**HOW TO FIX THE “GREAT REPEAL BILL”**

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**Executive Summary**

*What need we fear when none can call our power to account?*

Macbeth, Act V., Scene 1

Power must be held to account so it is not abused or used thoughtlessly. Lady Macbeth (who utters the above line) and her husband escape responsibility for their crimes because, as King and Queen, there is no check on their power. They are only brought to justice after a bloody civil war. In the UK, Parliament is the principal check on the power of the government.

The EU (Withdrawal) Bill, or “Great Repeal Bill”, will remove that check in respect of EU derived law (which includes a significant amount of domestic law) through “Henry VIII” and “Effective Henry VIII” powers (see p. 4). EU law makes up a significant proportion of the rules, rights, and protections that govern our day to day lives. Removing parliamentary scrutiny in relation to EU derived law therefore represents a massive expansion of unaccountable power.

Fortunately, our constitution already gives us the tools to fix this. The Bill can be amended so that the role of Parliament, and key rights and protections, are preserved yet the government’s ability to conduct Brexit is not hampered in any meaningful way. If the Bill is to be thus “fixed”, four measures must be introduced. These may be added as four separate amendments, or as a single “Individual Rights and Parliamentary Sovereignty” amendment.

1. **Substantive impacts clause**

This will formalise David Davis’ promise[[1]](#footnote-1) that the Bill will only be used to make “technical amendments” to EU derived law. It will mean that the substantive rights and protections currently found in EU law (such as protections for privacy, workers’ rights, or the environment), cannot be removed without a vote in Parliament.

1. **Institutional parity clause**

This ensures that rights and protections can’t be removed by the “back door”. EU institutions play a key role in ensuring rights and protections are realised in practice. This clause protects the role those institutions play by ensuring that any reference to an EU institution must be replaced by a reference to a UK institution of equivalent power and capacity.

1. **Explanatory statement**

This provides a “second layer” of protection. The minister must sign an explanatory statement whenever an instrument is made under the Bill, stating that it is not intended to impact on substantive rights and protections. If the instrument is intended to impact on substantive rights and protections then the statement must explain why this is necessary.

1. **Scrutiny by select committee**

If the explanatory statement attempts to make the case for an instrument that impacts on substantive rights and protections then it must be submitted to a select committee for scrutiny. The committee will be empowered to decide whether to refer the instrument for full parliamentary scrutiny and what form that scrutiny should take.

**Introduction**

The European Union (Withdrawal) Bill (“the Bill”/ “the Act”), previously known as the “Great Repeal Bill”, purports to transfer the *acquis* of EU law into domestic law. It will, however, empower ministers to amend transferred law with minimal scrutiny (“the Powers”)[[2]](#footnote-2). This means that important rights and protections, currently contained in EU law, may be removed without scrutiny.[[3]](#footnote-3) A number of vulnerable policy areas, and an assessment of the economic, administrative, and political pressures offering an incentive to remove the rights and protections contained therein, are identified in my report, “the Consequences of the Great Repeal Bill”.[[4]](#footnote-4) This paper acts as a companion piece to that report.

This paper identifies a number of possible amendments and offers a brief assessment of their key advantages and disadvantages. I recommend a combined approach:[[5]](#footnote-5)

1. The overriding goal should be to hold the government to their promise that the Powers will only be used to make “technical” amendments.[[6]](#footnote-6) This is achieved with a **“substantive impacts” clause**.
2. Substantive amendments should not be passed off as technical amendments. This should be prevented by an **“institutional parity” clause**.
3. These clauses should be bolstered by a duty for the minister to sign an **explanatory statement,** attached to all instruments made using the Powers, confirming that they are not intended to operate so as to impact on substantive rights.
4. All those to which no such guarantee cannot be made should be submitted to **scrutiny by a select committee** and, if necessary, to the super affirmative procedure.[[7]](#footnote-7)

**Key issues to address**

1. **“Henry VIII powers”**

These allow the Executive to repeal primary legislation using secondary legislation,[[8]](#footnote-8) thus largely eliminating scrutiny and undermining the sovereignty of parliament.

1. **“Effective Henry VIII powers”**

The unique status of EU law in the UK means that rules, that function as primary legislation in EU law, are given effect in the UK through s. 2(1) and (2) of the European Communities Act 1972. As such, even if the Henry VIII powers in the bill are addressed, the government will still exercise an unprecedented degree of unaccountable power and a broad range of rights and protections will be under threat.

1. **The “appropriate” test**

The powers in the bill may only be used if the minister believes it is “appropriate” to do so[[9]](#footnote-9). This is an inadequate safeguard because it leaves the matter entirely to the discretion of the minister.

1. **The removal of institutions**

Secretary of State maintained that the exceptional powers in the Bill will only be used to make “technical” changes[[10]](#footnote-10). There is no provision for this in the Bill itself. There is, therefore, no way to ensure the government keeps this promise. The White Paper identifies the removal of the duty to make a reference to an EU institution as a “technical” amendment.[[11]](#footnote-11) In fact, such an amendment will have significant substantive impacts. A reference to an institution is a key aspect of governance and often vital for ensuring that substantive rights and protections are properly enforced.

