Bingham Centre for the Rule of Law—Written evidence (LEG0052)

Summary

The Bingham Centre for the Rule of Law particularly welcomes the focus of this inquiry on the inclusion of delegated powers in primary legislation. Scrutiny of the inclusion of delegated powers in new Bills is at least as important as later scrutiny of the exercise of such powers.

Moreover, the scrutiny of secondary legislation is a subject which other organisations such as the Hansard Society have addressed in their publications in recent years. Accordingly, the Centre concentrates its brief submission on the underlying question of when it is appropriate for a Bill to delegate powers (Question 1). The submission then proceeds to apply the Centre’s view on this question to the issue of specific types of delegation highlighted in this inquiry, namely skeleton Bills and parts of Bills (Question 4) and Henry VIII clauses (Question 9).

The Centre recommends that the consideration of Bills containing delegated powers would be assisted by the development of a Code of constitutional standards. Skeleton Bills and Henry VIII clauses should be restricted to the most exceptional situations in which government is able to demonstrate a compelling justification for their inclusion. In the context of Brexit, there is a need for vigilance on these issues and new procedures may need to be adopted if the volume of Bills makes that necessary.

Introduction

1. The Bingham Centre for the Rule of Law welcomes this important and timely inquiry. The Centre is of the view that the delegation of legislative powers has a significant impact on the rule of law. In its response to Part 1 of this Committee’s inquiry into the legislative process, the Centre submitted that consideration of rule of law standards should become a regular part of legislating. The Centre’s description of applicable rule of law standards was set out in an Appendix, which is appended to this submission again for ease of reference.

2. Bingham Centre for the Rule of Law was launched in December 2010 to honour the work and career of Lord Bingham of Cornhill – a great judge and passionate advocate of the rule of law. The Centre is dedicated to the study, promotion and enhancement of the rule of law worldwide. It does this by defining the rule of law as a universal and practical concept, highlighting threats to the rule of law, conducting high-quality research and training, and providing rule of law capacity-building to enhance economic development, political stability and human dignity. The Centre is a constituent part of the British Institute of International and Comparative Law (BIICL), a registered charity and leading independent research organisation founded over 50 years ago.

The delegation of legislative powers in a constitutional context

3. Generally, the Centre supports the arguments of the Constitution Unit in its report on the Constitutional Standards of the House of Lords Select Committee on the

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1 Submission LEG0017, 16 October 2016.
Constitution.² There, in addition to drawing general principles from the work of the Committee, it argues for a published Code (a form of soft law) that sets out the standards that the Committee applies. The Centre agrees with that Report that a Code would make the work of the Committee more transparent and also thinks that in producing a Code, developing principles could be firmed up.

4. A Code of constitutional standards written for the legislative process would be particularly helpful to all concerned in the preparation and scrutiny of Bills with regard to the question of the extent to which a proposed delegation of legislative powers in a Bill might create constitutional problems at a later date. That question calls for rigorous and imaginative scrutiny of how the delegated power in a Bill could be used in future, and not only how the Executive plans to use it contemporaneously with the enactment of the legislation. More specifically, the Centre also recognises that Brexit will present extraordinary challenges to Parliament and that the Executive is likely to argue that increasing its law-making power is the only reasonable approach in this unprecedented process. This submission does not deal specifically with Brexit related challenges but, in accordance with its argument that Parliament bears great responsibility in protecting the primacy of its law-making role and ensuring that the Executive does not usurp this responsibility, the Centre supports arguments made in other submissions that special legislative processes and institutions may be needed to scrutinise and categorise provisions in Brexit related Bills delegating law making powers. Perhaps, following the example of other jurisdictions, people who are not politicians may be involved in such processes (over and above the legal advisers currently attached to committees), given the anticipated volume of legislation.

Question 1

For what purposes is it appropriate to delegate powers to make law to Government? Is there a clear boundary between subject-matters which are appropriate for primary legislation on the one hand, and for secondary legislation on the other?

