Joint written evidence submission to the House of Commons Public Bill Committee on the Retained EU Law (Revocation and Reform) Bill 2022

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The Bingham Centre is an independent, non-partisan organisation that exists to advance the Rule of Law worldwide. Established in 2010 as part of the British Institute of International and Comparative Law (BIICL), the Centre was brought into being to pursue Tom Bingham's inspiring vision: a world in which every society is governed by the Rule of Law "in the interests of good government and peace at home and in the world at large." The Rt Hon Lord Bingham of Cornhill KG was the pre-eminent UK judge of his generation, who crowned his judicial career by leaving us with arguably the best account of what the Rule of Law means in practice and why it is so important in any civilised society – too important to remain the exclusive preserve of courts and lawyers. One of our strategic aims is to increase discussion about the meaning and importance of the Rule of Law in the political process.

About Dr Oliver Garner

Dr Oliver Garner is the Maurice Wohl Research Leader in European Rule of Law at the Bingham Centre for the Rule of Law. He was previously the Brexit Research Fellow. He has contributed written evidence on the EU-UK Joint Committee of the Withdrawal Agreement to the House of Commons Future Relationship with the EU Committee, and written evidence on the Trade and Cooperation Agreement to the House of Commons European Scrutiny Committee. In March, he delivered oral evidence to the European Scrutiny Committee for their inquiry "Retained EU law: Where Next?". His research on Brexit has been published on platforms including the Cambridge Yearbook of European Legal Studies, the European Law Review, and the UK Constitutional Law Association Blog. His monograph on withdrawal and opt-outs from the European Union is under review with Oxford University Press.

About Dr Julian Ghosh KC

Dr Julian Ghosh KC is a Barrister at One Essex Court Chambers. He is also a Bye Fellow at Peterhouse College, Cambridge and Preceptor at Corpus Christi College, Cambridge. Furthermore, Dr Ghosh is a Visiting Professor at King's College London. He is the co-author of "Wade & Forsyth's Administrative Law" 12th edition (to be published in December 2022), which contains an already widely circulated (and well received) analysis of retained EU law. He is also a practising member of the Bar in both London and Scotland and a Deputy Judge of the Upper Tribunal, Tax Chamber.

Introduction

1. The Government has stated that the Retained EU Law (Revocation and Reform) Bill ('REUL(R&R)') has two purposes: (1) provide the executive with all the provisions required to modify retained EU law (REUL); and (2) remove the special features that REUL has within the UK legal system.[1]

2. The REUL(R&R) Bill pursues the legitimate legislative objective of ensuring that the UK statute book reflects the legal and political reality of withdrawal from the European Union. However, key parts of the Bill go further than what is necessary to attain these aims. These clauses would jeopardise Rule of Law principles if they came into force.[2] Their unintended effects could also undermine the Government's achievement of its objectives.

3. Our joint research on the Bill has identified at least **four aspects** that potentially hamper the functioning of the UK statute book. The first two issues outlined below are more relevant to the constitutional role of the legislature and the executive, as affected by the Bill, whereas the latter two concern how the operation of the judiciary may be affected by certain provisions.

    a. The 'sunset' clause in the Bill (clause 1(1)) would repeal secondary REUL that the executive does not preserve or replace.[3] There would be enormous pressure on Government capacity to identify and retain REUL using the powers contained in the Bill within the initial 15-month period before the first sunset at the end of 2023.[5] Failure to preserve the REUL necessary for sectors of the legal system to function would create a vacuum in the system and thus create legal instability. We propose a statutory amendment, in the form of a general yet conditional exception to the sunset clauses, to prevent such a situation.

    b. The powers to retain REUL raise Rule of Law concerns in themselves.[6] The executive would be able to side-line Parliament in creating new law to modify or replace secondary REUL. Making such major substantive policy changes using delegated legislation undermines the Rule of Law benchmark of the supremacy of the legislature. The legitimacy problems are exacerbated by the severe time-pressures that members of the executive will be acting under. This is another reason why the proposed exception clause would provide a sensible safety net whilst not compromising the policy objective of the Bill.

