

# VALUES, RIGHTS AND BREXIT – LESSONS TO BE LEARNT FROM THE SLOW EVOLUTION OF UK DISCRIMINATION LAW

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## Introduction

This paper sets out to provide an overview of the evolution of UK discrimination law over the last fifty years, with particular reference to how this process has played out in the employment sphere. In so doing, it makes the argument that the influence of European law – and especially the purposive and rights-centred approach adopted by the Court of Justice of the EU (CJEU) to the interpretation of EU equality legislation - has exercised a transformative effect on UK law in this context. In particular, it has played a key role in countering the influence of certain ‘drag factors’ which might otherwise have stunted the development and functioning of UK discrimination law. This ‘leavening’ influence of European law may survive the rupturing impact of Brexit, in part because the European approach has to some extent been internalised within UK law. The paper concludes by suggesting that there are some tentative lessons to be learnt from this experience, which may be of (possible) value to an Australian audience.

### I. ‘Drag Factors’ and the Hobbled Development of UK Discrimination Law

In outlining the evolution of UK discrimination law, it is necessary to examine how this legal framework initially took shape and the value ordering that influenced its development. In describing this process of growth and expansion, certain patterns recur. For many years, the development of the UK legal framework was hobbled by a number of drag factors, which often undercut its impact. In particular, legislators and judges repeatedly took the view that discrimination law norms should be viewed as exceptions to the freedom traditionally accorded by the common law to employers and service providers to run their businesses as they saw fit. This meant that discrimination law was often interpreted in a restrictive manner, or had its scope circumscribed by legislative fiat.

These drag factors were in play from the beginning of the development of UK discrimination law. Prior to the 1960s, UK law imposed few if any constraints on employers wishing to discriminate on the basis of race, sex, disability or other grounds. Discrimination *per se* breached no common law norm: no tort of discrimination was acknowledged to exist, while discriminatory treatment was held not to constitute an implied breach of contract in a sequence of employment cases dating back to the 1950s and early 1960s.<sup>1</sup> In general, discrimination was not regarded as a form of behaviour that was incompatible with the animating values of UK law: McCrudden has described British public law of this era as lacking any ‘positive principle of opposition’ to discriminatory behaviour, and the same analysis can be applied to private law (including employment law).<sup>2</sup>

However, the post-1945 liberalisation of UK society, the influx of new waves of migrants and the emergence of the high-profile feminist and anti-racist movements of the 1960s put pressure on the

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<sup>1</sup> Lester and Bindman have referred to the ‘ethical aimlessness’ of the common law in this context: see in general A. Lester and G. Bindman, *Race and the Law*, London, Penguin, 1972.

<sup>2</sup> See C. McCrudden, ‘Equality and Non-Discrimination’, in D. Feldman (ed.), *English Public Law*, 1<sup>st</sup> edn, Oxford, OUP, 2004, 581-668, 587, para. 11.18. See also A. McColgan, *Discrimination, Equality and the Law*, Oxford: Hart, 2014, 9-14.

legal status quo, generating demands for law reform. The Race Relations Act 1965 was the first fruit of this new era. Inspired in particular by the US Civil Rights Act 1964 and the provisions of various international human rights law instruments which had recognised the existence of a fundamental right to equality and non-discrimination, the 1965 Act prohibited service providers operating 'places of public resort' from discriminating on the basis of colour, race or ethnic/national origin – with 'discrimination' defined simply as involving 'less favourable treatment' on one of the prohibited grounds. However, its enforcement mechanisms were weak.<sup>3</sup> Furthermore, the 1965 Act did not apply at all to the employment relationship, reflecting a general political unwillingness to disturb the collective *laissez faire* system that then dominated labour law regulation in the UK. Thus, from the beginning, the development of UK discrimination law was hobbled by concerns that its impact would prove to be too destabilising: non-discrimination was acknowledged to be an important value, but not a sufficiently pressing norm as to justify the displacement of existing modes of labour market regulation.

Perhaps unsurprisingly, this awkward compromise proved to be unsustainable. Persisting problems of race discrimination resulted in the enactment of the Race Relations Act 1968, which extended the prohibition on race discrimination to cover the employment sphere and beefed up the existing enforcement mechanisms.<sup>4</sup> However, the real shift in UK discrimination law came a little later, with the passing of three statutes which laid the foundations for the current highly developed UK anti-discrimination legislative regime – namely the Equal Pay Act 1970 ('EPA', which gave legal effect to the principle of equal pay for work of equal value as between men and women), the Sex Discrimination Act 1975 (the 'SDA', which prohibited sex discrimination more generally in employment and occupation and access to goods and services) and the Race Relations Act 1976 (the 'RRA', which extended and upgraded the provisions of existing race relations legislation). All three of these statutes were designed to be more transformative than the 1965 and 1968 Acts.<sup>5</sup> In contrast to their predecessors, they set out to give substantive effect to the right of non-discrimination by restructuring existing legal relationships - both in the employment context and more generally across a wide range of forms of social interaction.

The SDA and RRA were thus given a wide scope of application, covering employment and occupation, access to goods and services, housing, education and a range of other activities. In addition, both statutes also for the first time set out an express prohibition on both direct and indirect discrimination, mirroring how US discrimination law had developed in cases such as *Griggs v Duke Power Co.*<sup>6</sup> Significantly, all three statutes also made it possible for individual litigants to bring civil claims against alleged discriminators in their own right: the SDA and RRA in effect created a new form of statutory tort action, while the EPA automatically inserted an enforceable equal pay clause into employment contracts. Employment claims brought under all three statutes were channelled through the newly established system of industrial (now employment) tribunals, whose composition was based on the ILO tripartite structure with a judicial chair being flanked by members nominated by employers and the trade unions respectively. In contrast, non-employment claims had to be

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<sup>3</sup> The Act did not establish an individual cause of action. Instead, complaints of discrimination were to be referred to a newly established Race Relations Board, which was to attempt to resolve them via conciliation mechanisms: if this did not succeed, the Board could refer cases of continuing discrimination to the Attorney General who could seek a court injunction preventing such behaviour from recurring. However, beyond that, no other remedy was available. See in general Lester and Bindman, *Race and the Law*, above n 1.

<sup>4</sup> In particular, the Act gave wider investigatory and enforcement powers to the Race Relations Board: Lester and Bindman, *ibid*.

<sup>5</sup> A. Lester, 'Discrimination: What Lawyers Can Learn From History' (1994) *Public Law* 224.

<sup>6</sup> 401 US 424 (1971).

brought through the ordinary court system – a less accessible route than the employment tribunal system.<sup>7</sup> However, any individual complaint going down either procedural route could be supported by the two new equality commissions set up to enforce the legislation, the Equal Opportunities Commission ('EOC') established under the SDA and the Commission for Racial Equality ('CRE') established under the RRA. These commissions were also granted wider investigatory and inquiry powers, enabling them to act as enforcement agencies in their own right.

From the outset, this legislation generated a steady flow of legal cases - especially in the employment context, due in part to the relatively accessible nature of the employment tribunal system.<sup>8</sup> This stream of litigation, taken together with the case-law that developed in its wake, helped to spread awareness of the substantive requirements of the legislation. It also gradually came to exercise a strong deterrent effect on overt and other forms of readily identifiable manifestations of sex and race discrimination.<sup>9</sup>

This meant that, by the mid-1980s, the EPA, SDA and RRA had put down deep roots in British law. However, around this time, the limitations of this statutory framework also started to come into focus.

