

European and External Relations Committee

The 'Great Repeal Bill'

Briefing paper by Professor Sionaidh Douglas-Scott

Introduction

1. On October 2, Theresa May announced plans for a 'Great Repeal Bill' to be included in the next Queen's Speech. There is little detail currently available, but it appears this Bill is intended to remove the European Communities Act (ECA) 1972 from the statute book following completion of Brexit negotiations. It would also incorporate current EU law into an Act of Parliament and then allow the UK government to decide if/when to repeal, amend or retain individual measures in the future, following Brexit.

2. It seems the UK government intends to introduce this Bill into Parliament in 2017, but it will not come into force until after a Withdrawal Agreement is concluded and the UK has actually left the EU. Indeed, the UK remains bound by EU law until it leaves the EU, and enforcing such a Repeal Act prior to formal withdrawal from the EU treaties would clearly violate both EU law and international law, and be very harmful to the UK's international reputation.

3. In fact, there is nothing very new about the *concept* of a Bill to repeal the ECA and retain EU law in the UK (apart from the proposed title of 'Great Repeal Bill'). Successive private members' Bills have been introduced into the UK Parliament in past sessions (although of course none were adopted). The wording of clause 1 of [this Bill](#) introduced in 2013 by Philip Hollobone MP is typical:

'1. Repeal of European Communities Act 1972

(1) The European Communities Act 1972 is repealed.

(2) Secondary legislation made under that Act shall continue in force unless it is subsequently amended or repealed, and any such amendments or repeals may

be made by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament.'

4. In addition to noting previous attempts to cut the UK's formal legal links to EU law by means of ECA repealing Bills that aimed to preserve some EU law, we can also make comparisons with 'continuance clauses' of former colonies on independence from the UK. The problem of how to avoid huge gaps in the law on independence, secession or disaffiliation from a former legal power is not new. For example, section 4(1) Jamaica Constitution ([The Jamaica \(Constitution\) Order in Council 1962](#)) reads:

'All laws which are in force in Jamaica immediately before the appointed day shall (subject to amendment or repeal by the authority having power to amend or repeal any such law) continue in force on and after that day, and all laws which have been made before that day but have not previously been brought into operation may (subject as aforesaid) be brought into force, in accordance with any provision in that behalf, on or after that day, but all such laws shall,

subject to the provisions of this section, be construed, in relation to any period beginning on or after the appointed day, with such adaptations and modifications as may be necessary to bring them into conformity with the provisions of this Order.'

Functions of a 'Great Repeal Bill'

4. A 'Great Repeal Bill' would apparently serve 2 major functions.

i) First, it would repeal the ECA 1972. 'Its effect will be clear,' Theresa May [told the Conservative party conference](#) in Birmingham. 'Our laws will be made not in Brussels but in Westminster. The judges interpreting those laws will sit not in Luxembourg but in courts in this country. The authority of EU law in Britain will end.' Crucially, it would remove priority of EU law over national law, thus expunging the doctrine of primacy of EU law. It would also remove the jurisdiction of the European Court of Justice in Luxembourg (CJEU) as far as the UK is concerned.

ii). Second, however, the function of the 'Great Repeal Bill' would not be to repeal all EU law as it applies in the UK. In fact, the purpose would be preserve and carry over into UK law the full body of EU law not already implemented in national law. Otherwise, given the many EU provisions applicable in the UK, there would be a risk of huge gaps in UK law on the date of withdrawal. So the Bill could stipulate something to the effect of, 'all existing EU law on the date of withdrawal from the EU remains in force', although it would probably have to be more detailed, for reasons set out immediately below.

Why is it thought necessary to translate EU law into national law?