[1] Retained EU Law (Revocation and Reform) Bill, 'Explanatory Notes', Bill 156–EN, 22 September 2022.
[2] Tom Bingham, *The Rule of Law* (Penguin, 2010), chs. 3-10.
[3] Clause 1(2) specifies that the sunset does not apply to instruments or provisions of an instrument that are specified in regulations made by a "relevant national authority".
[5] Clause 2 of the Bill provides a power for a Minister of the Crown to extend the sunset for specified secondary REUL to a date no later than 23 June 2016.
[6] The powers are defined in clauses 12 – 17. Clause 10 defines the scope of powers. Clause 11 outlines procedural requirements, including for parliamentary scrutiny.

c. On the new instructions to the judiciary contained within the Bill concerning retained case law, the first area of concern is 'reverse supremacy'.[8] This new doctrine is not necessary to ensure the abolition of supremacy of REUL. Furthermore, it could lead to legal incoherence whilst ultimately giving more discretion to the courts when confronted with a claimed conflict between laws.

d. The second issue concerns the provisions instructing courts when they should not rely upon the case-law of the Court of Justice of the European Union (CJEU).[10] This new instruction may prevent courts from having access to the resources needed to provide answers to technical points of law, thus jeopardising legal clarity and certainty.

The appendix addended to this submission, authored by Julian Ghosh KC, provides detailed academic legal argumentation for why these clauses are problematic.

4. This written evidence submission will focus on the most significant overarching concerns outlined above: the creation of a vacuum within the UK legal system by the 'sunsetting' of secondary REUL, and the related problem of executive powers to address this prospect. After outlining the Rule of Law problems caused by this situation, we propose recommendations to address these issues.

The Rule of Law Problems

The artificial emergency

5. The REUL(R&R) Bill creates an artificial emergency for the UK legal system. Following 'IP completion day', the regime created by the European Union (Withdrawal) Act 2018 allows Parliament to modify REUL at its leisure. By contrast, the 'sunsetting' by this Bill of vast quantities of REUL[12] at the end of 2023 –or a date no later than 23 June 2026 – replicates the Brexit Article 50 TEU deadline context that the creation of REUL was designed to overcome.[13]

[8] Clause 4 abolishes the supremacy of EU law. Clause 5 abolishes the general principles of EU law. For an explanation of 'reverse supremacy', see the Appendix to *Wade & Forsyth's Administrative Law* (12th edition) authored by Julian Ghosh (addended to this submission).

[10] These instructions are found in clause 7 of the Bill on the role of the courts.

[12] 2,400 according to original estimates by the Government; 3,800 by the revised estimates reported in the Financial Times following discoveries at the National Archives by researchers working on the database of retained EU law.

[13] The explanatory notes to the European Union (Withdrawal) Act 2018 state that "The principal purpose of the Act is to provide a functioning statute book on the day the UK leaves the EU. As a general rule, the same rules and laws will apply on the day after exit as on the day before."

6. The 2018 Act constructed a 'reservoir'[14] to conserve all the REUL that the UK needs for its legal system to function following the closure of the 'conduit pipe'[15] created by the European Communities Act 1972 whereby EU law took force in the UK during membership. The REUL (R&R) Bill creates a new 'drain' and sets the date when most of the 'water' of REUL would be allowed to empty away therethrough.

