

Women and Equalities Committee

Oral evidence: [Impact of Brexit on the Equality Agenda](#), HC 657

Wednesday 14 September 2016

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Members present: Mrs Maria Miller (Chair); Ruth Cadbury; Maria Caulfield; Angela Crawley; Mrs Flick Drummond; Jess Phillips; Mr Gavin Shuker.

Questions 1 – 42

Witnesses

I: Professor Catherine Barnard, Professor of European Law, University of Cambridge, and Professor Aileen McColgan, Professor of Human Rights, King's College London.

Examination of witnesses

Witnesses: Professor Catherine Barnard and Professor Aileen McColgan.

Chair: Good morning. Can I first of all thank everybody for being here, but also apologise for the Victorian conditions in which we meet? It is a little bit warm in here. If anybody feels faint or unwell, we will not take offence if you need to take a few moments to go out. The engineers have been in to try to fix the air-conditioning system, so apologies in advance from us.

The other thing I wanted to put on the record is to thank both Aileen and Catherine for being here today and for taking part in this evidence session for the Committee. In this session, we are looking at the impact of the UK's decision to leave the EU and what issues that might hold for the area of government we look at: women and equalities.

For the record, we were trying to elicit evidence from a cross-section of organisations and, if there are any other organisations who feel they might bring a different viewpoint to this, we would be very interested to hear from them and to take evidence from them. Obviously both of you have quite clear views on this, which you may have already articulated publicly. We always want to have balance here.

Thank you so much for your time. We know how much time it takes to come into a session like this and to prepare for it, so huge thanks from the Committee. You know the drill. We will have a number of questioning areas. We are very firm on timing. We do need to finish at 10.30, so we have just over an hour. That is right, isn't it? Sorry, we have 45 minutes. It is the heat. We will kick off with some questioning now.

Q1 **Mrs Drummond:** I will to start off with a very quick look at the status quo, how the EU has influenced our equality law and what significance it has—very briefly, because we will want to go into where we move forwards with other questions.

Professor Barnard: Thank you very much for inviting us here. As far as EU law is concerned, it has had a dramatic influence, but I would say it has not been unidirectional. It has not been the EU telling us, because in the drafting of some of the key Directives the UK has had—dare I say it?—a disproportionate influence, or the shape of UK law has had a disproportionate influence at the EU level.

The three big Directives that have made a difference are, first of all, Directive 2006/54/EC, which is largely a consolidation measure, and covers equal pay and equal treatment, things that are not directly pay-related. The other two important Directives are, first, Directive 2000/43/EC, which is on equal treatment in respect of race and ethnic minorities. Given that we already had the Race Relations Act in 1976, it has been slightly less influential.



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Particularly important is Directive 2000/78/EC, which is the so-called “horizontal directive”. This introduces the new protected characteristics that had not previously been covered under UK law, namely age, sexual orientation and religion and belief. Religion and belief had already been protected in Northern Ireland, but not in the rest of the UK. The extension of the protected characteristics—there are now nine protected characteristics in the Equality Act—owes a lot to EU law.

Q2 Mrs Drummond: Have there been any examples of the UK influencing EU law, or has it mostly been a bit of both?

Professor McColgan: As Catherine said, it is not unidirectional. It seems to me that, particularly in terms of disability, a great deal of the development of EU law on disability was directly influenced both by the Disability Discrimination Act in UK legislation and by personnel who had worked in the UK on disability and then took that expertise to the EU. There is very much an influence in both directions.

There is the consideration that is going on at present about the extension of prohibitions on discrimination in relation to disability, sexual orientation, religion and belief and age beyond employment. That is being considered at EU level. I have been involved in the background of some of that, and one of the real models for that would be our Equality Act. It has been very influential.

Professor Barnard: I would add also that at the institutional level the UK, since 1975-76, has had the EOC or Equal Opportunities Commission, and the equivalent for race, and they are now wrapped up into the Equality and Human Rights Commission. However, it has been the UK’s model, which says, “Women and other groups need to have an agency that can help them enforce their rights,” that has been instrumental in putting those sorts of components into the more recent iterations of the Directives, particularly the two 2000 Directives.

Q3 Mrs Drummond: Overall, has the EU or the UK been more ambitious in equality Acts?

