courts, driven by equality bodies, trade unions and other civil society organisations (CSOs).[83] Early strategic litigation in equality issues was in the 1970s and 1980s mainly driven by the UK equal opportunity commission, whose activities also served as models for litigators in other Member States.[84] More recently, after the EU adopted Directive 2000/43/EC and 2000/78/EC, it were again strategic litigants from the UK who pushed concepts such as associational discrimination.[85] Even after the 'Brexit' referendum UK courts continued to refer important cases to the ECJ in this regard, including in relation to the rights of trans gender women to avail of lower retirement ages, [86] as well as a monumental equal pay case clarifying important elements of work of equal value.[87] UK courts could refer cases to the ECJ until the end of the transition period in December 2020, and the relevant ECJ rulings would remain binding in their entirety in the EU and the UK.[88] This ensured a short continuation of symbiotic relationship between EU and UK courts in the field.[89] After the end of the transition period, that lack of sophisticated references from the UK is likely to impact on the development of EU anti-discrimination law in the future.

Of course, courts in other Member States and the ECJ itself may continue evaluating UK anti-discrimination case law. Academic and civil society cooperation on those matters could ensure that any positive developments in the UK, should they persist, continue to inform the development of EU anti-discrimination law and policy. There is even the possibility that the UK's secession from the EU facilitates proactive equality policies, in particular in relation to those supporting mothers and thus indirectly contributing to gender equality.[90] This presupposes that 'Brexit' results in greater unity amongst remaining EU Member States focused on the advancement anti-discrimination law.

The EU may also instead revert to less rights-based and potentially symbolic politics. Presently, the Union has adopted new strategies against racism and for gender equality,

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[82] (Suk, 2017).

[83] (Guerrero, 2020, pp. 75, 78)

[84] See again (Howes & Wank, 2005)

[85] ECJ (Grand Chamber) 17 July 2008 Case C-303/06 Coleman EU:C:2008:415

[86] ECJ (Grand Chamber) Case C-451/16 MB (Change of gender and retirement pension) EU:C:2018:492.

[87] ECJ 3 June 2021 Case C-624/19 Tesco Stores EU:C:2021:429

[88] UK-EU Withdrawal Agreement, Articles 86, 87 and 89; applied most recently in ECJ 15 July 2021 (Grand Chamber) Case C-709/20 The Department for Communities in Northern Ireland EU:C:2021:602.

[89] (Fredman, 2018).

[90] (Fagan & Rubery, 2018).

under the common title "A Union of Equality".[91] Both reinforce the commitment to anti-discrimination legislation, while also moving beyond anti-discrimination law as developed in the 1970s, 80s and 2000s. There is a certain emphasis on criminal law and surveyance in that the gender equality strategy stresses the combat of violence[92] and the anti-racism action plan announces a better implementation of the Framework Decision combating racism and xenophobia,[93] which builds on the criminal law tradition in anti-discrimination policy, as well as developing a new focus on countering racism in policing among others.[94] Both strategies also announce a renewed commitment to policy development, mainstreaming and action plans beyond implementing anti-discrimination law, including actions "working with the private sector"[95] and intensifying gender main streaming.[96] This may indicate a return to proactivity without an individual-rights-element, and a renewed relevance of discrimination discourses. It remains to be seen whether rights-policies favouring individual agency through strategic litigation will persevere alongside those tendencies.

5. Conclusion

The development of anti-discrimination law in the UK has had a mixed history. It is a body of law that was sometimes influenced by EU developments, even where the UK sometimes resisted progression of equality matters at the EU level (particularly in relation to gender equality matters). On the other hand, UK anti-discrimination law and policy at times contributed to the development of EU anti-discrimination law, albeit perhaps much less often, through references from UK courts to the CJEU or through the influence of domestic anti-discrimination legislation that was taking the lead on particular grounds of discrimination, namely disability discrimination.

