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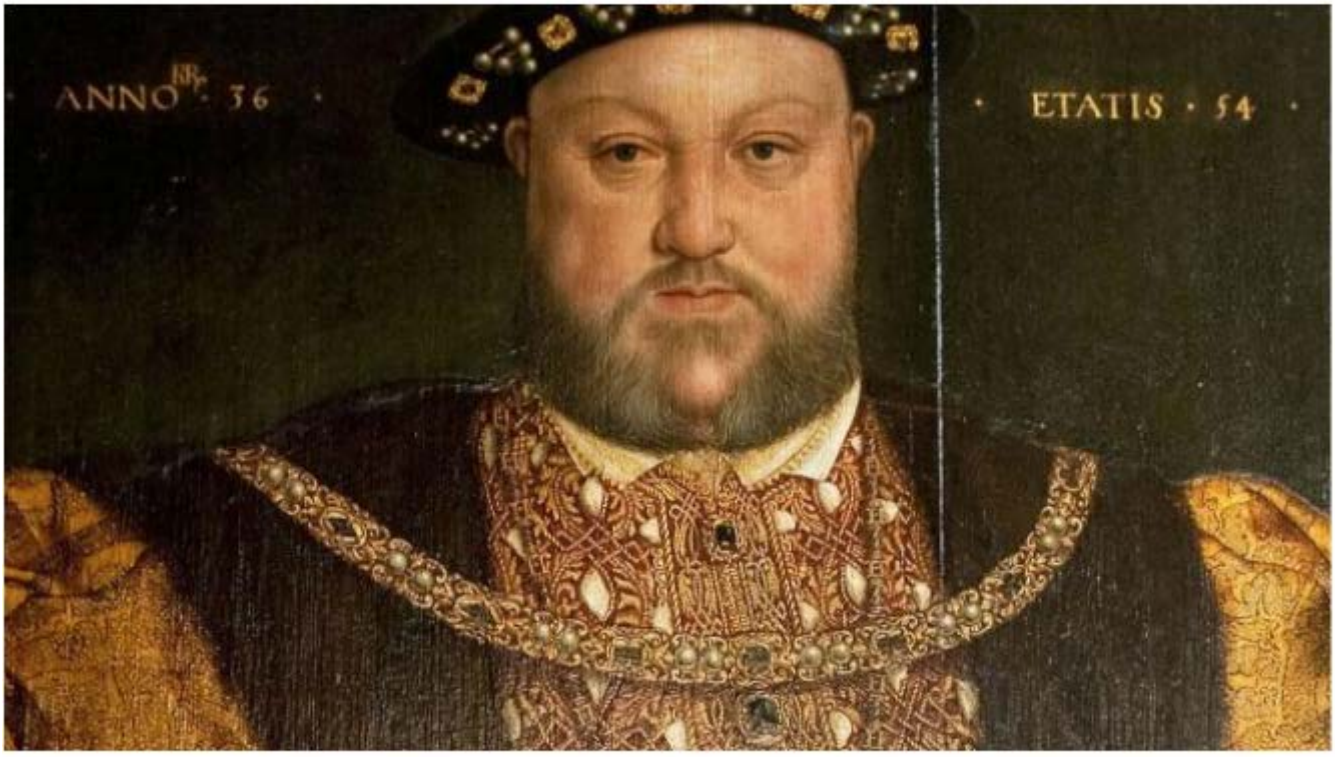
What using Henry VIII powers would mean



In 1539 the Statute of Proclamations gave Henry VIII the power to legislate by decree
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John Gould | Michael Stacey

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Divorces can be messy and details can be frustrating. It's ironic that history's most famous divorcé should again be newsworthy in relation to a different sort of divorce: Brexit. It is said that the government is attempting to give itself Henry VIII powers to decide the detail. So what does this mean?

The Statute of Proclamations 1539 gave Henry VIII the power to make law by royal proclamation. The modern use of the term relates to power granted by legislation to ministers to amend or repeal acts of parliament with limited parliamentary scrutiny using what are called "statutory instruments". These are a form of delegated legislation.

The purpose of the European Union (Withdrawal) Bill is to convert existing EU law into British law on "exit day" to provide legal certainty and continuity, while restoring control to the UK. However, much EU law will no longer make sense once the UK leaves. To enable this preserved law to function, wide powers are included enabling ministers to make delegated legislation to address any deficiencies, implement the EU withdrawal agreement and make consequential provision. This includes a self-amending provision, enabling the act itself to be amended by ministers.

The scale of the task is enormous. About 12,000 EU regulations with direct effect will be converted into domestic law, as will EU treaties in so far as they confer rights on individuals and some 8,000 statutory instruments made under the European Communities Act 1972 to implement EU directives domestically. The government estimates that 800 to 1,000 statutory instruments will need to be made before exit day to make Brexit a reality in UK law.

The debate concerning the use of statutory instruments is not new. Historically they were used to regulate administrative procedures rather than set policy, but their use has increased in frequency and importance since the Second World War. The most controversial are those that enable primary legislation to be amended or repealed where the limits of the power are ill-defined.

Statutory instruments are subject to some parliamentary control under either the negative procedure or the affirmative procedure (which requires a debate and a positive endorsement).

However — as critics have pointed out — the ability for meaningful scrutiny is limited. More than 23,000 statutory instruments have been made since 1997 and none has been rejected in the House of Commons. Only a handful have failed in the Lords, including the notorious blocking of cuts to tax credits in 2015.

Much is bound to be done by statutory instruments. The sheer volume of EU law to be converted is such that a purely primary legislative vehicle is likely to be unworkable, particularly in the timescale available. Many provisions will be technical and uncontroversial.

The real challenges are, first, defining the executive powers appropriately narrowly to assuage fears concerning their use; and, second, identifying those measures that require close parliamentary scrutiny and devising an appropriate procedure. The Devil may be in the detail, but finding him may be tough.

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