“Thus our constitutional settlement has become unbalanced, and the power to restrain legislation favoured by a clear majority of the House of Commons has become much weakened, even if exceptionally, such legislation were to infringe the rule of law as I have defined it. This calls for consideration as a serious problem”. Lord Bingham, *The Rule of Law*, London: Allen Lane, Penguin, 2010 p.169.

**Introduction**

The main focus of the submission relates to rule of law considerations relevant to the procedures and oversight of delegated legislation. The Government’s proposed Great Repeal Bill is intended to contain delegated powers to enable the Government to adapt any laws on the statute book to take account of changes in the UK’s relationship with the EU. The proposed Great Repeal Bill will repeal the European Communities Act 1972 and transpose European Law into UK domestic law. Such proposals have constitutional significance, particularly for the application of rule of law principles. The precise issue is how to improve and strengthen existing parliamentary procedures over delegated or subordinate legislation.

Many rules or principles such as avoiding retrospective legislation¹, or that retrospective legislation should be narrowly defined² and that laws should not retrospectively interfere with obligations when the liberty or criminal liability of the citizen is at stake,³ are easily identified with rule of law principles. Related issues of certainty and accessibility of laws are also important. It is clear that delegated legislation is amenable to judicial review but this is of limited utility in ensuring scrutiny.⁴

**Rule of Law Considerations and Delegated Legislation**

Delegated legislation⁵ has been the subject of various reports and inquiries, most notably the Renton Inquiry in 1975⁶, the Hansard Commission Chaired by Lord Rippon in 1993⁷ and more recently a Hansard Report.⁸ In December 2015 Lord Strathclyde conducted a review specifically directed to the role of the House of Lords and the primacy of the House of Commons⁹ in delegated legislation.

Emerging from previous House of Lords Select Committee Reports are a number of principles or standards that relate to safeguards for the operation of the delegation of

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¹ Reports 7 and 56
² Report 77
³ Report 7
⁴ Leading cases include Ahmed and Ors v HM Treasury (Justice Intervening Nos 1 and 2) (2010 UKSC 2 [2010] 2AC 544).
⁵ Useful statistical data is available from House of Lords Library Note: delegated Legislation in the House of Lords since 1997 LLN 2016/001 (5th January 2016).
legislative powers. Such standards have a strong resonance with the rule of law principles. There are a number of underlying principles as follows:

- Laws that contain delegated powers should strike a balance between the desire for effectiveness and the safeguards needed to ensure constitutional propriety;
- Constitutional safeguards should be added whenever possible” to a delegated ministerial legislative power without undermining the policy of a bill” and that such safeguards should be respected;
- Ministers should not be able to suspend legal powers by giving directions; instead orders, which are subject to parliamentary oversight should be used;
- Provision should be made for Parliament to be informed promptly of all ministerial exercise of legislative powers;

Underlying principles can also be identified with the use of Henry VIII powers, related to the rule of law, including the following:

- Ministers should provide Parliament with their justifications for proposing the delegation of legislative powers;
- Widely–drawn delegations of legislative authority cannot be exclusively justified by the need for speed;
- The justification for a Henry VIII power should refer to the specific purpose that it is designed to serve;
- In the use of “ incidental and consequential “ Henry VIII powers in relation to constitutional legislation, the Government should provide a clear and detailed account to Parliament of how and why it intends to exercise that power.

There are also related principles on the appropriate use and also limitations of delegated powers. Particularly relevant are the following:

- Henry VIII clause should be limited so that they cannot be used to alter constitutional arrangements;
- Secondary legislation is not the appropriate way to proceed with significant constitutional change;
- Henry VIII powers that relate to a constitutionally sensitive subject-matter should use a super-affirmative parliamentary procedure.