Professor McColgan: That depends on when you ask, and in relation to what ground. At present, there is a higher level of protection in relation to discrimination across the piste in the UK than there is at the macro European level, but there have been times when the UK has been pushed or pulled by the EU, and sometimes the EU has looked to the UK and moved in that direction.

Q4 Jess Phillips: If we were to leave tomorrow—if you were to accidentally trip over something and trigger Article 50 while you are here—what would that mean for equalities in this country?

Professor McColgan: It would depend on the Government of the day, because in this area, unlike many other areas, it is not the case that there is a lot of provision in regulation form at the EU level which would fall unless saved. In this area, by and large, the legislation takes the



form of Directives or treaty provisions that have been implemented into national law. One way of looking at it would be to say that nothing need change, because you could leave everything as it is. You would have to have discussions about what the case law meant and so on, and Catherine may want to talk about that, but at another level, of course, it means that there would be no underpinning and maintenance, or demand for maintenance, of the current provisions. As an equality lawyer I would say it is very troubling, because the whole thing could be knocked away.

Q5 Jess Phillips: Is there any particular group or protected characteristic for which you have the greatest concern, or where there is a big effect?

Professor McColgan: I think in this matter it is gender. It is women, because women are the most expensive. As a protected group, if you like to put it that way, women are the biggest. My particular concern would be about equal pay, because you could run an argument about lots of discrimination where it is not rational to discriminate and there are economic reasons not to discriminate. I am afraid, when it comes to equal pay, it is probably economically rational to pay women as little as you can get away with. If you do not have strong legislative provisions to prevent that, it is one of the areas that could be very problematic.

Q6 Jess Phillips: It is equal pay as opposed to the gender pay gap, I suppose. The Equal Pay Act in the UK, as far as watching that brilliant film tells me, did not come from the European Union. I realise that is not the best source.

Professor McColgan: The Equal Pay Act had been in place prior to membership of the EU. It is right that it preceded our membership of the EU, but, particularly in equal pay, a huge amount of the development of equal pay law has been profoundly driven by Europe. The law, of course is not always followed up in practice, which is partly the reason for the continuing pay gap.

Jess Phillips: So gender is the area that you would identify.

Professor McColgan: That is my thing. I do not know what Catherine thinks.

Professor Barnard: I think that is right. Assuming it is a Conservative Government still in place—

Jess Phillips: It is today; I said if it were today.

Professor Barnard: It would be very difficult for them to repeal protection against discrimination on sexual orientation or indeed religion and belief, because these are so politically sensitive and it would re-engage the debate about the “nasty party”. I think that will not happen because it would be so politically sensitive.

Age is a more interesting one. Age is very difficult, because our whole societal structure is built around age. On the other hand, there is an ageing population, and the coalition Government used the age



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discrimination provisions to justify the abolition, almost overnight, of the retirement age in the UK. It was presented in part to do with the need to show older workers respect and dignity at work, but of course we also know that it is to do with the fact that there is a major issue about the funding of pensions.

Age is always the more difficult provision. There is a big academic debate about whether age should be treated differently to the other strands, but even within the existing legislation age is treated differently, because, exceptionally, direct discrimination on the grounds of age can be justified, which is not the case with other strands.

Q7 Jess Phillips: To sum up what you have said, would you say that, were Article 50 to be triggered today, you would have concerns about how Governments could use gender and age, specifically, to claw back money?

Professor McColgan: Those would be two concerns; I would agree with Catherine about age. In terms of the protected characteristics, those are probably the most vulnerable. Over time, damage is likely to happen. At present, if you succeed in establishing in an employment-related claim that you have been subject to discrimination—it is not an easy thing to do—in principle you ought to be able to recover all the losses that flow from that. It is an uncapped remedy, and that uncapped remedy is the direct result of European case law. That is probably at risk, because it is very unpopular with employers.

Q8 Jess Phillips: Do you think that the current Government, in their negotiations on Brexit, share your concerns?

Professor McColgan: I do not think it is an issue that would arise in the Brexit negotiations, because it will be a domestic matter for Government to determine what the available remedy should be. Post-Brexit, it would no longer be a matter of whether there was an EU influence.

Q9 Chair: I think Jess meant more generally. Do you think these things will form part of the negotiations?