Despite that mixed history, there is consensus that EU law was a fundamentally significant influence on anti-discrimination law and its development in the UK and thus academics and activists – both in Great Britain and in Northern Ireland – have warned of detrimental impacts of the UK's withdrawal from the EU for anti-discrimination law. These warning often refer to loss of applicability of the EU Charter of Fundamental Rights, of the general principles of EU law (which incorporate non-discrimination) and loss of direct access to the CJEU. The fears are not of some immediately diminution in protections against discrimination but of a gradual rolling back of anti-discrimination protections over time following the UK's withdrawal.

Thus, it is positive that some continuing obligations on the UK to maintain equivalence to EU anti-discrimination law remain. These are stronger in relation to Northern Ireland where there is a direct commitments to 'no diminution' of rights, safeguards and equality of opportunity as set out in both the 1998 Agreement and in EU law, with direct inclusion of a number of EU anti-discrimination Directives.[97] These obligations are rooted in the idea that

[91] (European Commission, 2020a; European Commission, 2020b).

[92] COM (2020) 152, 3-5

[93] COM (2020) 565 final, 5-6

[94] Ibid, 7-12

[95] Ibidem p 18-19)

[96] COM (2020) 152, 15-16

[97] Protocol on Ireland/Northern Ireland, Art 2.

equality and non-discrimination have been central to peace and reconciliation in Northern Ireland, with EU membership and EU law perhaps underpinning the 1998 peace agreement. There are perhaps, therefore, more genuine concern for socio-economic equality at the heart of these obligations than there is in the market-based obligations relating to Great Britain. Those obligations relating to NI also carry more stringent, albeit at times vague and complex, enforcement mechanisms and consequences for failing to comply with the 'no diminution' obligation. Protection of anti-discrimination law in Great Britain may be derived from obligations relating to non-regression of labour standards under the contentious 'level playing field' provisions in the UK-EU TCA. The caveat to those obligations is that they relate solely to facilitating trade and investment between the UK and the EU, rather than being traced back to any genuine concern for principles of equality and non-discrimination. Accordingly, mere regression does not suffice to trigger any consequences, there must also be a discernible impact on trade and investment.

Additionally, the UK's withdrawal from the EU might not only impact on anti-discrimination law in the UK but could potentially impact upon EU anti-discrimination law. UK courts have been making more and more significant references to the CJEU on equality and discrimination matters, including from NI, which were allowed to continue up until the end of the transition period at the end of 2020. Where national courts of remaining Member States may continue to consider UK case law and civil society engagement may continue, the loss of sophisticated references from UK courts is likely to impact upon the development of EU anti-discrimination law. However, there might also be an opportunity for progression of EU anti-discrimination law, should remaining Member States unite behind one agenda without UK 'drag factors' halting progression, particularly in the field of gender equality.

Overall, the future for anti-discrimination law in the UK does not look as immediately dire as one might have thought,[98] particularly when falling into the competence of a Conservative UK Government who led a largely xenophobic and populist 'Brexit' campaign. This is particularly the case for NI, where the contribution of EU law to the development of anti-discrimination law and the centrality of equality to the peace and conflict transformation process was recognised and (at least in part) accounted for. In Great Britain, only time will tell how and to what extent obligations to maintain EU anti-discrimination law will be adhered to.

[98] see (Fredman, 2018).

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Abstract

This paper analyses the impact of 'Brexit' on UK and EU equality law from the perspective on whether there is "repatriation" of the field to the UK. We argue that this is an area where repatriation is not clear-cut: EU equality law was influenced by British legislation initiated before the UK joined the EU, and continued to be influenced by well developed litigation strategies of British and Northern Irish equality commissions and civil society organisations. Accordingly, there is the danger of reverse repatriation in that the EU may rescale the commitment to anti-discrimination law. In practice, we observe some "perverse" repatriation: the UK has some obligations to maintain the standards of EU equality law in Northern Ireland, while British equality law is only protected to a very limited degree under the Trade and Cooperation Agreement. Sadly, the decisive feature of EU anti-discrimination law is maintained neither in Northern Ireland nor in Great Britain. Citizens have lost directly effective EU equality rights, whose enforcement they can initiate with a good chance to involve the Court of Justice of the European Union. They have also lost the EU Commission oversight over the UK's activities via infringement procedures before that very same court.