7. The Government and Parliament may not even be aware of exactly how much water they have preserved in these particular siloes of the REUL reservoir.[16] This ambiguity jeopardises legal certainty and clarity. The 'sunset clauses' in the REUL(R&R) Bill create a material risk to the stability of the UK legal system, its practitioners, and its end-users in areas of key policy salience such as environmental protection, health and safety regulation, and social policy.[18]

Executive powers

8. The Bill continues the trend of vast delegated powers being created to deliver the Government's post-Brexit legislative and policy programme.[19] It creates a regime whereby the substance of vast quantities of secondary REUL can only remain in force if powers are exercised by a member of the executive to 'restate', and thus preserve, the content of the law. The Bill installs an initial minimum period of 15 months to determine what law is necessary for the UK's statute book to continue to function in key policy areas formerly regulated by EU law. This creates an unprecedented workload for the Government, its lawyers, and its civil servants. If this Bill were to come into force in its present form, and secondary REUL were to drain away out of the 2018 Act's 'reservoir' via the operation of the sunset clause, the relevant authorities would be provided only with 'buckets' to try to capture and preserve the resources that are necessary for the legal system to function.

9. This problem concerning policy efficacy is accompanied by a problem of constitutional legitimacy. The delegated powers in this Bill may not be sufficient for the overwhelming task of identifying and restating all necessary REUL within the time-constraints that the Government plans to impose upon itself. Nevertheless, the clauses that allow a "relevant national authority" to restate, modify, or even re-write REUL are still extremely broad regarding *what* they allow the executive to do, and also regarding *how* members of the executive may conduct these activities.

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[14] For this metaphor, building on Lord Denning's dicta in *Bulmer v Bollinger*, see Jack Williams, 'Retained EU Law: a guide for the perplexed', *EU Relations Law,* 28 December 2020. See also, at the time of the Internal Market Bill, Oliver Garner, 'A Barrier against the new incoming tide? The UK Internal Market Bill and Dispute Resolution under the Withdrawal Agreement and the Protocol on Ireland/Northern Ireland', *UK Constitutional Law Association Blog*, 17 September 2020.

[15] See *R(Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5.

[16] George Parker, 'UK plan to scrap all EU laws suffers new setback', *Financial Times*, 8 November 2022.

[18] For example, in these respective areas, the Bar Council (via circular email) has identified secondary REUL such as the Conservation of Habitats and Species Regulations 2017; EU General Food Law Regulation and EU Food Information to Consumers Regulation; and the Working Time Regulations 1998.

[19] See Ellis Patterson and Jack Simson Caird, 'Brexit, Delegated Powers and Delegated Legislation: a Rule of Law Analysis of Parliamentary Scrutiny', Bingham Centre for the Rule of Law report, 20 April 2020.

10. For example, clause 14(2) states that "a restatement may use words or concepts different from those used in the law being restated". The scope is defined by reference to a subjective and discretionary condition: the powers can enact "any change which the relevant national authority considers appropriate" for certain defined purposes.[23]

11. The most concerning delegated powers are found in clause 15(2) and 15(3). These provision, respectively, state that:

> "A relevant national authority may by regulations revoke any secondary retained EU law and *replace it with such provision as the relevant national authority considers to be appropriate to achieve the same or similar objectives* (emphasis added)."
>
> and
>
> "A relevant national authority may by regulations revoke any secondary retained EU law and *make such alternative provision as the relevant national authority considers appropriate* (emphasis added)."

These are a broadly defined powers for the executive to make law. There are further subjective and discretionary enabling conditions, namely what the executive actor may "consider to be appropriate". Furthermore, the language that allows pursuit of objectives that are merely "similar" to those pursued by a piece of secondary REUL sets a wide ambit and scope for the power in clause 15(2).

12. The outcomes of what can be done by the executive through exercise of the powers are extensive. They include the permission to "create a criminal offence that corresponds or is similar to a criminal offence created by [revoked] secondary retained EU law", and "the imposition of monetary penalties" in such corresponding cases.[28] These consequences are among the most severe that the legal system can prescribe in relation to an individual subject. The permission for the executive to bring about such effects upon an individual's livelihood should be subject to full democratic input and assent in the House of Commons from the representatives of those individuals who could eventually be affected by these powers.

