COMMONWEALTH ASSOCIATION OF LEGISLATIVE COUNSEL

THE LOOPHOLE

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CALC Council

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THE LOOPHOLE

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Editor—Duncan Berry, Secretary, Commonwealth Association of Legislative Counsel

CONTENTS

Editor's notes

This issue

Hello, everybody. I apologise for the lateness of this issue of *The Loophole*, which I had hoped to publish in 2005, about the time of the last CALC Conference in London. However, because of the fluid situation with one of the articles, this was not possible. This issue contains articles on Henry VIII clauses; the *Legal and Regulatory Reform Act 2006* (UK); Private Members' Bills; the role of the European Commission's legal revisers in drafting European Community legislation; writing a legal newsletter; and the effect of poorly written legislation in a bilingual legal system.

Some of you who presented papers at the 2005 CALC conference might be wondering why this issue does not include any of those papers. The reason is that, apart from the article on the *Legal and Regulatory Reform Act 2006*, the other articles had been written or were in the course of preparation at the time of the conference and we are now trying to catch up. George Tanner, Chief Parliamentary Counsel of New Zealand and a member of the CALC Council, has undertaken to produce a further issue of *The Loophole*, which will contain edited versions of some of those papers. I hope to arrange for publication of a further issue of *The Loophole* containing the remaining papers that were presented at that conference.

The CALC Conference and General Meeting 2007

In accordance with the CALC Constitution, a CALC conference and general meeting will be held in conjunction with the Commonwealth Law Conference to be held in Nairobi in September 2007. The conference and general meeting will immediately following the CLC, with sessions scheduled for: Thursday, 13 September (afternoon); Friday 14 September (all day); and Saturday 15 September (morning). The likely venue for the proceedings is the 680 Hotel in Nairobi.[1] It is also planned to hold a pre-conference reception for members on the evening of Wednesday, 12 September, and a CALC dinner on the evening of Friday, 14 September at a local restaurant.

The Council is assembling an interesting program, including the following:

- Quality control mechanisms, including the involvement of other professionals in the drafting process;
- Master drafting classes, the focus of which is likely to be a Biosecurity Bill;
- Enforcement mechanisms (including alternatives to criminal penalties);
- Best practices in drafting penal provisions;
- "Wordsmith or counsel: what is the role of the legislative drafter?";
- The effect of judicial interpretation on legislative drafting;

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[1] This hotel is very reasonably priced by Nairobi standards and also has the advantage of being close to the venue for the Commonwealth Law Conference.

- "Managing increasing government expectations with respect to legislation while maintaining quality";
- "Should a centralised legislative drafting office be decentralised?";
- Techniques for simplifying legislative language.

Once again, Lady Justice Mary Arden, has agreed to be a speaker at our conference and is expected to speak on a topic of interest to CALC members. However, speakers on the topics mentioned above are still required, so if you have something interesting to say about any of those topics, please contact Lionel Levert or me as soon as possible.

Electronic versions of articles published in *The Loophole* between 1983 and 1999

Articles published in *The Loophole* since 1999 have been readily available on CALC's current website. However, because issues of *The* Loophole published between 1983 (when CALC was established) and 1999 were not available in electronic form, articles appearing in those issues are not easily accessible. For some time the CALC Council has been investigating how copies of those articles can be made more widely available. Fortunately, Nilmini Dissanayake, Deputy Law Draftsman in the Hong Kong Department of Justice, has a complete set of *Loopholes* published during that period and she is now having them scanned and converted to electronic form. We hope to have them available on the CALC website (www.opc.gov.au/CALC) before the middle of 2007. On behalf of CALC, I should like to express our appreciation for Nilmini and her assistants in undertaking the work in involved.

Keeping legislation up to date

Many members will have read about the British Government's anti-terrorism legislation. According to a recent report in *The Times*, this legislation is to be a model for far-reaching reforms to United Kingdom legislation. The report goes on to say that, assuming the Prevention of Terrorism Bill is enacted, the British Government has undertaken to have an independent review of the Act after it has been in operation for a while to see how the powers conferred by the legislation were used. Because many members of the Parliament had misgivings about some of the powers conferred by the legislation, some of them supported a move to insert a "sunset clause" into the Bill, but this was resisted by the Prime Minister. Ironically, the use of sunset clauses[2] in primary legislation is central to legislative reforms to which the current British Government's business managers are committed.

