

The Powers That *May* Be

A historical perspective on Henry VIII powers

In 1642 democracy opened its doors and tyranny strode in. King Charles I attempted to arrest the Five Members in the last of a series of despotic acts which the Stuart Kings had committed - none the least of which was ruling without Parliament. Now, of course, it is tradition at each State Opening of Parliament for the doors to be slammed on the Black Rod, thereby signalling the independence of the British Parliament and reinforcing the doctrine of Parliamentary sovereignty. This may still exist in ritual but its application in practice is uncertain to say the least. As Britain leaves the European Union the British government wants to get on with the job but it has already fought and lost a series of legal battles testing the limits of executive power. Such behaviour triggered civil war in the 17th century and may yet do so today. It merits looking even further back to the reign of Henry VIII in order to understand the tussle for authority at the heart of the British Constitution; and why Brexit has awakened it once again.

The Tudors ushered in new ideas about kingship as they saw the King as 'the executive authority in the state and its representative'.¹ The Proclamation by the Crown Act (known more commonly as the Statute of Proclamations) was passed by Parliament in 1539 and gave decrees issued by the King, then Henry VIII, the same authority as legislation. The Proclamation states that: 'the King...may set forth proclamations...which shall be observed as though they were made by act of Parliament'.² This is why when governments provide for primary legislation to be repealed or amended without further Parliamentary scrutiny they are known as "Henry VIII clauses".

The context for Henry's power-grab was all too familiar. A time of new ideas and change; a time when the democratic process was under threat; and a time when 'England stood alone in Europe, and never in greater danger'.³ By claiming Royal Supremacy and waging war on Catholic England, King Henry had alienated the North and enraged an entire continent. Invasion, war and taxes were imminent. However, whilst Henry had had enough of institutionalised religion, he was far more respectful towards Parliament. Not only did he rule in partnership with Parliament between 1529 and 1536, but the very fact that the Proclamation was debated, amended and passed by Parliament reflected the commitment of Henry and his advisors (mostly common lawyers) to it. According to G.R. Elton the Henrician Reformation established the idea of both national sovereignty and constitutional monarchy in Britain.⁴ For instance, look at Henry's response to *Ferrer's Case* (1543) where he stated that 'we at no time stand so highly in our estate royal as in the time of Parliament,

¹ *A History of English Law*, ed. W.S. Holdsworth (London, ix, 1944), 6.

² <http://statutes.org.uk/site/the-statutes/sixteenth-century/1539-31-henry-8-c-8-proclamation-by-the-crown/>, accessed 24th June 2017.

³ Susan Brigden, *New Worlds, Lost Worlds: The Rule of the Tudors 1485-1603* (London, 2000), 133.

⁴ *A History of England*, ed. G.R. Elton (London, iv, 1955), Ch. 7.

wherein we as head and you as members are conjoined and knit together into one body politic'.⁵

Immediately following Henry's death the Statute of Proclamations was repealed. It was not until the reign of James I, Charles I's father, that the royal prerogative became an issue again. In a seminal ruling, *The Case of Proclamations*, Sir Edward Coke ruled that "the King by his proclamation...cannot change any part of the common law, or statute law, or the customs of the realm".⁶ The Stuarts continued to contest this and it was during the "Glorious Revolution" of 1688 that the limits of the royal prerogative were firmly established in a Bill of Rights. Parliamentary sovereignty became the touchstone of Whiggism and British identity (as was clear from the Leave Campaign). However, the fact remains that the power summoned by the Proclamation is still relevant - even if the monarch is not. Lord Judge has questioned both the usefulness and legality of the "Henry VIII clauses" for they have enabled the creation of 170,000 statutory instruments since 1950, only 17 of which have been rejected.⁷ Lord Judge concluded that the Parliamentary processes for enacting statutory instruments "are virtually habituated to approve them. Henry VIII himself might have settled for that." More recently, the Legislative and Regulatory Reform Act (2006) was dubbed the 'Abolition of Parliament Bill' for removing restrictions on executive power which the British Constitution had, over time, put in place.⁸

And so with Brexit, which, in requiring the invocation of Article 50 under the Lisbon Treaty, has led to a fierce debate over the limits of ministerial power. In *Miller v Secretary of State for Exiting the European Union* the Supreme Court ruled by a majority of 8 to 3 against the government by arguing that the change in the law required to implement the referendum's outcome must be made in the only way permitted by the UK constitution, namely by legislation. The Supreme Court concluded that it would be 'inconsistent' for such a major constitutional change to be effected by ministers alone, such that that 'the royal prerogative could not be invoked by ministers to justify giving notice under article 50 for exiting the EU and that ministers require the authority of primary legislation before they can take that course'.⁹

But the case is not closed, and the tussle for power will continue. A white paper for the Great Repeal Bill revealed that the government would seek to use the "Henry VIII clauses" and secondary legislation to give ministers ultimate authority over which parts of EU law Britain should keep. The Liberal Democrat MP Tom Brake has said that this bill 'would have

⁵ *Chronicles of England, Scotland and Ireland*, ed. Raphael Holinshed (London, iii, 1808), 824.

⁶ <https://ukconstitutionallaw.org/2016/06/27/nick-barber-tom-hickman-and-jeff-king-pulling-the-article-50-trigger-parliaments-indispensable-role/>, accessed 24th June 2017.

⁷ The Rt. Hon Lord Judge, *Ceding Power to the Executive; the Resurrection of Henry VIII*, delivered on 12th April 2016. <https://www.kcl.ac.uk/law/newsevents/newsrecords/2015-16/Ceding-Power-to-the-Executive---Lord-Judge---130416.pdf>

⁸ <https://centurean2.wordpress.com/2010/10/01/who-wants-the-abolition-of-parliament-bill/>, accessed 24th June 2017.

⁹ *Miller Judgement* [2017] 1 ALL ER 593 as paragraph [101].

made Henry VIII blush'.¹⁰ The European Union Withdrawal Bill contains more limited enabling powers, for example to deal with deficiencies arising from Brexit¹¹. Lord Judge questions the legality of skeletal provisions that enable changes to be made to primary legislation. His Lordship concludes that “unless strictly incidental to primary legislation, every Henry VIII clause, every vague skeleton bill, is a blow to the sovereignty of Parliament”.

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¹⁰ <https://www.theguardian.com/politics/2017/mar/30/great-repeal-bill-will-create-sweeping-powers-to-change-laws-after-brexit>, accessed 26th June 2017.

¹¹ Clause 7. Clause 8 gives an enabling power to legislate to implement international obligations and clause 9 enable legislation to be introduced to implement the withdrawal agreement.

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