To start with, the material scope of the 1970s wave of legislation was circumscribed. Discrimination based on grounds apart from race and sex was not covered. This meant that, for example, discrimination based on religion or belief fell outside the scope of the RRA.<sup>10</sup> Furthermore, UK courts proved to be reluctant to interpret the legislation in an expansive manner so to extend its scope of application. Thus, case-law clarified that discrimination on the basis of sexual orientation was held not to be covered by the SDA – even in situations where persons of only one gender were affected by the adverse treatment at issue.<sup>11</sup>

The UK courts also proved to be reluctant to give an expansive interpretation to other provisions of the EPA, SDA and RRA, even when applying ambiguous or open-ended clauses in the legislation. For example, the majority of the House of Lords concluded in the case of *Amin v Entry Clearance Officer Bombay* that the SDA did not apply to the performance by public authorities of their public functions, notwithstanding the ambiguous provisions of the legislative text in this regard.<sup>12</sup> A similar

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<sup>7</sup> Litigants in the ordinary courts can incur liability for costs, unlike in the employment tribunals. Tribunal procedure is also designed to be more user-friendly and accessible to lay litigants.

<sup>8</sup> UK discrimination law continues to generate a high level of litigation, especially in the employment context. For example, 34,606 discrimination claims were initiated before employment tribunals in England and Wales in 2012/3 alone: see Ministry of Justice, *Tribunal Statistics, Annex C: Management Information on Employment Tribunal Receipts, 2012-15*, available at <https://www.gov.uk/government/statistics/tribunals-and-gender-recognition-certificate-statistics-quarterly-january-to-march-2015>.

<sup>9</sup> See in general the conclusions of the 'Hepple Report' published in 2000: B. Hepple, M. Coussey and T. Choudhury, *Equality: A New Framework Report of the Independent Review of the Enforcement of UK Anti-Discrimination Legislation*, Oxford: Hart Publishing, 2000.

<sup>10</sup> The House of Lords in *Mandla v Dowell Lee* [1983] 2 AC 548 (HL) held that discrimination against ethnic groups such as Jews or Sikhs which were defined in part by reference to shared religious beliefs did come within the scope of the RRA. However, subsequent case-law clarified that the prohibition of race discrimination could not be extended to cover less favourable treatment linked to a person's religion or belief when such belief was not associated with a particular ethnicity: see e.g. *J.H. Walker v Hussain* [1996] ICR 291.

<sup>11</sup> See e.g. *Pearce v Governing Body of Mayfield Secondary School* [2001] IRLR 669.

<sup>12</sup> [1983] 2 AC 518 (HL). This judgment had the effect of insulating decisions of public authorities in many core areas of public sector activity, such as immigration control and policing policies, from any possibility of challenge on anti-discrimination grounds for the best part of two decades: see Baroness Hale, 'The Quest for Equal Treatment' [2005] *Public Law* 571-585, 575; A. McColgan, *Discrimination Law*, 2<sup>nd</sup> ed., Oxford, Hart, 2005, 271-280.

restrictive interpretation was adopted by the Court of Appeal in defining the scope of the RRA prohibition of indirect discrimination in *Perera v Civil Service Commission (No. 2)*, where the words 'requirement or condition' as set out in s. 1(1)(b) of the RRA were interpreted as not including criteria taken into account by employers in reaching a decision which were not determinative *per se*.<sup>13</sup> Again, this limited the scope of the legislation – in this case, by hobbling the prohibition on indirect discrimination. The provisions of the SDA and the RRA extending the investigatory powers of the equality commissions were also read narrowly, with the consequence that the commissions had in effect to abandon the use of such powers as part of their strategic enforcement policy.<sup>14</sup> This restrictive approach to interpreting the EPA, SDA and RRA was not universally applied: however, it recurred with sufficient consistency to become something of a *leitmotif* within the case-law, and to attract plenty of academic criticism on that score.<sup>15</sup>

In part, this narrow interpretative approach stemmed from the tendency of the UK courts to adopt a close textual reading of these anti-discrimination statutes, rather than focusing on their purpose and overall structure. In much of the early case-law, it was rare for the courts to opt for expansive readings of the statutory text that enhanced effective protection against discrimination. Furthermore, the various international human rights instruments ratified by the UK which recognised the existence of a general right of non-discrimination, including Article 14 of the European Convention on Human Rights and ILO Convention C111 on Discrimination (Employment and Occupation), were treated as being largely irrelevant to the interpretative analysis, in line with the traditional dualist approach adopted by UK courts to such international standards and the general suspicion of rights discourse that dominated labour law commentary at the time. Instead, the courts chose to rely on close parsing of the statutory text as a guide to interpretation – which often generated crabbed and tenuous readings that served to undermine the overall purposive thrust of the provisions at issue.<sup>16</sup>

Furthermore, the courts also at times appeared to apply the observe of a purposive approach to the EPA, SDA and RRA, choosing instead to read their provisions restrictively in order to minimise their impact on pre-existing legal rights and obligations. This restrictive approach was clearly motivated in part by concerns that discrimination law posed a risk to individual autonomy, and in particular to the extensive freedom historically enjoyed by employers and service providers under the common law to conduct their business as they see fit. Indeed, some of the initial court judgments relating to the provisions of the EPA, SDA and RRA explicitly suggested that such legislation should be read narrowly, in particular when it came to the provisions setting out the 'inquisitorial' investigative powers of the equality commissions.<sup>17</sup> Later judgments were more tactfully phrased. However, a pattern persisted whereby the reach of discrimination law was regularly read down to minimise its impact on business as usual – while expansionist readings designed to further the rights protective orientation of the legislation met with much less favour.

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<sup>13</sup> [1983] ICR 428. See also *Meer v London Borough of Tower Hamlets* [1988] IRLR 399, where Balcombe LJ at [10] acknowledged that the restrictive interpretation adopted by the Court of Appeal 'may not be consistent with the object of the Act'.

<sup>14</sup> G. Appleby and E. Ellis, 'Formal Investigations: The Commission for Racial Equality and the Equal Opportunities Commission as Law Enforcement Agencies' [1984] *Public Law* 236.

<sup>15</sup> See McColgan, *Discrimination, Equality and the Law*, above at n. 3; K. Monaghan, *Equality Law*, Oxford, OUP, 2013, 43-45; C. O'Conneide and K. Liu, 'Defining the Limits of Discrimination Law in the UK – Principle and Pragmatism in Tension' (2014) 14(4) *International Journal of Discrimination and the Law* 239-265.

<sup>16</sup> See e.g. *Perera*, above at n. 13.

<sup>17</sup> See in particular Lord Denning's views in *Science Research Council v Nasse* [1979] QB 144, where the CRE's use of its investigative powers was compared to the 'days of the Inquisition'.