Legislation of most jurisdictions may well remain in force for 50 years or more. A particular Act

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[2] For those readers unfamiliar with the concept, a sunset clause is one that sets a date for the expiry of the legislation in which the clause appears or provides for the legislation to remain in force only for a specified period after commencement. In order for the legislation to remain in operation after that date or the end of that period, the clause must either be repealed or be amended to extend the operation of the legislation until a later date or for a further period.

might be amended a great number (even hundreds) of times during the course of its life.[3] Unless such an Act is amended textually and then reprinted as if it were a new Act, it will soon become unintelligible. Even relatively recent legislation can be rendered obsolete because of technological change. One way of keeping the operation of an Act under review is to include a sunset provision, so that the Minister who is responsible for administering the Act will be forced to present a Bill to the legislature before the Act expires if it is to continue in operation.[4] There is, however, a possibility that the date set for the Act to expire might arrive without anyone realising it, unless some official is given the specific responsibility of bringing the matter to the attention of the relevant Minister well before the expiry date.[5] Apart from Tasmania, it is rare to find Acts containing sunset provisions. However, legislation in a number of Australian States provides for principal subordinate legislation[6] made in those States to expire after a specified period and for its remaking (usually after a sophisticated review process). In New South Wales, for example, a statutory regulation expires after 5 years and cannot be remade without a regulatory impact statement having been prepared in respect of the operation of the regulation and the public being invited to submit their comments on any proposed regulation intended to replace the expiring legislation. Although this system gives New South Wales parliamentary counsel a considerable amount of extra work, the system seems to work well. As far as I am aware, this is also true of other Australian jurisdictions that have legislation providing for the expiry of their subordinate legislation. My observation is that these procedures have been generally successful in ensuring that the subordinate legislation of those jurisdictions is kept up to date.

Another mechanism designed to bring about the review of an Act is the inclusion in the Act of a review provision directing the relevant Minister to carry out a review of the Act after it has been in force for (say) 5 years. Such provisions are commonly found in principal New South Wales Acts enacted since the beginning of the 1990s. However, I have been unable to discover whether such reviews are in fact carried out. But, assuming that these reviews are indeed carried out, they will provide the information that Ministers and their officers need in order to prepare instructions to

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3 For example, the *Income Tax Assessment Act 1936* of the Commonwealth of Australia has been amended by no fewer than 466 separate Acts (73 of them amended, in their effect on the Principal Act, by one or more other Acts!) and is still in force (although it is now being progressively replaced by the *Income Tax Assessment Act 1997*).

4 However, sunset provisions should be included only in principal Acts (i.e. Acts dealing with a single topic, such as companies, social welfare or prisons). It is not desirable to insert a sunset clause into an amending Bill, particularly if all of the amendments are textual. This is because the amendments merge with the principal Act as soon as the amending Act comes into operation.* The amending Act then becomes spent, so there is nothing of substance to expire. On one occasion during the early 1980s, the Tasmanian Legislative Council inserted a sunset clause into an Act amending the Tasmanian Ambulance Services Act. The Council's intention was to impose a time limit on the operation of the amendments themselves, but, by inserting a date for the expiry of the amending Act, it almost certainly failed to achieve its objective.

[*This is the better view, but, some parliamentary counsel in the United Kingdom disagree with it. *Editor*]

5 In the early 1980s, it was the practice of the Tasmanian Legislative Council to insert sunset provisions into Bills. Several of the Acts resulting from those Bills inadvertently expired because the relevant Minister had not been alerted in time to introduce a Bill into the Tasmanian Parliament to extend the operation of those Acts.

6 I.e. regulations, rules and by-laws.

legislative counsel to draft amending Bills that will ensure that the Acts concerned are kept up to date.

Returning to the recent newspaper report, it is understood that it is proposed to establish a process under which members of both Houses of the British Parliament would carry out post-enactment scrutiny of Acts. The reforms were to be flagged by the Leader of the House of Commons in response to a report of the Constitution Committee of the House of Lords, which had urged the conduct of triennial reviews of laws by ministries. It is believed that an inquiry by the Law Commission of England and Wales is currently under way with a view to defining the task, and Phillip Woolas, the Deputy Leader of the House of Commons, is quoted as saying that the suggestions of the Law Commission as to the way forward will lead to significant changes in the way Parliament operates. If a system for the post-enactment scrutiny of Acts is ultimately established, it will make a significant contribution towards ensuring that United Kingdom Acts remain coherent and relevant to the functioning of British society.

