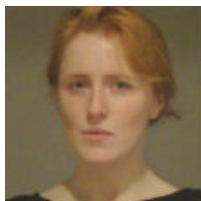


# The Lords have just raised the bar on the defence of rights and the rule of law in the Brexit process



*The success of the Lords' amendment to the EU (Withdrawal) Bill on Henry VIII powers is very important, writes **Joelle Grogan (Middlesex University)**. It introduces a test of objective necessity that would stop ministers making changes to law at their sole discretion. Whether it will survive the parliamentary 'ping-pong' between the two Houses is, however, uncertain.*

On 25 April, the House of Lords passed an amendment on the Henry VIII powers to be delegated to the executive in the EU (Withdrawal) Bill, which was the [sixth](#) defeat for government on the bill. While the change to the wording of the text turned on two short phrases and pivoted on two benign words ('appropriate' and 'necessary'), the consequence is colossal. This amendment has reshaped the scope of the most significant shift of legislative power from parliament to the executive in recent constitutional history from the test of **subjective discretion** to **objective necessity**.



Lord Lisvane. Photo: [UK Parliament](#) via a [CC BY 3.0 licence](#)

Clause 7 of the Bill, as introduced, proposed to delegate power to government to make such changes to the law through secondary legislation 'as the Minister considers appropriate' to deal with the (deceptively innocuous) 'deficiencies arising from withdrawal'. As underlined by [academics](#), [judges](#) and [NGOs](#), and by me [here](#) and [here](#) on LSE Brexit, there are many concerns about wide discretionary powers. This is also not the first indication of opposition by the Lords to unscrutinised delegated powers: they published a [report](#) on the concerns of a Henry VIII clause before a draft of the bill was presented to either House. One of the inherent dangers of Henry VIII powers to change primary law with limited parliamentary supervision is the possibility that government will implement policy decisions without parliamentary input or democratic legitimacy. This risk is endemic when the test for use of the powers is one of **subjective discretion**, or when it is left to discretion of the minister to determine which, how and in what form law is changed.

## From subjective discretion to objective necessity

Lord Lisvane, spearheading the proposed amendment, [described](#) the bar for use of these Henry VIII power in the Bill as introduced to be set so low as to ‘challenge even the most lithe and determined limbo dancer’. The earlier reassurance by government (in government amendment 83c) that ministers would be required to give ‘good reasons’ showing a ‘reasonable course of action’ was unconvincing. That a minister should have good reasons and pursue reasonable actions is obvious – not a concession. The Lords amended the bill to remove ‘the minister considers appropriate’ and to now read as:

A Minister ... may by regulations make such provision as is necessary to prevent, remedy and mitigate...

(a) any failure of retained EU law to operate effectively, or

(b) any other deficiency in retained EU law,

arising from the withdrawal of the United Kingdom from the EU.

The effect of this amendment is to introduce a test of **objective necessity**: a minister will have to show that their changes to the law would amount to no more ‘than is necessary in order to achieve the objective’<sup>[1]</sup> of addressing deficiencies or failures in the operation of law arising from withdrawal. The effect is significant, allowing for a more rigorous scrutiny of the use of Henry VIII powers – depending on its ultimate interpretation, it could set a bar high enough for perhaps not an emeritus professor, but at least a toddler to comfortably limbo.

Objecting to the amendment, the Minister of State for Exiting the EU Lord Callanan argued that the amendment could lead to ‘worse policy outcomes’ as it had the effect of limiting ministerial action to changing law ‘where strictly necessary’ rather than where it would be ‘sensible’ to do so: curiously misunderstanding the justification for the delegation of such unprecedented discretionary powers was to do only what was necessary to ensure the law continues to function properly after withdrawal, and *not* to implement government policy.

## What next?

This is not the final word on the EU (Withdrawal) Bill. Currently at the stage of third reading in the Lords, the Bill will return to the Commons for debate of the Lords’ amendments (resulting potentially in [parliamentary ping-pong](#)). Whether the amendment survives will be a political, rather than academic, question. It will face significant opposition in the Commons, with potential accusations of the threat of judicial activism in the interpretation of what ‘is necessary’. However, with the amendments over the last week and particularly that on the [removal](#) of the EU Charter of Fundamental Rights, the House of Lords have raised the bar on the defence of rights and the rule of law in the Brexit process. That’s something we can all support.

<sup>[1]</sup> Interestingly, this has echoes of the principle of proportionality, now incorporated into British law via EU *acquis*.

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

[Joelle Grogan](#) is a Lecturer in Law at Middlesex University.

[The good, the bad and the ugly arguments for ditching the EU Charter of Fundamental Rights](#)