

Brexit and Gender Equality

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In June 2016, as a result of a referendum held in the United Kingdom (UK), voters decided that the UK was going to leave the European Union (EU); otherwise commonly referred to as “Brexit”. Results showed that a slight majority of 52% of the population wanted the UK to leave the EU. However, it was not until 31 January, 2020, that the UK formally withdrew after months of negotiations had taken place. EU laws remain enforceable in the UK until a transition or implementation period ends on 21 December, 2020 - including certain legislation relating to gender equality. Even prior to Britain’s withdrawal from the EU, experts argued that it could have a detrimental effect on gender equality, ranging from consequential unemployment, tight family budgets and most importantly, weaker legal protection (Batha).

For the EU, gender equality is a core value. This is reflected in various articles¹, including Articles 21 and 23 of the Charter of Fundamental Rights of the EU, which prohibit any gender based discrimination, further establishing equality between genders as a fundamental right and providing stronger remedy mechanisms than that found in UK law (Honeyball, Mary, and Hanna Manzur). Unfortunately, even throughout the discussion of such an imperative topic such as Brexit, eight white men and only one woman took the lead throughout Brexit negotiations, leaving women entirely underrepresented, despite EU legislation having played such a fundamental role in the protection of equality and the need thereof in a post-Brexit era (Barr). Any protections offered through employment and anti-discrimination laws lose their effect unless effectively regulated. In other words, upon EU departure, the UK is no longer bound by any prospective laws and current laws can be repealed without adequately being made up for in new legislation.

Following the day of departure from the EU, a transition period was triggered on 1 February, 2020, as outlined in Article 126 of the Withdrawal Agreement, which concludes on 31 December, 2020, while being subject to extension². Article 127 of the agreement outlines that throughout this period, Union law remains in force unless otherwise stipulated and may be extended up to two years if necessary, prior to 1 July, 2020, in accordance with Article 132. As of July 12, Britain has formally rejected an extension (even despite a current pandemic taking a toll on the economy), providing companies and negotiators with a rather tight timeframe to adjust for a more confining trading environment with the EU (Brunsden, Jim, and Sebastian Payne). Unlike a “hard Brexit”, a “soft Brexit” would allow for a smoother transition from being an EU member to becoming a third country due to the maintenance of a close alignment of the UK with the EU. In contrast, a hard Brexit or “no deal” Brexit would have a more severe impact on women, however, this does not mean that they are left entirely unscathed by a soft Brexit.

¹ See Articles 2 and 3(3) TEU, Articles 8, 10, 19 and 157 TFEU for more.

² 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.

Throughout this phase of implementation, EU law continues to be applicable to all that falls within the scope of the Withdrawal Agreement. Generally (excluding those specified), this means that EU directives, regulations and decisions continue to be valid and enforceable in accordance with their entry into force: directives must still be implemented into national law in agreement with the EU-wide established deadline, while regulations and decisions continue to be directly applicable and binding within the UK. Over decades, the EU has shaped UK law, meaning that the UK would be left with a huge legal gap upon withdrawal. As a result, it was decided that EU-derived rights and legislation were to be upheld, otherwise referred to as retained EU law, to prevent a legal crisis and ensure legal certainty. Nevertheless, it would be for UK Ministers to decide on implementing legislation, potentially lacking the same standards as those upheld by EU directives (“Social and Equality Impacts”).

Since the UK has formally rejected an extension of the transition period – even prior to the deadline, the risk of a hard, no deal Brexit still remains (Brunsden, Jim, and Sebastian Payne). After four rounds of negotiations, there has been very little progress, especially considering the very close due date, placing pressure on negotiations: for a sturdy deal to be negotiated, time is of the essence, yet not available (Bunsden, Jim, and George Parker). Thus, either a frail agreement comes into existence where political and economic interests are prioritised over gender equality issues, or a no deal Brexit occurs after all. Considering that both parties wish to avoid such a scenario, the minor possibility exists that an extension may be requested to finalise and close negotiations after all (Dellanna).

The Withdrawal Act essentially repeals the European Communities Act 1972; once repealed by the end of 2020, EU legislation should have been transposed into UK law. Nevertheless, gender equality faces an array of threats, one of which can be found in Section 5(4) of the Withdrawal Act, which reads that “The Charter of Fundamental Rights is not part of domestic law on or after exit day,” followed by subsection 5, stating that 5(4) “does not affect the retention in domestic law on or after exit day in accordance with this Act of any fundamental rights or principles which exist irrespective of the Charter”³. Due to the UK’s constitution being unwritten, EU law has served as a remedy for the issue of equality not being a constitutionally guaranteed right. Although the British government has asserted that the rights enshrined in the Equality Act 2010 will continue to exist post Brexit, Parliament will not be bound to interpreting equality laws in a manner that provides adequate protection (“The Continuing Impact”). As of the 1 January, 2021, legislation can be diminished or repealed; the EU which previously served as a barrier to undermining equality, will no longer be able to protect equality rights.

In the case of a hard Brexit, the protection safeguarded by the Pregnant Worker’s Directive could not be assured anymore as the aim is to be free from EU legislation and for the UK to take matters into its own hands. This directive secures basic rights, addressing health and safety for pregnant staff and those who have recently given birth⁴. For instance, it provides

³ European Union (Withdrawal) Act, 2018, 16.

