Written evidence submitted by the University of Sheffield (GRB 05)

Introduction

1. We are both academic researchers with an interest in public law. We are currently researching the courts’ powers, rooted in the common law, to review and potentially strike down secondary (or ‘delegated or ‘subordinate’) legislation. Drawing upon this research (and other, related research being undertaken),¹ this short submission aims to draw the Committee’s attention to the treatment of secondary legislation by the courts in the context of applications for judicial review.

2. We accept (and will therefore not comment upon) the fact that giving effect to Brexit will, for practical reasons, likely require the use of much secondary legislation.² Instead, we confine our remarks to the possible impact of judicial review on the production of secondary legislation. Specifically, it is submitted that:

   (i) The courts’ present powers to review secondary legislation have a sound constitutional basis;

   (ii) The courts have clearly identified the legal principles used to determine the validity of secondary legislation, passed under delegated powers; and

   (iii) Clear awareness of the scope of the courts’ powers at the legislative stage, both in enacting the Great Repeal Bill and in the subsequent production/scrutiny of any secondary legislation, is of great importance to promoting legal certainty.

The Constitutional Basis of the Judicial Review of Secondary Legislation

3. While the doctrine of Parliamentary Sovereignty has precluded the courts from judicial review of primary legislation, the jurisdiction of the courts to review and strike down secondary legislation has been accepted for a number of years. This has included secondary legislation adopted with some degree of Parliamentary scrutiny under the affirmative and negative resolution procedures.³ In a recent Supreme Court case (R (On the Application of the Public Law Project) v Lord Chancellor [2016] UKSC 39), Lord Neuberger, in a judgment with which all other members of the seven-Justice panel agreed, provided a clear explanation of the constitutional basis for the courts’ powers in this respect:

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¹ Joe Tomlinson is also researching the impact of Brexit on the UK’s bureaucratic system for a British Academy/University of Cambridge initiative.
² We very much welcome, however, this Committee’s inquiry. While delegated legislation is a necessary part of modern government, there should be vigilance as to how it is used. This is especially so in the post-Brexit context and in relation to Henry VIII powers.

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Although they can be said to have been approved by Parliament, draft statutory instruments, even those subject to the affirmative resolution procedure, are not subject to the same legislative scrutiny as bills; and, unlike bills, they cannot be amended by Parliament. Accordingly, it is well established that, unlike statutes, the lawfulness of statutory instruments (like other subordinate legislation) can be challenged in court... In declaring subordinate legislation to be invalid in such a case, the court is upholding the supremacy of Parliament over the Executive. That is because the court is preventing a member of the Executive from making an order which is outside the scope of the power which Parliament has given him or her by means of the statute concerned.\(^4\)

4. The analysis in these two paragraphs is by no means new but it clearly and succinctly outlines a convincing justification for the role of the courts in scrutinising, and even quashing, secondary legislation.\(^5\) That justification could be understood as having two components:

a. The rationale for the justiciability of secondary legislation: the limited Parliamentary scrutiny of it and the inability of Parliament to make amendments to it; and

b. The rationale for the power to quash secondary legislation: to uphold Parliamentary Sovereignty.

**The Scope of Review of Secondary Legislation**

**Generally**

5. The test employed by the courts for determining the legality of secondary legislation is essentially a question of how the primary enabling statute (for present purposes this is the proposed Great Repeal Act), is interpreted. Recently, Lord Neuberger, in the *Public Law Project* case referred to above, put the approach in the following terms:

*Subordinate legislation will be held by a court to be invalid if it has an effect, or is made for a purpose, which is ultra vires, that is, outside the scope of the statutory power pursuant to which it was purportedly made... Accordingly, when, as in this case, it is contended that actual or intended subordinate legislation is ultra vires, it is necessary for a court to determine the scope of the statutorily conferred power to make that legislation.*\(^6\)

6. This summation of the well-known *ultra vires* principle of judicial review identifies a two-stage methodology, requiring the court to answer the following questions:

\(^4\) *R (on the Application of the Public Law Project) v Lord Chancellor* [2016] UKSC 39 [20-23].


