

# Modifying Retained EU law in the UK: Increasing Rule of Law Concerns?

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## Introduction

Despite withdrawal from the EU, the UK remains committed to constitutional values that are also found in Article 2 TEU. Indeed, the EU-UK future relationship is predicated upon both parties [upholding fundamental rights and the Rule of Law](#). In the [European Union \(Withdrawal\) Act \(EU\(W\)A\) 2018](#), the UK government decided to keep all EU law in force in the UK after Brexit as a new category of domestic law called "[retained EU law](#)". The legislation guaranteed the Rule of Law requirement of legal certainty by avoiding a regulatory black-hole after the EU Treaties ceased to apply to the UK in accordance with Article 50 TEU. However, now that retained EU law has taken full effect since the start of 2021, the Rule of Law concerns have shifted to the modification of this new source of UK law.

Following the end of the transition period on 31 December 2020, the government will enjoy [controversial delegated powers](#) to amend "[deficiencies](#)" in retained EU law for two more years. Amendment of retained EU law via primary legislation has been less controversial formally due to its compliance with constitutional orthodoxy, albeit with the caveat that [substantive concerns](#) were expressed over effective rights protection. The manner in which retained EU law is being amended and/or repealed in recent legislation, however, may pose different challenges for the [Rule of Law principles](#) of legal certainty, accessibility, clarity, and non-retrospectivity.

The issues surrounding modification of retained EU law may be made more acute by the UK Government [review of retained EU law](#). As part of the drive for "Brexit opportunities", Lord Frost has recently committed to "remove the special status of retained EU law" and to develop a "tailored mechanism for accelerating the repeal or amendment of retained EU law". Ahead of any such developments, this post will identify three distinct methods by which retained EU law has recently been amended, and analyse their compliance with Rule of Law principles. These methods are (1) disapplication of empowering clauses in cases of conflict; (2) delegated powers of modification; (3) express modification. The argument will be made that the government should avoid the method whereby the operation of retained EU law is iteratively disapplied in cases of conflict, employ the delegated powers model only when necessary, and follow the model of express repeal or amendment wherever possible.

## The disapplication method: legal uncertainty

[Section 7 of the EU\(W\)A 2018](#) is clear that an Act of Parliament can "modify" every category of retained EU law. Ostensibly, a recent example of such modification is found in [Clause 56 of the Nationality and Borders Bill](#). However, rather than modifying specific clauses of retained EU legislation, clause 56(1) instead bites upon the source mechanism through which retained EU law is given effect: "Section 4 of the European Union (Withdrawal) Act 2018 (saving for rights etc under section 2(1) of the European

Communities Act 1972) ceases to apply to rights, powers, liabilities, obligations, restrictions, remedies and procedures derived from the Trafficking Directive so far as their continued existence would otherwise be incompatible with provision made by or under this Act."

Benchmark B.3(ii) of the [Venice Commission Rule of Law checklist](#) indicates that legislation should state whether previous legislation is repealed or amended by the coming into force of the new statute. Clause 56 does not adopt such a precise method of identifying provisions within the retained Trafficking Directive that will be repealed or amended by the coming into force of the Nationality and Borders Bill. Instead, it takes a broader approach of biting upon the constitutional source whereby the provisions of the Trafficking Directive maintain their domestic effect. This resembles the formulation whereby [clauses in the UK Internal Market Bill](#) would have disapplied the EU(W)A 2018 in relation to the Northern Ireland Protocol in the event of incompatibility. Such a (controversial) mechanism would have been legally necessary due to the ultimate source of law being found in an international treaty. This is not the case in relation to the retained Trafficking Directive since the EU Treaties ceased to apply, and therefore the convoluted mechanism of disapplication appears practically unnecessary.

Disapplication in cases of incompatibility would lead to legal uncertainty, because individuals who fall under the provisions of both sources cannot be sure which provisions will apply until the point at which a Trafficking Directive norm is found to be incompatible with a provision under the Nationality and Borders Act, when it comes into force. Presumably it would fall to a court to make such a determination. The uncertainty during the period before any such ruling is exacerbated by the fact the disapplication clause also extends to provisions made under the Act, which means cases of incompatibility could arise every time delegated power is exercised.

The clause seems to act as a form of insurance policy; it is a legislative short-cut whereby the government can avoid having to undertake the work of identifying specific provisions of the Trafficking Directive it wishes to disapply now, and instead creates a means to defer this power unless and until incompatibilities are identified. The cost of such flexibility is certainty for individuals over which laws apply at any given time. Furthermore this may lead to issues of retrospectivity in practice because, on the common law understanding of *ex tunc* rather than *ex nunc* effect, a court finding of incompatibility between the Trafficking Directive and the Nationality and Borders legislation would mean that section 4 EU(W)A would be regarded as disapplied from the coming into force of the Nationality and Borders Bill, and the relevant provisions of retained EU law would be held to have not had effect from this date. However, individuals will not know with absolute certainty which provisions of the retained Trafficking Directive are in force until after the fact of a court judgment.

