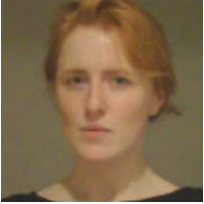


Legislation that is, and is not: the deeply problematic Repeal Bill



*The (no longer ‘Great’) Repeal Bill has been published, and is likely to encounter considerable opposition in both Parliament and the devolved assemblies. **Joelle Grogan** says that the Bill marks a move away from individual rights and remedies and offers nothing to allay concerns about ministers’ ability to amend laws without parliamentary scrutiny (Henry VIII clauses). It will be up to them to decide what ‘deficiencies’ in EU law need a remedy. The sheer volume of statutory instruments will demand a lot of vigilance from MPs and peers.*

In [two](#) earlier [posts](#) on LSE Brexit, I highlighted concerns regarding the potential consequences of the [Great Repeal Bill White Paper](#). In the five weeks since, there’s been a General Election, a hung parliament, a billion-pound deal for a minority government now facing a [legal challenge](#), a much delayed [Queen’s Speech](#) promising a repeal bill (though no longer a great one), and finally – over a year after the referendum – the European Union (Withdrawal) Bill (‘Repeal Bill’) aiming to solve all the issues of the separation of the UK from the EU presented to the Parliament.

Much has been made of the Bill, and in 14 pages and 19 sections it promises to radically change the foundations of the UK legal system. It will repeal the European Communities Act 1972 (ECA 1972) on ‘Exit Day’; it will ‘save EU-derived domestic legislation’ through incorporation; it will save rights and not save them; retained EU law will be supreme and not supreme; and a Minister of the Crown may by regulation deal with all possible present or future ‘deficiencies’ in the law arising from Brexit.



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The Repeal Bill is designed to deliver both the legal separation of the UK from the EU, but also a degree of legal certainty to individuals and businesses following Brexit. However, in effect, it compromises both and achieves neither.

Henry VIII to deal with the deficiencies

In a way that broadly echoes the ever-changing descriptions of Brexit, the Repeal Bill has introduced new terminology for delegated powers to change all retained EU law. The language of correction used by the White Paper has been replaced by ‘dealing with deficiencies’. Section 7 states that

‘A Minister of the Crown may by regulations make such provision as the Minister considers appropriate to prevent, remedy or mitigate (a) any failure of retained EU law to operate effectively, or (b) any other deficiency in retained EU law, arising from the withdrawal’.

In effect, the Repeal Bill proposes to delegate power to the Government to create secondary legislation which will change, amend or remove retained EU-law on an unprecedented scope and scale. The White Paper envisioned between 800-1000 statutory instruments for this purpose, but this is likely to be an underestimation for a possible [‘legislative tsunami’](#) which will arise to remedy, mitigate or prevent deficiencies under this Bill.

A significant improvement on the White Paper in terms of detail, the Bill outlines the sort of issues that a minister can consider to be deficient. However, **the types of deficiencies are open to the minister’s interpretation**. One of the most deeply concerning aspects is the estimation in the explanatory notes of the Repeal Bill that the rights of EU citizens could fall under the category of [deficiency](#) to be remedied by a Minister.

The Bill proposes that ministers will have **two years to use this Henry VIII power** to remedy or prevent deficiencies arising by virtue of retained law. As a time-limit, **it underestimates the scale and scope of change, and as an assurance to those sceptical of unrestrained executive power to legislate, it offers little comfort**. The limitations to be imposed on the delegated power may be familiar to a first-year law student reading about the rule of law: ministerial regulations may not have retrospective application, impose or increase taxes, create a criminal offence. They also may not amend, repeal or revoke the Human Rights Act 1998 (HRA 1998) or any legislation under it or amend the Northern Ireland Act 1998.

There is, however, no proposed requirement on Government to provide explanation, justification or evaluation of the impact of the changes made to the law through regulations, nor does it require assessment for impact on rights or the rule of law. Ministers will decide the level of Parliamentary Scrutiny, and in some limited cases, instruments may be made without any draft being laid before Parliament. The proposal to make the delegated powers temporal and corrective does not address the real and concerning issues with unchecked, broad and sweeping delegated powers to legislate. potentially amounting to a designed lack of accountability within the bill.

The inherent danger of delegated powers in the form of Henry VIII clauses is the possibility of the introduction of Government policy through secondary legislation without parliamentary debate, approval or oversight. A member of either House can call for an instrument to be debated. However, the sheer volume of changes to be made will require a high degree of vigilance across both Houses to ensure the use of Henry VIII powers does not go unchecked, thereby weakening Parliament. The argument that judicial review can serve as an adequate safeguard to unchecked Henry VIII power is predicated on individuals having sufficient legal knowledge, capacity and resources to bring cases concerning the 800-1,000 statutory instruments – though it could still provoke a torrent of applications. The power to amend all EU-derived primary and secondary law by Government without sufficient checks and controls, with little resource for parliamentary scrutiny and oversight, runs counter to legal certainty and the rule of law, and the ultimate supremacy of Parliament itself.