5. In a system where Parliament is the electorally accountable branch of government and has a robust legislative process to debate, scrutinise and amend a Bill before voting on whether it should pass, primary legislation is the appropriate vehicle for translating new policy choices into law. The purpose of including delegated powers in a Bill should be to enable Ministers (or sometimes other persons or bodies such as regulators) to add the detailed regulations (or other forms of secondary legislation) that are required to implement the new legislation. It will generally be the case that delegated powers can be exercised more than once, which enables the regulating authority to revise its regulations as circumstances change. This flexibility avoids the need for Parliament to revisit matters relating to the practical implementation of policies. At the same time, the power to regulate should not be used to make further policy choices beyond those made by the statute.

6. Given political pressures and incentives on the Executive, there is an inherent risk that delegated powers may be abused, for example to change policy direction in a manner

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² Jack Simson Caird, Robert Hazell, and Dawn Oliver, *The Constitutional Standards of the House of Lords* Select Committee on the Constitution: The Constitution Unit, January 2014. A selection of standards with particular relevance to the rule of law was included in the Centre’s submission LEG0017 as Appendix 2.
that should receive the type of scrutiny that is only available in the primary legislative process, or to concentrate excessive decision-making power in the hands of individuals.

7. It might be argued that parliamentary scrutiny of delegated legislation itself, or the judicial system, offer adequate protection against the misuse of delegated powers. However, unless the enabling statute is clear on the power that it delegates, neither later parliamentary scrutiny nor judicial scrutiny can be particularly effective. Moreover, the public and business should not be expected to rely on corrections to regulations after the event. Of course, UK courts do offer important safeguards. In particular, they will be slow to interpret a delegating provision as authorising regulations that infringe rights, undermine constitutional arrangements or impose unreasonable penalties, and may strike them down unless the relevant protective presumption is rebutted expressly or by very clear legislative implication. However, as is commonly acknowledged, this safeguard against the abuse of executive power is not an adequate protection. It is expensive to go to court to challenge the validity of regulations and most secondary legislation will never be tested in this way. Much depends on parliamentary scrutiny of the clauses in Bills which delegate law-making powers.

8. Although the subject matter of a Bill will usually not determine whether powers can be delegated or not, delegating authority to make laws carries greater dangers in particular areas including human rights (and thus most criminal law matters) and constitutional matters. Here, as has been widely recognised, it is especially important that delegated powers should be precisely framed. In certain circumstances, it may be reasonable for regulations to limit qualified rights, specify criminal penalties, or address aspects of the constitutional arrangements in the UK. However, it can never be appropriate for regulators to be given broad discretion on these matters. The ambit of the power to create delegated legislation should be limited to the particular needs of the matter by, for example, stipulating the principles that must be observed, specifying, perhaps as examples, the situations that the regulatory power might cover, and stipulating the limits of the power clearly. (This is also the view broadly speaking of the House of Lords Delegated Powers and Regulatory Reform Committee. 3)

9. Parliamentary scrutiny of delegating clauses may be helpfully informed by considering the position in jurisdictions where, unlike the UK, there are legally enforceable constitutional limits of the power of legislatures to delegate authority:

- Under the German Basic Law, 4 the federal parliament (Bundestag) is required to specify the ‘content, purpose and scope’ of any legislative powers which it delegates. The Federal Constitutional Court has interpreted this as requiring the legislature to take ‘significant’ decisions itself, in order to guarantee that it ‘bears political responsibility for all laws, including those created by the executive’. 5

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4 Article 80.
• The Supreme Court of Ireland has established that delegation of legislative power is only permitted if a statute specifies the principles and policies that are to be given effect.\(^6\)

• In South Africa, the vesting of legislative authority in Parliament by the first post-apartheid constitution led the Constitutional Court to hold that a Henry VIII clause was unconstitutional,\(^7\) and the Court remarked more generally that the granting of ‘plenary legislative power’, which might be the effect of skeleton Act, would also be unconstitutional.\(^8\) The Court has also struck down a grant of delegated power in the immigration context which had been used to adopt regulations that made it very difficult for foreign spouses of South African nationals to afford a visa, on the ground that this infringed the right to respect for human dignity.\(^9\) The Court reasoned that ‘The legislature must take steps where the limitation of rights is at risk to ensure that appropriate guidance is given.’\(^10\)

