

The (not so) Great Repeal Bill, part 2: How Henry VIII clauses undermine Parliament

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*The Great Repeal Bill proposes to delegate power to Government in the form of a Henry VIII clause which will enable Government to change all EU-derived primary and secondary law by means of a secondary act (usually a statutory instrument) with limited or no Parliamentary scrutiny or oversight. In the second of her two posts on the Bill, **Joelle Grogan** argues that this runs counter to democracy, legal certainty, the rule of law and the ultimate supremacy of Parliament itself.*



In an LSE Brexit post in November 2016, I outlined the [possible consequences](#) of Brexit, and the inclusion of a Henry VIII clause in the Great Repeal Bill, on rights protections in the UK. The post predicted that some rights would be lost post-Brexit, while other (contentious) rights would be weakened through the removal of remedies and EU-guarantees, and the lack of political will to replicate or protect them. The post warned too of the undemocratic, and innately controversial nature of Henry VIII clauses. There is now more certainty to the prognostications, as it has been confirmed that the Government intends to have power to reform, change and revise primary law on a level that has not been seen since the eponymous Henry VIII declared his [word was law](#).

Deal or no deal, the UK's process of withdrawal and separation from the EU will reshape the constitutional foundations of the UK – and under the current design of the White Paper, in a manner which will take control away from the democratically elected Parliament – weakening and not strengthening it.



Henry VIII, after Hans Holbein the Younger. [Public domain](#)

(3) Delegated powers

Charged as 'The Challenge', the White Paper recognises that by repealing the ECA 1972 a (significant) part of the law under which the UK has operated for more than forty years will be undermined. [3.1] Even where that law is converted into UK law, a large portion of it will not function effectively once the UK withdraws from the EU. The

White Paper proposes then to delegate power to change the ‘full body of EU-derived law’ which will ‘necessarily’ include primary and secondary legislation which implements EU obligations in addition to directly effective converted law. [3.16] The White Paper identifies that ‘corrections’ to the law would require Government to create between 800-1000 statutory instruments. [3.19] It will also include the power to transfer to UK-bodies or Government powers currently exercised by EU bodies. [3.16] This delegated power to legislate to change primary and secondary law is a Henry VIII power^[1] on unprecedented scale and scope, and raises a huge number of concerns, only some of which can be outlined below.

Building with straw, sticks and bricks: three case studies on the use of delegated powers

The White Paper presents three case studies to illustrate the expected use of a Henry VIII power by Government: (1) references to EU law; (2) the involvement of an EU institution; and (3) information sharing with an EU institution. As we consider these case studies, it should be remembered that these are to be considered paradigmatic cases, representative of ‘The Challenge’ and soluble by Government through statutory instruments, and not ‘hard cases’ similar to those outlined in Part I.

The **first case study** identifies the issue of references to EU law within the domestic legal framework. It envisions giving Government the ‘power to correct’: allowing them to amend converted law to ‘reflect our new position’. [3.4] Beyond the vague language of what exactly ‘reflecting new position’ could mean without policy choices (or likely the Withdrawal Agreement if there is one), in many cases it will not be enough to erase references to EU law, bodies or frameworks within existing UK law. It would instead be necessary to replace entire EU frameworks altogether with equivalent UK standards. For an example to be a part of Brexit negotiations, the [European Medicines Agency](#) is responsible for the scientific evaluation, supervision and safety monitoring of all medicines for use in the EU. Beyond the immediate question of what happens to areas currently operating under EU frameworks (for example, [medicines](#), or even [planes](#)) after Brexit Day, a significant question of the distinction between ‘correction’ and ‘policy implementation’ is unaddressed.

The **second case study** concerns the involvement of EU institutions, enabling in this instance the government to amend domestic legislation to ‘either replace the reference to the Commission with a UK body or remove this requirement entirely.’ Two issues are raised by this case study, the first is the assumption that there is an equivalent UK body which will be able to assume responsibilities for standards and compliance. This assumption presents its own resource, domestic expertise and logistical challenges highlighted in the example of the first case study. The second is more concerning: it explicitly enables a situation where a requirement could be removed entirely by Government. Removal of requirements, and perhaps the concomitant removal of ‘red tape’, could a way to introduce a policy of de-regulation by secondary legislation, and *not* by Parliament. The inherent danger in this case study is that standards – for example the Commission’s explicit responsibility to ensure fair competition or environmental standards – will be removed or reduced by accident or (policy) design.