5. There is some sense in repatriating EU law to the UK so there would not be legal vacuums on withdrawal from the EU. Clearly, though, the intention is to repeal much of this law in the future - in itself a massive task. Otherwise, it is likely that much repatriated EU law would be inconsistent with any future trade or other deals the UK might strike with other countries, or organisations. However, for the immediate post withdrawal period, when it will be necessary to ensure that EU law continues to have operational effect, care will be needed. This is because EU law has entered national law in complex ways through the ECA, and clarity of drafting will be needed to preserve these effects. There are basically 3 different ways in which national law gives effect to EU law at present.

i) First, there would need to be a clause in the 'Great Repeal Bill' to make up for the repeal of section 2(1) ECA. [Section 2\(1\) ECA](#) currently provides that provisions of EU law that are directly applicable or have direct effect, such as EU Regulations or certain articles of the EU Treaties, are automatically 'without further enactment' incorporated and binding in national law without the need for a further UK legislation. So when, for example, an EU Regulation enters into force, it automatically becomes part of national law, without the need for implementing legislation, as would usually be required for obligations assumed under international law in the UK. Without such a clause, directly applicable treaty provisions (such as those pertaining to equal pay for men and women) or EU regulations, would be lost. Of course, the 'Great Repeal Bill' might just use the simplistic formula mentioned above, that 'all existing EU law on the

date of withdrawal from the EU remains in force', obviating the need for a 'belt and braces' approach distinguishing different types of EU law. However, in the interests of clarity and legal certainty, the elaboration of a 'belt and braces' approach is desirable.

ii). Second, the Bill will have to ensure that 'secondary legislation' presently made under the ECA continues in force. [Section 2\(2\) ECA](#) at present applies to measures of EU law that are neither directly applicable nor have direct effect, and makes it possible to give effect in national law to such measures by secondary, or delegated, legislation, such as statutory instruments.

iii). Finally, presumably the 'Great Repeal Bill' would not touch EU law which has already become part of UK law due to primary legislation (eg the [Consumer Protection Act 1987](#)), which remain in force, although could be repealed by Parliament at some future date.

Some problems raised by the prospect of a 'Great Repeal Bill'

6. However, the prospect of this exercise also raises important questions. Theresa May [declared that](#) 'When the Great Repeal Bill is given Royal Assent, Parliament will be free – subject to international agreements and treaties with other countries and the EU on matters such as trade – to amend, repeal and improve any law it chooses.' But how would this work?

i) the need for secondary legislation

The Department for Exiting the EU [stated that](#) 'The Repeal Bill will include powers for ministers to make some changes by secondary legislation, giving the Government the flexibility to take account of the negotiations with the EU as they proceed.'¹ The example of the 2013 ECA Repeal Bill cited above includes the term 'repeals may be made by statutory instrument' and it is very likely that something like this would be included in the 'Great Repeal Bill' itself. Parliament simply would not have the time to manage the manifold repeals or amendments of EU law that would be desired, so much of this will presumably fall to the Executive. Indeed, the approach taken by successive private members' ECA Repeal Bills included a '[Henry VIII](#)' clause, namely a provision that enables *primary* legislation to be amended or repealed by subordinate legislation. Unfortunately, 'Henry VIII' clauses are becoming a too familiar part of UK legislation generally. Yet such a measure would be an unparliamentary and undemocratic way to repeal or amend former EU law, and hardly a means for Parliament to 'take back control,' given that Parliament has a fairly minimal role in secondary legislation and no power to make amendments. The use of 'Henry VIII' clauses to repeal certain provisions of EU law is of particular concern, given that EU law has created vast networks of rights and obligations, whose subject matter – eg social policy, discrimination law, or fundamental rights – covers many matters central to individual liberty (see para 11 below, for specific concerns raised in the context of 'Henry VIII' clauses and Scotland).

ii) references in EU legislation to EU agencies and standards

¹ This wording is misleading. Presumably the Dept. for Exiting the EU does not intend to make use of statutory instruments to amend the domestic impact of EU law while withdrawal negotiations are proceeding, ie while the UK is still a member of the EU, which would of course be unlawful in EU and international law.

