

Retained EU Law (Revocation and Reform) Bill: Human Rights Considerations

January 2023

The Scottish Human Rights Commission was established by the Scottish Commission for Human Rights Act 2006, and formed in 2008. The Commission is the National Human Rights Institution for Scotland and is independent of the Scottish Government and Parliament in the exercise of its functions. The Commission has a general duty to promote human rights and a series of specific powers to protect human rights for everyone in Scotland.

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1. Executive summary

The present paper is presented upon request of the Scottish Parliament's Constitution, Europe, External Affairs and Culture Committee, which is intended to provide key human rights considerations into the proposed Retained EU Law (Revocation and Reform) Bill.

The Commission presents its concerns over the potential impacts towards the enjoyment of human rights if the Retained EU Law (Revocation and Reform) Bill was to pass in its current form. In particular, the Commission is concerned over the potential retrogression on current enjoyment and protection of economic, social, cultural and environmental rights, without sufficient democratic and participatory scrutiny. The Commission recommends the Scottish Parliament to not grant consent to the Retained EU Law (Revocation and Reform) Bill.

2. Proposed Revocation Bill

As the Committee is fully aware, the UK Government has proposed a bill intended to:

- revoke certain retained EU law;
- make a provision relating to the interpretation of retained EU law and to its relationship with other law;
- make provision relating to powers to modify retained EU law;
- enable the restatement, replacement or updating of certain retained EU law; and
- enable the updating of restatements and replacement provision.¹

The Commission recognises the evidence already presented to the Committee by the Law Society of Scotland,² the Faculty of Advocates,³ the UK Environmental Law Association,⁴ the Scottish Environmental Link,⁵ RSPB Scotland,⁶ among others. The Commission also

acknowledges publicly available evidence provided by others, such as the Public Law Project,⁷ the Marine Conservation Society,⁸ and the Employment Lawyers Association.⁹

Overall, some of the above mentioned evidence indicate that the proposed bill is ‘constitutionally inappropriate, practically unfeasible, and potentially deeply harmful.’¹⁰ As indicated by the Public Law Project, the bill has the potential to:

- Place vitally important rights and protections on a cliff-edge;
- Create considerable legal uncertainty, which will put fundamental rights at risk and make it more difficult to enforce such rights; and
- Transfer vast legislative powers to ministers that can be exercised with minimal parliamentary oversight.¹¹

As also indicated by the Faculty of Advocates, there is a danger that “new legislation drafted to replace the existing rules in a particular area of the law is rushed [which consequently will] create uncertainty, and at worst may result in unintended consequences. There is also the danger that the existence or importance of a provision is overlooked in the haste, and that no replacement is in place at the time of automatic revocation – thus creating a gap in the law. All of this has the potential to create uncertainty, injustice and expense for individual citizens.”¹²

The proposed bill also presents a considerable risk to the enjoyment of human rights in Scotland, in particular, economic, social, cultural and environmental rights.

3. Economic, Social, Cultural and Environmental Rights in the UK

Economic, social and cultural (ESC) rights are protected under international law. The UK has ratified various binding instruments that contain such rights. Among them are the International Covenant on Economic, Social and Cultural Rights, and the European Social Charter. Economic rights are also protected under various binding instruments

from the International Labour Organisation (ILO Conventions). The right to a healthy environment is contained in various non-binding international instruments, but also considered to be an inherent component of other fundamental human rights, such as the right to health,¹³ the right to life,¹⁴ and the right to private and family life.¹⁵

ESC rights are human rights that are necessary to live a dignified life that is free from fear and want. Economic rights (such as social security and workers' rights), social rights (such as health, education, housing, food), and cultural rights (such as the right to take part in cultural life and to benefit from scientific progress) are always to be progressively realised. This means that all countries should aim at improving the enjoyment of ESC rights over time, conditioned to using the maximum of their available resources.¹⁶ To 'progressively realise' rights, countries need to be able to move as expeditiously and effectively as possible, taking deliberate, concrete and targeted measures.

Economic, Social, Cultural, and Environmental (ESCE) rights are not directly and expressly protected in the Human Rights Act, and are yet to be incorporated into UK or Scots Law as fundamental rights. Some limited protections are afforded through the interpretation of rights found in the European Convention on Human Rights. The Scottish Government has committed to the incorporation of the International Covenant on Economic, Social, and Cultural Rights and the right to healthy environment into Scots Law, following the recommendations of the National Taskforce of Human Rights Leadership, of which the Commission was an active member.¹⁷

The very limited protection of ESCE rights either within the UK's constitution or any other piece of UK or Scots Law, makes the protection afforded by EU retained law of great importance. If revoked completely or partially, this would represent an important retrogression of rights as no further protection will be afforded within UK or Scots law. If the Human Rights Act was to be repealed or reformed, as currently proposed by the UK Government, the level of protection of human rights would diminish even further.¹⁸

4. Non-retrogression of rights

Inherent to the obligation of progressive realisation, countries are obliged to not take deliberate retrogressive steps. This means that states have an overall obligation to ensure that the existing levels of enjoyment of rights do not deteriorate.

