

WHY HENRY VIII CLAUSES SHOULD BE CONSIGNED TO THE DUSTBIN OF HISTORY

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1. The Government sometimes adds a provision to a Bill which enables the Government to repeal or amend it after it has become an Act of Parliament. The provision enables the amendment of primary legislation using delegated (or secondary) legislation. Such provisions are known as 'Henry VIII clauses'. The House of Lords Select Committee on the Scrutiny of Delegated Powers in its first report of 1992-93 defined a Henry VIII clause as: a provision in a Bill which enables primary legislation to be amended or repealed by subordinate legislation, with or without further Parliamentary scrutiny. [HL 57 1992-93, para 10]. Even if there is 'scrutiny' it will be perfunctory: instead of weeks or even month of consideration by committee and in the various stages of the legislative process - Parliament gets, at most, the opportunity to vote for or against the measure - no amendment is possible.
2. To students of '*1066 and All That*' Henry VIII was a dangerous tyrant and '*a bad thing*'. In 1539 he persuaded a supine parliament to pass the Statute of Proclamations giving the king's decisions the same force as acts of the legislature; hence the name Henry VIII clause.
3. Although the 1539 Act was repealed immediately after the king's death in 1547 similar powers to bypass parliament have resurfaced in modern legislation (see, eg: the Banking (Special Provisions) Act 2008 allowing Treasury ministers to '*disapply any specified statutory provision or rule of law*'; the Constitutional Reform and Governance Act 2010 allowing ministers to amend or repeal any prior statute dealing with the civil service, treaties or MPs' expenses).
4. Henry VIII clauses are not new but they have grown exponentially in recent times. A short outline of the history of their use is illuminating. After the death of Henry VIII, such clauses fell into disuse and it was 1888 before they seem to have re-emerged in the United Kingdom.

5. A 1932 Report of the Donoughmore Committee found that between 1888 and 1929 only nine Acts of Parliament contained such clauses. It recognised that their occasional use might be justified but concluded that their '*use must be demonstrably essential*' and justified on each occasion by the Minister '*to the hilt*".
6. Thereafter, there were none until the Second World War, but they then returned in growing numbers. Concerns were more frequently expressed in the 1970s and 1980s. Controversy reached a height during the passage of the Deregulation and Contracting Out Act 1994 which contained a number of such clauses. More recently, as many as several hundred such clauses have been passed in a single Parliamentary session.
7. Despite it being unsupported by hard evidence and, therefore, speculative it seems probable that the proliferation of Henry VIII clauses reflects the influence of civil servants, who have found it convenient to circumvent the need to obtain Parliamentary approval for subsequent amendments to the statutes concerned.
8. It would be wrong to deny a Henry VIII clause any value. Such a clause can, for example, be useful where the Act in question may conflict with a large number of local Acts that may not be easily identifiable in the beginning, to allow either the old or the new Acts to be amended as necessary. But there are two clear dangers that widespread use of such clauses pose.
9. First, they bypass the authority of Parliament (parliamentary sovereignty). Certain developments in the twentieth and twenty-first centuries, including the UK's membership of the EU and the enactment of the Human Rights Act 1998, have led some to suggest that the principle of parliamentary sovereignty has declined. Arguably, this is truer in practice than in theory, as a result of Parliament's power to repeal the relevant legislation. However, the principle of parliamentary sovereignty remains a cornerstone of the constitution and, for that reason, Henry VIII powers have attracted a great deal of criticism.
10. Much of this criticism arises from the fact that their effect is practically to limit parliamentary scrutiny in allowing substantial changes to legislation to be made via

the delegated procedure. Henry VIII clauses and the subsequent use of the secondary (delegated) legislation to change Acts of Parliament are a “*constitutional oddity*” (House of Lords Constitution Committee, Sixth Report on the Public Bodies Bill, dated 4 November 2010, counter-democratic, undermine parliamentary sovereignty and unduly fetter parliamentary scrutiny).