There are further questions too. The statement on the Department for Exiting the EU webpage also states that ‘It will also ensure that the Government can establish new domestic regimes in areas where regulation and licensing is currently done at an EU level, and amendments are required to ensure the law operates effectively at a domestic level.’ This rather underestimates the nature of the task. Many EU laws make references to EU agencies and institutions setting standards or performing functions in relation to EU law. What will their role be if EU law is ‘patriated’? For example, the [European Medicines Agency](#) (EMA) is an EU agency for the evaluation of medicinal products, with a function rather similar to aspects of the U.S. Food and Drug Administration Agency. It is based in London (and will have to relocate on Brexit, with British job losses) and has overseen EU-wide drug approvals since 1995. Post Brexit, would the UK continue to accept decisions by a relocated EMA until a new British equivalent had been set up, which could take several years? If there were a British equivalent, there would also have to be arrangements for mutual recognition of UK and EU agency decisions, otherwise applicants would face extra costs of going through two agencies. This may sound technical, but such matters will arise with literally hundreds of EU provisions, requiring thought, time, expertise and expense before the law will be workable. More generally, any EU provisions translated into UK law relating to trade or co-operation with the EU (eg transfer of prisoners serving sentence in EU prisons, or recognition and enforcement of judgments) will only be workable if the EU and UK reach an agreement on the matter. Would this be a matter for Withdrawal Negotiations under Article 50? And what happens if agreement is not reached? Thus, there will be many rule of law (in the sense of ensuring a law that is clear, foreseeable and coherent) issues raised by the ‘Great Repeal Bill’.

iii) The role of the European Court, post Brexit

A further matter concerns the role of the CJEU post Brexit. On the one hand, the ‘Great Repeal Bill’ will have stipulated that the UK no longer recognises its jurisdiction. That was an essential part of ‘taking back control’. On the other hand, not recognising CJEU jurisprudence will render EU-derived UK law static, and of limited utility when it concerns trans-border matters (eg criminal law matters, such as EU arrest warrants, where the UK is likely to want to continue co-operation with the EU). So although CJEU decisions may be of ‘persuasive’ authority only post-Brexit, UK courts may find it practical to reach similar conclusions to the CJEU for a time to come.

Specific relevance of the ‘Great Repeal Bill’ for Scotland

7. However, one of the most immediate issues that the ‘Great Repeal Bill’ is likely to face arises with respect to devolved matters. The aim of the Bill is to convert EU law into national law. However, a good part of EU law relates to competences that have been devolved – for example, in the case of Scotland, devolved competences include: agriculture, fishing within Scottish waters, public procurement, environmental law, as well as others. If the ‘Great Repeal Bill’ translates EU law on matters that have been devolved into UK law this could amount to legislation on devolved areas.

The need for Legislative consent

8. Under s 28(7) Scotland Act 1998, the UK Parliament, as a sovereign legislature, retains the power to make or unmake any law for Scotland whatever. However, under

the ‘Sewel convention,’ legislative consent of the Scottish Parliament would be needed when Westminster legislation touches on devolved matters. In the June referendum, in the case of Scotland, 62% of those voting, voted to remain in the EU, and the Scottish government has stated its opposition to [‘Scotland being taken out of the EU against its will’](#), so consent may not be forthcoming.

9. As the term suggests, the ‘Sewel Convention,’ as a constitutional convention, takes the form of a political as opposed to a legally binding undertaking. However, s. 2 Scotland Act 2016 inserts a new subsection (8) into s. 28 Scotland Act 1998, giving statutory recognition to the Convention in the following form: *‘But it is recognised that the Parliament of the United Kingdom will not normally legislate with regard to devolved matters without the consent of the Scottish Parliament.’* This renders its status as a ‘mere’ convention somewhat less clear. At the very least, it may be argued that the express inclusion of the Sewel convention in the Scotland Act 2016 makes it impossible to ignore politically. To be sure, the provision is that Westminster will not ‘normally’ invade devolved competences without their consent, and much has been made of this. But there is no clear authority on what ‘normally’ means. As ‘normally’ is not defined in legislation, and is in any case far from unambiguous, it is possible this is a matter that could be left to the courts to decide.