Professor Barnard: It depends on what model may be adopted going forward, because, once Article 50 is triggered, EU law will continue to apply up until the moment that there is a divorce agreement. It will carry on applying for, we think, a minimum of two years. The reason why two years is the magic figure is because Article 50 says that the negotiations will go on for two years, and unless those two years are extended by unanimous agreement all of the treaty provisions and all of EU law will fall.

Assuming there is a negotiated divorce settlement, the next question—and a separate question—is what the future relationship will be. Ideally, those two would be negotiated at the same time, but Article 50 does not envisage that. Article 50 merely envisages that the divorce settlement takes into account some future relationship. There are some really quite



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technical legal problems about even trying to negotiate a future relationship while we are still a member.

If we do come up with some future relationship, it depends what form that might take. If we do a Norway, and thus join the European Economic Area, then almost all EU social law will carry on applying. Therefore, we will continue to have social law, including the equality Directives that we have mentioned, as a floor of rights. However, Theresa May has said that no existing model will apply; we will go for a bespoke system. In respect of the bespoke system, it may be that the EU will require us to comply with EU employment law, to create some sort of level playing field across the piece.

If that is the case, then, again, EU law will carry on fulfilling this function as a floor of rights. If, however, no particular arrangement is entered into and we fall back onto WTO rules, it is a complete free-for-all as far as employment law and equality legislation are concerned, and it would be for the Government to decide which rules they wanted to keep.

Q10 **Chair:** A free-for-all in the context of British law?

Professor Barnard: Exactly. The Government would be free to decide what they wanted to retain.

Q11 **Jess Phillips:** On the equal pay issue, it is enshrined in British law, so they would have to put it through Parliament to undo that.

Professor McColgan: Absolutely.

Jess Phillips: I feel a bit better now.

Q12 **Maria Caulfield:** I am slightly confused about some of the fears that you have raised. You have both said that the UK has led the way in many cases in terms of human rights and introducing human rights Acts and equalities Acts. I just wanted to touch on this question: are there any laws that the majority of EU countries have that we do not have in the UK currently, but that we should have in terms of equalities?

Professor McColgan: That is a very difficult question to answer. I have done many reviews of all EU legislation around discrimination, and I would say the answer to that is no. There are mechanisms of regulation that are used elsewhere that are helpful—labour inspectorates and the like—but I cannot point to any state and say, “That state has a much better system of equality law.” The point is that our exceptionally good system of equality law is partly the result of European pressure.

There are things that we like in Britain about equality law, and we like sexual orientation discrimination equality law so much that we have gone well beyond Europe. The same is true with disability and with religion and belief, but there are other things that historically we have not liked; we have seen them as burdens on business or as red tape. That is where my concern is, because where you have the European underpinning you have much less room for manoeuvre, whereas, if we take away the



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European underpinning, those areas that we have talked about are the ones that are likely to come under pressure.

- Q13 **Maria Caulfield:** Is it not true, though, that there are laws in this country that protect people's right that are not in EU law?

Professor McColgan: Absolutely.

- Q14 **Maria Caulfield:** For example, statutory maternity leave is the best in the EU at 52 weeks, 40 of which are shared parental leave. That is not happening in the rest of the EU.

Professor McColgan: It is better than the European standard, the EU minimum, because the EU sets minimum standards. It is certainly not the best in Europe. I conducted a big study last year, and it is nothing like the best in Europe.

- Q15 **Maria Caulfield:** Is it not true, though, that that is evidence showing that the UK often has better protection than many EU countries?

Professor McColgan: I have said from the beginning that there are some respects in which our law is better. It is absolutely not the case that we simply have a minimum standard. There are areas in which we are leaders, but there are also areas in which we are not leaders.

- Q16 **Maria Caulfield:** In terms of the role of the Council of Europe, for example, when we leave the EU we will still be members of that, and that has human rights as its ultimate overarching aim. We would still be part of the body of the European Court of Human Rights. Could you give me your views on the role of the Council of Europe and how that will ensure that we are kept in line and up to speed with human rights law?

Professor McColgan: Human rights law operates at a very different level from equality laws. The equality laws from the EU are detailed, specific and regulatory. Human rights law operates at a much more general level. You cannot easily say that the European Convention, however it is implemented in the UK, gives you rights to maternity leave, protection against unfair dismissal, protection against this, that or the other.