There is no doubt in my view that legislation, both Acts and Regulations, becomes out of date over time. Sometimes this is because the meanings of words change; sometimes it is because social attitudes change; and sometimes it is because of other factors, such as technical change. There is therefore a need for legislation to be reviewed periodically so as to ensure that it can be updated and so function optimally. For example, the advent of computerisation has resulted in huge changes to the way public administration is carried out and commercial businesses operate. Many laws enacted before the computer revolution fail to take these changes into account. So there is a constant need for review. The precise nature of the mechanism to be adopted probably does not matter as long is it is effective in achieving its objective.

Acknowledgment

I should like to acknowledge the assistance of Jeremy Wainwright (a member of the CALC Council) in assisting with the production of this issue.

Democratic reform and private members' business: Shifting sands or paradigms?

John Mark Keyes[1]

Introduction

When the Martin Government took office on December 12, 2003, one of its first official acts was to announce plans for enhancing public confidence in our system of government. It issued a statement entitled *Governing Responsibly: A Guide for Ministers and Ministers of State*[2] setting out key principles of responsible government in Canada as well as the Government's approach to democratic reform. Less then two months later on February 4, 2004, the Government released further details with a second statement entitled *Ethics, Responsibility, Accountability: An Action Plan for Democratic Reform*.[3]

These two statements cover many aspects of democratic government. In this article, I focus on one that lies at the core of democracy: the role of elected Members of Parliament[4] in making laws, more particularly *Private* Members – those who sit in opposition or on the back-benches of the Government outside the Cabinet. I will provide an overview of the role of Private Members in law-making and the steady progress they have made towards making this role more meaningful. I will then comment on how this progress has been most recently realized in the enactment of Private Members' Bills and conclude with some suggestions for those – whether within or outside government – who may be involved in the enactment of such Bills.

Role of Private Members

Up until the mid-1980s, the law-making process in the Canadian Parliament was dominated, if not monopolized, by the Cabinet. This is a general characteristic of parliamentary government based on the Westminster model. The Government is formed by those who command the confidence of the lower house. Confidence has been most effectively harnessed through the organization of political parties. Party discipline allows the leadership to maintain confidence by controlling the voting intentions of elected Members in house proceedings, including those relating to law-making. The Cabinet decides the position that party Members are to take on all questions before the house and party Members are expected to vote accordingly or else risk expulsion from the party and the loss of the advantages that membership in the governing party entails. The Government's control of the lower house has also meant that its time is devoted to its own Bills to the exclusion of all others.

This feature of parliamentary government in Canada has produced a simmering discontent on the back-benches. The Report of the Special Committee on Reform of the House of Commons (McGrath Report)

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1 Director, Legislative Policy and Development, Legislative Services Branch, Department of Justice (Canada)

2 http://www.pco-bcp.gc.ca/default.asp?Language=E&Page=Publications&doc=guidemin/guidemin_e.htm.

3 http://www.democraticreform.gc.ca/actionplan/actionplan_e.htm.

4 This paper does not consider the role of Senators, which has also evolved over recent years and is, of course, the subject of considerable debate in terms of their mandate and selection.

in 1985 voiced this discontent and recommended reforms to parliamentary procedure. Although some were accepted,[5] the discontent continued, prompting further reforms, the latest of which is a provisional standing order adopted on March 17, 2003.[6] However, these too failed to satisfy many Members and in the dying days of the Chrétien Government, Mr. Martin garnered considerable support in his leadership quest by listening sympathetically to their complaints and promising action if chosen as leader. Given this constituency of supporters, it was hardly surprising that his first official statement after becoming prime minister promised to enhance their role in the law-making process.

