

Decimating rights

The consequences of the Great Repeal Bill

June 2017

Written by Sam Fowles



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The Great Repeal Bill will empower the government to select which EU laws, rights and protections are transferred into domestic law. This power will be largely unaccountable. Key rights and protections are therefore vulnerable to repeal without scrutiny. Five policy areas are particularly vulnerable:

1. **Workers' rights** in particular the rights of agency workers, protections for working time, and enforcement of the prohibition on discrimination.
2. **The environment** in particular ensuring that environmental protections are effective, and polluters bear the cost of pollution, water safety, and air quality.
3. **Human rights** particularly prohibitions on the torture trade and protections for privacy.
4. **Consumer protection** particularly the regulation of dangerous chemicals 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.

What is the Great Repeal Bill?

The Great Repeal Bill (GRB) will facilitate a wholesale shift of power, from elected representatives in parliament to ministers and civil servants, acting without accountability or democratic scrutiny. Important rights and protections across a range of policy areas will, as a result, be vulnerable to repeal.

EU law will cease to apply in the UK when the UK leaves the Union. Given that around 14% of UK law originates in the EU,¹ this will cause substantial regulatory uncertainty. To avoid this, the GRB will, in theory, transfer the entire body of EU law (the "acquis communautaire" or "acquis") into UK law before the UK leaves the Union.²

In fact, *the GRB will empower the government to unilaterally decide which elements of the acquis are transferred, and to alter existing UK law to take account of Brexit negotiations, without a vote in Parliament.*³

The GRB gives the government three avenues by which to remove EU law rights:

1. Secondary Legislation

The GRB will transfer the *acquis* into "secondary legislation".⁴ This can be repealed without a vote in Parliament.⁵

2. Henry VIII Powers

Some rights derived from EU law are already found in primary legislation.⁶ Primary legislation can, usually, only be repealed or replaced by another piece of primary legislation. This is a crucial guarantee of democratic decision-making: decisions taken by the representatives of the electorate can only be overturned by representatives of the electorate. Henry VIII powers allow ministers and civil servants to repeal or alter primary legislation using only secondary legislation: decisions taken by elected representatives will be overturned by unelected bureaucrats.

3. Declining to transfer rights

The GRB gives the government the power to select which aspects of the *acquis* are transferred into domestic law.⁷ For those rights and protections which have not already been transferred into domestic law,⁸ ministers and civil servants will have complete discretion over whether to transfer them through the GRB.

Workers' Rights

Theresa May has promised that all workers' rights found in EU law will be preserved for the duration of her government.⁹ The broad powers and absence of scrutiny in the GRB, however, mean that there is no way to hold her to her promise.

Agency workers

The Temporary Agency Workers Directive¹⁰ ensures that agency workers receive the same treatment as workers employed directly by a company.¹¹

The UK government resisted the Agency Workers Directive and only provided the weakest possible form of implementation. A government report advised that the UK break EU law by refusing to implement the directive.¹² The GRB thus provides an opportunity to remove rights to which Conservative governments have long been opposed.

Working time

The Working Time Directive¹³ gives workers rights to, *inter alia*, daily and weekly rest, maximum weekly working time, and a minimum of four weeks paid annual leave.¹⁴

The UK government opposed the original directive and only implemented it two years after the deadline. It has consistently lobbied for the rules to be watered down and sought to create opt-outs for UK business.¹⁵ There remains support within the Conservative Party for removing working time rights.¹⁶

Discrimination

The Equalities Act 2010 broadly prohibits discrimination in UK law already, but EU law is essential if it is to remain *effective*. EU law prohibits caps on the damages that may be awarded by the courts in cases of illegal discrimination. A cap on damages will eviscerate the Equalities Act. The cost of discriminating (and thereby the incentive not to discriminate), will be reduced, perhaps to the extent that it becomes meaningless. Successive Conservative governments have indicated an intention to cap damages but have, thus far, been prevented from doing so by EU law.¹⁷

Environment

Environmental protections are especially vulnerable to abolition through the GRB. Environmental protection is one of the most integrated areas of EU law and requires constant updating, with agencies such as the European Environment Agency playing a vital role. It will therefore be one of the easiest aspects of the *acquis* to dispense with under the GRB. Certain areas of environmental protection are particularly vulnerable.

The doctrine of "useful effect"

This is a way of interpreting the law, rather than law itself. In discharging their duties to protect the environment, states must take measures that are effective.¹⁸ It is not sufficient for a state to have done *something*, it must do *something that works*.