In the first instance, the European human rights are directed at the state rather than at private individuals. There is some read-across to private individuals, but it certainly would not be the case that maintaining the membership of the Council of Europe and being subject to the European Convention would suffice instead of a detailed statutory regulation of equality.

- Q17 **Maria Caulfield:** The Labour MP Kelvin Hopkins, who is MP for Luton North, has cited that the European Court of Justice has not always stood up for rights in other European countries. He has often cited the Viking Line and Laval cases. Could you give us an indication of your views on that? We are often told that this nirvana of the European Court is there for workers' rights, but in some cases it has not stood up for workers.



Professor McColgan: It is not a nirvana. I suggest Catherine will deal with this.

Professor Barnard: The Court of Justice has been strong in supporting equality generally; there are exceptions, but the Court of Justice in Luxembourg has been basically very supportive of equality law, and indeed has pushed at the boundaries of equality law. To give you an example, UK law at the time did not give an equal treatment to transsexuals, and the Court of Justice read the protection of transsexuals into a Directive that had been drafted with gender in mind. It was quite a radical decision at the time, but the UK, to its credit, promptly transposed that decision into British law.

That is a good example of where the court has pushed. Another example is in respect of what is called associative discrimination. Associative discrimination is where I do not have the characteristic, but I associate with someone who does and I am prejudiced as a result of my association with the person with the characteristic. The court has pushed there. There was some protection under UK law already, but the court has pushed that.

The third example where the Court of Justice has really pushed is in respect of pregnancy discrimination. For a long time, the British courts struggled with how to deal with less favourable treatment of a pregnant woman, and there are some terrible decisions where you see the treatment of a pregnant woman being compared to a man with an arthritic hip. If a man with an arthritic hip would have been dismissed, therefore you can dismiss the pregnant woman. The Court of Justice was having none of this, and said that, because only women can get pregnant, therefore less favourable treatment of a pregnant woman is by definition on the grounds of sex.

Those are three good examples where the Court of Justice has really pushed the meaning of equality law.

Q18 **Maria Caulfield:** In terms of the particular cases that I have raised, the Viking Line and Laval cases, where workers were being undercut by other EU workers, the European Court did not stand up for those workers.

Professor Barnard: The case I have been talking about is where the court has been interpreting existing Directives. The cases you were talking about, the Viking Line and Laval cases, are where the court has used the so-called "four freedoms". These are what we term the "negative provisions" of the treaty: "Thou shalt not interfere with free movement of goods" or "Thou shalt not interfere with freedom of establishment", and used those to interfere with national laws on strikes. You are absolutely right: in the UK the trade unions loathe those decisions because they seem to be very damaging to trade union rights, but that is where the court has used the treaty provisions to strike down national law. What I am talking about, which is relevant for this



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Committee, is where there is already a corpus or body of EU equality law, in the form of a Directive that the court has interpreted.

- Q19 **Maria Caulfield:** That is extremely helpful. Moving on, in terms of the negotiations for leaving the EU, can I just ask you both what impression you have of how the Government are engaging with some of the equalities issues? What evidence are they collecting; what engagement are they having with relevant bodies around protecting equalities rights during Brexit?

Professor Barnard: To my knowledge, not at all.

Professor McColgan: I am not aware of anything either, which does not mean it is not happening, but I am certainly not aware of anything.

- Q20 **Maria Caulfield:** What role do you see for bodies like the Government Equalities Office in influencing that debate and making sure that, as we move forward, the UK, if not keeping in line with the EU in terms of equalities, is leading the way and still having an influence, as you have both said we currently do?

Professor Barnard: My understanding as far as the Brexit negotiations are concerned is that it is all still extremely rudimentary and there is a lot of trying to get the infrastructure in place to engage with the negotiations.

- Q21 **Maria Caulfield:** What would your recommendation be to Government about involving those sorts of bodies in the negotiation so that we can say to them, "The evidence suggests that you should be bringing those bodies in now, rather than reflecting back once Article 50 is triggered"?

Professor Barnard: They need to decide what model they want going forward, because, if they go for the Norway model, the European Economic Area model, in one sense there is nothing to negotiate about. The Norway model is as close to EU law as it is possible to be, having left. Of course, that is problematic on the leave side, because a lot of people who voted leave do not want a Norway model. They do not want a sort of EU-lite.