In the **third case study**, the Government considers information sharing with EU Institutions. The White Paper states that the UK would still be able to comply with such requirements in legislation where there would be ‘no legal barrier’ to doing so. It identifies situations in which an exchange of data would be beneficial to the UK, as for instance, security as in the case of the European Arrest Warrant. In each of these case studies, the proposed solution is delegated powers, or, ‘a power to correct the statute book, where necessary, to rectify problems occurring as a consequence of leaving the EU’. In each of these, the question ought to be asked for Government to answer in their ‘corrections’ to the law: what is the purpose of the current law, what are the aims and impact of the reform, and why these changes are necessary. However, **the White Paper contains no mandate for these checks on the exercise of Henry VIII power.**

No taxation without representation! ... but perhaps policy without Parliament

One of [inherent](#) dangers of Henry VIII powers to change primary law with limited supervision, is the possibility open to Government to implement policy decisions without Parliamentary input or democratic legitimacy. The White Paper acknowledges these concerns and initially lays out that the Great Repeal Bill 'will not aim' to make 'major changes to policy or establish new legal frameworks beyond what is necessary' [1.21] and will no new taxation will be introduced through secondary legislation. [3.17]

Indeed, to underline that delegated powers will not be used for policy-making, the Secretary for State for Exiting the European Union explicitly mentioned in the Foreword to the White Paper that the Great Repeal Bill will not be a 'vehicle for policy changes – but it will give the government the necessary power to correct or remove the laws that would otherwise not function properly once we have left the EU'. This assurance that Government will *not* implement policy without Parliament is subsequently (ostensibly) contradicted by the White Paper: 'where Government policies are delivered by secondary legislation, the case for that decision is justified.' [3.9]

The justification focuses 'the statute book can continue to function, and that decisions can be taken in the national interest and reflect the contents of the Withdrawal Agreement' [3.12] while also emphasising the 'prohibitively large amount of primary legislation to correct these problems.' [3.11] Incorporating terms of the Withdrawal Agreement by secondary legislation raises the same concerns as the Henry VIII clause within the ECA 1972. However, the cynic might counter that with only 21 months left to negotiate with the EU and under the repeated rhetoric of 'no deal is better than a bad deal', such an Agreement looks increasingly unlikely. Highlighting the concern that policy could be introduced without Parliament through use of delegated powers is deeply concerning from the perspective of democratic legitimacy, but any concern would be assuaged if sufficient possibility of scrutiny and constraints on the use of delegated power to legislate were included as part of the Great Repeal Bill.

Great power and great responsibility: limited scrutiny of delegated powers

The GRB envisions two types of statutory procedure, allowing Parliament to have 'different levels of scrutiny' over the '800 to 1,000' statutory instruments to be created by Government. [3.19] This is aimed to recognise the 'balance that will have to be struck between the importance of scrutiny and the speed of this process'. [3.20] The **affirmative procedure**, requiring debate and approval of both Houses of Parliament, will be reserved for 'more substantive changes'. [3.22] The **negative procedure**, under which it is estimated that most statutory instruments will fall due to the 'mechanistic nature of the conversion', does not require a vote or debate in Parliament, though members of either House can require a debate, and, 'if necessary' a vote on these statutory instruments. [3.21] The White Paper does not indicate principles or mechanisms which will determine which procedure statutory instruments will follow.

This is a **key issue for the election**: we are electing the Government who propose to have power to change law on an unprecedented scale and scope. We will also be electing MPs who will be able to call for statutory instruments to be justified and accounted for in Parliament. A weak opposition, or MPs unwilling to depart from party lines, would enable the use of Henry VIII powers by Government to go unchecked and without significant oversight, ultimately weakening Parliament.

