British sovereignty post-Brexit: Why the Great ‘Repeal’ Act will actually weaken Parliament

blogs.lse.ac.uk/europpblog/2016/10/24/british-sovereignty-post-brexit/

24/10/2016

Brexit was supposed to return parliamentary sovereignty. Instead it has brought about the most submissive, disempowered Parliament in modern history, writes **Jo Murkens**. *The Great ‘Repeal’ Act will collapse the distinction between EU and national law, creating powers never expressly granted by Parliament. It will probably also enable the government to amend primary legislation without a parliamentary vote.*

Brexit started with the valiant but ham-fisted attempt by former Prime Minister David Cameron to achieve what he called in 2013 ‘a new settlement’ with the EU. Three years later, the UK has been plunged at every level into a constitutional soul-searching exercise.

The government has pledged to introduce the Great Repeal Bill in 2017. The Bill’s purposes are (i) to repeal the European Communities Act 1972 and (ii) to ensure that EU law that has not already been implemented in national law remains in force from the date of withdrawal. For the new Prime Minister Theresa May, the key word is ‘repeal’: the repeal of the ECA 1972 entails in turn the freedom of Parliament ‘to amend, repeal and improve any law it chooses’ after the Bill becomes law. But how far does that power extend?

The Great Repeal Bill converts all existing EU law into British law. Overnight, the Bill will accomplish the greatest legal transplant on these isles since the reception of Roman law in Scotland in the late Middle Ages. That massive incorporation alone should worry anyone who wants Britain to make its own laws and govern itself. After 43 years of legal integration with the EU, disentangling UK law will consume incalculable time and effort. Ironically, the vast majority of EU law will therefore remain in force well after Brexit. It would be far more apt to refer to this measure as the ‘Great Retention Bill’.

True, Parliament will remain ‘free’ to repeal EU law. But which EU law would it wish to repeal? The Conservative Party manifesto in 2010 stated: ‘We will work to bring back key powers over legal rights, criminal justice and social and employment legislation to the UK’. The Working Time Directive was a particular bugbear for many years. But May has already used her recent conference speech to underwrite existing workers’ legal rights. Moreover, having

initially opted out of all 130 Justice and Home Affairs measures in 2013, the UK subsequently opted back in to 35 measures, including Europol and the European Arrest Warrant. Having backtracked on earlier electoral promises, it is unclear which EU laws May's government can dismantle.

Brexiters should spell it out honestly: the future is not sovereignty

The picture gets much worse if you're a committed Brexiter. Upon coming into law, the Great 'Repeal' Act will immediately collapse the distinction between EU law and national law. The impact on the domestic constitution will be immeasurable. Two brief examples suffice. First, the doctrine of proportionality is currently available to judges in judicial review proceedings involving EU law, but not in domestic law. If the distinction collapses, proportionality will become a generally available standard of review as a matter of UK law, creating a new judicial power never expressly granted by Parliament. Second, the Charter of Fundamental Rights of the EU was given full legal effect by the Treaty of Lisbon 2009. After Brexit, it will automatically take on full legal effect in UK law. The negotiated British protocol, which ensures that the Charter does not extend the powers of the Court of Justice of the EU over United Kingdom law, will be redundant.

The purpose of the Great Repeal Bill is to restore sovereignty to Parliament. In fact, it will have three rather different effects. First, it will submerge the entire UK legal system within EU law. Second, even more than the ECA 1972 and the Human Rights Act 1998, the Great Repeal Act will subject the entire UK legal system to enhanced judicial powers. Third, it will empower government, not just Parliament, to alter that newly incorporated EU law.

Better still, then, it should be called the 'Great Empowerment Act'. The Bill will probably include a 'Henry VIII' clause, authorising the government, rather than Parliament, to use subordinate legislation to amend or repeal primary legislation. Such clauses are admittedly common in domestic legislation. They often relate to technical detail, and are for the most part uncontroversial. However, EU law does not just deal with technicalities. It covers social policy, employment law, and fundamental rights. It permeates every level of state and society, including national constitutional law. Generally speaking, the use of Henry VIII clauses already creates huge scope for executive abuse of power. In the context of EU law, their use will be, as Sionaidh Douglas-Scott recently noted, 'profoundly unparliamentary and undemocratic', and 'particularly repugnant'.

Brexiters should spell it out honestly: the future is not sovereignty. It is subjugation to judicial decisions and to executive powers. While it promises democracy, all Brexit will deliver will be a lawyers', technocrats', and bureaucrats' paradise operating beyond the reach of Parliament. That looks very much like the world from which they kept insisting they were liberating us.

Two cases demonstrate the point – one in London and one in Northern Ireland. The Northern Irish case deals with the impact of EU withdrawal on the Good Friday agreement and on the peace process. This is the case that should be grabbing media attention. Are memories of the Troubles already lost in the mists of time? Instead, coverage has focused on the London case, which centres on the procedural question as to who gets to notify the European Council under Article 50 TEU. The government insists that it alone has the power of notification. Formally, EU treaties are part of foreign relations, which fall within the domain of the executive's prerogative power. The claimants, however, note the gravity of withdrawing from the EU and its pervasive impact on domestic law. That, they argue, is why Parliament must debate and vote on the issue.

Curiously, if the Brexiters had stayed true to their word about 'taking back control', and if Parliament had pushed for further debate or for legislation ahead of Article 50 negotiations, the courts would not have heard the case. They would have treated it as a non-justiciable political question for Parliament to decide. The Brexiters' doggedness that only the government can trigger Article 50 by prerogative power has created a space for the courts. This is a further illustration that Parliament has not taken back control. Instead, the sovereign body of the UK has ceded power to three other branches – first, to the undemocratic and unparliamentary prerogative powers of government; second, to a national referendum it knows to be purely advisory; third, to a court of law. This is parliamentary submissiveness, not sovereignty.

The legal challenge to the government brought by an investment manager and a hairdresser will one day be cited in the same breath as *Bush v Gore*, the US Supreme Court decision that resolved the 2000 presidential election. Whichever way the court decides the case will be wrong, because the court should never have heard the case in the first place. The UK does not tend to litigate the meaning of its constitution. Under the UK's own constitutional understanding, it should be for Parliament to resolve by what process the UK can withdraw from the EU. But the UK Supreme Court will have to step into the breach in order to remedy Parliament's failure to vote on Article 50.

Brexit has indeed resulted in a new constitutional settlement. The Great Repeal Bill and the Article 50 litigation illustrate how the UK constitution is being transformed, more by accident than by design. Leavers were promised 'sovereignty' and 'control'. But Parliament now finds itself sidelined by the government, in hock to an advisory referendum, and supinely awaiting a judicial decision it had the power to avert.

Brexit has not reinstated sovereignty. It has revealed our newly suppressed, subdued and submissive Parliament.

Please read our comments policy before commenting.

Note: This article was originally posted at LSE Brexit and it gives the views of the author, and not the position of EUROPP – European Politics and Policy, nor of the London School of Economics.

Shortened URL for this post: **http://bit.ly/2eDtmBE**

About the author

Jo Murkens – *LSE Law*
Jo Murkens is Associate Professor in Law at the LSE. He was previously a researcher at the Constitution Unit, UCL, where he led the research on the legal, political and economic conditions and consequences of Scottish independence.