13. The only substantive condition imposed upon the exercise of the clause 15 law-making powers is that the "overall effect… does not increase the regulatory burden".[29] Again, however, the relevant actor identified to determine whether this condition is fulfilled is the member of an executive (the "relevant national authority") who is exercising

[23] Clause 14(3). The purposes are "(a) resolving ambiguities; (b) removing doubts or anomalies; and (c) facilitating improvement in the clarity or accessibility of the law".
[28] Clause 15(4).
[29] Clause 15(5).

the power. The condition itself could, unintentionally, cause regulatory uncertainty as businesses contend with the possibility of litigation that may quash regulations for breaching the restriction in clause 15(5).[30]

14. The wide delegated powers in the Bill go further than the Henry VIII clauses found in previous Brexit legislation, such as the "deficiency correction" powers in section 8 of the European Union (Withdrawal) Act 2018. The Bingham Centre for the Rule of Law criticised these powers when they were first proposed.[31] The House of Lords Constitution Committee referred to "an extraordinary portmanteau of effectively unlimited powers".[32]

15. The 2018 Act powers were at least subject to strictly defined substantive conditions and limitations upon the content and effects of the regulations.[33] By stark contrast, the clause 15 law-making power in this Bill gives free license to the executive to create legislation on any matter previously regulated by secondary retained EU law without even needing to be strictly tied to the exact objectives pursued by the previous law. It may be suggested that the 2018 Act functioned as a 'doorstop', and that the REUL(R&R) Bill represents only the latest escalation in the scope of power that is being delegated to the executive in post-Brexit matters.

16. The constitutional consequence of these powers is that Parliament would be further side-lined from having its say over the law of the land in the post-Brexit regulatory landscape.[34] This challenges the internationally recognised Rule of Law benchmark that the supremacy of the legislature over the executive must be ensured.[35]

17. The key problem is that so much domestic law – in the form of REUL – could be repealed without any parliamentary oversight at all. This scrutiny deficit is exacerbated by the historical practice of 'gold-plating' legislation.[36] Parliament has often used the domestic legislation that is necessary to transpose EU law obligations to pursue related yet purely domestic policy objectives; it has also used Acts of Parliament promulgated predominantly for domestic policy priorities as a means to transpose EU law obligations.[37] This means that the original source of crucial parts of

[30] The authors thank the Director of Research at the Bingham Centre for the Rule of Law – Professor Jeff King – for raising and emphasising the significance of this point.
[31] Bingham Centre for the Rule of Law, 'The EU (Withdrawal) Bill: A Rule of Law Analysis of Clauses 1-6', 21 February 2018; see also the
[32] House of Lords Constitution Committee, 'European Union (Withdrawal) Bill: interim report' (3rd Report, Session 2017-19, HL Paper 19), para 44.
[33] See section 8(2), (3) and (7) of the European Union (Withdrawal) Act 2018.
[34] This dilutes the achievement of the aim of the 2018 Act, again detailed in explanatory notes, that "[after Brexit] It will then be for Parliament and, where appropriate, the devolved legislatures to make any future changes."
[35] Venice Commission, *The Rule of Law Checklist*, 11-12 March 2016, p.20
[36] Vaughne Miller, 'EU Legislation: Government action on 'gold-plating'', House of Commons Library Research Briefing, 19 April 2011.
[37] For example, section 5 of the Modern Slavery Act 2015 transposed provisions on maximum prison terms from Article 4 of the 2011 EU anti-trafficking Directive, but section 54 of that same Act creates obligations for companies to provide a statement on modern slavery and human trafficking at the start of every financial year which was not derived from any obligation in the Directive.

the 'pool' found in the 'reservoir' of REUL could reflect policy choices made directly by UK parliamentarians.