11. Secondly, in the case of prospective Henry VIII clauses, there is no way of assessing at the time of enactment which future statutes the power will be used against. It has been suggested by Barber and Young (2003 PL 112 at 114) in the context of emergency powers legislation which may be used in relation to all primary legislation whether enacted before or after the Act conferring the power that such prospective Henry VIII clauses ‘*constitute a fetter on the power of future Parliaments creating the risk that as yet un-thought of statutes will be overturned through the use of delegated powers*’ and that ‘*Parliament must put its trust entirely in the body to whom Parliament is delegated.*’

12. A notable recent example of the potentially enormous reach of Henry VIII clauses is afforded by the Legislative and Regulatory Reform Bill introduced in 2006 by the Blair Government. Clause 1 provided that a Minister could, by Order, make provision for ‘*reforming legislation.*’ The measure was presented as simple streamlining of the Regulatory Reform Act 2001 by which the Government, to help industry, could reduce red tape. The Bill, which came to be known as the Abolition of Parliament Bill’, produced uproar. Six Cambridge law professors writing to the Times (16th February 2006) said that, as drafted, the Government by delegated legislation could curtail or abolish jury trial, allow the Prime Minister to sack judges, rewrite the law on nationality and ‘reform’ Magna Carta. The Government accepted that the Bill went too far and it was considerably amended to build in various safeguards including the super-affirmative procedure which ‘*requires Ministers to take into account any representations, any resolution of either House, and any recommendations of a parliamentary committee in respect of a draft order (a draft order being laid for a period of 60 days).*’

13. The Public Bodies Act 2011 is another example of the worrying use of Henry VIII clauses. JUSTICE called the Bill ‘*one vast Henry VIII clause*’.

14. The House of Lords Constitution Committee's Report on the Bill as first introduced was outspokenly critical (see HL Constitution Committee 6th Report 2010-2011 *Public Bodies Bill* HL 51):

'The point of principle

*6. The Government has not made out the case as to why the vast range and number of statutory bodies affected by this Bill should be abolished, merged or modified by force only of ministerial order, rather than by ordinary legislative amendment and debate in Parliament. As we have said, and as is axiomatic, the ordinary constitutional position in the United Kingdom is that primary legislation is amended or repealed only by Parliament. Further, it is a fundamental principle of the constitution that parliamentary scrutiny of legislation is allowed to be effective. While we acknowledge that exceptions are permitted - as in the case of fast-track legislation, for example - we have also sought to ensure that such exceptions are used only where the need for them is clearly set out and justified. As we have said, the use of Henry VIII powers, while accepted in certain, limited circumstances, remains a departure from constitutional principle. **Departures from constitutional principle should be contemplated only where a full and clear explanation and justification is provided.***

13. The Public Bodies Bill [HL] strikes at the very heart of our constitutional system, being a type of 'framework' or 'enabling' legislation that drains the lifeblood of legislative amendment and debate across a very broad range of public arrangements. In particular, it hits directly at the role of the House of Lords as a revising chamber.'

15. In June 2012 the House of Lords Delegated Powers and Regulatory Committee in a special report identified eleven statutes in which there were a variety of heightened statutory scrutiny procedures because of Henry VIII powers. It urged that no new variations of such heightened scrutiny measures be introduced (see HL Delegated Powers and Regulatory Reform Committee *'Strengthened Statutory Procedures for the Scrutiny of Delegated Powers'* 3rd Report 2012-2013, HL 19).
16. In January 2014 the Constitution Unit at UCL published a set of proposed legislative standards for the scrutiny of Bills. Unsurprisingly, it contains a large number of suggested provisions for addressing the effect of Henry VIII clauses.
17. It is worth reproducing in full:

'2) Delegated powers, delegated legislation and Henry VIII clauses

2.1 Defining the power

2.1.1 Delegations of legislative power should be framed as narrowly as possible.

2.1.2 The policy aims of a Ministerial power should be included in the bill itself.

2.1.3 The scope of a Henry VIII power should be limited to the minimum necessary to meet the pressing need for such an exceptional measure.

2.1.4 The use of Henry VIII powers should only be permitted if specific purposes are provided for in the Bill.

2.1.5 Ministerial powers should be defined objectively.

2.1.6 Ministerial powers to make secondary legislation should be restricted by effective legal boundaries.

2.2 Safeguards in delegation of legislative powers

2.2.1 Laws that contain delegated powers should strike a balance between the desire for effectiveness and the safeguards needed to ensure constitutional propriety.