Such attitudes were not just confined to the judges. Successive UK governments were also reluctant to extend the scope of discrimination law, often out of a concern to minimise its impact on the economic freedom of employers and service providers. No substantial steps were taken to extend the scope of UK anti-discrimination law for many years after 1976.<sup>18</sup> Pressure from the disability rights movement finally succeeded in securing the enactment of the Disability Discrimination Act ('DDA') in 1995. However, key elements of the new statute were framed in relatively narrow terms, including the definition of disability and the scope of the reasonable accommodation obligations imposed upon employers.<sup>19</sup> When it came to other grounds such as age, religion or belief and sexual orientation, reliance was placed on other policy tools (such as voluntary 'codes of practice') to combat discrimination, in place of what was seen as the potentially destabilising tool of legislation. Indeed, discrimination on these grounds was only prohibited from 2003 on by virtue of the requirements of EU law (see below), almost thirty years after the EPA, SDA and RRA were first enacted.<sup>20</sup>

To summarise, the development of UK discrimination law was hobbled by (i) political reluctance to extend its scope and (ii) judicial resistance to embracing a purposive interpretative approach. Wider human rights considerations had little impact, either at the legal or political level: the UK's traditional dualist approach to international law, plus its traditional reluctance to embrace 'rights talk', kept them at bay. Furthermore, non-discrimination was not acknowledged to be a core common law value – which fuelled an underlying perception that discrimination law represented a useful but alien transplant into the stable ecosystem of UK law, whose growth had to be contained and limited.

Some of these 'drag factors' remain in play today, notwithstanding the dramatic expansion of UK discrimination law in the 2000s and its codification in the Equality Act 2010 (see below). Political reluctance to extend the scope of anti-discrimination legislation persists, while courts and tribunals still regularly hand down judgments featuring unconvincingly narrow readings of the provisions of anti-discrimination statutes.<sup>21</sup> However, the conceptual foundations that underpin UK discrimination law have acquired much greater solidity – and the rights-protective orientation of the legislation is now widely acknowledged in both the political and legal spheres. As a consequence, many of the limitations of the original 1970s legislation have been partially overcome. However, much of this transformation can be traced back to the influence of European law, as distinct from domestic legal factor, and the purposive, rights-protective stance it has adopted vis-à-vis discrimination law norms. Understanding this intertwined UK/European relationship is therefore key to understanding the evolution of UK discrimination law from 1965 to its current form, as the next part of this paper illustrates.

## II. The Leavening Influence of European (EU) Law

The UK's ambiguous relationship with wider processes of European integration has played out through various modes of political, legal and administrative/technical interaction. Legally, the two most significant such modes have been (i) the system of human rights protection established under

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<sup>18</sup> K. Monaghan, *Equality Law*, above at n 15.

<sup>19</sup> See in general, C. Gooding, 'The Disability Discrimination Act 1995: An Overview', in J. Cooper, *Law, Rights and Disability*, London: Kingsley, 2000, 139-163.

<sup>20</sup> C. O'Conneide, 'Fumbling Towards Coherence: The Slow Evolution of Equality Law in England and Wales' (2006) *Northern Ireland Legal Quarterly* 57-102.

<sup>21</sup> See the *cri de coeur* by Juliette Nash in Discrimination Law Association, *Briefings* 377-390, Vol. 26, October 2005, 390: 'it is clear that expecting the [Employment Appeals Tribunal] to give anything resembling a purposive interpretation to legislation is most unwise'.

the European Convention of Human Rights ('ECHR') and (ii) EU law. Both these legal frameworks have exercised a considerable influence on the development of UK discrimination law, while being influenced in their own turn by the British standards. When it comes to discrimination law, they have exerted a 'leavening effect' on British discrimination law, helping to counteract the influence of the drag factors discussed above and giving it much greater scope, substance and texture. However, their impact has played out in different, albeit inter-related, ways – which need to be carefully disentangled, given the potential consequences of Brexit (as discussed further below).

### ***II a. The ECHR and the 'Normalising' of Rights Discourse***

The ECHR has exerted a considerable influence over UK public law, especially since the incorporation of Convention rights into UK law via the Human Rights Act 1998 (HRA). However, its impact on UK discrimination law has been limited. The ECHR jurisprudence on Article 14 of the Convention, which guarantees the right to equality and non-discrimination, has until recently been relatively under-developed.<sup>22</sup> Furthermore, as the Convention takes effect in the context of the vertical relationship between individuals and the state, its influence in the horizontal/private law sphere has been limited.

Having said that, the ECHR case-law relating to equality and non-discrimination case-law has expanded considerably over the last decade or so.<sup>23</sup> Certain judgments of the European Court of Human Rights have fleshed out the scope of the positive obligations imposed upon state parties to take positive steps to protect individuals against discrimination in the employment sphere – especially when it comes to discrimination linked to religious belief, political opinion or trade union membership.<sup>24</sup>

More indirectly, but perhaps ultimately more significantly, UK membership of the ECHR system, coupled with the impact of the HRA, has familiarised courts with human rights claims – and encouraged political and legal actors more generally to engage with rights discourse to a much greater degree than had been the case hitherto.<sup>25</sup> Non-discrimination has featured prominently in this 'normalisation' of rights discourse. Article 14 has featured in many of the leading HRA cases, generating a number of significant judgments where acts of public authorities were struck down on the grounds that they unjustifiably discriminated against particular groups based on gender, nationality, carer status or other 'suspect grounds'.<sup>26</sup>

Furthermore, in a sequence of judgments dating back to the 1990s, the UK courts have recognised the existence of a common law principle of equality.<sup>27</sup> By virtue of this principle, which represents an extension of the existing administrative law doctrine of rationality, unequal treatment by public authorities based on irrational criteria such as race or gender prejudice is reviewable by courts on the basis that it offends against rule of law first principles. Significantly, Blake J. in *R (Limbu) v Secretary of State for the Home Department* suggested that the 'common law and Convention principle[s] essentially walk hand in hand together':<sup>28</sup> this common law principle has been

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<sup>22</sup> See O'Connell, above at note 20.

<sup>23</sup> R. O'Connell, 'Cinderella comes to the Ball: Art 14 and the right to non-discrimination in the ECHR' (2009) 29(2) *Legal Studies* 211–229.

<sup>24</sup> See e.g. *Wilson v UK* [2002] IRLR 568; *Redfearn v UK* (2013) 57 EHRR 2; *Eweida v UK* (2013) 57 EHRR 8.

<sup>25</sup> S. Gardbaum, 'A Comparativist's View', *Modern Law Review*.

<sup>26</sup> See e.g. *Moore v Secretary of State for Communities and Local Government* [2015] EWHC 44 (Admin), paras. [85]-[138]; *Hurley v Secretary of State for Work and Pensions* [2015] EWHC 3382 (Admin).

<sup>27</sup> See e.g. *Matadeen v Pointu* [1999] 1 AC 98; *R (Rotherham Metropolitan Borough Council) v Secretary of State for Business, Innovation and Skills* [2015] UKSC 6.

<sup>28</sup> [2008] EWHC 2261 (Admin).

conceptualised as an English public law equivalent to the rights standards developed at European level.

