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The term 'Henry VIII power' is commonly used to describe a delegated power under which subordinate legislation is enabled to amend primary legislation.

Daniel Greenberg, *Craies on Legislation* 10th ed. (Sweet and Maxwell, London, 2015), para. 1.3.9

1. In this submission, I will first lay out what I describe as the constitutional fundamentals pertaining to Henry VIII clauses. To do so I will draw on material from several jurisdictions with which I am familiar. I will then move on to discuss, in light of these constitutional fundamentals, the “Great Repeal Bill” which Parliament will shortly be charged with considering.

**Constitutional Fundamentals**

2. Henry VIII clauses are constitutionally exceptional and exceptionable. Several examples can be given from jurisdictions with written and unwritten constitutions.

**Ireland**

3. In Ireland, a jurisdiction with a written constitution, Henry VIII clauses contained in primary legislation have been held to pose serious constitutional problems.

4. Pursuant to Article 15 of Bunreacht na hÉireann, the “sole and exclusive” law-making power of the state is vested in the Oireachtas (Parliament).

5. As a result, regulations that modify primary legislation are necessarily *ultra vires*: “for the Minister to exercise a power of regulation granted to him by these Acts so as to negative the expressed intention of the legislature is an unconstitutional use of the power vested in him” (*Harvey v. The Minister for Social Welfare* [1990] 2 IR. 232, at p. 244, *per* Finlay C.J.)

6. In principle, Henry VIII clauses are unconstitutional *per se* (unless they can be saved by benevolent judicial construction) because the Oireachtas “is constitutionally prohibited from abdicating its power” (*Laurentiu v The Minister for Justice, Equality & Law Reform* [1999] 4 I.R. 26, at p. 61).

7. Henry VIII clauses are unconstitutional *per se* not merely because they violate the letter of Article 15 by vesting law-making power in the executive branch – they are unconstitutional because they violate the democratic spirit of Article 15: “in accordance with the democratic basis of the Constitution, it is the people’s representatives who make the law, who determine the principles and policies” (*Laurentiu*, at p. 61. The provisions at issue in *Laurentiu* were not Henry VIII clauses but in the course of argument counsel for the State conceded that power to amend primary legislation could not be delegated: see p. 71).
Canada

8. Like Ireland, Canada has a written constitution (see The Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11).

9. However, Henry VIII clauses are constitutionally permissible. In Re Grey (1918) 57 S.C.R. 150, the Supreme Court of Canada accepted that Parliament could not “abdicate its functions” (at p. 157) but it could delegate extremely broad powers to the executive. As Duff J. explained:

   There is no attempt to substitute the executive for parliament in the sense of disturbing the existing balance of constitutional authority by aggrandizing the prerogative at the expense of the legislature. The powers granted could at any time be revoked and anything done under them nullified by parliament, which parliament did not, and for that matter could not, abandon any of its own legislative jurisdiction. The true view of the effect of this type of legislation is that the subordinate body in which the law-making authority is vested by it is intended to act as the agent or organ of the legislature and that the acts of the agent take effect by virtue of the antecedent legislative declaration (express or implied) that they shall have the force of law (at p. 170).

10. Nonetheless, the constitutional propriety (as opposed to validity) of Henry VIII clauses has been called into question. For instance, Campbell J took the view in Ontario Public School Boards’ Association v Ontario (Attorney General) (1997) 151 D.L.R. (4th) 346 that Henry VIII clauses reverse the “usual rule…that legislative power is vested in the democratically elected Legislative Assembly to make laws after full public debate” (at para. 49). He went on to observe:

   This power is constitutionally suspect because it confers upon the government the unprotected authority to pull itself up by its own legal bootstraps and override arbitrarily, with no further advice from the Legislative Assembly, and no right to be heard by those who may be adversely affected by the change, the very legislative instrument from which the government derives its original authority (at para. 51).

New Zealand

11. In New Zealand, a jurisdiction with an unwritten constitution and a unicameral legislature Henry VIII clauses have provoked the ire of the Regulations Review Committee on several occasions. An example is the Committee’s recommendation that Parliament disallow the Road User Charges (Transitional Matters) Regulations, 2012: “Investigation into the Road User Charges (Transitional Matters) Regulations 2012 (SR 2012/145)”.

12. The Committee recalled its general remit to draw attention to unusual uses of delegated powers and matters more appropriate to legislative enactment. In this context, it took into account the purpose of the Henry VIII clause in question:

   In considering this ground, it is important to bear in mind that the power delegated by section 90 is a power to make regulations for transitional
purposes. Regulations made under section 90 may prescribe “transitional and savings provisions” concerning the commencement of the Act; may provide that specified provisions of the Act do not apply “during a specified transitional period”; and may provide for any other matters necessary for facilitating “an orderly transition” from the provisions of the 1977 Act to those of the 2012 Act (my emphasis).

13. The Committee took issue with three aspects of the Regulations, which, in its view, should have been implemented by amending the primary legislation (the Road User Charges Act 2012).

14. First, the Regulations sought to expand the definition of the term “exempt vehicle”. In the Committee’s view, this effected a reversal of policy requiring an amendment to the legislation.

