



The Great Repeal Bill and Henry VIII

- There are currently 20,319 EU laws in force in the UK, the Great Repeal Bill (GRB) will convert them into domestic UK law in order to preserve legal continuity. In addition there is existing ECJ case law interpreting existing EU laws.
- The GRB will contain a power to amend current EU legislation once it is in UK law. This may be required to take into account changes required by the negotiations. This power has been described as a “Henry VIII” power as it would give ministers the power to change legislation post implementation. This will be likely to include a sunset clause.
- The GRB will be introduced in the next Queen’s speech. It will repeal the European Communities Act 1972, s.2 of which allowed for the direct effect of EU regulations in the UK, ECJ case law and for EU directives to come into force via delegated legislation as well as in primary legislation. S.2 of the ECA is arguably the largest ‘Henry VIII’ power ever introduced.
- Analogies to Henry VIII are unhelpful, while his 1539 statute of proclamations gave him the right to create law by decree the GRB will place into UK law laws that already have force in the UK, with minor amendments. Parliament will then have jurisdiction to amend or repeal as it feels fit.

Background

The Prime Minister announced the GRB on 2 October 2016 to the Conservative Party Conference and to Parliament on 10 October stating that:

“To be prepared for an orderly exit, there is a need to move forward on domestic legislation, in parallel with our European negotiation... Therefore, I can tell the House that we intend to introduce the great repeal Bill in the next parliamentary Session.”¹

The Government’s White Paper on Brexit states that:

“the Bill will preserve EU law where it stands at the moment before we leave the EU.... the Bill will enable changes to be made by secondary legislation to the laws

¹ 10 October 2016, statement to Parliament;

<https://www.parliament.uk/business/news/2016/october/statement-next-steps-in-leaving-the-eu-10-october-2016/>

that would otherwise not function sensibly once we have left the EU, so that our legal system continues to function correctly outside the EU.”²

Current EU legislation in force

EU legislation makes up a large proportion of law in force in the UK. The exact % has been a matter of dispute ranging from 7% to 80%.³ Nick Clegg counting primary legislation stated it was 7% (or 50% on another occasion), Business for Britain claimed it was 64.7%. Given the varying importance of different laws a precise figure will remain elusive.

EU laws:

Policy Area	EU Legislation in force
General, financial and institutional matters	1437
Customs Union and free movement of goods	1138
Agriculture	3055
Fisheries	786
Freedom of movement for workers and social policy	676
Right of establishment and freedom to provide services	432
Transport policy	723
Competition policy	574
Taxation	190
Economic and monetary policy and free movement of capital	564
External relations	4251
Energy	379
Industrial policy and internal market	1520
Regional policy and coordination of structural instruments	359
Environment, consumers and health protection	2210
Science, information, education and culture	450
Law relating to undertakings	116
Common Foreign and Security Policy	639
Area of freedom, security and justice	796
People's Europe	24
Total	20,319⁴

Section 2 of the European Communities Act

The European Communities Act 1972⁵ contained the power to allow Ministers to legislate via statutory instrument as well as give force to ECJ judgements and regulations without any further

² UK Gov, “The United Kingdom’s exit from and new partnership with the European Union” 2 February 2017; <https://www.gov.uk/government/publications/the-united-kingdoms-exit-from-and-new-partnership-with-the-european-union-white-paper>

³ Christopher Howarth blog post 2 November 2015; <http://christopherhowarth.uk/what-of-uk-law-comes-from-the-eu/>

⁴ EU-Lex, EU laws in force, the separate EU total of EU regulations is far larger; <http://eur-lex.europa.eu/browse/directories/legislation.html>

⁵ European Communities Act 1972; <http://www.legislation.gov.uk/ukpga/1972/68/contents>

need for legislation. As the House of Commons's briefing note explains "*As delegated powers have been central to the legislative scheme used to facilitate the UK's EU membership, namely through section 2(2) of the ECA.*"⁶

What is a Henry VIII power?