The exact status, scope and substance of this equality principle remains unclear.<sup>29</sup> Furthermore, as a doctrine of administrative law, it can be invoked against public authorities discharging their statutory functions - but not employers or service providers. However, it serves as a good example of how rights concepts have percolated into the common law, and begun to reshape its scheme of values. It also illustrates how UK courts have become increasingly comfortable engaging with rights discourse in general, and the principle of non-discrimination in particular. In general, anti-discrimination controls are no longer viewed as running against the grain of common law values: instead, in obiter remarks and extra-judicial speeches, they are now regularly described as important component elements of a rule of law based legal system.<sup>30</sup>

This shift in judicial attitudes correlates with gradual adjustments in how anti-discrimination legislation has been interpreted and applied by the courts. There has been a tendency for the higher courts in particular to adopt a more expansive approach when interpreting statutory text in this context, and to emphasise the importance of reading the legislation in a way that gives effect to its assumed purpose, i.e. to provide effective protection for the right to non-discrimination. As previously mentioned, this shift is not uniform. However, it has become a clearly identifiable trend. For example, recent UK Supreme Court judgments in discrimination cases such as *Essop* clearly adopting a purposive approach that gives presumptive priority to rights-protective readings of the legislation.<sup>31</sup>

The ECHR-influenced 'normalisation' of rights discourse has clearly influenced these developments, by helping to create a more welcoming climate for expansive, rights-protective approaches to the interpretation and application of anti-discrimination legal norms in general. It has thus indirectly contributed to the expansion and deepening of UK discrimination law. In so doing, however, it has mainly supplemented the influence of the other major European driver of legal change – EU law.

### ***II b. EU Law- Non-discrimination as a Core Objective and Fundamental Norm of the Legal System***

The influence exerted by EU law on the development of UK discrimination law since the UK joined what was then the EEC in 1973 has manifested itself in several different ways. Some of this influence has been indirect in nature. For example, British courts have become accustomed to applying various elements of EU law which are thoroughly marinated in the language of rights - including the 'general principles' of EU law (i.e. the substantive rule of law values which EU legal norms are required to respect) and the EU Charter of Fundamental Rights. In tandem with the ECHR/HRA, this has encouraged a wider opening up to 'rights talk' – which has been particularly pronounced in the context of discrimination law.<sup>32</sup> However, the primary impact of EU law on UK discrimination law has been much more direct. To give effect to the binding requirements of EU law, the UK has been required to expand the scope of application of its own domestic anti-discrimination legislation, and

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<sup>29</sup> See the comments of Scott Baker J in *Association of British Civilian Internees Far East Region v Secretary of State for Defence* [2002] EWHC 2119 (Admin) (18 October 2002), [53]-[54].

<sup>30</sup> See e.g. Baroness Hale's judgment in *Ghaidan v Godin-Mendoza* [2004] 2 AC 557, especially [132]; and also her views as expressed in B. Hale, 'The Quest for Equal Treatment' [2005] *Public Law* 571-585.

<sup>31</sup> *Essop v Home Office* [2017] UKSC 27.

<sup>32</sup> See e.g. the comments of Lord Sumption in *R (Rotherham Metropolitan Borough Council) v Secretary of State for Business, Innovation and Skills* [2015] UKSC 6, where he suggests that the EU general principle of equal treatment is an analogue to the common law principle of equality.

to beef up its substantive requirements to ensure effective protection against the various forms of discriminatory treatment prohibited under EU law. Many of these changes have been implemented in response to judgments of the European Court of Justice (ECJ),<sup>33</sup> which has adopted a strongly purposive approach in interpreting EU equality law. As a consequence, UK discrimination law has been extended, deepened and given more impact – with EU law thus acting as the major counterweight to the drag factors previously mentioned, in particular in the context of employment and occupation.

To illustrate this, a historical detour is required. The development of EU equality law began in the field of equal pay: the provisions of the original Article 119 of the Treaty of Rome, now Article 157(1) of the Treaty on the Functioning of the EU (TFEU), required member states to give effect to the principle of equal pay for male and female workers for work of equal value. Subsequently, the ECJ in its ground-breaking judgment in the case of *Defrenne v Sabena (No. 2)* ruled that achieving equal pay constituted both a core economic and social objective of the EEC. Developing this line of argument, the ECJ went on to conclude that equal treatment as between men and women also constituted a general principle of the EU legal order, i.e. an objective norm to which other elements of EU law must conform.<sup>34</sup> Following that, in the follow-up case of *Defrenne v Sabena (No. 3)*, the ECJ linked this general principle to the protection of fundamental rights, concluding that ‘respect for fundamental personal human rights is one of the general principles of community law, the observance of which it has a duty to ensure’, and that ‘there can be no doubt that the elimination of discrimination based on sex forms part of those fundamental rights’.<sup>35</sup>

This opened the way for the EU to adopt a range of measures designed to reinforce gender equality in the employment sphere, including the 1975 Equal Pay Directive<sup>36</sup> and the 1976 Equal Treatment Directive.<sup>37</sup> In so doing, the EU institutions drew heavily upon the recently enacted UK legislation in this field – which at that time had no real equivalent in other European states. The content of the Equal Pay and Equal Treatment Directives were thus heavily influenced by the EPA and SDA: they were designed to lay down a comprehensive floor of legal rights protecting individuals against sex discrimination in employment and occupation across the EU, just as the EPA and SDA had done in the context of the UK.

However, unlike the UK legislation, these directives were from the beginning given an expansive interpretation by the ECJ, which took account both of the central importance of gender equality as a core objective of the EU legal order and the need to ensure effective protection of the ‘fundamental personal human right’ of freedom from sex discrimination.<sup>38</sup> Thus, from the beginning, a purposive,

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<sup>33</sup> The ECJ has, since the provisions of the Treaty of Lisbon came into force in 2009, been renamed the ‘Court of Justice of the EU’ (CJEU). Its original name is used here when referring to pre-2009 judgments, in the interests of historical accuracy.

<sup>34</sup> See in general K. Lenaerts and J. Gutiérrez-Fons, ‘The Constitutional Allocation of Powers and General Principles of EU Law’ (2010) 47 *CMLR* 1629–1669.

<sup>35</sup> Case C-149/77, *Defrenne v Sabena (No. 3)* [1978] ECR 1365, [26]-[27].

<sup>36</sup> Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay, OJ L 045, 19/02/1975, p. 19.

<sup>37</sup> Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, OJ L039, 14/02/1976, p. 40.

<sup>38</sup> For example, in Case C-13/94, *P and S v Cornwall County Council* [1996] ECR I-2143 (discussed further below), the ECJ stated at [18]-[20] that that the provisions of the Equal Treatment Directive were ‘simply the expression, in the relevant field, of the principle of equality, which is one of the fundamental principles of Community law’. It then went on to affirm that ‘the right not to be discriminated against on grounds of sex is one of the fundamental human rights whose observance the Court has a *duty to ensure*’ [author’s italics], and

rights-protective interpretative approach was built into the equality jurisprudence of the ECJ.<sup>39</sup> This led to the Equal Pay and Equal Treatment Directives being interpreted in ways that extended protection against gender discrimination in the employment context, which in turn required substantial adjustments to be made to UK law to ensure conformity with the binding requirements of EU law.

Thus, in *Barber v Guardian Royal Exchange Assurance Group*,<sup>40</sup> the provisions of UK law that permitted employers to set different occupational pension entitlement ages for men and women were deemed by the ECJ to breach the requirements of the Equal Pay Directive: the Court concluded that such occupational benefits constituted a form of pay which should be treated as coming within the scope of the Directive.<sup>41</sup> This judgment brought a swathe of hitherto excluded occupational benefit schemes within the scope of UK discrimination law, which in line with the requirements of EU law had to be interpreted in conformity with the ECJ's conclusions - thereby considerably expanding its scope of application.