⁴ Council Directive 92/85, 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, 1992 O.J. (L 348) 1.

for a minimum 14 week leave, at least two of which are to be taken prior to giving birth, paid leave for antenatal appointments, as well as prohibits the dismissal of pregnant workers up until their return from maternity leave, supposedly protected by the Equality Act, which will be susceptible to amendments by the government in power. It has happened in the past, where Members of Parliament have suggested that such laws be scrapped as it would be ideal in spurring growth (Cowburn).

More importantly however, with the UK's departure from the EU by the end of the year, no matter the Brexit scenario, the judgements from the Court of Justice of the EU (ECJ) would no longer be binding. Thus, the responsibility for applying case law will remain with British courts, which will make use of case law established prior to exiting the EU. Hence, the UK will not be able to benefit from any legislative advancements achieved by the EU or any new ECJ judgements in the future, causing women's rights to be "frozen in time" ("Brexit: Social and Equality Impacts"). An example of this includes the Work-life Balance Directive, which entered into force in August 2019 and must be adopted by MS within the following three years. Transposing this directive would encourage a "gender-balanced use of family-related leaves and flexible working arrangements," ("Work-life balance"), and would grant "an individual right of four months of parental leave" ("Better Work-Life"), from which the UK would be exempt upon conclusion of the transition period.

What makes matters more troubling is the stance taken by Boris Johnson's government. Although it has signalled that it "will remain aligned with the EU...and maintain many of those rules," there is "a lack of trust" (Gupta). In former Prime Minister Theresa May's withdrawal agreement(s), she had assured that previously granted protections would continue, unlike Johnson who moved the focus to the Political Declaration (Gupta). This declaration is a legally non-binding document and solely lays the path for "future relationship negotiations" ("Brexit Deal: Political Declaration"). In general, however, the conservative government has "consistently rejected key proposals and amendments to the Withdrawal Act 2018," including a non-regression clause on EU equality law (Honeyball, Mary, and Hanna Manzur). Such guarantee would prevent any norms that have already been implemented from being reviewed, if such re-examination would result in a deterioration of standards on equality rights.

In November 2019, the European Parliament passed a resolution urging all EU MS to ratify the Istanbul Convention. This Convention is the first international instrument that establishes a comprehensive and legally binding framework tackling violence against women, focusing on prevention, improving protection and ensuring punishment. While the UK signed the convention in 2012, it has failed to ratify it up to this day along with Bulgaria, Czechia, Hungary, Lithuania, Latvia and Slovakia ("Istanbul Convention: All member states"). In order to be properly implemented, it is necessary for states to assign ample funding for "crisis and long-term support but the UK fails to meet it" (Oppenheim). For instance, "rape crisis centres...are comically underfunded and underinvested" (Oppenheim). Consequently, after the transitional phase ends, the ability of the EU to place systemic pressure on the UK in support of gender equality related issues, would also be relinquished along with the much needed funding. "Brexit would lead to cuts to public services and welfare on which women disproportionately rely" (Batha) and lead to a loss in funding for projects dealing with the gender pay gap, potentially aggravating it instead (Honeyball, Mary, and Hanna Manzur).

Both a frail agreement and a no-deal Brexit are envisaged to “drag down the economy” and “may end up having a disproportionately negative impact on women” (Gupta). This is due to the different roles played by women at home and in the economy: women tend to work part-time or as temporary workers, often because it aids them in balancing family and work, where legislation does not offer sufficient support. Data published by the Women’s Budget Group (WBG) informs that women are more affected by poverty than men (Reis), that 74% of part-time workers are represented by women, 57% of involuntary part-time employment, and women constitute 69% of low earners (“2020: WBG Briefing”). The Johnson’s Withdrawal Agreement is “estimated to cost 6.7% of expected GDP rise over 15 years,” costing “as much as £130bn in lost GDP growth” – through such contraction of the economy, women are likely to suffer more as they occupy the majority part-time jobs, jobs which have a tendency to be eliminated first when the economy slows (Inman). A no-deal Brexit would be the harshest, valuing loss at 9.3% of income, where the UK is obliged to follow World Trade Organisation rules on trade (Inman). Mary Ann-Stephenson, director of WBG stated that “years of austerity following the 2008 crisis had already shown that women suffer more than men when the economy takes a knock” (Batha). Brexiteers have argued that such arguments are divisive and that it must not be politicised further than necessary. However, fact is that women hold a majority of part-time positions, suffer more from poverty and have the tendency to take on more family related roles and therefore are more prone to losing out without adequate support and legislation.

The EU has functioned as a major actor in placing gender equality on policy-making agendas. Although it is not entirely clear whether there will be a Brexit deal or not by the established deadline – a deadline so close that it is concerning – there is a wide-ranging consensus that Brexit repercussions on the economy are negative, with a no-deal Brexit being the most harmful, in particular for women (Stephenson, Mary-Ann, and Marzia Fontana). Even though the UK is not the only democracy with an uncodified constitution, the fact that it has been unwilling to retain the Charter of Fundamental Rights is concerning – upon departure from the EU, the previously guaranteed rights will no longer be entrenched as they had been through the support of EU legislation. Standards established by the EU must not be followed anymore, which may be interpreted as a positive aspect for those who demanded for the UK to regain control, however, for women previously laid guarantees fall away and are, or can be, weakened as they become more fragile. Despite not always being explicit, the EU has embedded gender equality in EU strategies for economic growth and security unlike the UK which has taken an approach where it is treated as a separate issue, adding to its policy being superior to that of the UK (Walby). Seemingly, Brexit has laid the groundwork for many uncertain years, where case law may be questioned, EU granted rights will be under review and legislation may be amended.

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