More difficult is if there is no model at all or if it is a really hard Brexit. Some of the discussions I have been involved with a little bit suggest that we are moving increasingly fast towards a hard Brexit. In that case, it means that we will lose EU law acting as this floor. That is not catastrophic straight away, because, as we have already said, a lot of EU law is already hardwired into the Equality Act 2010, and indeed in places the Equality Act goes much further.

Lobby groups are worried that, once that floor has been removed, a Government may decide to lower the standards, and there is not that floor to stop them from doing it. The reason why they have concerns about this is, where the Government—both the coalition Government and



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the Conservative Government—have been most active in the employment law field is in all those areas over which there is no EU legislation.

They have, for example, introduced a requirement of employment tribunal fees. EU law has almost nothing to say about that. They have also interfered with, or changed, the rules on claiming unfair dismissal, so you now have to work for two years before you can claim it. Again, EU law has nothing to say about that. On the Trade Union Act and setting the voting thresholds, again, EU law has nothing to say. It is not an area where the EU can legislate.

Q22 Maria Caulfield: To bring it back to the question, would you want to see groups like the Equality and Human Rights Commission more involved in the negotiations and discussions? Do you feel the Government should invite those bodies in, or do you think those bodies have a role to stand up and comment from the sidelines now, so that they are involved in that process?

Professor McColgan: I think the logic of Catherine's position, which is one I entirely agree with, is that if there is a role, it is a role in trying to persuade Government not to do hard Brexit. If there is a hard Brexit, there is nothing to discuss on equality in the Brexit negotiations. The question will be, "What happens afterwards?" Then, of course, one would hope that the equality body and various others were involved in that.

Q23 Angela Crawley: You made the point about the EU underpinning many of the laws that we have in the UK, and you are absolutely right in terms of the Equality Act. That was, at the time, ahead of its time; however, it is increasingly becoming outdated. I think it is fair to say that you are also right to be concerned about the EU's role in reining in the UK when required. I share those concerns, and I share the concerns around—although you have not said it—the Human Rights Act potentially being repealed in favour of a British Bill of Rights, which without the EU could be anything at this stage.

My question was this: you mentioned the Norway model and I would be interested in hearing from both of you what you think the clear benefits are from the Norway model that would be advantageous to the UK.

Professor Barnard: The benefits generally or specifically in this area?

Angela Crawley: In equalities, yes; we will keep it there.

Professor Barnard: The advantage of the Norway model is, first, that the EU *acquis*—which is jargon for the case law and legislation—would continue to apply. Secondly, it has been underestimated in the debate so far that there is an ultimate court to go to, which is the EFTA Court. The EFTA Court is physically located next door to the Court of Justice and pays very close heed to what the Court of Justice has said.

There is a difference, in that national courts, when they make a reference to the EFTA Court, which basically means asking a legal question of the



EFTA Court, are not obliged to follow the answer. Generally, they do, but there is some wriggle room for the national courts. Indeed, there is a very important case in the field that you mentioned, where the Norwegian courts have not followed the Viking Line/Laval case law so closely, because they think it is not appropriate in Norway.

Generally, though, there is a court. The reason why I mention the importance of having a court is that, while in the UK of course we do have a tribunal system that enforces these rights, there needs to be some external check on what the British tribunals are doing. The EFTA Court model at least gives some external view on what the national courts are doing. That is a Brexit-lite or EU law-lite.

The reason why it would be a difficult model to sell for those who voted leave is, first, that Norway still contributes. Norway is the 10th largest contributor to the EU budget. Secondly, it comes with free movement of persons attached, and we know the issues around that; although, in the EEA agreement there is an emergency brake for migration, which there is not in the EU treaty. Thirdly, the other reason why it would be difficult is that we would have to comply with all sorts of EU rules without having a formal say over their adoption. That said, Norway is very effective at making its voice heard, albeit that it does not have any vote on the final measure.

Q24 **Angela Crawley:** Do you mind if I ask a supplementary? How does Norway get its voice heard?

Professor Barnard: It is very effective at lobbying in Brussels. It also gets itself on various regulatory committees and working groups.

Professor McColgan: I could not add anything to what Catherine has said.

Q25 **Angela Crawley:** Could I ask one further question? It was simply to ask the question about international private law and the effect that you thought Brexit could have, if we go for a more severe or expeditious Brexit programme, in terms of domestic laws in the UK and the devolved competencies of Scots law and other nations.