The House of Lords Select Committee on the Scrutiny of Delegated Powers 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."*⁷

The most extreme recent proposed Henry VIII clause was the 2006 Legislative and Regulatory Reform Bill introduced. Clause 1 provided that a Minister could, by Order, make provision for 'reforming legislation.' This was subsequently dropped after being dubbed the "Abolition of Parliament Bill".⁸

Why is it necessary?

The Government has stated that it is necessary to ensure that UK legislation is kept up to date with the EU negotiations "as they proceed". This could include issues such as whether the UK remains a member of EU agencies. The Rt. Hon David Davis MP states that:

*"The Repeal Bill will include powers for ministers to make some changes by secondary legislation, giving the Government the flexibility to take account of the negotiations with the EU as they proceed. It will also ensure that the Government can establish new domestic regimes in areas where regulation and licensing is currently done at an EU level, and amendments are required to ensure the law operates effectively at a domestic level. The ECA created a power which currently exists for Ministers to make secondary legislation to give effect to EU law."*⁹

Rt. Hon. David Lidington MP the leader of the Commons:

*"Because a lot of those EU regulations will, for example, refer to the Commission or another European body, a regulator, you need to substitute a UK authority in place. So we need to have a power under secondary legislation to **tweak the acquis**, the European regulations so that it's actually coherent. **It will be a limited and defined power, not to act like a dictator**, but by secondary legislation. And the scope, the definition of those powers, and when they can be used, in what circumstances, is something Parliament will have to approve in voting through the Bill itself."*¹⁰

⁶ House of Commons Library February 2017; <http://researchbriefings.files.parliament.uk/documents/CBP-7793/CBP-7793.pdf>

⁷ First report of 1992-93 [HL 57 1992-93, para 10].

⁸ Richard Gordon QC "Why Henry VIII clauses should be abolished"; <http://www.publiclawproject.org.uk/data/resources/220/WHY-HENRY-VIII-CLAUSES-SHOULD-BE-CONSIGNED-TO-THE-DUSTBIN-OF-HISTORY.pdf>

⁹ <https://www.gov.uk/government/news/government-announces-end-of-european-communities-act>

¹⁰ Sky News 27 March 2017; <http://news.sky.com/story/henry-viii-powers-to-alter-eu-laws-not-acting-like-a-dictator-10814832>

Why are they called Henry VIII powers?

The 'Henry VIII' epithet comes from the 1539 Statute of Proclamations (repealed 1547) which gave King Henry VIII power to legislate by proclamation.

The Statute, passed by Parliament stated that:

"The King for the time being, with the advice of his council, or the more part of them, may set forth proclamations under such penalties and pains as to him and them shall seem necessary, which shall be observed as though they were made by act of parliament; but this shall not be prejudicial to any person's inheritance, offices, liberties, goods, chattels or life; and whosoever shall willingly offend any article contained in the said proclamations, shall pay such forfeitures, or be so long imprisoned, as shall be expressed in the said proclamations; and if any offending will depart the realm, to the intent he will not answer his said offence, he shall be adjudged a traitor."

While the idea of ruling by decree fits the image of the monarch it can be noted that it was somewhat tempered by the caveat for individual rights.

Criticism of modern "Henry VIII" powers

Lord Judge in an interesting 2016 speech argued that

"When we speak of Henry VIII clauses, we believe we are referring to the Parliament which enacted that statute and vested arbitrary and dictatorial powers to that terrifying monarch. In doing so, we insult the memory of many brave, but unknown, because this is all pre-Hansard, members of the Commons. I venture to suggest that they would have been appalled at the modern legislative habit of bestowing what we call Henry VIII powers on any old Secretary of State, and insulted that we dismiss them in this way."

He went on to calculate that:

"Since 1950, sixty-five years, some one hundred and seventy thousand statutory instruments, prepared not by Parliamentary Counsel but by government departments, exercising powers granted by legislation, have been laid before Parliament. In that time seventeen, not seventy, have been rejected by one or other house."

How common are Henry VIII powers?

The Hansard Society has calculated that in the 2015-16 parliamentary session:

- "Of 23 government Bills, 16 contained a total of 96 Henry VIII powers to amend or repeal primary legislation.
- 65 of these powers were included in Bills on introduction. A further 31 were added during their progress through Parliament.

