The Taming of Control - the Great Repeal Bill

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30.03.2017 doi: 10.17176/20170330-173803

After a nine-month hiatus, Brexit is now underway. On 29 March 2017, the United Kingdom's Prime Minister Theresa May sent the European Council President Donald Tusk a letter notifying the European Council of the UK's intention to withdraw from the European Union in terms of Article 50(2) TEU. The very next day, Theresa May's Secretary of State for Exiting the EU David Davis unveiled a White Paper setting out the aims of a Great Repeal Bill (GRB). The intention to introduce legislation to repeal the European Communities Act 1972 – the domestic legislation that gives effect to EU law in UK law – had been trailed at the Conservative Party conference in October 2016. But as well as repealing this piece of domestic legislation, the intention behind the Bill is to domesticate existing European law in UK law as of the date when the UK leaves the EU. In her Lancaster House speech in January 2017, Theresa May set out the aim behind the legislation:

> *The same rules and laws will apply on the day after Brexit as they did before. And it will be for the British Parliament to decide on any changes to that law after full scrutiny and proper Parliamentary debate.*

It is through the GRB that Theresa May intends to respond to the apparent desire of voters to take control over laws. But in seeking to domesticate EU law into national law on 'Brexit Day', the UK government is taming control.

I have written elsewhere about the technical challenges that will face the government in incorporating the acquis in domestic law. Others have written eloquently on the devolution and delegated rule-making aspects of the GRB. This post focuses on some selected key issues raised by the White Paper.

Convert and Preserve

In order to domesticate the EU acquis the GRB seeks to covert directly applicable EU law into domestic law and to preserve rules that are already incorporated into UK law through secondary legislation by replicating the 1972 Act as a legal basis for these secondary acts with the GRB. The aim is to ensure legal certainty and clarity at the point that the UK leaves the EU. But much like the emerging position on immigration, rather than Brexit leading to a fundamental change, it is likely to mean that much will carry on as before. It is a curious feature of recent referendums in the UK – including the Scottish independence referendum – that the radicalism of the change being sought is tempered by political statements as to how much will remain the same. Nonetheless, it is the idea that the UK Parliament will in the future be able to decide what it will or will not keep that underlines the claim of restoring 'control'. Yet it is a control that is displaced to another time and without any clear indication of the circumstances upon which that control might be exercised.

One change is clear – the EU Charter of Fundamental Rights will not be a source of norms against which the legality of UK measures within the scope of EU law will be open to challenge. As to the interpretation of EU-derived rules in a manner that is consistent with fundamental rights, the implication is that it will be domestic standards in the form of the Human Rights Act will condition that interpretation.

The Implications of a 'No Deal'

It is important to recognise the implications of the GRB in terms of what will happen to tariff and non-tariff barriers after Brexit. It is only through the conclusion of a WTO-compliant trade agreement that the UK and the EU would be able to continue trading

on a tariff-free basis. It is accepted by the Prime Minister in her letter to Donald Tusk that failure to come to such a deal will result in the imposition of tariffs on WTO terms. That would be a bad deal for both the UK and the EU. But what is also clear from the White Paper is that even if there is no deal, the UK will still adopt the EU acquis in domestic law. The White Paper states:

> *The Great Repeal Bill would also support the scenario where the UK left the EU without a deal in place, by facilitating the creation of a complete and functioning statute book no longer reliant on EU membership.*

After decades of complaints about Brussels 'red-tape', the UK Government is now seriously stating that it will countenance not only increased costs from tariffs but also the full application of all the regulatory norms and standards applicable to trade in goods and services after Brexit as a matter of domestic law. And this from a Conservative Government that has argued for free trade and reductions on the regulatory burdens on business.

How to Incorporate

As noted previously, EU rules that are not directly applicable are already transposed into UK law. As for directly applicable rules, the intention is not to transpose these rules as if they were directives: there will be no 'copying' of the rules into domestic instruments. Rather, the White Paper states that:

> *… the Bill will make clear that EU regulations – as they applied in the UK the moment before we left the EU – will be converted into domestic law by the Bill and will continue to apply until legislators in the UK decide otherwise.*

This is in effect what section 2(1) of the European Communities Act already does: it treats these regulations as a source of domestic law. The only difference seems to be that it is only those regulations that existed before Brexit Day which will be given this effect.

The Influence of the Court of Justice

A key manifestation of taking back control over laws is that the UK will not be bound by the jurisdiction of the Court of Justice after Brexit. Despite it being almost impossible to find specific let alone numerous examples of judgments with which Brexiteers disagree – or would disagree so much as to make leaving the EU the inevitable consequence – removing the jurisdiction of the Court has become a central plank of Brexit policy. It is, therefore, noteworthy that the White Paper states that:

> *To maximise certainty, therefore, the Bill will provide that any question as to the meaning of EU-derived law will be determined in the UK courts by reference to the CJEU's case law as it exists on the day we leave the EU.*

This is a modification of what is in section 3(1) of the European Communities Act 1972. It is interesting that the GRB felt it necessary to say anything about this at all. It could simply have left it to the discretion of counsel and courts to see what use they made of CJEU jurisprudence as a guide to interpretation. But it seems clear that the issue is not just about the UK now having control over EU law, it is about the UK Government having control over UK courts.

As to the capacity of UK courts to depart from existing CJEU case law, the GRB states:

> *… we propose that the Bill will provide that historic CJEU case law be given the same binding, or precedent, status in our courts as decisions of our own Supreme Court.*

In other words, UK courts will not have the freedom to depart from this case law and the Supreme Court itself will normally be bound by such precedent departing only 'when it appears right to do so'. The circumstances upon which a logic of appropriateness would drive the Supreme Court to drift from CJEU jurisprudence in the post-Brexit world is a thesis to be written.

But in trying to lay down a marker – the CJEU jurisprudence as of Brexit Day – the GRB now creates confusion as to what to do with post-Brexit CJEU case

law. On the one hand, the implication would be that it is not appropriate to refer to such case law given the more explicit instruction as regards pre-Brexit case law. On the other hand, the policy behind the GRB is to ensure consistency and certainty with the law remaining the same unless and until Parliament decides otherwise. One option could be that a principle of interpretative homogeneity should apply with it being for Parliament to correct any interpretations and applications of EU-derived law with which it wishes to depart. That would seem to be consistent with the general approach of the GRB.

Final Thoughts

For voters who wanted the UK to remain in the EU, the risk was how much would change after the UK leaves. For those who wanted the UK to leave the EU, the hope was that, indeed, much would change. Both sets of voters may be surprised at the efforts being placed on seeking continuity in governance. For Remain voters, while this may afford some comfort, it will simply reinforce the view that the better way of keeping things the same was for the UK to remain a Member State of the EU. For Leave voters, the outcome may be more ambiguous. On the one hand, post-Brexit continuity would seem to be a rebuttal of 'Project Fear' claims about the risks from leaving the EU. On the other hand, the taming of control rather than the taking of control may well lead some to conclude that Brexit is an incomplete political project.

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SUGGESTED CITATION

Armstrong, Kenneth: The Taming of Control – the Great Repeal Bill, Verfassungsblog, 30.03.2017, doi: 10.17176/20170330-173803.

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Langzeitarchiviert bei IntRechtDok unter: doi.org/10.17176/20170330-173803.