Retrogressive measures might be exemplified in many ways. For example, they can include cuts to programmes related to rights; the withdrawal of funding of services aimed to achieve the realisation of human rights; or deliberate legislation intended to reduce the protection afforded to certain rights.

When a deliberately retrogressive measure is taken, a country is always required to demonstrate that this was the consequence of the most careful consideration of all alternatives and was justified given the country's efforts to protect other fundamental rights. A country is required to demonstrate that it implemented a retrogressive measure, given that:

1. the maximum available resources were not sufficient;
2. the most careful consideration was made, having ensured a participatory process to hear the views of rights-holders;
3. a proportionality analysis was made, ensuring that given the different options that were available, the country took the one that was less negatively impactful for human rights;
4. the measures were not directly or indirectly discriminatory; and
5. those most at risk were prioritised.¹⁹

Some of the information currently available indicates that there are considerable concerns in relation to the impacts that this legislation could have to the current protection afforded by retained EU law, which would amount to retrogressive measures. This is of particular importance for regulation related to the right to a healthy environment, workers' rights, the right to health and the right to food. The following list

is presented as a brief, and not exhaustive, demonstration of some of the impacts to the enjoyment of ESCE rights if the retained EU law was revoked.

4.1. Right to a healthy environment

As indicated by the UK Environmental Law Association the “overall approach proposed under the Bill will lead to a significant risk that the substance as well as the coherence of environmental law across the UK will be undermined and weakened.”²⁰ This is because the bill could lead to whole areas of environmental law such as waste, water and air quality, nature conservation, and the regulation of chemicals being removed from UK law “automatically, simultaneously and without any safeguards or replacement” unless specific action is taken by UK ministers.²¹ This would be the consequence of a sunset provision currently introduced in the bill, which specifies that all EU retained law will automatically be revoked on 31 December 2023 unless action is taken to retain, replace or amend the legislation.

Furthermore, as indicated by the Scottish Environment Link, at least 570 pieces of Retained EU Law relating to the environment have been identified by the Cabinet Office, but it is currently unclear how many of these laws have devolved implications. There is a significant risk that some legislation might not be identified in time and that environmental protections will be revoked from UK law by accident, rather than design.²² In other words, if the Scottish Parliament was not to identify, in the short period of time provided, the relevant rules that fall within devolved context and are related to the protection of the environment, then such norms would disappear automatically.

4.2. Workers’ rights

In relation to workers’ rights, the Employment Lawyers Association has provided a detailed list of rights that would disappear from UK Law if the UK Government did not directly act to retain them:

- The right of a worker to a 20 minute break in their shift and a break from work each day and a day off every week or 2 days off every

14 days;

- Paid holidays at the same rate of pay that a worker should get when they are working;
- The right of an NHS worker who has worked through the pandemic and been unable to take their paid annual leave, to carry that leave over;
- Maximum hours not just for office workers but also for safety critical workers such as airline pilots, sea-fisherman and HGV drivers;
- The obligation on employers to make an assessment of health and safety risks to their workers or keep such a risk assessment up to date;
- The right of part-time and fixed-term workers to be treated, pro rata, similarly to permanent workers unless the employer can justify that treatment, which the Commission considers would have a disproportionate impact on women if such a rule was to be revoked;
- The right of Agency Workers that they should, after 12 weeks, receive the same basic working and employment conditions such as pay or rest periods as a directly employed worker;
- Rights to take parental leave; among others.²³

4.3. Right to health and food

EU retained law provides for certain important rules that, holistically, ensures the enjoyment of the right to health and the right to food of people in Scotland. For example, some retained law requires for food business operators to ensure that all stages of production, processing and distribution of food under their control satisfies important hygiene requirements.²⁴ Such regulation ensures, for example that:

- food business operators ensure that food products are protected against contamination;
- food businesses have measures to control contamination arising from the air, soil, water, feed, fertilisers, veterinary medicinal products, plant protection products and biocides and the storage, handling and disposal of waste;
- food business operators rearing, harvesting or hunting animals or producing primary products of animal origin take adequate measures to:
 - ensure the cleanliness of animals going to slaughter and, where necessary, production animals;
 - use potable water, or clean water, whenever necessary to prevent contamination;
 - ensure that staff handling foodstuffs are in good health and undergo training on health risks;
 - prevent animals and pests from causing contamination;
 - store and handle waste and hazardous substances so as to prevent contamination; among others.²⁵

Revocation of EU retained law in relation to food and health standards, such as those described above, would undoubtedly reduce the domestic legal protections that are currently in place and which guarantee the full and adequate enjoyment of the right to health and the right to food.

4.4. Overall retrogression

If important protections currently afforded within current retained EU law were to be revoked, this would unequivocally amount to a retrogressive measure under international human rights standards.