Previous process reforms

To understand the current Government's approach to democratic reform and its implications for the law-making process, it is first necessary to appreciate what Private Members had already achieved in reforming the law-making process.[7] The process for preparing Government Bills is complex and does not involve Private Members until the caucus briefings that take place just before introduction.[8] Drafting must be approved by the Cabinet through the submission of a Memorandum to Cabinet. Bills are drafted by the Legislation Section of the Department of Justice on instructions provided by departmental officials and counsel. The Privy Council Office manages the Cabinet approval process and supports the Government House Leader in the parliamentary process.

Since the late 1980s, committees have been increasingly active in amending Government Bills. It is now quite rare for a Government Bill to be enacted without amendment and many are subject to substantial changes. In addition, a new procedure for referring a bill to committee before second reading was instituted in the 1990s, allowing greater scope for amendment, unconstrained by the approval of the principle of the bill. However, the procedure was rarely used.

Just as the preparation of Government Bills does not involve Private Members, the preparation of Private Members' Bills correspondingly takes place independently of the Government. They originate in the offices of Private Members, are developed by their staff, often with the assistance of researchers from the Library of Parliament, and are drafted by legislative counsel in the Office of the House of Commons Law Clerk and Parliamentary Counsel.

Chapter IV of the *Standing Orders*[9] of the House of Commons provides one hour of debate each day for

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5 See Nora S. Lever, "New Rules for Private Members' Business", *Canadian Parliamentary Review*, Vol. 9 no 3, 1986 at http://www.parl.gc.ca/infoparl/English/09n3_86e.htm.

6 See "The New Rules at a Glance" at http://www.parl.gc.ca/information/about/process/house/Private_Members_Business/PMB-e.htm.

7 For a general description of this process, see the House of Commons *Précis of Procedure*, chapter 11 at http://www.parl.gc.ca/information/about/process/house/precis/chap11-e.htm.

8 See *Guide to Making Federal Acts and Regulations* at http://www.pco-bcp.gc.ca/default.asp?page=publications&Language=E&doc=legislation/lmg_e.htm.

9 http://www.parl.gc.ca/information/about/process/house/standingorders/toc-e.htm.

the business of Private Members. This is critical since a particular item cannot proceed unless a certain amount of time is devoted to it. Given the number of Private Members and the limited time allocated to their business, only relatively few Private Members' Bills can receive the attention of the House if any of them is to proceed through the parliamentary process.

Chapter XI of the *Standing Orders* elaborates on how Private Members' Business is to be dealt with. It provides that at the beginning of each Parliament, the names of 30 Members are drawn to establish the "order of precedence". The Member at the top of the order has their item (either a bill or a motion) debated for one hour and then drops to the bottom to await another turn as the other Members' items reach the top of the order and are debated. [10] A bill must be debated for 2 hours at second reading, at which time it is put to a vote on whether to refer it to committee. It typically takes 6 weeks of sitting days (2 to 6 calendar months) for an item to work its way up the order to the top. However, Members are allowed to change places on the order of precedence. Thus, with a little help from their friends, their items can be debated more quickly.

It is also worth noting that all Private Members' items are now votable, unless the Subcommittee on Private Members' Business decides otherwise. Its decision is based on criteria adopted by the Standing Committee on Procedure and House Affairs. The criteria provide that bills and motions are non-votable if they deal with matters outside federal jurisdiction, violate the Constitution or concern questions that have already been voted on or are items of Government Business.[11]

New approach

Against this backdrop of existing procedures, the current Government laid out its approach to democratic reform. The first element has to do with how it will deal with Private Members' Business and confirms a practice that was already in place under the previous Government. The Government determines its position on each Private Member's item. Ministers, working principally through their Parliamentary Secretaries, are responsible for ensuring that Members of both the governing party and the opposition parties are informed of this position for the purpose of seeking their support, either to oppose the item or put forward amendments. This means that persuasion, and not party discipline, will be used to advance the Government's position.

The second plank of the Government's new approach establishes a system of votes:

- *one-line free votes* on which all Members are free to vote as they see fit,
- *two-line free votes* on which the Government takes a position that Ministers and Parliamentary Secretaries are expected to support, but which other Members are free to vote on as they wish.
- *three-line votes* on which all party Members are expected to support the Government as a matter of confidence.

[10] For further details on how the list is replenished, see *Standing Order* 87.

[11] Above n. 6.

Most votes will be one-line or two-line free votes. Three-line votes will be reserved for matters of fundamental importance to the Government.