11 Report 64
12 Report 51
13 Report 64
14 Report 25
15 Reports 25, 27, 77 and 138.
1616 Report 30
17 Reports 51 and 77
18 Report 56
19 Reports 25,39 and 51
20 Reports 138 and 145
21 Report 139.
The main submission is that the inquiry into delegated legislation is an opportune moment to refine and consolidate many of the above principles into a working standard that is fit to address the future intended use of delegated powers. It is estimated that since 1992 the number of delegated legislation SIS’s are roughly 3,000 per year. Only about 1,200 are submitted to parliamentary scrutiny. In the last 65 years just 16 SIS’s out of over 169,000 or 0.1% have been rejected. The quality of consultation is variable as is the drafting and standard of Explanatory Memorandums. The main findings of the recent Hansard Society Report on Delegated Legislation, are that the way Parliament deals with delegated legislation is unsatisfactory. A major reason is that such scrutiny that there is, is not systematic or clear. Indeed the entire area leaves much to the random interventions and sporadic periods of activity followed by inaction. The Report concluded that the absence of “objective criteria” is apparent with many parliamentarians willingly admitting that they often do not understand the procedures which are “complex and often illogical”. The procedures are assigned to one of three forms of scrutiny with at least 16 variations on the three procedures and at least 11 forms of strengthened procedure alone. Concerns about the adequacy of Parliamentary scrutiny are heightened when considered in the context of the proposed Great Repeal Bill.

The rule of law and the proposed Great Repeal Bill and the use of delegated powers

The Government indicated in October 2016 that it favours a Great Repeal Bill with the sole purpose of transposing EU law into UK law and repeal the European Communities Act 1972. The latter has been acknowledged as a “constitutional statute” that is indicative of its special status and significance. The use of delegated powers is likely to be extensive, although there are many unknowns. These include making adjustments in the light of negotiations with the EU; making necessary changes to EU related legislation if it is at variance with the policy making of Government; ensuring that any transitional arrangements are in place. The case for an extensive use of delegated powers is largely a pragmatic and political one based on timescales and a preference for the more simplified forms of scrutiny in contrast to the use of primary legislation. The practical case is that the Government needs “wriggle room” to ensure that there is adequate legal coverage to deal with negotiations as matters proceed. It is generally accepted that delegated legislation attracts less scrutiny than primary legislation. It is inevitable that many of the delegated powers will have Henry VIII powers including widely drawn powers to cover different eventualities. It is clear that the scale and extent of the delegated legislative powers envisaged will be unprecedented coming from one generic legislative source and also with such a profound impact on the ability of Parliament to


24 These are the negative resolution procedure, the affirmative resolution procedure or a form of strengthened procedure.

25 Gov.uk Government announces end of European Communities Act (2nd October 2016).


27 See House of Commons Briefing Paper Legislating for Brexit: the Great Repeal Bill Number 7793 (21st November 2016). Many of the ideas set out in this paper have been influenced by the arguments made in the paper and are summarised here for ease of analysis.
scutinise. Inevitably this will prompt political and constitutional debates. The proposed Great Repeal Bill raises rule of law principles in the context of ensuring that there is adequate parliamentary oversight. It is possible to argue that the following rule of law principles should apply to the procedures associated with Henry VIII powers:

- Limits should be set on the delegated powers applicable to particular purposes or subject matter;
- Limitations on any powers that may be used to restrain individual rights should be scrutinised and overseen by Parliament;
- Drawing up an appropriate set of procedures that allows adequate Parliamentary scrutiny;
- Any use of sunset or sunrise clauses setting limitations on unfettered ministerial discretion should also be considered and used to ensure adequate scrutiny of unbridled executive powers.

EU membership is a complex and technical arrangement that engages with many regulatory bodies within the EU that will take considerable time to “un-package”. There are many levels of complexity including the mode of drafting of EU regulations and Directives that is distinct from the English form of legislative drafting. Translating these into precise English language will be demanding especially with conceptual differences between legal systems. Transposing EU law into UK law is not straightforward as many EU provisions have been amended and revised on a regular basis, keeping up to date will not be easy. The variety of EU agencies and organisations add further complexity especially when there are continuous and detailed interaction with EU institutions that shape and interpret the law. The scale of the enterprise is unprecedented and setting a realistic time-table is difficult as unpredictable events may interpose. Making legislation continue to function is likely to be difficult until the final negotiations are concluded. There is no certainty that this will be achieved within the allotted two year time-table. There is every expectation that there will have to be a transitional period of an undetermined duration. There is also the vexed question of how interpreting existing EU law under the European Court of Justice will continue to influence UK courts. In addition there are many pieces of UK primary legislation that will need to be interpreted and adapted after Brexit. Maintaining EU obligations before and up to the departure Treaty is likely to take considerable effort. The publication of the Great Repeal Bill should be considered carefully in terms of the extent it will rely on delegated powers.