Professor Barnard: As you know, this is one of the biggest and most difficult issues. Inevitably, there will be repatriation of powers from Brussels, and the question will be how those powers will be divided between Westminster and Edinburgh and the other devolved administrations. That is an area where people from your party, I imagine, would have a lot to say. One of the interesting questions for you is to what extent equality law may be an area you would want to fight to preserve.

Angela Crawley: Do you have any views on that? I will come back to you.

Q26 **Mr Shaker:** At some point, Britain will leave the European Union and will



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take one fork while the rest of the EU takes the other. Are you aware of any discussions at the moment about where equalities legislation and thought is going in Brussels? In other words, what is the positive opportunity we might miss out on? What kind of areas would we want to be looking at?

Professor McColgan: There are a number of initiatives. There is a draft Directive knocking about that would push protection related to age, disability, sexual orientation or religion and belief beyond employment. As I say, that is something we already have here, and there is still work going on around that. I have done a number of reports to look at where we are now and what is happening.

Then there is concern about work/life balance and making improvements in that respect. It is easy to say that, in some ways, we look as if we are very good on work/life balance, because we have entitlements to request flexible working and we have long statutory maternity leave. However, if you actually look at things in terms of pay—pay that allows people to take significant periods of leave, childcare provision and so on—we are not very good within Europe. That is one thing where I would anticipate some movement in the medium term in Europe, and I think that would be a real loss.

Professor Barnard: The EU cupboard is not flush with lots of exciting initiatives at the moment, and employment law is an area of particular problem. There is a schism between the states from the west and the Eastern European states, and that schism is very evident over the latest proposal on posting workers; those are workers who are temporarily sent to another member state. It is not as though, in the short term, we will be missing out on a lot of big ideas.

There is the Accessibility Act going through, which is aiming to make products much more accessible for people with disabilities. That is one thing we may lose out on. The other area where the EU is doing quite a lot of work, but they are having difficulty, is over intersectionality. If you have a Bangladeshi woman or an older Bangladeshi woman who cannot get a job, there are two or three protected characteristics that come together, precluding the individual from getting what she wants.

The UK's original 2010 Act did have a provision on intersectionality, but it was never brought into force. Because a lot of groundwork has already been done, that may be an area for activity when the political circumstances are right.

Q27 **Chair:** Before we move on to the final set of questions, can I just pick up on a couple of comments that you have both made? At one point you said there is no demand for maintenance of the law; and at another point you said there would be no European pressure to improve our law. I think, from those statements, you take a dim view about the commitment of the UK Parliament and the UK legal system to improving equality. We are democratically elected. Why do you not think that we



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care about equality and will put that pressure on?

Professor McColgan: I have been doing equality law since 1989, and I have, as a result—

Q28 **Chair:** In all that time we have been members of the EU.

Professor McColgan: Yes.

Chair: So why do you think that we are—

Professor McColgan: Because I have been studying and engaging with equality law for that whole period of time. As a result of that I know that there are some impulses that are really positive—and the UK has done some absolutely tremendous work in forging ahead with equality—but there is also always a cost. The movement towards equality costs some people. It costs employers; it costs the people who lose out while the disadvantaged gain. That is why there is always a tension.

Q29 **Chair:** Do you not think our UK legal system can bring in the sort of tension that you are talking about there? If not, how do we change it?

Professor McColgan: It is not that the legal system cannot, but the legal system is dependent on the will of Government, and sometimes the Government need to be pushed a bit by somebody external who will say, “You know it is the right thing to do; just do it.”

Q30 **Chair:** The legal system in this country is separate to Parliament, so how should the legal system be putting that pressure on?

Professor McColgan: The legal system cannot pressurise the Government.

Q31 **Chair:** In terms of the implementation of the law and how it is interpreted, it can. It does so all the time.

Professor McColgan: My understanding is that this conversation is about what law we do and should have, or are likely to have. Then there are questions about how that law is implemented.

Q32 **Chair:** What system would we need to have in place in the UK if we did not have recourse to the current systems of outside pressures? What do we have to have in place to enforce rights? What are we missing at the moment that you feel so strongly is required to ensure that we have a continuing pressure to improve equality?