A third element has to do with parliamentary committees:

> The government will look to committees to play an active role in policy and legislative issues, and Ministers should place a high priority on developing good relationships with parliamentary committee chairs and members, and supporting the essential work of the committee.[12]

To this end, bills subject to one-line and two-line free votes will routinely be referred to committee before second reading, allowing committees greater scope to amend them since the principle of the bill has not yet been approved.

Finally, the Government has promised additional resources to support committees and Private Members in their law-making activities, particularly for legislative counsel services provided by the Office of the House of Commons Law Clerk and Parliamentary Counsel. Although resources may seem to be simply a matter of internal house-keeping, they are critical to an enhanced role for Private Members. The preparation of laws is a complex affair, demanding considerable effort and expertise in determining legislative policy and how to implement it. These resources have until recently been concentrated within the Government. If committees and Private Members are to assume a larger role, they must have access to the resources needed to fulfil it effectively.

What does it all mean?

Despite the reforms instituted in the wake of the McGrath report in 1985, relatively few Private Members' Bills have been enacted. And of these, most have addressed matters of relatively little legislative significance, such as the designation of public days or changing the names of electoral ridings. However, in its last two sessions, Parliament has enacted eight Private Members' Bills, four of which made significant changes to the law.[13] This is a record, not only quantitatively, but qualitatively as well. There are several lessons to be learned from this as a harbinger of more to come.

First, Private Members' Bills on the order of precedence have to be treated with the same seriousness as Government Bills. Those who are interested in their subject-matter, whether in Government departments or in the private sector, must follow them closely and be prepared to advance their positions effectively. For the Government, Parliamentary Secretaries now act as the link between the caucus and their Minister on these matters. The task of lobbying Members' is for the political staff of the Minister and Parliamentary Secretary. However, Government policy officials are responsible for supporting their

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[12] Above, n. 2.

[13] An Act to amend the Statutory Instruments Act (disallowance procedure for regulations) SC 2003, Chapter 18; User Fees Act, SC 2004, Chapter 6; An Act to amend the Hazardous Products Act (fire-safe cigarettes), SC 2004, Chapter 9; An Act to amend the Criminal Code (hate propaganda), SC 2004, Chapter 14. For a complete list of enacted Private Members' Bills, see http://www.parl.gc.ca/information/about/process/info/pmb.asp?lang=E&Hist=N.

minister and parliamentary secretary in analysing and formulating a position on Private Members' items. In this respect, they must treat these items in the same way as Government Business.

The second lesson is that success in asserting a position on Private Members' Business depends on being able to marshal arguments that have broad appeal for Members. Technical correctness is of little use if it cannot be translated into a comprehensible argument that speaks to Members.

The third lesson is that it is often easier and more effective to suggest amendments than to oppose altogether a Private Members' Bill. The objective should be to find a middle ground that substantially avoids any problems in the original proposal, while at the same time advancing its main purposes. The experience with Bill C-205[14] is instructive. This Bill proposed to enact a procedure for the revocation of statutory instruments on the basis of a report of a parliamentary committee responsible for scrutinizing them. The Bill was based on a procedure already in place under the *Standing Orders* of the House of Commons. However, this procedure lacked legal effect and was limited in scope to statutory instruments made by Ministers.

The Government initially opposed the Bill on the basis that it would have applied to many instruments of a non-regulatory nature and that it did not allow enough flexibility in preparing for revocation. A compromise was reached at second reading that saw the Bill amended by unanimous consent so as to narrow its scope to regulations (as opposed to the broader category of statutory instruments) and provide a role for regulation-makers in their revocation. In addition, the Government addressed some of the underlying concerns of the committee about delays in Government responses to its inquiries about regulations.[15] The experience on Bill C-205 suggests that the Government and Private Members can work together effectively in the enactment of their Bills. If this experience is generalized, it may help address concerns about resources for committees and Private Members. And beyond the resource considerations, it may also avoid the debilitating conflict that often characterizes the legislative process and leads to results that are less satisfying for all concerned, most especially those Canadians who, as the Government has said, "are expecting more from their government and representatives."

So what does it all mean? Well, much remains to be seen. But one thing seems certain: the sands, if not

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[14] 2nd Session of the 37th Parliament: http://www.parl.gc.ca/common/Bills_House_Private.asp?Language=E&Parl=37&Ses=2#C-205.