18. The task of separating such law from 'pure' REUL would require rigorous analysis based on expertise in the base source EU law in question. The risk for democratic legitimacy is that UK law created by MPs and Peers to pursue their constituents' interests will be allowed to flow out of the system without these representatives having any control over the 'buckets' – the powers for the executive to restate and retain secondary REUL.

The role of the judiciary

19. The creation of the 'drain' by the sunset clauses in the REUL(R&R) Bill means that a vacuum would form in the areas of economic, social, and private life that were formerly governed by secondary REUL that is not preserved by the executive. If end-users of the legal system do not have clarity over what rules apply to govern their activities in the relevant economic and social sectors then this may lead to increased litigation to determine the precise state of the law. The fallout means that the courts may have an increased work-load of cases without clear rules to guide their adjudication.

20. This situation is inimical for both the Rule of Law and the Government's policy objectives. Regarding the former, the vacuum creates legal instability and uncertainty for end-users over what rules they should follow to conduct their life plans. Furthermore, it would increase the burden upon the capacity of the courts and also contribute to legal uncertainty and incoherence.[40] The courts would need to act to fill the vacuum created by secondary REUL draining away. This means they would need to exercise more discretion, contrary to the Government's objectives to impose more constraints on what they perceive to be an over-active judiciary.[41] Therefore, not only would the effects of the sunset clause for the judiciary pose a threat to Rule of Law principles, but the consequences would also be counter-productive for Government policy objectives.

Recommendations: An exception clause (the 'drain catcher' mechanism)

21. To achieve the Government's policy objective of removing unnecessary REUL from the statute books, whilst also maintaining the stability of the legal system in areas where such REUL is necessary, we propose the creation of an exception to the sunset clause.

[40] See analysis on the Court of Appeal *TuneIn* case in Jack Williams, 'Departing from retained EU case law: new Court of Appeal judgment', *EU Relations Law*, 1 April 2021.

[41] For Rule of Law criticisms of this Government policy, see Ronan Cormacain, 'The Judicial Review and Courts Bill: A Rule of Law Analysis', Bingham Centre Rule of Law Monitoring of Legislation project report, 26 October 2021.

22. The purpose of this caveat would be to provide a *general and prospective* mechanism to ensure that certain defined secondary REUL can remain in force beyond the sunset dates, rather than leaving everything to the *specific and retrospective* regime whereby a relevant national authority would have to identify and 'restate' REUL in regulations *after* the Bill comes into force. These carve-outs would operate as a 'drain catcher' mechanism to ensure that significant REUL is not flushed out of the reservoir. This **primary recommendation** could be realised through a new clause stating that certain identified pieces of secondary retained EU law will **automatically** be preserved as 'assimilated law'[43] upon the coming into force of the Bill.

23. The condition for the preservation of this law could be twofold: (1) the secondary REUL is necessary for the functioning of the UK legal system; and/or (2) the secondary REUL reflects the policy priorities of the Government, devolved administrations, and Parliaments as demonstrated by its compliance with the content of substantive post-Brexit legislation.[44]

24. Parliament would, of course, also be free to make any explicit revocations and insertions of wording into the secondary REUL that would be preserved through this clause. Such express modification would follow the 'best practice' precedent for such amendments being executed through Schedules to post-Brexit legislation.[45] Therefore, our proposal would see the preservation of necessary and/or desirable secondary REUL being executed by Parliament, rather than through executive action.

25. To realise this recommendation, the pieces of secondary REUL that Parliament intends to preserve could be identified and catalogued within Schedules to the Bill. This would ensure legal certainty and clarity over what law remains in force. The National Archives database of retained EU law could be used for this endeavour. This model of express identification and preservation upon the face of the Bill would require such work to be done before the Bill came into force. As argued above, however, the Government is creating an 'artificial emergency' for itself through the sunset clauses: there is no *external* time-pressure that would prevent this work of prior identification and preservation being done thoroughly.