Similarly, in *P v S and Cornwall County Council*,<sup>42</sup> the ECJ held that discrimination arising from a person undergoing gender reassignment came within the scope of the Equal Treatment Directive: in its judgment, which invoked the relevant ECHR jurisprudence as well as the principle of human dignity, the Court concluded that such discrimination constituted unfavorable treatment 'by comparison with persons of the sex to which [the claimant] was deemed to belong before undergoing gender reassignment'. As a consequence, the scope of UK discrimination law had to be extended to cover discrimination based on gender reassignment – a significant extension of its reach.

Multiple other examples could be given, which would be familiar to any student of UK employment law. They include the leading cases of *Webb* (no requirement to identify a male comparator to establish a claim for pregnancy discrimination),<sup>43</sup> *Danfoss*<sup>44</sup> and *Enderby*<sup>45</sup> (once *prima facie* discrimination shown, the burden of proof shifts to an employer to objectively justify pay disparities); and *Marshall*<sup>46</sup> (the cap on compensation for discrimination claims imposed by the SDA was incompatible with the need to ensure effective deterrence of unequal treatment).

Indeed, from the 1980s on, the ECJ became a happy hunting ground for the British equality commissions and activist lawyers seeking to expand the scope and substance of UK discrimination

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proceeded to interpret the scope of the Directive by reference to 'its purpose and the nature of the rights which it seeks to safeguard'.

<sup>39</sup> See in general C. O'Connell, 'The Constitutionalization of Equality within the EU Legal Order: Sexual Orientation as a Testing Ground' (2015) 22 *Maastricht Journal of European and Comparative Law* 370-395.

<sup>40</sup> Case 262/88, [1990] ECR I-1889.

<sup>41</sup> In so doing, the Court expressly referenced the need to ensure effective and comprehensive protection against discrimination: '[w]ith regard to equal pay for men and women, genuine transparency, permitting an effective review by the national court, is assured only if the principle of equal pay must be observed in respect of each of the elements of remuneration granted to men and women, and not on a comprehensive basis in respect of all the consideration granted to men and women' [4].

<sup>42</sup> Case C-13/94, [1996] ECR I-2143.

<sup>43</sup> Case C-32/93, *Webb v EMO Air Cargo* [1994] IRLR 482.

<sup>44</sup> Case 109/88, *Danfoss* [1989] ECR I-3199.

<sup>45</sup> Case C-127/92, *Enderby v Frenchay AHA* [1994] ICR 112.

<sup>46</sup> Case C-271/91, *Marshall v Southampton and South-West Hampshire Area Health Authority (No 2)* [1994] ICR 242. At [24], the Court concluded that the Equal Treatment Directive's 'objective is to arrive at real equality of opportunity and cannot therefore be attained in the absence of measures appropriate to restore such equality when it has not been observed...[T]hose measures must be such as to guarantee real and effective judicial protection and have a real deterrent effect on the employer'.

law.<sup>47</sup> The ECJ's case-law, based around its purposive interpretative approach directed towards ensuring effective protection for the principle of gender equality, generated transformative shifts within the UK's legal framework – helping in particular to counteract the legal and political drag factors which continued to hobble its development at domestic level. Its impact in this regard was amplified by the EU legal requirement that any provisions of national law, including parliamentary legislation, had to be set aside: this allowed litigants in cases like *Barber, P v S* and the others listed above to overturn both statutory provisions and established judicial precedents which had previously operated so as to limit protection against discrimination.

The reach of EU legislation has also expanded over time, in part because of the desire of the EU institutions to signal their commitment to progressive social values in an area (employment conditions/gender equality) where the Union had clear competency to act. This generated measures such as the Pregnant Workers Directive,<sup>48</sup> the Parental Workers Directives,<sup>49</sup> the Part-time Work Directive,<sup>50</sup> and the Fixed-term Work Directive<sup>51</sup> - all of which indirectly extended the scope of protection enjoyed against sex discrimination.

Furthermore, the EU also gained new competence to act to combat other forms of discrimination. The inclusion by the Treaty of Amsterdam in 1999 of a new Article 13 (now Article 19 TFEU) into the EC Treaty conferred competency upon the EU institutions to 'take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation'. This provided the legal basis for Directive 2000/43/EC (the 'Race Equality Directive') which has prohibited race discrimination in both employment and occupation and a wider range of social interaction (including access to goods and services, education, 'social advantages' and 'social protection'), and Directive 2000/78/EC (the 'Framework Equality Directive') which prohibited discrimination on the basis of age, disability, sexual orientation and religion or belief in the field of employment and occupation. The existing gender equality directives were also extended and upgraded.<sup>52</sup>

These developments required UK legislators to keep pace. This resulted in discrimination on the basis of age, sexual orientation and religion or belief in the employment context being prohibited for the first time in UK law, while the existing legislation covering disability, race and sex discrimination

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<sup>47</sup> See C. Barnard, 'A European Litigation Strategy: The Case of the Equal Opportunities Commission', in J. Shaw and G. More, *New Legal Dynamics of European Union*, Oxford, Clarendon Press, 1995.

<sup>48</sup> Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (tenth individual Directive within the meaning of Article 16 (1) of Directive 89/391/EEC).

<sup>49</sup> Council Directive 96/34/EC of 3 June 1996 on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC; Council Directive 2010/18/EU of 8 March 2010 implementing the revised Framework Agreement on parental leave concluded by BUSINESS EUROPE, UEAPME, CEEP and ETUC and repealing Directive 96/34/EC.

<sup>50</sup> Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC - Annex: Framework agreement on part-time work.

<sup>51</sup> Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP.

<sup>52</sup> See 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 ('the Goods and Services Directive'); Council Directive 2006/54 on equal opportunities and equal treatment of men and women in employment and occupation (the 'Recast Gender Equality Directive'); and Directive 2010/41/EU of the European Parliament and of 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 (the 'Self-Employment Directive').

had to be upgraded to meet the new requirements of EU law.<sup>53</sup> Furthermore, as the ECJ carried over its expansive interpretative approach from the gender equality context into the new terrain opened up by the post-2000 Directives,<sup>54</sup> further adjustments had to be made to UK law to reflect the Court's evolving case-law. Thus, in *Coleman v Attridge Law*, the ECJ ruled that employment discrimination on the basis of association with a disabled person was prohibited under the requirements of the 2000 Framework Directive, requiring a significant extension of UK law to mirror this legal position.<sup>55</sup> Furthermore, the requirement that all EU law and national implementing measures conform to the provisions of the EU Charter of Fundamental Rights, including the right to effective protection against discrimination as set out in Article 21 of the Charter, have also been applied by UK courts to set aside legislation restricting the right of access to the courts to challenge alleged discriminatory treatment by an employer.<sup>56</sup>

In other words, the gradual extension of EU equality law has ratcheted up protection against discrimination in the UK, greatly expanding both its scope and substance. It is no exaggeration to say that the EU standards have had a transformative effect on British law in this regard. UK discrimination law might hypothetically have over time evolved along similar paths as EU law. However, it is clear that EU law, working in tandem with the more indirect influence of the ECHR, has greatly accelerated the process of development - and given UK discrimination law teeth that it might not otherwise have.