This is an exacting standard. It allows citizens to hold government to account and ensures the environment is protected in substance. The GRB will enable the government to impose a less exacting standard, thus avoiding accountability for environmental protection and likely saving money that may otherwise be spent defending expensive judicial reviews.¹⁹

The "Polluter Pays" and "Precautionary" principles

The "polluter pays" and "precautionary" principles underpin all EU environmental law.²⁰ The polluter pays principle requires that efforts to protect the environment place the burden of paying for damage to the environment on those responsible for that damage. The precautionary principle requires that a product, mechanism, or policy must be *proved to be safe* before it is deployed – unlike the US system, for instance, which usually insists on *proving danger* before action its deployment can be stopped. Conservative MPs have expressed hostility to both "Polluter Pays" and "Precautionary" principles and encouraged dispensing with the precautionary principle in particular.²¹

Water safety

EU law places a duty on states to guarantee a minimum quality of water for drinking and bathing and to protect wildlife.²² These regulations are often seen as a burden for industries that impact heavily on the water table. A government seeking to counterbalance a shortfall in economic growth after Brexit will have a powerful motivation to stimulate industries, such as fracking,²³ by removing regulations which maintain water safety and quality.

Air quality

EU law places a duty on states to maintain and improve the quality of the air we breathe.²⁴ Conservative governments have repeatedly lost cases in court because they have failed to take sufficient measures to improve air quality.²⁵ Simply removing the duties imposed by EU law will, no doubt, appear an attractive course to a government seeking to avoid another high-profile defeat on the issue.

Human Rights

While EU law is not the most high-profile guarantor of human rights in the UK, it nevertheless imposes important obligations on member states. The primary EU human rights instrument is the Charter of Fundamental Rights. Most of the rights contained in the Charter are protected by the European Convention on Human Rights²⁶ or the common law. Human rights protections may nevertheless be affected by the GRB.

Torture

The Torture Directive²⁷ prevents member states from supplying the means to carry out torture, cruel or inhuman treatment, or the death penalty.²⁸ Without the Torture Directive, UK law offers a far more limited prohibition on the torture trade.

The UK has breached the Torture Directive on several occasions, recently by permitting arms fairs in which banned items were offered for sale.²⁹ The UK will likely find itself under pressure to relax restrictions on the torture trade post-Brexit. For instance, the Trump administration might want to open up new supply lines for death penalty drugs in its trade negotiations with the UK,³⁰ as these have increasingly been blocked by EU states, while authoritarian Gulf states may see an opportunity to expand the existing trade in weapons used to suppress protests.

Privacy

EU law imposes limits on government interference with privacy. Parts of the UK's Investigatory Powers Act, which violate individual privacy, were ruled illegal by the CJEU.³¹ The EU's "Privacy Shield" programme imposes strict standards for US companies (like Facebook or Amazon) operating in the Union to prevent excessive collection and retention of EU citizens' data.³²

The GRB offers a chance to remove a roadblock to implementation of the IPA, which formed a major part of Theresa May's agenda as Home Secretary. The Trump administration recently acted to undermine the EU's Privacy Shield by removing protections for foreign nationals under the US Privacy Act.³³ The GRB offers the UK government the chance to curry favour with the Trump administration by removing barriers to the bulk and unscrutinised collection of UK citizens' data.

Consumer Protection

Consumer protection must be continually updated to take account of changing circumstances and technologies. This makes it particularly vulnerable in the GRB because, if it is to maintain equivalent standards, the UK must create equivalent institutions or subscribe (but without an input) to existing EU institutions. The GRB White Paper indicates that, in such a situation, the government will consider dropping the protections altogether.³⁴

REACH

REACH protects EU citizens from exposure to dangerous chemicals. It applies the precautionary principle, requiring manufacturers to prove that the chemicals they create or import are safe before they can be used, and maintains a register of dangerous chemicals. It is administered by the European Chemicals Agency.

Maintaining REACH (or an equivalent) will be expensive³⁵ and will likely prove a barrier to any trade agreement with the USA, which generally has a lower standard of protection.³⁶ Conservative ministers have spoken approvingly of the removal of the precautionary principle,³⁷ a fundamental component of REACH.

Food safety

The EU's General Food Law provides essential guarantees of food safety.³⁸ It imposes strict traceability requirements on foods imported into or produced in the Union and includes provisions for emergency responses if food is contaminated. These limit the potential for disasters such as the horsemeat scandal, and enable a rapid response to emergencies such as outbreaks of BSE or foot-and-mouth disease.