1. **The “urgency” override**

The Bill allows ministers further exceptional powers if the minister determines that an amendment must be made “urgently”.[[12]](#footnote-12) This creates an incentive to leave Brexit negotiations and changes to EU derived rights and protections to the last minute. This will further curtail accountability.

**Assessment of possible amendments**

**“Substantive rights/impacts” clause**

Such a clause would limit or prohibit the use of the Powers if that use will impact on the substance of EU derived laws. It must be carefully drafted so as to ensure that EU derived laws retained in the Bill provide the same level of protection and the same rights in practice as the original EU law would have done.

***Advantages***

* Offers broader coverage for substantive rights and protections and addresses both Henry VIII and Effective Henry VIII powers.
* Offers a higher standard of accountability than the “appropriate” test.
* Will be difficult to argue against. The Secretary of State has stated that the powers in the Bill will not be used to remove substantive rights.[[13]](#footnote-13) This merely formalises a commitment he has already made.

***Disadvantages***

* It will be difficult to draft a completely watertight clause. This device will be most effective in concert with other mechanisms.

**“Parity of institutions” clause**

A clause creating a duty to assign any reference to an EU institution to a UK institution with equivalent powers.

***Advantages***

* Will prevent the removal of key governance steps, like that recommended in the White Paper.[[14]](#footnote-14)
* Addresses one of the most pressing threats in the Bill – undermining EU derived rights and protections by weakening the mechanisms that protect them.

**Explanatory Statement**

All instruments made under the Act must be accompanied by an explanatory statement, signed by the minister, confirming whether the instrument is intended to impact on substantive rights or protections and offering an explanation as to why. This is similar to a provision already found in section 19 of the Human Rights Act 1998.

***Advantages***

* Utilising existing legislative tool
* Addresses the key issues
* Will have minimal impact on efficiency
* Enforceable through the courts

**Substantive impacts committee**

A parliamentary committee will assess whether instruments made under the Act will impact on substantive rights and, if so, whether they should be subject to the super-affirmative procedure.

***Advantages***

* Addresses both Henry VIII powers and Effective Henry VIII powers.
* Offers a high standard of scrutiny.
* Saves time by avoiding the need for Parliament to consider purely technical amendments.

***Disadvantages***

* Requires establishing the relevant committee. It is unlikely an existing parliamentary committee will have the capacity to undertake this task. The committee must also have sufficient legal support.
* Will still compromise the efficiency of the process to a certain extent

**List of protected rights or policy areas**

A small number of rights and protections may be protected by listing EU derived laws to which the Powers will not apply.

***Advantages***:

* Offers a clear and specific guarantee for those rights and protections listed.
* Simple to understand.

***Disadvantages***

* There will be disagreement as to which policy areas to include in the list. It may be difficult to forge a political consensus on anything other than a very limited number of areas.
* This will not necessary offer sufficient protection from “technical” amendments with substantive impacts. Rights may be rendered unenforceable in practice while ministers claim their powers have not been exercised in relation to the right or protection itself.
* This option will never be exhaustive. The *acquis* is too vast to list the full extent of rights and protections that must be preserved. Protecting specific rights or policy areas will have a limited effect at best.

**Preserve the Charter of Fundamental Rights**

***Advantages***

* The Charter contains important rights that, while often protected in other areas of EU or domestic law, are often not given protection of equivalent clarity.
* The Charter is already drafted and has been applied in domestic courts. There will be no legal ambiguity.
* This is already supported by the Labour front bench.[[15]](#footnote-15)

***Disadvantages***

* Protecting the Charter only protects a relatively limited subset of EU derived rights and protections.
* Does not address the most pressing threat. It will be politically difficult to use the Bill to remove rights in principle (as protected in the Charter). It is more likely that the Powers will be used to remove mechanisms that guarantee rights. The Charter does not protect these directly.

**Submit all uses of Henry VIII powers to the affirmative or super-affirmative procedure**

***Advantages***

* Applies existing methods of parliamentary scrutiny.

***Disadvantages***

* Fails to address the issue of Effective Henry VIII powers.
* Highly impractical, with over 1000 statutory instruments expected to be made under the Act in the next 18 months, it is not possible to submit them all to satisfactory scrutiny.

**Submit all uses of Henry VIII powers under the Bill to scrutiny by a parliamentary committee which will then decide if they may be passed by the negative, affirmative, or super-affirmative procedure**

**Disadvantages**

* This is impractical for the same reason as above.

**“Constitutional protection” clause**

A clause prohibiting the use of the powers in the bill to make amendments of a “constitutional” nature. Similar clauses are found in other statutes.[[16]](#footnote-16)

***Advantages***

* Will protect key constitutional rights.