15. Second, the Regulations amended the definition of the term “permit”. Here, the ministry claimed that the original legislation contained an error. In the Committee’s view, the use of the Regulations for this purpose was again a reversal of policy which was properly a matter for Parliament.

16. Third, the Regulations extended the period for commencement of certain provisions contained in the primary legislation. In the Committee’s view, this would “subvert” the commencement date intended by Parliament and was thus inappropriate.

17. Also of note is the Committee’s recent report on emergency legislation: “Inquiry into Parliament's legislative response to future national emergencies (I.16B)”. Particularly striking is the recommendation that any Henry VIII clause permitting the executive to modify primary legislation should set out in advance the primary legislation that could be so modified:

[W]e recommend that any future national emergencies legislation with power to make Orders in Council overriding other Acts should set out an exclusive “positive list” of enactments (including subordinate legislation) that can be overridden by Order in Council. We are unable to say in advance which enactments should be on that list. It will depend on the nature of the particular emergency, and when it occurs. Rather than attempt to prepare a list in advance, we think a better approach would be for the list of enactments that can be overridden to be developed under the supervision of the Attorney-General, with select committee consideration, informed by submissions, during the preparation of bespoke legislation following a national emergency. We consider that the guiding principle should be that the list of Acts that could be overridden should be no broader than necessary in each circumstance. We consider that there should be substantive justification for the inclusion of each Act listed (at p. 21).

18. The Committee also noted that previous emergency legislation had insulated several statutes that might be described as constitutional in nature (e.g. the New Zealand Bill of Rights Act 1990) from modification by subordinate legislation (id.).
19. The reasons that Irish and Canadian courts and New Zealand’s parliamentarians are chary of Henry VIII clauses also resonate in this jurisdiction. They explain why Henry VIII clauses are interpreted narrowly by the courts:

Parliament does not lightly take the exceptional course of delegating to the executive the power to amend primary legislation. When it does so the enabling power should be scrutinised, should not receive anything but a narrow and strict construction and any doubts about its scope should be resolved by a restrictive approach (Orange Personal Communications Ltd [2001] Eu L.R. 165, at p. 177, per Sullivan J.).

20. Recently in R (Public Law Project) v Lord Chancellor [2016] UKSC 39, Lord Neuberger noted that “[w]hen a court is considering the validity of a statutory instrument made under a Henry VIII power, its role in upholding Parliamentary supremacy is particularly striking, as the statutory instrument will be purporting to vary primary legislation passed into law by Parliament” (at para. 25) and warned that such powers will be interpreted restrictively “if there is any doubt about the scope of the power” (citing McKiernon v Secretary of State for Social Security, The Times, November 1, 1989).

21. As this Committee has previously warned, “the use of Henry VIII powers, while accepted in certain, limited circumstances, remains a departure from constitutional principle [that] should be contemplated only where a full and clear explanation and justification is provided” (6th Report 2010-2011 Public Bodies Bill HL 51, at para. 6).

The Great Repeal Bill

22. Consequent on the result of the referendum on European Union membership in June 2016, Britain is poised to leave the EU. The mechanics of departure are as yet unclear. However, the government envisages disentangling the British legal system from the European by means of a “Great Repeal Bill”.

Proposed Bill

23. This legislative project was announced by the Prime Minister in her speech to the Conservative Party’s conference in October 2016. She said:

This historic Bill – which will be included in the next Queen’s Speech – will mean that the 1972 Act, the legislation that gives direct effect to all EU law in Britain, will no longer apply from the date upon which we formally leave the European Union. And its effect will be clear. Our laws will be made not in Brussels but in Westminster. The judges interpreting those laws will sit not in Luxembourg but in courts in this country. The authority of EU law in Britain will end.

As we repeal the European Communities Act, we will convert the ‘acquis’ – that is, the body of existing EU law – into British law. When the Great Repeal Bill is given Royal Assent, Parliament will be free – subject to international
agreements and treaties with other countries and the EU on matters such as trade – to amend, repeal and improve any law it chooses. But by converting the acquis into British law, we will give businesses and workers maximum certainty as we leave the European Union. The same rules and laws will apply to them after Brexit as they did before. Any changes in the law will have to be subject to full scrutiny and proper Parliamentary debate. And let me be absolutely clear: existing workers’ legal rights will continue to be guaranteed in law – and they will be guaranteed as long as I am Prime Minister.

24. No further details as to the content of the “Great Repeal Bill” or the parliamentary procedure to which it will be subject have been made available to the public.

Disentangling Britain from EU Law

25. Given the extent to which EU law has flowed “into the estuaries and up the rivers” of the domestic legal system over the past four decades, the process of disentanglement will by necessity be gradual (H.P. Bulmer Ltd v J. Bollinger SA [1974] Ch. 401 at 418, per Lord Denning M.R.). What the Prime Minister seems to envisage is the adoption of the EU ‘acquis’ en masse, the better for British politicians to chip away at it over time.