**An opportune constitutional moment to ensure transparency over delegated powers**

The scale of the range of delegated powers is likely to be large. In the absence of any clear time-table for withdrawal there are many possibilities. Withdrawal itself will require, at least secondary legislation once the Treaty authorising withdrawal is signed. There may be a need for secondary legislation at different points in the negotiation process. This places on Parliament strong incentives to ensure that appropriate procedures are in place in advance. The government needs to be clear on its scope and purpose at the very least to ensure that the justification or otherwise of the use of delegated powers can be assessed. The appropriateness

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28 These are a composite of points summarised from the House of Commons Briefing Paper. There is also some consistency in such principles emerging from previous House of Lords Reports.

29 One example is the European Medicines Agency that sets the complexity of the problem of mutual recognition.
of secondary or primary legislation is the key starting point and the will of Parliament has to be clear. One example is over the question of how rights might be affected. Here the courts will not accept that Parliament intends rights to be affected unless this is clearly made out and expressly stated. Otherwise there is a presumption that rights adversely affected would be illegal, a clear rule of law issue. Past debates such as the passage of the Legislative and Regulatory Reform Bill 2005, is a good example of the rule of law concerns about using delegated legislation when primary legislation ought to have been used. Lessons from the debate on the Bill and the use of delegated powers that do not act excessively are pertinent to the debate on the Great Repeal Act. Principles such as the use of only proportionate powers; setting limits on interfering with any existing protections and rights; and limitations on amendments that have constitutional significance are all relevant. Setting substantial safeguards including protecting human rights is a minimum for considering the appropriate parliamentary procedures that will ensure adequate scrutiny over executive discretion.

It is clear that the choice of the most appropriate procedure for delegated powers is critical. There are two possibilities – negative or positive procedures. The negative procedure allows either House within 40 days passing a motion that the instrument may be annulled. The affirmative procedure allows an instrument to be laid before Parliament in draft and must be approved by both Houses. The Lords normally debate all affirmative instruments. In addition there are various enhanced procedures that may allow the relevant select committee to scrutinise the instrument and under this arrangement there is a final version open for scrutiny. The “super affirmative” resolution was used for the Legislative and Regulatory Reform Act 2006. The benefits are that it allows public transparency and scrutiny, input from the valuable expertise in committees and an opportunity for the Government to amend or modify the proposed instrument. The approval of both Houses is also a feature allowing time for checking and analysis.

Recommendations

Rule of law considerations provides compelling arguments for Parliament to seize the initiative and adopt rigorous scrutiny of delegated powers relevant to the Great Reform Bill. The constitutional status of the European Communities Act 1972 requires substantial and adequate scrutiny over its repeal. This includes:

- Consideration of a suitable form of a super “affirmative scrutiny” that is suitable to meet the needs of due process and transparency;
- Designing a suitable enhanced scrutiny procedure consistent with the constitutional significance of the bill is important and an opportunity for Parliament to advance rule of law principles and ensure their observance;
- Rule of law principles articulated by many select committee reports might form the basis of a set of constitutional standards as a guide in setting priorities and ensuring that both Houses of Parliament provide substantial scrutiny over the Great Repeal Bill;
- Vetting the Great Repeal Bill will require careful scrutiny of the use of delegated powers and how best Parliament may provide scrutiny;

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31 See :section 3 of the Legislative and Regulatory Reform Act 2006.
• Setting time-scales and ensuring that procedures are appropriate to meet the needs of the Great Repeal Bill will encourage good practice and oversight;
• Appropriate time for debate will require both Houses to set aside adequate time as well as ensuring co-operation between select committees. The role of the Liaison Committee will be pivotal in fostering appropriate co-operation between the relevant select committees;
• The administrative allocation of principles between different committees needs the attention of the relevant Parliament authorities including the Clerk of the Houses of Parliament, to provide resources and the use of constitutional expertise;
• New procedures are needed to ensure that the Great Repeal Bill is given adequate scrutiny. Lessons learned from the passage of the Legislative and Regulatory Reform Act 2006 should be considered in the specific context of the complexity of the Brexit debate;
• The scope of the Great Repeal Bill is such as to warrant a comparable Parliamentary response in keeping with the constitutional status accorded to the European Communities Act 1972.

This is a constitutional moment that might provide both Houses of Parliament with the opportunity to enhance the rule of law principles at a time of economic uncertainty and unpredictability.

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