***Disadvantages***

* The practical impact is not clear. Lawyers generally agree that constitutional protection clause will protect statutes like the Human Rights Act, but it is not clear whether they would extend to “constitutional-lite” statutes like the Equalities Act.[[17]](#footnote-17)
* Does not address the most pressing issues.

**Recommendations**

**The Ideal/ “Belt and Braces” Solution**

A combination of:

1. **Substantive rights/impacts clause,**
2. **Institutional parity clause,**
3. **Explanatory statement duty, and**
4. **Substantive rights committee.**
5. Under the headline ***“protection of substantive rights”.***

These four provisions will work together to ensure the highest practical standard of scrutiny without compromising the speed of the process. The substantive rights clause will establish the principle (to which the Secretary of State has already committed) Powers may only be used for technical amendments. The institutional parity clause will prevent key governance mechanisms from being undermined under the guise of a “technical amendment”. The explanatory statement will provide a “shield” for individuals because any application of an instrument that has the effect of compromising substantive rights will become more vulnerable to judicial review. The statement will also streamline the work of the committee because it need only consider instruments accompanied by a statement indicating they will impact on substantive rights (as such, the scrutiny could be undertaken by an existing committee). The committee ensures that any instruments under the Act which risk impacting on substantive rights will be subject to proper parliamentary scrutiny. The “urgency override” may be addressed by submitting any instrument passed under that power to the committee.

**The fall-back position**

Combine the **“substantive rights” and “institutional parity”** clauses under the heading of “substantive rights” and enforce with a clause by requiring an **explanatory statement**.

This means that parliamentary scrutiny will remain limited but the government will still be held accountable through judicial review.

**For an “easy win”**

A simple **constitutional protection clause** or a **substantive rights clause** will offer a lower standard of accountability but will likely meet with the least opposition.

1. Secretary of State for Exiting the EU, Parliamentary Debates (Hansard), House of Commons, 30th March 2017, cols. 431, 435, and 439 [↑](#footnote-ref-1)
2. European Union (Withdrawal) Bill 2017, s. 7(1) and (4), s. 8(1) and (2), s. 9(1) and (2) [↑](#footnote-ref-2)
3. See Sam Fowles, “The Great Repeal Bill: Addressing Unaccountable Power”, (Another Europe is Possible, March 2016), available at <http://www.anothereurope.org/briefing-note-how-the-great-repeal-bill-threatens-our-democracy/> (last accessed 17th August 2017) [↑](#footnote-ref-3)
4. Sam Fowles, “Decimating Rights: The Consequences of the Great Repeal Bill”, (Global Justice Now, July 2017), available at <http://www.globaljustice.org.uk/sites/default/files/files/resources/decimating_rights_-_grb_briefing.pdf> (last accessed 17th August 2017) [↑](#footnote-ref-4)
5. This paper offers recommendations as to the substance of amendments, for ease of understanding they are not formulated in legislative language. [↑](#footnote-ref-5)
6. Secretary of State for Exiting the EU, Parliamentary Debates (Hansard), House of Commons, 30th March 2017, cols. 431, 435, and 439 [↑](#footnote-ref-6)
7. See House of Commons Information Office, “Statutory Instruments”, Factsheet L7, Legislative Series (May 2008), p. 9, available at <https://www.parliament.uk/documents/commons-information-office/l07.pdf> (last accessed 18th August 2017) [↑](#footnote-ref-7)
8. See European Union (Withdrawal) Act, s. 7(4), 8(2), and 9(2) [↑](#footnote-ref-8)
9. Ibid, s. 7(1), 8(1), and 9(1) [↑](#footnote-ref-9)
10. See n. 4 [↑](#footnote-ref-10)
11. Department for Exiting the European Union, “Legislating for the United Kingdom’s Withdrawal from the European Union”, CM. 9446, (March 2017), pp. 20-21 [↑](#footnote-ref-11)
12. See n. 1, sch. 7, pt. 3 [↑](#footnote-ref-12)
13. n. 4 [↑](#footnote-ref-13)
14. See n. 9 [↑](#footnote-ref-14)
15. Heather Stewart, “Brexit” Labour threatens to defeat Theresa May over great repeal bill”, The Guardian, (13th July 2017), available at <https://www.theguardian.com/politics/2017/jul/12/labour-tories-great-repeal-bill-brexit-eu> (last accessed 17th August 2017) [↑](#footnote-ref-15)
16. See, for example, Section 3(2)(f) of the Legislative and Regulatory Reform Act 2006; section 5D(2)(e) of the Fire and Rescue Services Act 2004 (as amended in 2011); section 6(2)(e) of the Localism Act 2011 [↑](#footnote-ref-16)
17. See T. Khaitan, ‘A Constitution Protection Clause for the Great Repeal Bill?’, U.K. Const. L. Blog (19th Jul 2017), available at: <https://ukconstitutionallaw.org/> (last accessed 18th August 2017) [↑](#footnote-ref-17)