26. Although the emphasis in the Prime Minister’s speech is on Parliament being free to change EU law going forward, it is, as my colleague Mark Elliott has put it, “almost inconceivable that the entirety of the process whereby the body of domesticated EU law is to be reviewed — and some, perhaps much, of it adjusted or removed — could be carried out in this way” (“Theresa May’s Great Repeal Bill: Some Preliminary Thoughts”, Public Law for Everyone, October 2, 2016).

27. It has thus been suggested that “the ‘Henry VIII’ powers, which have been used to implement the incoming EU law, would be used to unravel EU law” (Martin Howe Q.C., How to Leave the EU: Legal and Trade Priorities for the New Britain (Politeia, London, 2016) at p. 16). Ministers would thus be able – to use the Prime Minister’s words – to “amend, repeal and improve” domestic law that is intermingled with EU law.

28. It is true that that European Communities Act 1972 contained, in s. 2, a Henry VIII clause designed to permit Ministers to implement EU law obligations. But as George Peretz Q.C. has observed, “it has been used to implement EU legislation that has already undergone considerable scrutiny at EU level (by member states and the European Parliament)”, whereas “Parliament’s scrutiny of UK statutory instruments is widely regarded as seriously deficient (not least because there is no power to propose amendments)” (“The Great Repeal Bill: a giant Henry VIII clause?” Brexit Blog, October 3, 2016).

29. A similar comment can be made in respect of the Henry VIII clause contained in s. 10 of the Human Rights Act 1998. Any ministerial action to remove legislation that has been declared incompatible with a Convention right will be taken on foot of a judicial decision issued after a rigorous, public, adversarial process.
30. Indeed, a Henry VIII clause permitting the executive to derogate from EU law would be altogether more radical than existing clauses, because the principles guiding ministerial action will not necessarily have been worked out in advance through a transparent process to which interested parties could contribute. Making law without meaningful parliamentary scrutiny is constitutionally unpalatable.

31. Accordingly, it would be constitutionally appropriate – perhaps even required as a matter of constitutional propriety – to insert safeguards in any Henry VIII clause contained in a Great Repeal Bill.

*Potential Safeguards*

32. Nonetheless, some sort of Henry VIII clause may be required to be included in the Great Repeal Bill. Once Britain’s membership of the EU has formally ceased, there will be no fetter on Parliament’s ability to pass legislation that diverges from EU law. When such legislation is passed post-Brexit, it may be necessary to effect modifications to existing primary legislation. And it would certainly be convenient to make transitional and consequential modifications by way of regulation rather than by way of primary legislation.

33. Drawing on the constitutional fundamentals outlined above, a number of safeguards can be envisaged. These apply particularly to the “Great Repeal Bill” but could apply more broadly.

34. **First**, the exceptional nature of Henry VIII clauses suggests that exercises of the powers contained in the Henry VIII clause should be subject to the *affirmative resolution procedure*.

35. **Second**, the Henry VIII clause could be *expressly limited in scope*. Parliament could provide, for instance, that the powers can be used only to make transitional and consequential modifications in order to implement new legislation effectively. Limiting the scope of the Henry VIII clause would allow parliamentarians (as with New Zealand’s Regulations Review Committee) to disallow modifications that are not designed to make necessary transitional and consequential modifications and also allow the courts, on judicial review, to declare extravagant uses of the Henry VIII clause *ultra vires*.

36. **Third**, it would be possible to set out in statute a *positive list of statutes that could be amended by exercise* of the Henry VIII clause (as New Zealand’s Regulations Review Committee has proposed in respect of emergency legislation). There is no doubt that this might cause inconvenience from time to time, if statutes need to be added to the positive list – but there is equally no doubt that some sort of fast-track procedure could be envisaged to permit modifications to be made with all due speed.

37. **Fourth**, in the alternative, it would be possible to set out in statute a *negative list of statutes that could not be amended by exercise* of the Henry VIII clause (see e.g.
Civil Contingencies Act 2004, s. 23(5)(b), protecting the Human Rights Act 1998). Statutes setting out workers’ rights, equality standards and environmental protections would be candidates for inclusion on such a negative list, to the extent that they contain significant EU law elements. Of course, Parliament would remain free to alter legislation contained in a negative list in the ordinary way.

38. **Fifth**, any amendments proposed by ministers could be accompanied by an EU law impact assessment which would lay out the new measure and its likely effect in practice, in particular how the new UK law would deviate from EU law. Such assessments could be reviewed by a parliamentary committee, which could then recommend whether or not the measure ought to require legislation. Indeed, permission from the committee could even be made a condition precedent to an exercise of the power contained in the Henry VIII clause.

39. Depending on the desired level of integration with the EU post-Brexit it is possible to imagine, in tandem with the parliamentary committee evoked above, the establishment of an independent agency which could monitor the UK’s compliance with EU law and suggest ways of minimising tariff and non-tariff barriers to trade with the EU where EU law and UK law began to diverge. Indeed, this could even be an agency jointly staffed by EU (which has many decades of experience of monitoring compliance with EU law) and UK representatives.

40. **Sixth**, any amendments could also be accompanied by a devolution impact assessment. Again, a committee could be established to scrutinise proposals and could also be empowered to require consultation with the executive or legislative branch of a regional government before introducing delegated legislation to change EU law.

*January 2017*