• A relatively recent set of safeguards is provided by the Kenyan Constitution of 2010, which states that an Act of Parliament which delegates legislative authority ‘shall expressly specify the purpose and objectives for which that authority is conferred, the limits of the authority, the nature and scope of the law that may be made, and the principles and standards applicable to the law made under the authority’.\(^11\)

10. In the UK context, as the Constitution Unit Report notes, principles concerning delegated powers can be drawn from the work of the Committee on the Constitution. Similarly, although the House of Lords Delegated Powers and Regulatory Reform Committee maintains a case by case approach to scrutinising Bills, its approach to scrutiny contains some important principles which the Centre endorses but believes could be more directly applied. For instance, the DPRRC requires the government memorandum accompanying a Bill to ‘fully explain the purpose of the power’, and ‘describe why the matter that is the subject of the power has been left to delegated legislation rather than included in the bill’.\(^12\) Taking this to its logical conclusion, it would be desirable for Bills to make the purpose of each delegated power explicit, as unlike assurances given in a memorandum, this is a reliable constraint on the exercise of the power. The Committee has proposed a structured test for whether delegated powers should include a power to shape criminal offences and penalties, recommending that ‘save in exceptional circumstances, the maximum penalty on conviction [should] be included on the face of the bill’ and adding that ‘where the ingredients of a criminal offence are to be set by delegated legislation, the Committee would expect a compelling justification’.\(^13\) Expanding such examples and seeking to

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\(^{7}\) Executive Council of the Western Cape Legislature v President of the Republic of South Africa 1995 (4) SA 877 (CC).

\(^{8}\) ibid para 51.

\(^{9}\) Dawood v Minister of Home Affairs 2000 (3) SA 936 (CC).

\(^{10}\) ibid para 54. It should be noted that, like the UK, the South African system is parliamentary. Its deviations from the Westminster model, such as fusing the head of state and head of government, do not materially alter the key aspects of a parliamentary system, most significantly, the responsibility of the head of government to Parliament. Like the UK government, the South African President and Cabinet must retain the confidence of Parliament and may be dismissed through a vote of no confidence.

\(^{11}\) Constitution 2010, Article 94(6).

\(^{12}\) Guidance for Departments (n 3) para 28.

\(^{13}\) ibid para 38.
draw a framework of principles from them would facilitate the work of Parliament in this regard and provide the executive with guidance.

11. In the context of Brexit, as the Centre notes above, some special procedures and standards supplementing existing mechanisms, for identifying delegations of power that require special scrutiny are worth considering. In particular, Parliament should have effective scrutiny procedures in place so that the Executive cannot claim excessive delegated powers on the basis that Parliament cannot manage the load.

Recommendation: Parliamentary sovereignty means that it is not possible to have general constraints on the delegation of powers legally entrenched in a way that binds future Parliaments. However, Parliament can establish a set of principles to underpin its assessment of the validity of clauses that delegate legislative authority. The House of Lords Constitution Committee, Delegated Powers and Regulatory Reform Committee, and ad hoc committees formed to consider delegated powers in the House of Commons, should, consider adopting a Code for this purpose. In this context, referring to the constitutional limits in the comparable jurisdictions discussed above as these provide relevant models for addressing what is essentially the same problem as well as the rich reports of bodies that have already studied this question. In the context of Brexit, additional procedures, including perhaps an additional stage in the committee process, may be necessary to deal with the anticipated large volume of legislation.

Question 4

Are there circumstances in which ‘skeleton’ Bills and clauses are appropriate? Are ‘skeleton’ Bills and clauses becoming more frequent, and if so, why?

