**Thomas Horsley: UK Courts and the Great Repeal Bill –Awaiting Fresh Instruction**

The UK Government’s announcement that it intends to repeal the [European Communities Act 1972](http://www.legislation.gov.uk/ukpga/1972/68/contents) (ECA) through the Great Repeal Bill raises the prospect of far-reaching changes to the institutional role of UK courts within the domestic legal order. For the duration of the UK’s membership of the (now) European Union, the ECA has functioned as the source of the domestic constitutional instruction to national courts to give internal effect to EU law in proceedings falling within the scope of Union law. As this post highlights, what replaces that Act – and, more precisely, the terms of Parliament’s new instruction to UK courts (where provided) – is an absolutely critical issue when drafting the Great Repeal Bill. It is also, in the first instance, a political decision for Parliament or, perhaps more accurately, the Government acting through Parliament.

**The Current Instruction: The European Communities Act 1972**

UK courts and the Court of Justice have never agreed on the source of the constitutional instruction to give internal effect to EU norms. For the Luxembourg Court, the obligation to do so derives from the EU Treaties as the basis of a ‘new legal order’ that is distinct from the standard normative framework of public international law ([*Van Gen den Loos*](http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:61962CJ0026&from=EN)). By contrast, UK courts have consistently located the instruction to attribute internal effect to EU norms firmly in the domestic constitutional order – specifically in provisions of the ECA. In summary, that Act is interpreted as instructing UK courts to do two things. First, it directs domestic courts to apply EU law ‘as national law’ in accordance with the principle of primacy established by the Court of Justice. As the Supreme Court summarised in [*Miller*](https://www.supremecourt.uk/cases/docs/uksc-2016-0196-judgment.pdf) [at para.60],

‘The 1972 Act… authorises a dynamic process by which, without further primary legislation (and, in some cases, even without any domestic legislation), EU law not only becomes a source of UK law, but actually takes precedence over all domestic sources of UK law, including statutes.’

Secondly, the ECA also instructs UK courts to function as ‘European courts’ when adjudicating disputes that engage questions of EU law. More specifically, [s3(1)](http://www.legislation.gov.uk/ukpga/1972/68/section/3) prescribes that,

‘For the purposes of all legal proceedings any question as to the meaning or effect of any of the Treaties, or as to the validity, meaning or effect of any [EU instrument], shall be treated as a question of law (and, if not referred to the European Court, be for determination as such in accordance with the principles laid down by and any relevant [decision of the European Court].’

In combination, the two key instructions set out in the ECA – on the domestic effect of EU norms and the principles governing their interpretation respectively – have had a fundamental impact on the position and functioning of UK courts. The most significant transformative impact is undoubtedly the acquisition by domestic courts of competence to review primary legislation. The exercise of judicial review powers over primary domestic law under the terms of the ECA remains unique within the UK legal order. Its closest equivalent is [s4 of the Human Rights Act (HRA),](http://www.legislation.gov.uk/ukpga/1998/42) which grants UK courts competence to issue declarations of incompatibility against primary UK law on grounds of non-compatibility with Convention rights incorporated into domestic law through that Act.

Among other things, the existence of a ‘European mandate’ under the ECA has also strengthened UK courts’ contribution to policymaking through judicial interpretation. This follows as a consequence of the s3 ECA obligation to ‘adjudicate European’ when considering disputes involving questions of EU law. The EU legal method, developed by the Court of Justice, differs markedly in key respects to the standard rules of statutory construction and methods of legal interpretation that operate domestically. The additional space opened up for domestic courts to contribute to the development of law through recourse to the more dynamic method of interpretation applicable within the field of EU law is greatly enhanced by the preliminary reference procedure. That procedure places UK courts in direct conversation with the Court of Justice – one of the EU’s most dynamic EU and policy actors. The fruits of this dialogue are on full display in cases such as *Jessy St Prix*, in which the UKSC ([*Jessy St Prix*](http://www.bailii.org/uk/cases/UKSC/2012/49.pdf)) and Court of Justice ([Case C‑507/12](http://curia.europa.eu/juris/document/document.jsf?docid=153814&doclang=en)*)* joined forces to expand the legal protection that [Art 7(3) of Directive 2004/38 EC](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:158:0077:0123:en:PDF) affords EU citizens previously employed in host Member States.

**The Great Repeal Bill and UK Courts: Future Options**

The UK legal order presents Parliament with a number of potential options following the repeal of the ECA as the source of the current constitutional instruction to domestic courts. These options range from no replacement through to the full (re)enactment of the substance of the ECA under a new name. As things stand, the Government’s [*Brexit* *White Paper*](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/589191/The_United_Kingdoms_exit_from_and_partnership_with_the_EU_Web.pdf) indicates that current thinking favours more radical change to the current constitutional instruction to domestic courts under the ECA. Should that view gain traction, it is likely to effect significant change to UK courts’ current institutional functions.