A Great Repeal Bill, but not a Magna Carta: unconstrained Henry VIII powers

Beyond the possibility of Parliamentary scrutiny of secondary legislation under the affirmative procedure, the White Paper proposes few actual constraints on the use of the power to change vast amounts of UK law through secondary legislation by Government. There is also a high likelihood that a significant amount of legislative power will be removed from Parliament by passing '[skeletal primary legislation](#)' broadly drafted without clear boundaries to delegate large law-making capacity to Government.

The White Paper acknowledges the concerns raised by the House of Lords Constitutional Committee in their [Report\[2\]](#) on the Great Repeal Bill, relating to the need for clear limitations on the use of secondary legislation to change EU-derived law in terms of the 'purposes for which it can be used, the processes that have to be followed in

using it, and the length of time for which powers are available.’ [3.14] The White Paper also quotes from the [Constitutional Committee Report](#) that ‘it is unrealistic to assume that Parliament will be able tightly to limit the delegated powers granted under the Bill’ as this would constrain Government capacity to adapt EU law, and that circumstances would ‘almost certainly necessitate the granting of relatively wide delegated powers to amend existing EU law and to legislation for new arrangements following Brexit’ [3.13 citing HL Paper 123, 16-17] The lack of constraints on the exercise of delegated powers to change law related to the EU are aimed at balancing ‘the need for scrutiny and the need for speed’. [3.23]

The White Paper proposes that the ‘constraints placed on the delegated power in section 2 ECA to assess whether similar constraints could be suitable for the new power’. These constraints are the non-retrospective effect of the law, and that no new taxation would be introduced. [3.17] The White Paper acknowledges that these powers ‘do not need to exist in perpetuity’ and will ensure that the power is ‘appropriately time-limited’. [3.25] What this time limit is, and whether any other limits will be placed on the exercise of wide legislative powers by the executive is up for debate in Parliament. The White Paper, however, contains no requirement on Government to provide explanation, justification or evaluation of the statutory instruments, and does not require assessment for impact on rights or the rule of law. The lack of oversight checks implicitly limits the prerogative of Parliament to legislate. The [irony](#) of the Brexit campaigners’ accusations of the EU’s democratic deficit and legislating without Parliament should not be lost here: **Government will have the power to legislate with less scrutiny and oversight than the EU.**

In the face of such concern, some might argue that the possibility of judicial review, and the liability of Government for secondary legislation could be raised as a reasonable objection to concerns related to the lack of sufficient *ex ante* scrutiny of Government’s delegated power to legislate. While beyond the scope of this post, this argument is predicated on individuals having sufficient legal knowledge, capacity and resources to bring cases concerning the 800-1,000 statutory instruments to a heavily backlogged Court system. This argument also intrinsically acknowledges the weakening of Parliament, and the undermining of the separation of powers.

The (not so) Great Repeal Bill

The proposals of the Great Repeal Bill create significant issues for legal certainty and democratic legitimacy – but most concerning is the scale of legislative power to be delegated to Government without sufficient scrutiny or adequate checks. Even on the most optimistic assessment of positive and negative procedures for scrutiny of secondary legislation, the latent threats to cornerstones parliamentary sovereignty and the rule of law, are extant: **the power to amend all EU-derived primary and secondary law by Government without sufficient checks and controls, with little resource for parliamentary scrutiny and oversight, runs counter to democracy, legal certainty, the rule of law and the ultimate supremacy of Parliament itself.**

Whoever is elected to Government will face challenges in Brexit at unprecedented scale and complexity: negotiation with the EU (which is less a homogenous body as the compromised interests of the remaining 27 Member States) and the repeal, conversion and reform of a vast amount of law which will immediately affect the lives of millions of people. But, in this election, just as important are those MPs who are not in Government – they will have the essential responsibility to safeguard individual rights and liberties, Parliamentary Sovereignty, and the democratic legitimacy of the Brexit that lies ahead.

These choices and this election will have impact far, far beyond the next five years.

Notes

[1] It should be noted that the White Paper does not identify proposed delegated power as a Henry VIII power, though the [House of Lords Constitutional Committee](#) and the [House of Commons Library](#) has.

[2] It is notable that, in an [exceptional](#) decision by the House of Lords, the Report was produced *before* the White Paper had been introduced to either House.

This post represents the views of the author and not those of the Brexit blog, nor the LSE.

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