10. The issue of legislative consent suggests that constitutional problems lie ahead. Appearing on BBC *Sunday Politics Scotland* on October 2, Michael Russell [said](#): ‘A piece of legislation such as Theresa May is now promising, this great repeal act, will require the approval of the Scottish parliament. A legislative consent motion will be required.’ However Theresa May told the conservative conference that she ‘would not be held to ransom by any of the devolved administrations’, and ‘divisive nationalists’ she accused of trying to break up the UK. Scottish Secretary David Mundell [told BBC Radio Scotland](#): ‘I haven’t seen the evidence that would suggest that a legislative consent motion is required by the Scottish Parliament.’ So there is clearly a difference of opinion.

11. The prospect of a ‘Great Repeal Bill’ caused further alarm in Scotland when a report authored by Professor Alan Page ([‘The implications of EU withdrawal for the devolution settlement’](#)) presented to the Scottish Parliament’s European and External Relations Committee suggested that many laws affecting devolved issues could be unilaterally scrapped by Westminster as a consequence of Brexit, because (as already mentioned) secondary legislation could be used to unpick former EU laws. However, because brought about by secondary legislation, such changes would not require the consent - or even the knowledge - of MSPs. Professor Page described this as ‘a significant potential gap’ in law making in devolved areas. Such a situation would presumably come about after the enactment of a ‘Great Repeal Bill’ and exit from the EU, at a later date when it was decided to repeal or amend former EU laws now incorporated into UK legislation. As Page writes, ‘At the moment there is no requirement for the Scottish Parliament’s consent to UK subordinate legislation transposing EU obligations in the devolved areas; nor is the Parliament routinely informed about such legislation. The situation could thus arise in which the UK legislated extensively in areas devolved to Scotland without seeking the consent of the Scottish Parliament as there would be no requirement of its consent in relation to subordinate legislation altering the effects of EU law in the devolved areas.’

12. So clearly, there are very considerable implications for Devolution. What would happen if Westminster ignored constitutional practice and enacted the 'Great Repeal Bill' without the consent of the Scottish Parliament? Constitutional conventions are binding. It is clearly unconstitutional to disregard conventions, and actions that violate them can have considerable political and constitutional consequences. For example, in 1982, then Canadian Prime Minister, Pierre Trudeau, 'patriated' the Canadian Constitution across the entirety of the country against the wishes of the Quebec government, (which claimed the existence of a convention requiring their consent), destabilising relations between Canada and Quebec for many years, and triggering independence referenda in Quebec. There exist precedents in which the Welsh Assembly has refused consent to UK legislation, but in which the UK Government pressed on regardless, and the Welsh Assembly also enacted its own legislation. The Welsh legislation was challenged in the UK Supreme Court (being a non sovereign legislature this is possible) and in the 2014 case, [*In re Agricultural Sector \(Wales\) Bill*](#) the Welsh legislation was upheld.

13. A direct legal challenge to a 'Great Repeal Act' would be unlikely to succeed due to the doctrine of parliamentary sovereignty, as such an Act would of course be primary legislation. Article IX of the Bill of Rights Act operates to prevent proceedings in Parliament from being questioned in the courts. In *Pickin v British Railways Board* ([1974] AC 765) it was held that an Act of Parliament must be accepted as conclusively valid by the courts, even if there is some evidence that it was brought about by deception.

14. However, this is not the only way in which intergovernmental disputes over the 'Great Repeal Bill' might come about. It is conceivable (as in the case of the Welsh Agricultural Sector Bill) the Scottish Parliament might produce its own legislation on devolved matters formerly the province of EU law. Such an ASP (a 'Great Continuation Act'?) might affirm the continuation in Scottish law of all areas previously a matter of EU law that fell within its devolved competence. Such a measure could provide pre-emptive protection against the risk of actions described in the Page report.

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