### **III. The Equality Act 2010 and the UK's Gradual Embrace of an Expansive, Rights-protective Take on Discrimination Law**

This leavening effect has not always been endorsed with enthusiasm in the UK, running counter as it does to the influence of the deeply rooted 'drag factors' discussed above. Even where an expansion of existing UK discrimination law has been clearly required by EU norms, the response has sometimes been grudging. For example, when the UK had to dispense with its reliance on unenforceable codes of conduct and actively prohibit employment discrimination on grounds of age, religion or belief and sexual orientation in the early 2000s – in response to the requirements of the Framework Equality Directive - the implementing legislation only made such changes as where strictly necessary to comply with EU law.<sup>57</sup>

This reflected once again the historic reluctance of UK legislators to extend the scope of discrimination law beyond what was strictly necessary. However, it also ensured inconsistency in the scope of protection afforded to different forms of discrimination, as discrimination on the basis of age, religion or belief and sexual orientation that fell outside of the scope of the Framework Equality Directive (i.e. in access to goods and services, education, housing and the performance of public functions) was not covered in contrast to the other grounds of disability, race and sex. Furthermore, it also ensured that different definitions of key concepts such as indirect discrimination would be

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<sup>53</sup> This was achieved through a combination of legislative amendments and the passing of regulations under the appropriate provisions of the European Communities Act 1972: see O'Conneide, 'Fumbling Towards Coherence', above at note 20.

<sup>54</sup> See in general C. O'Conneide, *The Evolution and Impact of the Case-Law of the Court of Justice of the European Union on Directives 2000/43/EC and 2000/78/EC*, Brussels: European Commission/Migrant Policy Group, 2012, available at <http://www.migpolgroup.com/portfolio/the-evolution-and-impact-of-the-case-law-of-the-court-of-justice-of-the-european-union/>.

<sup>55</sup> Case C-303/06, [2008] 3 CMLR 27.

<sup>56</sup> *Benkharbouche v Embassy of the Republic of Sudan* (Rev 1) [2015] EWCA Civ 33 (05 February 2015).

<sup>57</sup> See in general M. Bell, 'A Patchwork of Protection: The New Anti-Discrimination Law Framework' (2004) 67(3) *Modern Law Review* 465-477.

applied in different contexts, depending on whether they fell within the scope of EU law or not: the wording of the new directives was more expansive in important respects than the more narrowly drafted UK legislation, but the implementing legislation only adjusted the UK legal position to reflect these changes within the scope of application of the directives.<sup>58</sup> All this generated an unwieldy 'patchwork of protection',<sup>59</sup> adding additional complexity to an already fragmented legislative framework.

This fragmentation, taken in tandem with a growing willingness among key UK legal and political actors to follow the lead provided by the ECHR/EU and embrace a more expansive view of the function and purpose of discrimination law, ultimately generated moves to 'level up' protection across the different non-discrimination grounds. To start with, the Equality Act 2006 extended protection against religious and sexual orientation discrimination beyond the sphere of employment and occupation. It also created a new single Equality and Human Rights Commission ('the EHRC') into which the existing equality commissions were merged, whose investigatory powers were reinforced and extended as compared to those available to its predecessors.<sup>60</sup> Subsequently, UK government proceeded to carry out a comprehensive review of discrimination law in 2007,<sup>61</sup> the conclusions of which were finally given legislative shape in the codifying Equality Act 2010. The Act made provision for a generally uniform approach to discrimination based on the 'protected characteristics' of age, disability, gender reassignment, marital status and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation.<sup>62</sup> It also effectively levelled up the scope of protection applied across these different grounds,<sup>63</sup> widened the scope of permissible positive action,<sup>64</sup> and imposed a single general positive duty on all public authorities requiring them to promote equality of opportunity across all the equality grounds set out in UK law.<sup>65</sup>

Much of the provisions of the 2010 Act were prompted by EU requirements – either directly, with various provisions being included to give full effect and/or clear legal expression to relevant EU legal standards, or indirectly, with various other provisions inserted to smooth over inconsistencies left over from previous moves to give effect to EU law.<sup>66</sup> However, some of its elements went well beyond the requirements of EU law. For example, the general positive equality duty imposed on all

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<sup>58</sup> See N. Bamforth, M. Malik and C. O'Connell, *Discrimination Law: Theory and Context* (London: Sweet & Maxwell, 2008), 299-309.

<sup>59</sup> Bell, at note 57 above.

<sup>60</sup> C. O'Connell, 'The Commission For Equality And Human Rights: A New Institution For New And Uncertain Times' (2007) 36(2) *Industrial Law Journal* 141-162.

<sup>61</sup> See *Discrimination Law Review: A Framework for Fairness: Proposals for a Single Equality Bill for Great Britain*, London, Department of Communities and Local Government, 2007.

<sup>62</sup> For a comprehensive analysis of the 2010 Act, see B. Hepple, *Equality: The New Legal Framework*, Oxford: Hart, 2010; by the same author, 'Two Steps Forwards and Two Steps Backwards for Reflexive Regulation' (2012) 40(4) *Industrial Law Journal* 315-335. A separate statutory framework is still in place in Northern Ireland.

<sup>63</sup> In particular, the 2010 Act made provision for the prohibition on age discrimination to be extended to cover the provision of goods and services and the performance of public services, except as regards persons under 18: see s. 28 of the 2010 Act read together with Part 2.

<sup>64</sup> Ss. 158-9 of the 2010 Act.

<sup>65</sup> See s. 149 of the 2010 Act. This single duty replaced the positive duties previously imposed on public authorities to promote equality of opportunity on the grounds of race, disability and gender.

<sup>66</sup> See for example the provisions of s. 158 of the 2010 Act relating to positive action, which reflect the (controversial) standards laid down in this regard by the ECJ in cases such as Case C 407/98, *Abrahamsson v Fogelqvist* [2000] ECR I-5539.

public authorities was the culmination of a decade's worth of legal attempts within the UK to impose proactive obligations on public authorities to take positive steps to promote substantive equality of opportunity: no analogous requirements exist in EU law, which remains underdeveloped in this regard.<sup>67</sup> Similarly, the decision to extend protection against discrimination on the basis of age, religion or sexual orientation beyond the employment sphere was not mandated by EU law.<sup>68</sup>

The 2010 Act therefore showed not alone a willingness on the part of UK legislators to adopt a similar approach to discrimination law as applies in EU law, but also to cautiously extend the scope of UK law into new terrain – reflecting a tentative desire to add a more substantive dimension to the existing framework of legal regulation.<sup>69</sup>

The 2010 Act was also expressly framed and justified as an attempt to give clear, accessible and comprehensive legal protection to the fundamental right of equality and non-discrimination. Thus, at the Second Reading of the Bill in the House of Commons, Harriet Harman M.P., the Minister for Women and Equality, in introducing the Bill stated that it was designed to give fuller and better effect to the principle of equality, which she described as both the 'birthright of every individual'.<sup>70</sup> Similarly, the Joint Committee on Human Rights of the UK Parliament ('JCHR') commented that '[m]any of the measures it contains will enhance the protection of human rights' and praised the Act for advancing the right to non-discrimination while simultaneously harmonising and simplifying the law in this context.<sup>71</sup>

The 2010 Act can thus be viewed as marking the moment when the UK legislature endorsed the idea that comprehensive, cross-ground statutory protection against discrimination was a necessary corollary of the need to respect the fundamental right to equality and non-discrimination. EU law may have prompted much of its contents, while the ECHR may have played a key role in opening up UK law and politics to rights discourse. However, the 2010 Act domesticates these external influences, by embedding the rights-inflected European approach in national legislation – and goes beyond its European influences in some significant ways.