\(^6\) *Public Law Project* (n 4) [23].
a. what is the scope of the power granted by Parliament in the parent clause of the primary legislation; and

b. does the effect or purpose of the secondary legislation fall within the scope of the power identified?

7. It should be noted that the test is one of ‘effect or purpose’, therefore a piece of secondary legislation can be unlawful even if it indirectly results in the powers delegated by Parliament being expanded by the person creating the secondary legislation in question.

Henry VIII Clauses

8. Parent clauses permitting the amendment of the primary legislation in question (so-called ‘Henry VIII’ powers), a modern example being s9(2)(b) Legal Aid, Sentencing and Punishment of Offenders Act 2012, have long been seen as dubious as a matter of good constitutional practice. The courts’ have been especially cautious in their treatment of such provisions:

> When 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.

While ‘normal principles of statutory construction’ apply to the interpretation of Henry VIII powers, ‘the more general the words by Parliament to delegate a power, the more likely it is that an exercise within the literal meaning of the words will nevertheless be outside the legislature’s contemplation’.

9. Beyond conventional interpretive principles, the courts also apply additional principles when interpreting Henry VIII clauses. These may be called the two principles concerning ‘doubt’:

a. The first principle is that it is ‘legitimate to take account of the fact that a delegation to the Executive of power to modify primary legislation must be an exceptional course and that, if there is any doubt about the scope of the power conferred upon the Executive or upon whether it has been exercised, it should be resolved by a restrictive approach’.  

\footnote{Ibid [25].}

\footnote{Ibid [26].}

\footnote{Ibid [27], citing McKiernon v Secretary of State for Social Security, The Times, November 1989; Court of Appeal (Civil Division) Transcript No 1017 of 1989. This principle is said to apply where either the negative or affirmative resolution procedures were adopted.}
b. The second principle is that where there is 'little room for doubt about the scope of the power' then the scope of the power should not be cut down by an artificial reading.\textsuperscript{10}

10. Prospective Henry VIII clauses, namely clauses that create a power for the Executive to modify primary legislation passed \textit{after} the parent Act, are considered to present particular constitutional difficulties. One prominent example is section of the 10 Human Rights Act 1998. Granting such power has been stated to be ‘remarkable in that it allows another body or person to alter statutes that have not yet been passed; Parliament is creating a mechanism that may be used to fetter its future incarnations’.\textsuperscript{11}

\textbf{Promoting Legal Certainty and The Need for Awareness of the Legal Framework Applicable to Secondary Legislation}

11. The UK’s withdrawal from the EU, and the necessary ‘untangling’ of a broad range of laws, has the potential to significantly undermine certainty within the legal systems of the UK. This, in turn, risks undermining the Rule of Law, a fundamental principle of the UK’s uncodified constitution. However, it is submitted that awareness of the legal framework applicable to secondary legislation amongst all relevant actors, including those developing the Great Repeal Bill and Ministers empowered to pass secondary legislation, may assist in the mitigation of such uncertainty and therefore promote the Rule of Law.

12. Based on the legal principles identifiable in case law, it is submitted that the following measures may increase legal certainty by reducing the likelihood of legal challenge:

(i) Clear identification of the precise scope of the powers delegated in the parent clauses contained in the Great Repeal Bill;

(ii) Avoidance of the use of Henry VIII clauses within the Great Repeal Bill unless strictly necessary;

(iii) If Henry VIII clauses must be utilized:

\hspace{1cm} a. There should be particular reluctance to grant prospective Henry VIII powers to the Executive; and

\hspace{1cm} b. They ought to be drafted in the narrowest possible terms (\textit{e.g.} instead of one single clause permitting Ministers to modify primary legislation to enable withdrawal from the EU, a 'sectoral' approach might be better adopted. This could restrict the scope of a Henry VIII clause to a specific area of regulation, and provide more detailed and tailored guidance on how it may be exercised).

\textsuperscript{10} Public Law Project (n 4) [28], citing \textit{R v Secretary of State for the Environment, Transport and the Regions, Ex p Spath Holme Ltd} [2001] 2 AC 349, 383.
