

The Triangular Model: Maintaining Governance & Fundamental Rights

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The European Union (Withdrawal) Bill (“the Bill”/ “the Act”) 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”)¹. This means that important rights and protections, currently contained in EU law, may be removed without scrutiny.²

1. In this response, I wish to highlight three key themes throughout this note that will be necessary to address in order to ensure that the highest practical standard of scrutiny without compromising the speed of the process is upheld. These are:
 - **(i) Substantive Rights and Scrutiny**
 - **(ii) Effective Governance**
 - **(iii) Retained Domestic and EU Law**
2. In doing so, notably, the possible impacts of the Bill in the context of each theme will be discussed. Finally, recommendations will be provided as to measures that can be taken to amend the Bill that will secure vital rights and preserve constitutional protections.
3. If these amendments are passed, then the Bill will still provide for an efficient Brexit that upholds essential rights, that promotes democratic scrutiny, that provides a framework for the highest standards of governance, and that clarifies retained domestic and EU legislation as subordinate legislation. Only with these amendments can we begin to heal the Brexit divide, as they will ultimately give people a stake in the debate. It has never been more important for voters, and their representatives in Parliament, to have a voice. A Brexit can be achieved that unites the country.

¹ European Union (Withdrawal) Bill 2017, s. 7(1) and (4), s. 8(1) and (2), s. 9(1) and (2)

² 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 12th October 2017)

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

Macbeth, Act V., Scene 1

4. 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 and must stay the principal check on the power of the government.
5. The Bill will remove that check, and in doing so give the government a range of exceptional powers. Key rights and protections will therefore be vulnerable to repeal without scrutiny. Notably, areas of particular vulnerability will be:
 1. **Worker's Rights** - in particular the rights of agency workers, protections for working time, and enforcement of the prohibition on discrimination.
 2. **Environmental Rights** - in particular ensuring that environmental protections are effective, and polluters bear the cost of pollution, water safety, and air quality.
 3. **Human Rights** - in particular prohibitions on the torture trade and protections for privacy.
 4. **Consumer Protection** - in particular the regulation of dangerous chemical and food safety.
 5. **Financial Regulation** - particularly in the event that Brexit negotiators are unable to secure the concessions required to maintain the City of London's access to the EU.

The only limit on these exceptional powers, is a promise by the government that they will not be used to make "[policy changes](#)". But, as it seems only the government will have the power to decide what counts as a "policy change", this does not represent any sort of meaningful accountability. Indeed, the White Paper's example of a "non-policy" change (notification requirements relating to protected natural habitats) would remove a substantive protection for our natural environment, with potentially devastating impacts³.

³ See Sam Fowles "Decimating Rights: The Consequence of the Great Repeal Bill," (Another Europe is Possible, June 2017), available at http://www.globaljustice.org.uk/sites/default/files/files/resources/decimating_rights_-_grb_briefing.pdf

Key issues to address

“Henry VIII powers”

6. These will allow the Executive to repeal primary legislation using secondary legislation,⁴ thus largely eliminating scrutiny and undermining the sovereignty of parliament. The former Lord Chief Justice, Lord Judge, describes them as a “self-inflicted blow” that boosts the power of the executive and should only be used in a national emergency⁵.
7. Some existing primary legislation “hooks” certain obligations to EU institutions or decisions. It makes the exercise of certain powers or the fulfilment of certain duties, for which the legislation provides, contingent on decisions, standards, or institutions at EU level. When the UK leaves the EU, these legislative hooks must be removed and replaced with references to equivalent decisions, standards, or institutions in the UK. Where the hooks are contained in primary legislation, a Henry VIII power enables the government to make these adjustments without consulting Parliament.
8. The justification for this is that it wastes Parliament’s time to devote the full legislative process to an essentially administrative adjustment. While this argument is compelling, its basis remains unclear. Legislative hooks are, in general, contained in secondary legislation. In these cases, a Henry VIII power is unnecessary because the administrative adjustment can be made with a normal statutory instrument.
9. Even where legislative hooks are found in primary legislation, a general Henry VIII power is not necessary. The desired effect can be achieved with targeted Henry VIII powers, linked (on the face of the Bill or in the schedules) to specific legislative hooks or drafted so as to apply only to legislative hooks.
10. In view of the undemocratic nature of such powers, the case for limited, rather than general, Henry VIII power seems overwhelming, if their only purpose is to address the issue of legislative hooks.

⁴ See European Union (Withdrawal) Act, s. 7(4), 8(2), and 9(2)

⁵ House of Commons Library, “Legislating for Brexit: The Great Repeal Bill.” (27th February 2017), p.36, available at <http://researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-7793#fullreport> (last accessed 19th March 2017)

“Effective Henry VIII powers”

8. 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.

The “appropriate” test

9. The powers in the bill may only be used if the minister believes it is “appropriate” to do so⁶. This is an inadequate safeguard because it leaves the matter entirely to the discretion of the minister.