Professor McColgan: Again, I think my concern is less with the implementation of the rights, because they will continue to be implemented in the UK through the courts, and more about what the content of those rights is likely to be if there is not a continuing pressure from Europe in terms of the content of equality law. It is not really about implementation; it is more about content. The content will include what the remedies are for—

Q33 **Chair:** Again, you are saying that Parliament is not very good at



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pressing itself on being innovative in equality law.

Professor McColgan: No, sometimes it is.

Q34 **Chair:** Sorry, I am trying to get to the bottom of this. If we do not have this fallback, how do we fix it?

Professor McColgan: Sometimes it is and sometimes it is not. Parliament is better about recognition. It is better about saying, "Let's embrace gay marriage; let's embrace prohibitions on discrimination on grounds of religion or belief." It is less good about doing things that require the redistribution of resources between the more and less fortunate, and that is where my concern is.

Q35 **Chair:** I am not sure you have answered my question. How would we fix that? If we want to make it as good as it is now but we do not have recourse to these things, because, in your words, there is this "hard and severe Brexit", how do we make sure that this does not happen? You have not really given us a solution.

Professor Barnard: Clearly, your Committee plays one role. The EHRC plays another role. There is a plethora of organisations, such as the Fawcett Society and so forth, but trying to gain traction to effect change, particularly when the Government has so much else on its agenda, is a real problem. Furthermore, the EHRC's budget for enforcement has been cut quite significantly, as indeed have a lot of agencies'.

We know there are periods and individuals who make a big difference; we just need to go back to look at the Equal Pay Act when it was introduced in 1970. It was down to an individual really pushing it through. However, what is really making the Equal Pay Act work and be effective is not the principle of equal pay for like work, so the man and I are doing the same job, but where we are doing work of equal value. The case is being heard at the moment about, for example, dinner ladies and—

Q36 **Chair:** Sorry to interrupt you, but I am conscious of the time. What you are saying is that there is no systemic pressure.

Professor Barnard: That is exactly right—not that has the same profound effect.

Q37 **Chair:** You do not believe that democratically elected people bring that, which is an interesting conversation, but you believe there are organisations, like the Equality and Human Rights Commission, which would need to be able to bring that systemic pressure for improvements.

Professor Barnard: Exactly, and with an agenda that says, "Intersectionality is becoming the biggest issue" or "race discrimination"; there are fundamental problems there, as the EHRC's recent report has shown. Therefore, they need to have a forum in Parliament, like this Committee, to be able to report to; and then somebody needs to take the lead and run with it through Parliament.

Chair: That is helpful. This is a really interesting line of questioning.



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Can we indulge ourselves for five minutes to continue it?

- Q38 **Maria Caulfield:** I want to come back to your statement that you do not think Parliament will necessarily lead the way once we leave the EU. Historically, the UK Parliament has. We had the National Insurance Act in 1911, the Wilson Government introducing the Equal Pay Act in 1970, the Race Relations Act in 1976 and the Sex Discrimination Act in 1975. We have a huge history of leading the way. You both agreed when you were giving evidence at the beginning of the session that the UK is often pushing the EU in terms of equalities.

I am a little bit confused now that you are saying we will not be able to lead the way and still influence the EU if we leave, because there is clear evidence that we have done that before, and there is clear evidence that even today, in terms of maternity rights, gay marriage and a living wage, we are still leading the way even though we are part of the EU. I am slightly confused that, at the beginning of the session, you said we are pushing the boundaries ourselves, yet if we leave we will suddenly stop doing that.

Professor McColgan: It is about consistency. There may well be things that we would do post-Brexit that would lead the way, but both Catherine and I have expressed concerns about particular areas where we think the absence of a European floor and/or a systemic pressure may well generate difficulties. It is not being disrespectful of democracy to say that democratically elected people and those who elect them have a lot of things to contend with and competing interests, and sometimes equality will not be at the top of their agendas.

- Q39 **Ruth Cadbury:** What model of future relationships between the UK and the EU after Brexit would offer the best opportunities to protect and enhance equality measures? You have already talked about the Norway model. Is there anything else you wanted to add on that?

Professor Barnard: The only thing I would add is that the Prime Minister has already said she will not go down one particular model. There is some justification for that, because the Norway model is not perfect from a trade point of view. Norway does not have a customs union with the European Union, so therefore there are barriers in respect of the movement of goods. That does not affect equality law, but it means that just signing up to the EEA is not a perfect solution.