- 98 statutory instruments (12.9%) amended primary legislation. Over half of which were subject to the least stringent form of parliamentary control, the negative scrutiny procedure.”¹¹

Labour Party position:

Labour Party leader Jeremy Corbyn MP has said they would vote against the inclusion of a Henry VIII power.

“We’re not going to sit there and hand over powers to this government to override parliament, override democracy and just set down a series of diktats on what’s going to happen in the future. We’d be failing in our duty as democratically elected parliamentarians if we did that.”

*Corbyn said the fact that the constitution allowed these sorts of powers to survive was “a wondrous thing”, but “they’ve got to stop”.*¹²

What would happen if there were no Henry VIII powers?

Alternatives?

- **An individual vote:** An individual vote on every 20,319 EU laws would take over 200 days of Parliamentary time, sitting 24/7.
- **A debate on every page of law?** In 2005 Open Europe calculated there were already 666,879 pages of law since its inception in 1957. If Parliament discussed every piece 24/7 for a year it would give them 47 seconds per page.¹³
- **Abandon all the EU law? Legal Chaos?**
Stephen Laws QC, the First Parliamentary Counsel 2006-2012, has said that

*“It would be constitutionally irresponsible for the Government to take an irrevocable step to begin a process without being wholly confident that it will, in practice, be able to secure the legislation to complete it in an orderly way and on time. The accepted constitutional responsibilities of the Government in the unwritten, political constitution certainly include avoiding the creation of chaos in the UK legal system. Nor should the UK put itself in a position where it **might be forced to make concessions in the negotiations** to secure more time for an orderly implementation.*

“Legal chaos would result if an Art 50 notification expired without new UK legislation in place because directly applicable law would cease to apply in the UK immediately on the exit that follows automatically on the expiry of the notification. Directly applicable law only

¹¹ The Hansard Society. “Parliament and Delegated Legislation in the 2015-16 Session”; <https://assets.contentful.com/u1rlvvs33ri/4bENE9GGcg2K2W8soKyeyK/f3137f273a18b43f639833e21be98f75/Westminster-Lens-Hansard-Society.pdf>

¹² Guardian quoting a 25 March interview of ITV’s Peston on Sunday: <https://www.theguardian.com/politics/2017/mar/26/labour-opposes-henry-viii-powers-rewrite-eu-laws-great-repeal-bill>

¹³ <http://researchbriefings.files.parliament.uk/documents/RP10-62/RP10-62.pdf>

applies in EU member States. Furthermore, there is a strong legal argument that implementing UK regulations under s. 2(2) of the 1972 Act would also cease to have effect in relation to times after exit. The power to make those regulations is contingent on the existence of the obligation on the UK, as a member State, to maintain laws giving effect to the relevant EU rules. Once the obligation expires with the termination of membership, it is as if the power to make the regulations is repealed. The effect of repealing a power under which regulations are made is that the regulations cease to have effect for the future. Section 16 of the Interpretation Act 1978 saves the operation of the regulations in relation to pre-repeal cases, but not their continuing effect. Only a Bill passed before exit could prevent that default rule from applying.”¹⁴

Potential safeguards?

- **A sunset clause.** To ensure that the power is used for the sole purpose of effecting the UK's exit from the EU.
- **Limited in scope.** It is possible that several whole areas of EU law do not need transposing, i.e the free movement of persons, if there is no utility in these laws post Brexit.
- **Substantive votes on re-joining EU agencies and Justice & Home Affairs.** If the EU laws on Justice and Home Affairs are transposed there could be a commitment to substantive votes on any new agreement with the likes of Europol, Eurojust and the European Arrest Warrant?

¹⁴ Stephen Laws QC, Stephen Laws was the First Parliamentary Counsel 2006-2012 and is an Honorary Senior Research Associate, University College London, and Senior Associate Research Fellow, Institute of Advanced Legal Studies; <https://ukconstitutionallaw.org/2016/07/18/stephen-laws-article-50-and-the-political-constitution/>