A step away from individual rights and remedies

The Bill proposes that any rights, powers, liabilities, obligations, restrictions, remedies and procedures which existed before exit day are to continue after exit day. However, like a [Schrödinger’s Brexit](#), this is and is not.

This is exemplified in the position of the HRA 1998 in the Bill. Stating that the HRA 1998 cannot be repealed under this Bill reads as anomalous: the HRA 1998 relates to the European Convention of Human Rights (ECHR), and the Council of Europe – *not* the European Union. The HRA 1998 is independent of withdrawal from the European Union. It is an Act of Parliament with quasi-constitutional status, and essential to the Good Friday Agreement of Northern Ireland. To imply a Minister *could* repeal it is dangerous, to imply it could be repealed under this bill is absurd.

The only alternative explanation of this anomaly of stating that the HRA 1998 cannot be repealed under the Repeal Bill may be a way of implicitly reassuring us of the future of human rights protection— at least for the moment. If this is the aim, it misses the point entirely. Under the Repeal, the EU Charter of Fundamental Rights will ‘not be part of the domestic law on or after exit day’. The removal of the effect of the EU Charter of Fundamental Rights substantively weakens the protection of rights in the UK: laws which violate Charter rights will no longer be set aside.

While it contains interpretive duties, the HRA 1998 does not provide equivalent levels of protection to the EU Charter. In the event of an unavoidable violation of ECHR rights, the Courts can only issue a declaration of incompatibility to Parliament. This fits with the larger attitude of immunising law and Government policy from individual legal challenge: the right in *Francovich* which allows for damages in the event of a breach of EU obligations by the State will end (Schedule 1, 4). General Principles of EU law, including recognisably rule of law principles and human rights, is retained in domestic law (only if acknowledged by pre-exit case law) but given no right of action, nor is any court or tribunal permitted to disapply any rule of law or quash any conduct (Sch 1, 5). What this cumulatively reflects is an obfuscation in what it means to protect rights, and to guarantee individual liberties and the rule of law: a right is only a word if it has no remedy.

But a step towards certainty and mutual trust

Legal certainty is essential to a functional legal system, a fact recognised by the bill. Under the Repeal Bill, case law of the Court of Justice of the EU decided before exit day will have a similar status to UK Supreme Court judgments. After exit, courts are not bound to the principles or decisions made by the European Court of Justice, nor can they refer any question of interpretation of retained EU law to the Court. However, in an ostensible improvement, courts may have regard (if they consider it appropriate to do so) to anything done on or after exit day by European Courts and bodies.

A concern I raised in my [last post](#) is that setting an ‘expiry date’ on the relevance of the European Court of Justice would fossilise the law: case law will have no relevance in cross-border matters where the law in the EU27 is subsequently changed or repealed by the EU legislator, or reformed and clarified in a subsequent case by the European Court. This concern is prevented, mitigated and remedied somewhat by the acknowledgment that the retention of EU law, and a future relationship with the EU, require at least some convergence and not divergence in the law. This is a first step towards recognition of the importance of mutual trust and recognition between the UK and EU27, essential to cross-border transactions, and judgments relating to families, consumers and security. In light of the debate surrounding the relevance of the European Court of Justice, it is a big step.

Conclusion

For a much-anticipated Bill, this is unlikely to survive long in its current form. For a minority Government facing challenge from all sides, finding support will be essential. As the ongoing [Euratom](#) debates show, ‘gung-ho’ support for Brexit bills across the aisles is no longer likely, opposition parties have already promised to treat the Repeal Bill as a ‘[Christmas tree](#)’ for all the amendments to be attached to it, as the First Ministers of Scotland and Wales, Nicola Sturgeon and Carwyn Jones, issued a [joint statement](#) declaring they would withhold legislative consent.

The drafters of this bill had a Herculean task, made no simpler by the [often-contradictory](#) statements of senior members of Government. ‘Brexit means Brexit’ has come to be almost a caricature of meaning everything to everyone, all at once. Yet there is also no alternative to a Repeal Bill if the Government plans to deliver Brexit: the ECA 1972 must be repealed, legal certainty ought to be guaranteed, and an efficient mechanism for quickly addressing issues which arise must be framed. However, the expediency of the Henry VIII powers for Ministers of the Crown as currently framed to remedy and prevent ‘deficiencies’ in the law arising from Brexit does not, and should never, be to the sacrifice of individual rights and the rule of law.

For the European Union (Withdrawal) Bill, it looks as if nothing of substance has changed beyond dropping the honorific of 'Great'. The concerns I have previously raised, mirroring those of the [House of Lords](#), [academics](#), [judges](#) and [NGOs](#), remain. In the year since the Brexit referendum, much has happened – little of it certain, but most of it not so (and no longer) all that *Great*.

This post represents the views of the author and not those of the Brexit blog, nor the LSE.

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[The \(not so\) Great Repeal Bill, part 1: only uncertainty is certain](#)