On the one hand, Parliament could repeal the ECA with no replacement instruction with respect to the internal effect of the present EU *acquis* – the body of law that the Great Repeal Bill is expected simultaneously to ‘nationalise.’ Should that be the case, UK courts can legitimately be expected to interpret that body of (now) national law in accordance with ordinary rules of domestic interpretation. It would be rather bold for UK courts to conclude otherwise; for instance, by asserting that the repatriated EU *acquis* should be attributed 'special status' vis-à-vis ordinary domestic law in absence of any replacement legislative instruction to do so. As [*Miller*](https://www.supremecourt.uk/cases/docs/uksc-2016-0196-judgment.pdf)again reiterated, UK courts locate the instruction to afford special treatment to the EU *acquis* expressly in the ECA and the doctrine of parliamentary sovereignty [at para. 60]. Of course, UK courts could be bolder and see an opportunity to craft a new constitutional approach. More likely, however, in the absence of any replacement legislative instruction in the Great Repeal Bill, UK courts would continue to forge links between UK and EU law using domestic principles of judicial interpretation – specifically, the comparative method of interpretation. Judgments of the Court of Justice would, in such circumstances, carry only persuasive authority as ‘foreign law’ – a point the UKSC anticipates in [*Miller*](https://www.supremecourt.uk/cases/docs/uksc-2016-0196-judgment.pdf) [at para. 80]

On the other hand, Parliament could opt to preserve the current constitutional instruction on a new basis. With respect to external legal norms (e.g. provisions of the anticipated UK/EU withdrawal agreement; UK/EU bilateral trade deal(s); and, on hard Brexit: WTO commitments), Parliament could legislate to provide for their direct effect within the UK legal order. Parliament has done so in other areas, including Convention rights (through the HRA) though, of course, not without placing important limits on domestic courts’ powers in that specific sphere (see s3 and s4 HRA). However, given the UK Government’s political hostility to direct effect, such an approach is highly unlikely. Overall, the [*Brexit* *White Paper*](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/589191/The_United_Kingdoms_exit_from_and_partnership_with_the_EU_Web.pdf) signals a clear shift away from the present ECA model providing for the enforcement of international norms through private litigation before national courts in favour of State-managed dispute resolution mechanisms.

A range of options exists between the two extremes sketched out above. These include, for instance, the introduction of a ‘continuance clause’ in the Great Repeal Bill (see here also [Sionaidh Douglas-Scott](https://ukconstitutionallaw.org/2016/10/10/sionaidh-douglas-scott-the-great-repeal-bill-constitutional-chaos-and-constitutional-crisis/)). More than likely, such an instruction would be framed statically rather than dynamically; i.e. Parliament would specify a cut-off date with respect to the binding status of Court of Justice judgments as a matter of UK law. The problem, of course, is determining what to do when there is ambiguity with respect to the EU judgment in question. Without the preliminary reference procedure to link the two legal orders, UK courts will ultimately be left to determine the ‘correct' reading of the Court of Justice’s case law. That position would leave domestic courts considerable scope to determine the practical effect of the existing body of Court of Justice case law declared ‘binding’ domestically through a continuance clause in the Great Repeal Bill. In addition, the continuance clause would also need (ideally) to comment on the position of repatriated EU law *vis-à-vis* ordinary domestic law. In particular: should UK courts continue to give primacy to the nationalised *acquis* over all conflicting national law as before under the ECA?

More ambitiously, a continuance clause could be framed prospectively; in other words, mandating that UK courts should continue to apply the nationalised *acquis* in accordance with evolving EU case law. However, that is also unlikely in light (again) of the UK Government’s political hostility to direct effect and, moreover, the Court of Justice. A softer option, and one that may indeed end up as a compromise position, would be to instruct UK courts to interpret the nationalised EU *acquis* in conformity with Union law. Thus, the Great Repeal Bill could essentially seek to replicate the approach outlined by [s3 HRA](http://www.legislation.gov.uk/ukpga/1998/42). That provision instructs UK courts to interpret UK law (including primary legislation) in conformity with the Convention rights (as an external source of international law) incorporated into domestic law through the HRA. It is also worth noting that a similar interpretative obligation already binds UK courts – through s3 of the ECA – under the doctrine of ‘indirect effect’ developed by the Court of Justice (e.g. [*Von Colson*](http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:61983CJ0014&from=en)).

Although softer than direct effect, an interpretative obligation of the above kind would have the advantage of maintaining close links between the UK and EU legal orders, post-Brexit. Specifically, it would instruct UK courts to develop national law in harmony with future developments in Union law, whilst at the same time preserving space for national law to diverge as a matter of principle. In the hands of a willing court, a legislative instruction to interpret UK law in conformity with, for instance, developments in EU case law, could effectively function in proxy for direct effect proper. Even in the absence of such an approach, however, an interpretative instruction of the above kind is arguably rather attractive politically: it satisfies the Government’s ‘take back control’ narrative, whilst providing for the maintenance of practical links between the UK and EU legal orders in post-Brexit. Ultimately, it would fall to UK courts to determine the strength of any interpretative instruction over time – here, a review of domestic case law on s3 HRA could provide useful insights. Of course, it must also be noted that the approach of UK courts to s3 HRA is itself the subject of criticism within Government – recall here its proposal to replace the HRA (including s3) with a British Bill of Rights.

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The repeal of the ECA heralds fundamental changes to the institutional functions of UK courts. As this post highlights, the future position of EU law within the UK legal order post-Brexit will depend on whether and, if so what, instruction Parliament gives to UK courts in place of the ECA – and s2 and s3 of that Act in particular. The UK Government appears fully committed to recasting the status quo. When presenting the Great Repeal Bill before Parliament, it should think carefully and responsibly about the changes it proposes to govern the domestic effect of the current EU *acquis* – and, looking even further ahead, to provisions of any subsequent bilateral UK/EU agreements.

Managing the repeal of the ECA through the Great Repeal Bill is not simply a matter of nationalising the EU *acquis* (itself no easy task) and perhaps, more controversially, establishing sweeping new executive powers to authorise adjustments to substantive norms. It also involves fundamental decisions about *how* the nationalised EU *acquis* (together with provisions any future bilateral UK/EU agreements) should be enforced and interpreted domestically and *by whom*. As this post illustrates, the flexibility of the UK constitutional order affords Parliament considerable freedom to determine what model to adopt – each of which carries radically different implications for domestic courts. On these matters, UK courts await fresh instruction.

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