Taken in tandem with the shifts in judicial attitudes that have paralleled these developments discussed above, this marks a dramatic transformation in how non-discrimination values are viewed. Whereas in 1965 they were regarded as alien bodies introduced into the native bloodstream of the common law, the 2010 Act has confirmed that they are now acknowledged to be part of the normative underpinnings of the UK legal system taken as a whole.

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<sup>67</sup> O'Connell, 'Fumbling Towards Coherence', above at note 20.

<sup>68</sup> A proposal by the European Commission to extend such protection within EU law has languished within the EU legislative process for the last nine years: see Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation, COM/2008/426 final, available at <http://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A52008PC0426>.

<sup>69</sup> For criticism of the extent to which the legislation succeeds in this aim, see in general, Hepple, *Equality: The New Legal Framework*, above n 62; see also C. McCrudden, 'Equality Legislation and Reflexive Regulation: A Response to the Discrimination Law Review's Consultative Paper' (2007) 36(3) *Industrial Law Journal* 255-266. Both Hepple and McCrudden are very critical of how the 2010 Act fails to impose positive duties on private sector employers – an omission which shows that UK legislators have not forgone all their habitual reluctance to impose substantive constraints on the freedom of action of employers.

<sup>70</sup> HC Deb, 11 May 2009, col. 553.

<sup>71</sup> Joint Committee on Human Rights, *Legislative Scrutiny: Equality Bill*, 26<sup>th</sup> Report of Session 2008-09, HL Paper 169, HC 736, 12 November 2009 (London: Stationary Office, 2009), p. 3.

This is not to suggest that the status and substance of these anti-discrimination values are not up for debate, or that UK discrimination law does not continue to generate controversy. Political debates still persist about what the law should permit or prohibit, and in particular about the extent to which the freedom of action of employers should be circumscribed to give effect to the requirements of discrimination law. Similarly, courts and tribunals still hand down the occasional judgment that applies the legislation in restrictive and constraining ways – reflecting a persisting presumption that discrimination law should be read narrowly.<sup>72</sup> Attempts to expand the scope of the existing legislation, or to invoke the provisions of the ECHR to challenge existing primary and secondary legislation, also attract resistance.<sup>73</sup>

However, the general direction of travel has been towards a more willing embrace of an expanded concept of non-discrimination, understood to be linked to the enjoyment of fundamental rights and the vindication of core common law principles. Purposive readings of the legislation have become commonplace, while the provisions of the 2010 Act continue to attract cross-party political support. Thanks in part to the influence of European law, discrimination law has put down deep roots in UK law - notwithstanding the 'aliennes' of its origins.

#### **IV. Brexit and the Future**

It remains to be seen whether this situation will change in the future. The Brexit referendum in June 2016 resulted in a vote to leave the EU. At the time of writing, the consequences of this vote continue to play out. It is not clear what the future UK/EU relationship will look like, or how UK law may develop in the future outside of the EU. In particular, considerable uncertainty exists as to the scope and content of any future transitional and/or final trade agreements between the EU and the UK, and the extent to which any such agreement will require the UK to adhere to elements of the existing EU *acquis*, including EU labour standards and the specific requirements of the equality directives. However, it is very likely that the status of EU law will change after Brexit, with possible knock-on effects on UK discrimination law more generally.

At the time of writing, the UK government in the text of its draft EU (Withdrawal) Bill has proposed that all existing EU law in force on the date of Brexit will be carried over and remain in force within UK law, subject however to any future primary or secondary legislation which amends or repeals its provisions.<sup>74</sup> Similarly, the established case-law of the ECJ/CJEU is to be treated as binding precedent, which is to be treated as equivalent in status to judgments of the UK Supreme Court unless subsequently overruled or overtaken by new legislative provisions.<sup>75</sup> If this approach becomes law, this means that the provisions of the EU equality directives will remain part of UK law. They will thus continue to have binding effect, more or less equivalent in status to Westminster primary legislation, and thus remain an authoritative reference point in interpreting provisions of the 2010 Act that come within its scope. However, these EU-derived norms will no longer bind Parliament (as they do at the moment). They will also be open to amendment by secondary legislation, passed by

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<sup>72</sup> See for example the judgment of the Court of Appeal in *Home Office v Essop* [2015] EWCA Civ 609, subsequently reversed by the UK Supreme Court as noted above.

<sup>73</sup> The Conservative-Liberal Democrat coalition government of 2010-5 chose not to bring several provisions of the 2010 Act in force – citing concerns about regulatory overload on public authorities and/or private employers. See e.g. *The Guardian*, 'Theresa May scraps legal requirement to reduce inequality', 17 November 2010, available at <https://www.theguardian.com/society/2010/nov/17/theresa-may-scraps-legal-requirement-inequality>.

<sup>74</sup> Clause 2 of the EU (Withdrawal) Bill (HC Bill 5), Session 2017-9 (hereafter 'the Bill').

<sup>75</sup> Clause 6 of the Bill.

ministers using the extensive Henry VIII powers that they will enjoy under the Withdrawal Bill.<sup>76</sup> Similarly, existing ECJ/CJEU case-law will retain its precedential value – but may be modified by subsequent judgments, or nullified by primary/secondary legislation. Furthermore the EU Charter of Fundamental Rights will not be carried over into UK law, even though the general principles of EU law will remain invocable within the newly bounded scope of application of ‘surviving’ EU law.<sup>77</sup> Judgments of the CJEU handed down post-Brexit will also lack any particular binding force, even if the EU legislation they refer to remain part of UK law: British courts will be under no obligation to defer to such judgments, although they can be taken into account ‘where appropriate’.<sup>78</sup>

These proposed changes need not necessarily result in the dilution of the existing levels of protection available under UK discrimination law. Unlike other aspects of EU law relating to labour rights and the protection of workers, the requirements of EU equality law have for the most part been given a firm statutory footing in UK law via the provisions of the 2010 Act. This will insulate them to some extent from any attempts to dilute the existing level of protection afforded by EU/UK law against discrimination: any adjustments to the provisions of the 2010 Act by ministers using the extensive Henry VIII powers granted to them under the provisions of the EU Withdrawal Bill are likely to be subject to close and careful parliamentary scrutiny, and may be vulnerable to legal challenge on *ultra vires* grounds if they overstep the scope of such powers.

However, by opening up the current provisions of EU equality law to the possibility of amendment or repeal, Brexit will deprive UK discrimination law of the legal comfort blanket hitherto provided by the binding requirements of EU law. Primary legislation amending or repealing key elements of the existing legal framework will become a possibility, while the expansive interpretative approach adopted by the ECJ could be reversed by a less equality-sympathetic UK Supreme Court in the future. The avenue of rights protection offered by the EU Charter of Fundamental Rights will also be closed off - even if in practice this adds little to other elements of EU law or to the ECHR/HRA.<sup>79</sup>

Perhaps most significantly of all, the UK will be cut off from any future developments within EU equality law. For example, proposed new directives designed to (i) level up protection across the various non-discrimination grounds recognised in EU law<sup>80</sup> and (ii) to impose binding positive action targets upon company boards with a view to ensuring that 40% of company boards will be female by a specified date,<sup>81</sup> if enacted as EU legislation post-Brexit, will have no impact on UK law.