The removal of institutions

10. The Secretary of State has maintained that the exceptional powers in the Bill will only be used to make “technical” changes⁷. 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.⁸ 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.

11. **The “urgency” override**

The Bill allows ministers further exceptional powers if the minister determines that an amendment must be made “urgently”.⁹ 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.

⁶ Ibid, s. 7(1), 8(1), and 9(1)

⁷ See n. 4

⁸ Department for Exiting the European Union, “Legislating for the United Kingdom’s Withdrawal from the European Union”, CM. 9446, (March 2017), pp. 20-21

⁹ See n. 1, sch. 7, pt. 3

Possible amendments

11. The overriding goal should be to hold the government to their promise that the Powers will only be used to make “technical” amendments.¹⁰ This is achieved with a “**substantive 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.
12. Substantive amendments should not be passed off as technical amendments. This should be prevented by an “**institutional parity**” clause. This would create a duty to assign any reference to an EU institution to a UK institution with equivalent powers.
13. An **Equivalent governance clause** will also create a duty to ensure that any relevant regulatory function previously exercised by an EU institution will be exercised by a UK institution after Brexit. This ensures that rights cannot be eviscerated by the “back door” by removing the institutions that protect them.
14. 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. This is similar to a provision already found in section 19 of the Human Rights Act 1998.
15. A **parliamentary committee** can 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.¹¹
16. These provisions will work together to ensure the highest practical standard of scrutiny without compromising the speed of the process.

The fall-back position

17. 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

¹⁰ Secretary of State for Exiting the EU, Parliamentary Debates (Hansard), House of Commons, 30th March 2017, cols. 431, 435, and 439

¹¹ 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/107.pdf> (last accessed 18th August 2017)

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

Mutually essential

18. Each of these amendments is mutually essential – they will not be as effective without each other.
19. **Scrutiny amendments alone** will mean that important issues fall through the cracks. In its current form, Parliament simply does not have the capacity to subject the 1000 (or more) statutory instruments likely to be made under the Bill to the required level of scrutiny.
20. **Limits on technical amendments alone** will leave vital rights and protections (such as protections for the environment) vulnerable to evisceration by the “back door”, by simply removing the institutions that enforce them, leaving them as rights in name only.
21. **Governance amendments alone** will leave the security of rights and protections entirely to institutions that may not be set up for several years.
22. If all these amendments are passed then the Bill will still provide for an efficient Brexit, but one that is conducted with respect for vital rights and protections.

For an “easy win”

23. 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.
24. It must therefore be guaranteed, that on the face of the Bill, Henry VIII powers will not be used to erode substantive individual rights. This will mean that individuals can hold the government to account in court if it starts to misuse its powers. Further, their use should be subject to the affirmative or super-affirmative procedure, meaning that they cannot be used without a vote in Parliament.

Further Considerations

25. References to EU institutions in the *acquis communautaire*:
- It is unlikely to be possible or economically feasible to create exact equivalents to the full range of EU institutions referred to in the *acquis*.
 - The Government's approach in the Great Repeal Bill white paper appears to be to remove those references entirely.
 - This means substantive protections could be lost.¹²
 - A better approach is to find alternatives, UK institutions that can take on the functions of EU institutions in relation to particular laws, (such as the Equalities and Human Rights Commission or the Health and Safety Executive) on a temporary or permanent basis.

Clarity is Necessary – The Accountability gaps

26. The absence of transparency about the contents of the Bill means that no proper public debate can take place about the substance of the Bill. Important questions that remain unanswered include:
- a. What EU law the Bill will preserve?
 - b. In which class of UK law will the Bill preserve EU norms?
 - c. How will these decisions be made?
27. The discretionary powers contained in the Bill will give the government the power to repeal rights contained in EU law with minimal scrutiny and without the permission of Parliament. Moreover, it is not clear that the most extreme powers mooted for inclusion in the Bill are necessary to achieve its stated purpose
28. Sunset clauses must be included in the Bill. Without them, the government will be able to exercise vastly expanded discretionary power indefinitely. This process may permanently alter the balance of power between Parliament and the government.

¹² For example, if the requirement to refer cases to the Commission (or an equivalent body) contained in the Offshore Petroleum Activities (Conservation of Habitats) Regulations 2001 was removed, as suggested in the white paper, then it would be significantly easier to disrupt wildlife and natural habitats.

29. The political process by which the Bill will be passed is likely to strangle debate by withholding details of the Bill until the last minute then rushing the Bill through Parliament with the threat of a “regulatory cliff” if the Bill is not passed before Brexit day.
30. Notably, we need to say **one way or another** whether retained domestic and EU law is primary or subordinate legislation. This is not about party politics or pushing an agenda, this is about costs as it is going to cost far more money to make referrals to the Supreme Court. However, currently, the Bill **does not identify what retained law will be primary or subordinate legislation**. This has implications for Judicial Review. The only explanation that has so far been provided is found in Schedule 8 clause 19. This is too narrow, as it will not refer to wider law. Primary legislation will make it harder for the court to do anything, for example the Human Rights Act. Conversely, subordinate legislation would mean that courts would have the full power of the HRA.