12. A skeleton Bill is defined by the Delegated Powers and Regulatory Reform Committee as one which has the effect that ‘the real operation of the Act would be entirely by the regulations, or orders made under it’.14 They are Bills that set out the general shape and structure of an intended law but leave all the detail to secondary legislation.15 The Committee is prepared to scrutinise such Bills, but would require ‘full justification for the decision to adopt that structure of powers’, and likewise for a skeleton part of a Bill.16

13. In practical terms, skeleton Bills effectively give the Executive an opportunity to determine, and to alter from time, through regulations policy in the area that the Act covers. There may be rare exceptions where a skeleton structure is acceptable because there is no time to settle the detailed content of the legislation although the very fact that the executive fears that the matter may be delayed in Parliament, which has procedures for ‘fast-tracking’, itself raises concern about the reasons for proposing a skeletal Bill. In any event, such cases are surely rare and in such instances the burden of justification should be on the government to satisfy Parliament that it would not be possible to present the substantive legal changes it wishes to make in the form of a Bill rather than regulations. It may be that the justification standard can only be met in extreme situations, for instance if a war or civil emergency made it uncertain whether

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14 Guidance for Departments (n 3) para 36.
16 ibid.
Parliament would have the opportunity to meet and consider the proposed substantive legal changes.

**Recommendation:** Bills which are wholly or partly ‘skeletal’ in nature should not be adopted in the absence of an exceptional justification, and the burden of explanation should fall on the government. A special procedure for considering the necessity of a ‘skeletal’ Bill, should be considered.

**Question 9**

Bills often include ‘Henry VIII powers’, which allow the Government to amend or repeal primary legislation by secondary legislation. For what reasons might such powers be appropriate, and with what level of scrutiny? Are there any subject-matters or purposes for which Henry VIII powers should never be used? Should Henry VIII powers ever be exercisable by a person who is not a Minister?

14. Henry VIII clauses do not seem to be necessary for effective government except, perhaps, in very exceptional circumstances. Some argue that Henry VIII clauses are necessary in anticipation of situations of armed conflict or national disaster for instance. However, there seems no reason why properly crafted Acts could not address such circumstances. Not every parliamentary jurisdiction permits such clauses. The example of South Africa is cited above.

15. If, however, some use of Henry VIII clauses is considered necessary, this submission assumes that their constitutionally anomalous nature and the need to provide exceptional justification for their inclusion are clear. The submission does not traverse these matters in full. It assumes that the need for enhanced scrutiny of the exercise of such powers is clear. The starting point should be that since Henry VIII powers concern the modification of primary legislation, if they are to be used at all, there is a need for special vigilance to ensure that these provisions do not usurp Parliament’s role of making policy choices.

16. In the context of Brexit, if the proposed Great Repeal Bill were to give the Executive delegated power to make policy choices about which elements of EU law to retain and which to discard or modify, then it would be a much more sweeping power than the precedent set by the European Communities Act 1972.

**Recommendation:** Henry VIII clauses should be recognised as constitutionally anomalous and should be enacted only where there is an exceptional justification and no other realistic way of ensuring effective governance.
Appendix - What is the Rule of Law? An Explanation of Rule of Law Principles

1. The rule of law principles that are relevant for present purposes are outlined above. This Appendix explains rule of law principles more fully.¹⁷

The law must be accessible, intelligible, clear, and predictable

2. When the law meets this requirement, people are able to understand what activity is prohibited and therefore discouraged, and what their rights are so that they are able to claim those rights.

3. Uncertainty on the law discourages business and financial activity, as well as the good operation of UK law generally.

4. Parliamentary processes for legislative scrutiny and law-making can help to alleviate uncertainty by providing clarity on the timetable for the establishment of new laws and on the likely content of those laws.

Laws should apply equally to all

5. This principle means that the law should not have discriminatory provisions, and that the law should not tolerate discrimination. A key example is slavery: equality before the law necessitated the abolition of slavery and explicit legal decision that the law would not recognise a distinction between enslaved and free people. Anti-discrimination law implements this rule of law principle.

6. At the same time, there are categories of people whom the law should treat differently because their position is different. For example, children cannot be prosecuted for crime below a certain age, because children are less mature than adults.