The current publicly available information also does not seem to demonstrate that the most careful consideration has been given to ensure that the potential retrogression of human rights is needed. The legislative powers that would be transferred to Ministers would also reduce the democratic scrutiny, making it unclear what type of participatory process (through consultations, evidence, debates, and

others) would be implemented to ensure the views of rights-holders are carefully and meaningfully taken into account.

Furthermore, the automatic revocation of EU law if no positive action is enacted by the UK Government would – when concerned with rules related to ESCE rights – undoubtedly represent a state failure to avoid retrogressive measures, as no careful consideration would have taken place. Given the high volume of current EU retained law, and the short span of time before its automatic revocation, this could be a likely outcome.

5. Recommendation

Given the international human rights obligations to which the UK has committed to comply with (including progressive realisation and non-retrogression); the potential impacts on the current enjoyment of economic, social, cultural, and environmental rights that the bill would have; and the lack of guarantees that all fundamental human rights protections will be guaranteed or that any retrogressive measure will be implemented after the most careful consideration has been given to people's rights; the Commission recommends the Scottish Parliament to not grant consent to the Retained EU Law (Revocation and Reform) Bill.

¹ Further information available at <https://bills.parliament.uk/bills/3340>

² See full evidence at <https://www.parliament.scot/-/media/files/committees/constitution-europe-external-affairs-and-culture-committee/law-society-of-scotland.pdf>

³ Full evidence available at <https://www.parliament.scot/-/media/files/committees/constitution-europe-external-affairs-and-culture-committee/foa.pdf>

⁴ See evidence at <https://www.parliament.scot/-/media/files/committees/constitution-europe-external-affairs-and-culture-committee/ukela.pdf>

⁵ Evidence available at <https://www.parliament.scot/-/media/files/committees/constitution-europe-external-affairs-and-culture-committee/link.pdf>

⁶ See full written evidence at <https://www.parliament.scot/-/media/files/committees/constitution-europe-external-affairs-and-culture-committee/rspb-scotland.pdf>

⁷ See report by the Public Law Project at <https://publiclawproject.org.uk/content/uploads/2022/10/Second-Reading-Commons-Briefing-REUL-Bill-final.pdf>

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- ⁸ See analysis by the Marine Conservation Society at <https://www.mcsuk.org/news/analysis-the-retained-eu-law-bill/>
- ⁹ See briefing paper by the Employment Lawyers Association at https://www.elaweb.org.uk/sites/default/files/docs/ELA_REU_Bill_BriefingPaper_22Oct22_FINAL.pdf
- ¹⁰ See report by the Public Law Project at <https://publiclawproject.org.uk/content/uploads/2022/10/Second-Reading-Commons-Briefing-REUL-Bill-final.pdf>
- ¹¹ See report by the Public Law Project at <https://publiclawproject.org.uk/content/uploads/2022/10/Second-Reading-Commons-Briefing-REUL-Bill-final.pdf>
- ¹² See <https://www.parliament.scot/-/media/files/committees/constitution-europe-external-affairs-and-culture-committee/foa.pdf>
- ¹³ See UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant), 11 August 2000, E/C.12/2000/4
- ¹⁴ See Council of Europe Report The Environment and Human Rights Introductory Report to the High-Level Conference Environmental Protection and Human Rights (2020)
- ¹⁵ See more at the European Court of Human Rights factsheet “Environment and the European Convention on Human Rights” (2022) available at https://www.echr.coe.int/documents/fs_environment_eng.pdf
- ¹⁶ UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant), 14 December 1990, E/1991/23
- ¹⁷ See [New Human Rights Bill - gov.scot \(www.gov.scot\)](https://www.gov.scot)
- ¹⁸ See the Commission’s position on the repeal of the Human Rights Act at [Submission to UK Gov Consultation on Reform of the Human Rights Act \(scottishhumanrights.com\)](https://www.scottishhumanrights.com)
- ¹⁹ UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 19: The right to social security (Art. 9 of the Covenant), 4 February 2008, E/C.12/GC/19, paragraph 42
- ²⁰ See <https://www.parliament.scot/-/media/files/committees/constitution-europe-external-affairs-and-culture-committee/ukela.pdf>
- ²¹ See <https://www.parliament.scot/-/media/files/committees/constitution-europe-external-affairs-and-culture-committee/ukela.pdf>
- ²² <https://www.parliament.scot/-/media/files/committees/constitution-europe-external-affairs-and-culture-committee/link.pdf>
- ²³ See full paper at https://www.elaweb.org.uk/sites/default/files/docs/ELA_REU_Bill_BriefingPaper_22Oct22_FINAL.pdf
- ²⁴ Regulation (EC) No 852/2004 of the European Parliament and of the Council of 29 April 2004 on the hygiene of foodstuffs, article 3
- ²⁵ Regulation (EC) No 852/2004 of the European Parliament and of the Council of 29 April 2004 on the hygiene of foodstuffs, Annex I