The General Food Law requires that producers and importers keep records of their products and imposes duties to maintain safety standards. This adds costs for producers and importers. The GRB offers an opportunity for food industry lobbyists to eliminate those costs.³⁹

Financial Regulation

Financial regulation is likely to be a case of "all or nothing". Accepting EU regulation is likely to be the price for privileges such as the financial passport

or maintaining Euro clearing houses in London, seen as essential to maintaining the City's role as an international financial centre. This will, however, require the UK to accept EU regulations without having a role in determining how they are made. Given the history of the UK in challenging EU financial regulation, this could easily be resisted by some in the Conservative Party.

If Brexit negotiators are unable to secure privileges such as the financial passport⁴⁰ there will be substantial motivation to seek to balance this loss by stripping back financial regulation. The GRB gives the government the power to alter the law, without a vote in Parliament, to take account of Brexit negotiations "as circumstances develop". While the full extent of such powers has not been made clear, they may be used to remove essential financial regulations, such as minimum levels of capitalisation. This will undermine the structural stability of the economy and increase the UK's vulnerability to a financial crash similar to that of 2008.

Recommendations

Brexit and the GRB create the opportunity to remove key rights while avoiding democratic accountability. The hung-parliament 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.

If the rights listed above are to be protected, the GRB must be either voted down or amended to include specific protections in those policy areas.

Further, the GRB must be amended so that:

1. The scope and purpose of the delegated powers in the bill are clearly defined and subject to clear lines of accountability.
2. Henry VIII powers are either removed or subject to the super-affirmative procedure.
3. Delegated powers are subject to sunset clauses so they cannot be exercised indefinitely.
4. The bill includes enhanced processes for screening and scrutinising delegated legislation, including through new or existing parliamentary committees.
5. **The Bill guarantees, on its face, that the powers it provides will not be used to reduce substantive individual rights and protections found in the *acquis*.**⁴¹

References

- 1 House of Commons Library, "Legislating for Brexit: The Great Repeal Bill", (27th February 2017), p. 4, available at <http://researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-7793#fullreport> (last accessed 19th March 2017)
- 2 This includes, All Treaties, Directives, Regulations, Decisions, and Judgements of the Court of Justice of the European Union, See Department for Exiting the European Union, "Legislating for the United Kingdom's Withdrawal from the European Union" March 2017, ("the GRB White Paper"), p. 13, available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/604516/Great_repeal_bill_white_paper_accessible.pdf (last accessed 13 June 2017)
- 3 For a more detailed version of this argument see S. Fowles, "The Great Repeal Bill: Addressing Unaccountable Power", Another Europe is Possible, 27th March 2017, available at <http://www.anothereurope.org/briefing-note-how-the-great-repeal-bill-threatens-our-democracy/> (last accessed 13 June 2017)
- 4 GRB White Paper, p. 13
- 5 Some EU law has already been transferred into UK law by the European Communities Act 1972. This law is also secondary legislation.
- 6 This is legislation that has been passed by votes in the Houses of Commons and Lords and received Royal Assent. See GRB White Paper, pp. 21-23
- 7 Ibid, p. 13
- 8 Such as through Section 2 of the ECA 1972
- 9 Sanya Burgess, "'Workers Rights Will Be Protected Pledges May'", The Times, 2 October 2016, available at <https://www.thetimes.co.uk/article/workers-rights-will-be-protected-pledges-may-tv3bff2bq> (last accessed 13 June 2017)
- 10 Directive 2008/104/EC implemented in the UK by the Agency Workers Regulations 2008
- 11 This includes a minimum wage, rest breaks and limits on working time, paid annual leave, and protections for health and safety and against unlawful deductions from wages.
- 12 Mark Foster QC, "Workers rights from Europe: The Impact of Brexit", (legal advice to the TUC), para. 50-52
- 13 Implemented in the UK by the Working Time Regulations 1998 (secondary legislation)
- 14 Ibid, para. 53-57 Beyond the Regulations, there are almost no provisions for safe working time in UK law.
- 15 Ibid, para. 53-57
- 16 For example, see The Working Time Directive (Limitation) Bill 2015-16, first reading 6 July 2015
- 17 See Foster, para 25
- 18 See, for example, UK Drinking Water Case (C-337/89 Commission v UK (1992) ECR I-6103; Commission v UK (1993) ECR I-4109
- 19 Given the intention behind the bill includes giving the government the power to depart from EU doctrines, the courts are unlikely to refuse to apply secondary legislation to that effect. While any secondary legislation to this effect will likely be subject to challenge by judicial review (and arguments exist to do so), this will be costly for the challenger and far from certain of success.
- 20 Precautionary Principle, Article 191(1) Treaty on the Functioning of the European Union, "TFEU", (a more limited version is to be found under WTO rules); Polluter Pays Principle, Article 191(2) TFEU
- 21 See, for example, Alan Mak MP, "Scrap the Precautionary Principle to institute a Fourth Industrial Revolution", City AM, 14 November 2016, available at <http://www.cityam.com/253506/shelve-eus-anti-innovation-precautionary-principle> (last accessed 13th June 2016)
- 22 Water Framework Directive 2000/60/EC
- 23 The Conservative party has indicated strong support for fracking, despite the environmental impact, for example, backing for fracking was included in the 2017 Conservative General Election Manifesto along with a promise to make exploratory wells "permitted developments", thereby removing the necessity of obtaining planning permission. See <http://www.independent.co.uk/news/uk/politics/election-2017-conservatives-fracking-party-manifesto-tory-gas-shale-domestic-environment-a7742496.html> (last accessed 13 June 2017)
- 24 See, for example, the EU Clean Air Policy Package 2013, available at http://ec.europa.eu/environment/air/clean_air_policy.htm (last accessed 13 June 2017); Air Quality Directive 2008/50 transferred into UK law by the Air Quality Standards Regulations 2010.
- 25 See, for example, R (ClientEarth) v Secretary of State for Environment Food and Rural Affairs (2016) EWHC 2740 (Admin); (2017) P.T.S.R. 203
- 26 Which, as a treaty distinct from the EU, will not be affected by Brexit
- 27 See Regulations EC1236/2005, EU775/2014, EU2016/2134, implemented by the Expert Control Order 2008
- 28 Inter alia, its schedules ban items including drugs used in the death penalty, restraints used in various types of torture, and equipment for suppressing demonstrations.
- 29 See, for example, Cahal Milmo, "Organisers of world's largest arms fair in London accused of failing to stop promotion of equipment 'used in torture'", The Independent, 11 September 2013, available at <http://www.independent.co.uk/news/uk/home-news/exclusive-organisers-of-worlds-largest-arms-fair-in-london-accused-of-failing-to-stop-promotion-of-8809831.html> (last accessed 13 June 2017)
- 30 The EU ban has impacted severely on several US states, with Arkansas recently attempting to execute eight people in a single month because it's stocks of drugs were reaching their expiry date. See Ed Pilkington and Jacob Rosenberg, "Fourth and final Arkansas inmate Kenneth Williams executed", The Guardian, 28 April 2017, available at <https://www.theguardian.com/us-news/2017/apr/27/arkansas-executions-kenneth-williams-fourth-final> (last accessed 13 June 2017)
- 31 Joined cases Tele2 Sverige AB v Post-och telestyrelsen C-203/15 CJEU and Secretary of State for the Home Department v Tom Watson and Others C-698/15 (both 21 December 2016); see also, *Maximillian Schrems v Data Protection Commissioner* Case C-362/14 CJEU (6 October 2016) In particular those which allowed the government to collect private data in bulk even if individuals have not committed or are not suspected of a crime, and without independent supervision.