The law must afford adequate protection of fundamental human rights

7. As Lord Bingham said:

   A state which savagely represses or persecutes sections of its people cannot in my view be regarded as observing the rule of law, even if the transport of the persecuted minority to the concentration camp or the compulsory exposure of female children on the mountainside is the subject of detailed laws duly enacted and scrupulously observed.¹⁸

8. It is not sufficient that laws meet the formal and procedural requirements of being duly enacted, clear and so on. In terms of content, the law must provide protection for fundamental human rights such as the prohibitions of torture and slavery, freedom of expression, freedom of religion, and right to family life. Whatever proposals may be brought forward for a Bill of Rights for the UK, these fundamental human rights remain matters that should be protected across all areas of UK law.

Legal right and liability determined by application of the law and not the exercise of discretion

9. The rule of law can be understood in contrast with the ‘rule of man’, meaning a society in which one or more individuals rules arbitrarily exercising power unconstrained by law where the ruler(s) are above the law.

10. The entitlement of citizens to Government grants such as welfare and the legal obligations of citizens must be sufficiently defined in law, and not subject to the arbitrary exercise of power. By way of a simple example, ‘We expect the taxes we pay to be governed by detailed statutory rules, not by the decision of our local tax inspector. He has the duty to apply the rules laid down, but cannot invent new rules of his own.’

11. Government decision-makers and officials will inevitably need to exercise discretion when making decisions, but the rule of law requires that such discretion should not be unconstrained and, in effect, arbitrary.

The Government (ministers and public officers) must exercise their powers properly

12. In the UK, Parliament makes laws and the Executive (the Government) applies those laws.

13. Lord Bingham rightly said:

This is important. When Parliament, by statute or statutory regulations, empowers a specific officer (such as a secretary of state or the Director of Public Prosecutions or the Director of the Serious Fraud Office) or a specific body (such as a housing authority, a social services department, a county council, a health authority, a harbour board or the managers of a mental hospital) to make a particular decision, it does not empower anyone else. It expects that officer or body to follow any guidelines on policy that may have been laid down, but expects that the officer or body will exercise his or its own judgment, having regard to any relevant experience and the availability of resources. It does not expect, or intend, that the decision should be made by some judge who may think that he or she knows better. But there is a presumption that the decision made will be in accordance with the law.

14. The accepted tests for judicial review of Government decisions reflect this principle by enabling courts to overturn a Government decision where it is unlawful and has therefore departed from the intention of Parliament. The court does not substitute its decision for the Government official’s decision, rather, the court sets the decision aside if, for example, the decision-maker exceeded their power.

15. This rule of law principle supports and reinforces parliamentary sovereignty by articulating the need for the Executive to act in accordance with the intentions of Parliament.

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Dispute resolution

16. Given that everyone is subject to and entitled to protection by the law, a consequential rule of law principle is that ‘Means must be provided for resolving, without prohibitive cost or inordinate delay, bona fide civil disputes which the parties themselves are unable to resolve.’

17. Cost and delay of court proceedings are enemies to the rule of law. Legal aid serves an important role by enabling poor litigants to have access to the legal system.

18. The more affordable and expeditious dispute resolution is, the better the rule of law is served, albeit that this goal may remain elusive.

Adjudicative procedures provided by the state should be fair

19. This principle may be described as the right to a fair trial, however, the rule of law principle extends beyond the context of criminal law to all public and civil law trials.

20. The independence of the judiciary and legal profession are necessary requirements for trials to be fair.

21. Various rules serve to protect the fairness of trials. In the criminal law context, these rules include that trials should be conducted in public, and an accused is to be presumed innocent until proven guilty.

The rule of law in the international legal order

22. In order to realise a rules-based international order, it is important that states comply with their obligations under international law. Lord Bingham explained that

> although international law comprises a distinct and recognizable body of law with its own rules and institutions, it is a body of law complementary to the national laws of individual states, and in no way antagonistic to them; it is not a thing apart; it rests on similar principles and pursues similar ends; and observance of the rule of law is quite as important on the international plane as on the national, perhaps even more so.

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