## **The delegated powers model: scrutiny concerns**

The second model of modification is more familiar from the context of the power of deficiency correction - delegated powers to modify retained EU law. An example of such powers enabling modification of retained EU law is found in [section 2\(9\)\(a\) of the Trade Act 2021](#): "Regulations made under subsection (1) [to implement international trade agreements] may, among other things, make provisions - (a) modifying retained direct principal EU legislation or primary legislation that is retained EU law". This clause falls under [section 7\(2\) EU\(W\)A 2018](#), which allows modification of retained direct principal EU legislation by "any provision made on or after the passing of this Act by or under primary legislation".

These implementing powers resemble those created by the [European Union \(Withdrawal Agreement\) Act 2020](#) and the [European Union \(Future Relationship\) Act 2020](#) to implement the results of the Brexit negotiations. This distinguishes the clause from the factual context of clause 56 of the Nationality and Borders Bill, which does not concern the implementation of international agreements. Whereas the former concerns conflicts between domestic sources of law, the powers in the Trade Act

look ahead to a situation whereby retained EU law may come into conflict with new obligations agreed in international law. However, it should also be noted that no such condition is imposed by the Trade Act, and instead Ministers implementing new international obligations have the discretion to modify pre-existing retained EU law even if there is no incompatibility.

The use of delegated powers and secondary legislation to repeal or modify norms that formerly formed a "binding and overriding" source of domestic law prompts the [same concerns](#) over scrutiny and accountability that were raised in the context of the deficiency correction power under the 2018 Act. However, in contrast to the disapplication method in the Nationality and Borders Bill, express modification through a form of legislation means that individuals can more readily know what the law in force is in this area, and furthermore accessibility and clarity are assured by the fact they will be able to find the text modifying retained EU law in secondary legislation. Arguably, in contrast to the Nationality and Borders Bill context, the use of a disapplication model could have been more justified by the factual context of the Trade Act, as it would provide a mechanism for the resolution of incompatibilities between new international obligations and pre-existing retained EU law.

## **The express repeal model: best practice for the Rule of Law**

Both the disapplication and delegated power methods can be contrasted to another piece of post-Brexit legislation that modifies retained EU law. [Schedule 11 to the Fisheries Act 2020](#) is entitled "retained direct EU legislation: minor and consequential amendments". The paragraphs identify specific provisions in the Common Fisheries Policy Regulation that are either revoked, amended, or replaced by new provisions. This represents the best practice for modifying retained EU law from a Rule of Law perspective. Individuals will have clear certainty over what legal provisions are in force, and they will be able to access this legislation. From the perspective of scrutiny and accountability, the relevant changes are subjected to full parliamentary scrutiny in the chambers of the House of Commons and the House of Lords, and regarding prospectivity the modifications were made at the point that the Fisheries Act came into force. The context behind the Fisheries Act may have played an important role, as the new fisheries arrangements were a keenly debated feature of negotiations on the Trade and Cooperation Agreement with clear policy preferences on the part of the UK Government. However, political equivocation with regard to the policy area of trafficking that is addressed by the Nationality and Borders Bill cannot be pleaded as a defence to the legal uncertainty that the disapplication method of modifying retained EU law would cause.

## **Conclusion**

Clause 56 of the Nationality and Borders Bill would introduce a mechanism whereby the repeal of provisions of the retained EU Trafficking Directive is dependent on the finding of incompatibilities on an iterative basis after the Act comes into force. This means that individuals would be left in a situation of continuing uncertainty over what law is in force on trafficking, and with the possibility of retrospective findings of incompatibility. The political reason behind the mechanism appears to be indecision over what provisions of the Trafficking Directive would need to be repealed, or what preferences the government has for such repeal. The Fisheries Act demonstrates that modification of retained EU law can be affected through clear legislative text that comes into force prospectively. If the government were unsure over what provisions of the Trafficking Directive should be repealed or amended, then they should have followed the more desirable albeit still problematic method of creating delegated powers of modification akin to the Trade Act. In the future, any "tailored mechanism" for fast-tracked amendment or repeal of retained EU law proposed by the Frost review should follow the best practice of express repeal. The government should avoid continuing the trend of the Nationality and Borders Bill using disapplication clauses, first developed in the Internal Market Bill, that are neither necessary nor appropriate for the modification of domestic law.

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