The Power the Bill gives the Government

31. If EU norms are transferred into secondary legislation during the Transferring Stage then the government can repeal them without parliamentary scrutiny during the Repeal Stage. The Bill may, however, give the government the power to repeal, replace, or maintain EU norms during the Transferring Stage, without parliamentary scrutiny.
32. The Secretary of State for Exiting the EU, David Davis, has said that EU norms will be transferred into UK law “wherever practical” before Brexit day. This indicates that, in some cases, it will be “impractical” to transfer a particular norm into UK law and that norm will, therefore, be scrapped. If this is the case the Bill must empower the government to repeal EU norms before Brexit day. It is not clear what this power will look like, how it will be applied, or how it will be scrutinise
33. A power that allows ministers or officials to dispense with inconvenient EU norms during the Transferring Stage has the potential to confer an unlimited discretion to dispense with EU norms. If this is the case, parliamentary scrutiny in the Repeal Stage becomes almost meaningless because Parliament’s scrutiny will be, in effect, subject to the discretion of officials.

Why This Matters

34. Parliament is side-lined as a decision-making body

If MPs are not given accurate information about the content of the Bill or the government is able to remove rights in EU law entirely through secondary legislation, Parliament will have little or no role in the decision-making process.

35. Public discourse has less impact on decision-making

Similarly, if the public debate is limited to discussions of generalities rather than specifics, and the legislative control over the repeal of EU laws is side-lined, then the government's incentives to respond to public debate are limited.

36. Decisions are uninformed

Without vigorous public debate, research centres, think tanks, NGOs, and universities will be unable to contribute to the process of determining which norms are preserved after Brexit day. Decisions will therefore be made based on limited information and research.

37. Decisions are driven by a purely ideological agenda

38. Reports from those working with DExEU already indicate that decisions are driven by ideological "red lines" rather than a balanced assessment of the long-term interests of the UK. Eliminating free movement and removing the UK from the jurisdiction of the Court of Justice of the EU, in particular, take precedence over all other concerns. Without proper scrutiny or accountability, there will be no check on a purely ideological approach to determining which EU rights remain after Brexit, almost certainly leading to negative long-term consequences.

Recommendations

Force the government to reveal its plans

39. It is not possible to effectively scrutinise the Bill, campaign on issues it raises, or protect EU norms such as employment or fundamental rights until it becomes clear what the Bill will contain and how it will achieve its objectives. While the government is allowed to keep the details of the Bill under wraps, it can operate almost entirely without accountability. The first step in a progressive response to the Bill must be to bring it out into the open.

Address the mechanics

40. The mechanics of the Bill will determine what power the government has and to whom it is accountable in the exercise of that power. Addressing the mechanics of the Bill is therefore a prerequisite for campaigning on any substantive issue.

Pick key rights to save

41. The *aquis communautaire* is vast and complex. This complexity creates two opportunities for the government. First, to dispense with substantive rights, second (and more problematically) to make seemingly innocuous legal changes that, while not ostensibly removing rights, have the impact of nullifying them as effective legal entitlements. A progressive approach to the Bill cannot, therefore, merely focus on policy areas. It must identify the specific rights and mechanisms that must be preserved and it must educate the public about the importance of those rights and mechanisms.

Insist on starting early

42. A ticking clock is the enemy of accountability. If the government is allowed to delay the issue until the last minute, it will be much more difficult to subject the Bill to proper scrutiny. The Bill will be one of the most complex Bills in living memory (even if it is presented as relatively simple). It will not be possible to subject it to proper scrutiny in a short period of time.

Concluding Comments

43. Brexit is the defining issue of our generation, and will represent a wholesale constitutional rewrite. The only way to genuinely uphold our rights is to transfer EU law wholesale into UK law. We can then decide which EU derived laws to maintain, repeal, or replace in a thoughtful, transparent, and accountable manner, after Brexit.
44. The Bill represents a unique opportunity for the government to use the power of the state to benefit itself and its supporters. However, there is unlikely to be time to complete the transfer of the *acquis*, in a manner that is both responsible and functional, before the expiry of the Art. 50 negotiation period. Furthermore, the opacity of the process and the powers proposed in the legislation itself risks side-lining Parliament as a decision-making body and public discourse as an effective forum for exploring the implications of public policy decisions.

45. Currently, Brexit and the European Union (Withdrawal) Bill create the opportunity to remove key rights while avoiding democratic accountability. The hung-parliament however offers a counter-opportunity: to subject the government's actions under the bill to high levels of scrutiny and thereby protect key rights and protections derived from EU law.