2.2.2 If constitutional safeguards can be added to a delegated ministerial legislative power without undermining the policy goals of a Bill then they should be included.

2.2.3 Henry VIII powers should be accompanied by adequate procedural and legal safeguards.

2.2.4 Henry VIII powers that relate to a constitutionally sensitive subject-matter should use a super-affirmative parliamentary procedure.

2.2.5 Ministers should not be able to suspend legal powers by giving directions; instead orders, which are subject to parliamentary oversight, should be used.

2.2.6 Provision should be made for Parliament to be informed promptly of all ministerial exercises of legislative power.

2.3 Appropriate uses of delegated powers

2.3.1 Henry VIII clauses should be limited so that they cannot be used to alter constitutional arrangements.

2.3.2 Laws should not permit the sub-delegation of legislative powers.

2.3.3 Delegating order-making powers to Ministers to change the statute book should be avoided when there are other more constitutionally appropriate alternatives available.

2.3.4 Delegated legislation should not be used to create regulations that will have a major impact on the individual's right to respect for private life.

2.3.5 Delegated legislation should not be used to create new criminal offences.

2.3.6 Bills should identify the provisions in other enactments that require amendment, rather than using Henry VIII powers to leave the power to make amendments to the subsequent discretion of the relevant department.

2.3.7 The most important aspects of a policy should be included on the face of a bill and not left to be decided through delegated legislation.

2.3.8 *Rules that are central to a bill of constitutional significance should be to the greatest extent possible on the face of the bill, so allowing full legislative amendment and debate.*

2.3.9 *Rights of appeal should be defined in primary legislation and not in secondary legislation.*

2.3.10 *Delegations of legislative authority should fit within the overall scheme of the bill.*

2.4 The parliamentary justification of delegated powers, delegated legislation and Henry VIII powers

2.4.1 *Ministers should provide Parliament with their justifications for proposing the delegation of legislative powers.*

2.4.2 *Ministerial assurances as to the purpose of order-making powers are not a substitute for legal safeguards on the face of a Bill.*

2.4.3 *Widely-drawn delegations of legislative authority cannot be exclusively justified by the need for speed.*

2.4.4 *The justification for a Henry VIII clause should refer to the specific purpose that it is designed to serve.*

2.4.5 *Where an "incidental and consequential" Henry VIII power is likely to be used in relation to constitutional legislation, the Government should provide a clear and detailed account to Parliament of how and why it intends to exercise that power.'*

18. None have yet been implemented.

19. The phrase '*consigned to the dustbin of history*' is not entirely mine'. In fact only one word is the product of originality on my part. At the Lord Mayor's Annual Dinner in July 2010 the former Lord Chief Justice Lord Judge devoted his entire Mansion House speech to Henry VIII clauses urging that they be '*confined to the dustbin of history*' (my underlining).

20. Joshua Rozenberg's account of the speech in the Guardian is (aside from amusement value) perhaps indicative of the fact that even the most distinguished lawyers can rant and rave about constitutional improprieties such as Henry VIII clauses but, in the end, it is unlikely to make a blind bit of difference:

'Of course, the government took the view that these powers were necessary. "Necessity is the plea for every infringement of human freedom," responded Judge, quoting William Pitt the Younger. "It is the argument of tyrants; it is the creed of slaves."

Having twice implied that Clarke was a tyrant, the lord chief justice stressed that he was not accusing governments past or present of intending to subvert the constitution. "But what's to come is always unsure."

The proliferation of Henry VIII clauses would inevitably damage further the sovereignty of parliament, he feared, "increasing yet further the authority of the executive over the legislature".

Clarke took all this in good part: he has known Lord Judge since the days when they used to appear against each as barristers on the Midland circuit. "I take the lord chief justice's words as important to bear in mind," he said politely.

There were other signs of friendship: the lord chancellor said that he had not even been as bruised by judicial review as some of his colleagues. "Nevertheless," he continued, "I know I speak for all members of the government when I say to you – be gentle with us."

This was, perhaps, a rather curious thing to ask of the judges. It seems as unlikely that the courts will hold back from quashing ministerial decisions as it is that ministers will start repealing Henry VIII clauses – even though that could presumably be done without the need for legislation.'