- 32 European Commission, "EU-US Privacy Shield", July 2016, available at http://ec.europa.eu/justice/data-protection/files/factsheets/factsheet_eu-us_privacy_shield_en.pdf (last accessed 13 June 2017)
- 33 Glyn Moody, "Already Under Attack In Top EU Court, Privacy Shield Framework For Transatlantic Data Flows Further Undermined By Trump", TechDirt, 30 January 2017, available at <https://www.techdirt.com/articles/20170127/07084536577/already-under-attack-top-eu-court-privacy-shield-framework-transatlantic-data-flows-further-undermined-trump.shtml> (last accessed 13 June 2017)
- 34 GRB White Paper, Case Study 3, p. 21
- 35 It will require a level of administration (and probably an institution) equivalent to that of the European Chemicals Agency
- 36 See Michael Warhurst, "MPs call for post-Brexit UK to remain as close as possible to EU's main chemicals law REACH", ChemTrust, 29 April 2017, available at <http://www.chemtrust.org.uk/eac-brexit-reach-report/> (last accessed 13 June 2017)
- 37 n. 20
- 38 There is no equivalent in English law that offers protections to an equivalent extent.
- 39 The General Food Law has not been transferred into domestic law. It can therefore be dispensed with through the GRB.
- 40 It is not clear that UK negotiators will accept, for example, a role for the CJEU in administering the regulations, as the price of the passporting and other privileges.
- 41 Such a guarantee will provide a basis for judicial review of any repeal of rights or protections.

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Another Europe Is Possible, 66 Offley Road, London SW9 0LS

• info@another europe.org • another europe.org

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Global Justice Now, 66 Offley Road, London SW9 0LS

+44 20 7820 4900 • offleyroad@globaljustice.org.uk • globaljustice.org.uk