Brexit will therefore decouple UK discrimination law from what has tended to be the main engine that has driven its growth and expansion – namely EU law. This will test the extent to which it has become domesticated within national law, and the degree to which its animating values have found a firm foothold within the general framework of British legal and political norms.

Thus far, the initial signs are relatively positive. Even Eurosceptic Conservative MPs in England and their allies in the press seem unwilling to tamper with the essentials of the 2010 Act (in contrast to their vocally expressed opposition to the HRA), while strong support has been expressed by

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<sup>76</sup> See Clauses 7-9 of the Bill.

<sup>77</sup> Clauses 5(4)-(5) of the Bill.

<sup>78</sup> Clause 6(2) of the Withdrawal Bill.

<sup>79</sup> See in general R. Wintemute, ‘Goodbye EU Anti-discrimination Law? Hello Repeal of the Equality Act 2010?’ (2016) 27(3) *King’s College Law Journal* 387-397.

<sup>80</sup> Above at note 68.

<sup>81</sup> Proposal for a Directive of the European Parliament and of the Council on improving the gender balance among non-executive directors of companies listed on stock exchanges and related measures, COM/2012/0614 final.

parliamentary committees for UK discrimination law to be protected against any Brexit-related dilution.<sup>82</sup> In contrast to certain other areas of EU-influenced labour market regulation, discrimination law does appear to have put down deep roots in British soil - helped it would seem in part by its close link with fundamental rights claims, and the sense in which its presence in UK law is (now) assumed give effect to certain core values of the legal system. However, only time will tell whether these roots survive the Brexit process.

## V. Conclusions – The Value of Rights?

Taking stock of this analysis of the evolution of UK discrimination law, are there any perspectives that may be of use to an Australian audience – or indeed anyone else from a common law jurisdiction with no direct interest in the interaction of UK and EU law, and the seemingly infinite complexities of Brexit? It is perhaps possible to flag up some specific points which may be worthy of note, taking into account the common ground shared by UK and Australian law. However, it is left to the reader to determine how relevant they may be to the Australian experience, bearing in mind the significant differences that exist between how discrimination law is structured, interpreted, applied and enforced in both countries.

To start with, the differences in how UK anti-discrimination statutes have been interpreted over time are striking, with narrow and rigid textual analysis gradually giving way to a relatively more expansive and purposive approach under the influence of European law. This shows that applying discrimination law is not a straightforward exercise in legal technique – which will not surprise anyone who has ever been involved in litigating a discrimination claim. There are value choices to be made when interpreting statutory language in this context, and also in applying concepts framed at a certain level of generality, such as indirect discrimination, to the facts of actual cases. And, in making such value choices, courts often look for guidance to the background norms of the legal system in question.

UK courts initially adopted a narrow interpretative approach to anti-discrimination statutes: this may in part have been motivated by lingering ideological hostility to the ‘equality agenda’, but more generally appears to have reflected the underlying structural logic of the common law – in particular its historic assumption that restrictions on individual autonomy (or, in the case of labour law, employer/employee ‘autonomy’) were inherently suspect, and liable to be read down in instances of statutory or doctrinal ambiguity. This valorisation of autonomy has been subject to sustained criticism, in particular as regards its application in the context of the employment relationship.<sup>83</sup> It certainly acted as a ‘drag factor’ on the development of UK discrimination law – and its impact appears to have been manifested not alone in judicial interpretation of the legislation but also in political reluctance to extend the scope of the law.

In contrast, within both the ECHR framework of rights protection and EU law, a different system of values appears to have been in play. EU equality law in particular has been characterised by an inherent expansive dynamic, reflecting the existence of both an institutional desire to set out progressive agenda in this area and also an understanding of non-discrimination that conceptualises it as a fundamental legal value. Ensuring effective discrimination against discrimination is acknowledged to be both a basic right and a core objective of the EU legal order, which has

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<sup>82</sup> See in particular the conclusions of the report of the House of Commons Women and Equalities Committee, ‘Ensuring Strong Equalities Legislation after the EU Exit’, 7<sup>th</sup> Report, Session 2016-7, HC 799, published 28 February 2017.

<sup>83</sup> See most recently J. Conaghan, ‘Labour Law and Feminist Method’ (2017) 33(1) *International Journal of Comparative Labour Law and Industrial Relations* 93-114.

encouraged the ECJ to adopt a generally expansive interpretative approach to the provisions of EU equality law.

In other words, the comparatively elevated status accorded to non-discrimination within the normative frameworks underpinning both EU and ECHR law has provided a legal justification for adopting an expansive approach to discrimination law – and this has gradually been carried over into UK law, with rights discourse being a highly significant transmission device in this regard. Now, the specific provisions of the Equality Act 2010 are underpinned by quite a different set of values than originally applied in the early years of UK discrimination law – as reflected in the much more expansive, rights-protective approach adopted in recent years by British courts to the interpretation of UK discrimination law, and the political context that surrounds such legislation. Brexit will be a test of the depth of this transformation. But there is no doubt that discrimination law has acquired a status and significance that it did not originally enjoy, thanks in part to its link to rights discourse more generally.

Of course, the use of ‘rights talk’ to challenge embedded structures of disadvantage and oppression has often been criticised. Indeed, UK and Australia have a shared history of rights scepticism, manifested in both political debate and legal commentary. This has been particularly pronounced in the context of labour law, where the collectivist tradition of both countries has frowned upon the allegedly individual orientation of ‘rights talk’ and its lack of clear definition.

Such suspicion is not wholly unjustified: indeed, substantial criticisms can be made of the limits of rights-based approaches to discrimination law as developed within the framework of the ECHR and EU law.<sup>84</sup> However, when it comes to discrimination law, the UK experience arguably shows that rights discourse can serve as an effective vector for the transmission of equality-friendly values from one legal system to another - and that ‘rights talk’, for all its flaws, can be effective in helping to displace other values and assumptions which may otherwise shape the interpretation, application and development of discrimination law. Furthermore, it can have a ‘spill over’ effect, and influence the development of other areas of labour law: indeed, just as this paper was being finished, the UK Supreme Court has invoked the existence of a common law right of access to justice to strike down ministerial regulations imposing substantial fees on employees wishing to bring claims against their employers in the employment tribunals – placing particular emphasis on the obstacles this presents to litigants bringing discrimination claims, and thereby attempting to vindicate their fundamental right to non-discrimination.<sup>85</sup>

Australian readers are thus invited to consider the following lessons from the UK experience: (i) value choices have to be made when it comes to interpreting and applying discrimination law; (ii) the background norms of a legal system can exercise a considerable influence over this choice; and (iii) rights discourse that assigns non-discrimination a high place in the legal hierarchy of values can be effective in shifting existing patterns of interpretation, even if introduced via appeals to external legal orders. Whether such lessons have validity outside the particular context of the UK/Europe relationship is a question for them to consider.

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<sup>84</sup> See for example the discussion of gender equality in M.-B. Dembour, *Who Believes in Human Rights? Reflections on the European Convention*, Cambridge, CUP, 2006.

<sup>85</sup> *R (Unison) v Lord Chancellor* [2017] UKSC 51.