26. This recommendation would prevent the restatement and preservation of REUL being left to the executive acting under self-imposed time-pressure and via unnecessarily broad powers. Instead, Parliament would retain full input over the determination of what REUL will remain in force within the UK legal system *before* the clock starts ticking towards the sunset dates.

27. Furthermore, as an additional safeguard, our **supplementary recommendation** is for the delegated powers in the Bill to be recast as a residual insurance policy, rather than the primary mechanism to preserve secondary REUL. The function of the powers would be limited to a form of 'correction' to address the situation in which any

[43] See clause 6 of the Bill for the definition and functioning of 'assimilated law'

[44] For example, the Environment Act 2021; Fisheries Act 2021; and the Nationality and Borders Act 2022.

[45] See European Scrutiny Committee, 'Oral evidence: Retained EU Law: Where next?', Oliver Garner response to Q35,

secondary REUL which arguably fulfils the twofold condition has been missed in the initial exercise of identification and cataloguing during the passage of the Bill. Parliament could also extend the limited power to modify such REUL to the executive, if this were necessary to make the REUL fit for purpose in the post-Brexit regulatory landscape.

28. Therefore, if this supplementary recommendation were realised, the executive powers in the Bill would be strictly limited. In substance, they could be used only to preserve secondary REUL that fits the twofold condition of necessity for the legal system and/or post-Brexit policy fit. In form, the powers of amendment could only be triggered if the executive could demonstrate that the REUL would need to be amended to comply with these conditions. If such a recommendation were realised through parliamentary amendments to the Bill, including the removal of wording allowing great executive discretion such as in clauses 15(2) and (3), then this would rein in the extraordinarily broad ambit of the powers to create new domestic law that are currently found in the Bill.

29. The Government's stated long-term objective in relation to REUL was to provide the power for Parliament to determine whether historical EU law should remain in force, and if not to determine with what domestic law it should be replaced.[46] Therefore, any major new policy decisions on areas previously regulated by retained EU law should be taken by Parliament. Our recommendations seek to assist the Government's and Parliament's realisation of that objective for the post-Brexit regulatory landscape.

Conclusion

30. The most important threat to constitutional principle and legal functioning in the Retained EU Law (Revocation and Reform) Bill is the vacuum that would be created by the repeal of secondary REUL upon the sunset date of the end of 2023. The 'draining away' of vast swathes of law from the 'reservoir' created around EU law by the European Union (Withdrawal) Act 2018 would undermine that legislation's purpose of ensuring legal stability post-Brexit.

31. The only way to prevent this outcome is the exercise of powers by the executive to preserve secondary REUL. However, these delegated powers in themselves raise major Rule of Law concerns over the breadth of discretion given to the executive to create law without sufficient parliamentary oversight or input.

[46] European Union (Withdrawal) Act 2018, 'Explanatory Notes', c. 16-EN, para 10: "As a general rule, the same rules and laws will apply on the day after exit as on the day before. It will then be for Parliament and, where appropriate, the devolved legislatures to make any future changes."

32. Our recommendation for an amendment to create an exception clause (a 'drain catcher mechanism'), and the supplementary recommendations regarding delegated powers, would prevent the creation of a legal vacuum. Not only would such a clause prevent the Rule of Law problem of legal instability, but it would also alleviate the pressure on Government capacity to preserve the secondary REUL that is still necessary for the legal system. This would assist political actors to pursue the substance of their regulatory policy agenda post-Brexit.

33. The introduction to this evidence briefly identified further Rule of Law concerns arising from the Bill that are relevant to the functioning of the judiciary. It is crucial to note that the recommendation proposed above would be necessary to prevent the grave consequences of a legal vacuum; however, it would not be sufficient to address the risks to legal certainty, clarity, and coherence posed by 'reverse supremacy', the new instructions on CJEU case-law, and the provision on accrued rights. Further specific and detailed scrutiny of these provisions will be necessary to ameliorate these Rule of Law concerns as the Bill progresses through its parliamentary stages.