Are there any other possibilities? The other is a bilateral arrangement like Switzerland has, but that is not a popular model because there are about 120 agreements between the EU and Switzerland; Switzerland, as we know, also has issues about the free movement of persons and the EU does not like the Swiss model. However, it could be that we enter into a series of bilateral agreements with the EU, and one of those bilateral agreements may be that we respect all of EU employment law in order to create a level playing field.



The alternatives that you might have heard discussed include a free trade agreement, such as the EU-Canada free trade agreement, which then becomes also the model for the UK-EU agreement. The Canadian free trade agreement, which is the most sophisticated of the free trade agreements, deals with just trade. It does not deal with employment law or equality law. From a UK perspective, it is not ideal because, while it deals with tariff-free movement of goods, it does not deal with passporting of financial services, which is one of the things that the City is concerned with.

Those are the main models, and the alternative is that we do not have any model at all; we have hard Brexit and we fall back on the WTO. The WTO for the purposes of this Committee says nothing whatsoever about equality law or employment law more generally. It is broadly about tariffs on goods and also says something on services. The WTO model would remove the floor of rights that EU law provides, and then it would be up to the UK Parliament to decide what level of protection to give in the field of equality.

That might be a good level of protection, because, if you take a 100-year trajectory, as you have absolutely rightly said, there have been periods when Parliament has pushed and done good things for women and other protected groups. However, there are other periods when Parliament has been less protective of women. It depends on the colour of the Government in power.

Q40 Ruth Cadbury: We are where we are at the moment. Do you think there should be UK engagement on draft EU legislation that is currently under discussion, such as the Accessibility Act, the Women on Boards Directive and the Pillar of Social Rights? Would it help us in the long term if we were part of that engagement?

Professor Barnard: I think the answer to that must be yes. Whether we will be listened to is, of course, another matter, but I think the answer must be yes. We also know that if we do a Norway we will have to be bound by it anyway, so it would be sensible to have our say while we have the right to have our say. It may be that a future Government look at the EU legislation and think it is a good idea, and even though we are not obliged to implement it, we do because we think it is a good thing to do. Of course, we would not be under an obligation to do so.

Q41 Ruth Cadbury: As a last chance, because you have covered this slightly, by leaving the EU could we go further? Could there be equality measures that were UK-specific rather than EU-derived?

Professor Barnard: Absolutely, but we can do that now, because all of these Directives are what are called “minimum standards” Directives. They are floors, so we have absolute freedom.

Ruth Cadbury: So that goes back to the political will and priority.

Q42 Angela Crawley: I want to take you slightly back to the models that



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you mentioned. It sounds as though the UK would like a “pick and mix” deal of trade with no free movement of people, but there is no mention of where the equality agenda will be in that. I was interested to know, first of all, which of the models you mentioned you would recommend from an equalities perspective. I also just wanted to touch on this briefly: when you qualified in 1989 I was two, so I do not necessarily suggest that my experience in Parliament could trump your years of equality law. I just wanted to recover on that, but over to you.

Professor McColgan: Catherine is the European lawyer; I am in discrimination and human rights. From an equality perspective something as close to Norway as possible would probably be best. That is from an equality perspective, and I am not a politician.

Professor Barnard: It is worthwhile thinking, in respect of what exiting the EU will look like, about something that is really important in this field: that there will eventually be some sort of Brexit Act. It will not be called that, but it will be an Act of Parliament repealing the European Communities Act 1972. One of the really important things that should be thought about is what will happen to the case law of the Court of Justice.

It seems likely now that any Brexit Act will probably keep on board all pre-existing EU legislation, to give Parliament time to work through that legislation and work out which bits it wants to repeal and which bits it wants to keep. There is an important issue, because there is a huge body of case law, and, as I have said to you, the case law in this particular field is really important and has been quite influential in shaping the direction of travel.

What will happen to that case law—both the case law pre-Brexit and also, more importantly perhaps, case law of the Court of Justice post-Brexit? That means interpreting provisions that are still effectively incorporated into UK law by the fact that we have the Equality Act, which gives effect to the Directives I mentioned at the beginning.

Chair: Thank you so much. I am sorry we have overrun; I hope that does not cause any problems for you for the rest of the day. On behalf of the Committee, thank you so much for your time and your expertise; it has been an extremely useful session. Thank you very much.