[15] See the Cabinet Directive on Law-making, s. 7: http://www.pco-bcp.gc.ca/default.asp?Page=Publications&Language=E&doc=legislation/lmgcabinetdirective_e.htm.

the paradigms, are likely to keep shifting.

Henry VIII clauses: Their birth, a late 20th century renaissance and a possible 21st century metamorphosis

Dennis Morris[1]

1—Introduction

A Henry VIII clause is so called because of the penchant of the English monarch of that name to give himself power to amend (and in some cases to suspend or dispense with) statutes passed by the Parliament. So the expression "Henry VIII clause" has come to mean "a provision in a Bill which enables primary legislation to be amended or repealed by subordinate legislation with or without further parliamentary scrutiny".[2] After the death of Henry VIII, such clauses fell into disuse and it was 1888 before they seem to have re-emerged in the United Kingdom. Even then, their use was spasmodic and in a circumscribed form. It was not until the Thatcher era[3] that these clauses became frequent. This was paradoxical, even surprising, when one recalls that Mrs Thatcher had pledged "to get government off the people's backs." However, I would venture to suggest that it was not the then Prime Minister who was responsible for the re-emergence of these clauses but rather the influence of civil servants, who found it convenient to circumvent the need to obtain Parliamentary approval for subsequent amendments to the statutes concerned.

All of the statutes passed since the Second World War that are referred to below were enacted during the period 1979 to 1997, when governments dominated by the Conservative Party were in power in the United Kingdom. My aim in citing and discussing these statutes is to show that the ultimately successful campaign to marginalise Parliament either began, or was well under way, during the premiership of a Prime Minister who, despite her radicalism, her very frequent participation in House of Commons divisions, and her maintenance in other respects of close relations with Members of Parliament generally, was seemingly powerless to prevent the re-emergence of Henry VIII clauses in United Kingdom statutes. This, I suggest, in turn—

- shows the observations as regards legislative delegation made by Lord Chief Justice Hewart in 1929 to have been singularly prescient, and

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[1] Legislative consultant; formerly of the Parliamentary Draftsman's Office, Ireland, and the Attorney General's Chambers, Hong Kong.

[2] *Review (October 1994) of the first year's work of the House of Lords Select Committee on the Scrutiny of Delegated Powers*, paragraph 16.
Erskine May (21st Edn ,1989), p. 539, describes Henry VIII clauses as being "used, broadly speaking, to confer power to alter financial limits, to bring lists up to date, to make exceptions to the operation of a statute, or to make alterations of detail within a narrowly defined field" and refers to the Donoughmore Committee's report, Cmnd. 4060 (1932).

[3] The period during which Margaret Thatcher was Prime Minister of the United Kingdom (1979-90).

- renders Sir Carlton Allen's subsequent critical comments currently less convincing.

I will return to discuss those observations and comments later.

In a paper read to the Third Commonwealth Conference on Delegated Legislation, Lord Rippon of Hexham, QC, said:

> In recent years, some of us in the United Kingdom have been expressing concern at the ever increasing quantity and decreasing quality of our legislation. I should say at the outset that I do not blame the Parliamentary draftsmen. They are ever increasingly over-burdened …, they do very well. The fault lies with Government and Parliament. Although our Bills get longer and longer, increasingly they are merely skeletal legislation, leaving vital details to be settled by orders and regulations. I want to focus attention on the way in which primary legislation includes clauses providing that the Minister may amend or at times even repeal not only the primary legislation by order but also sometimes other Public or even Private Acts. In the 1920s and early 1930s the severest criticisms were made of the use of this so-called "Henry VIII clause", named it has been said, "in disrespectful commemoration of that monarch's tendency to absolutism", in order to put what is happening today into a proper perspective and to make it clear that it is being used today in Act after Act on a scale that would have been absolutely unthinkable until recently.
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> The first "modern" instance of a "Henry VIII clause" was in the *Local Government Act 1888*, when the power to amend was given to empower the Minister to bring the Act "into full operation". Henry VIII clauses were used in some later Acts to enable those Acts to be amended in order to "remove difficulties". For example, see the *National Insurance Act 1911* (UK).
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> Up to 1932,[4] it had appeared in just nine Acts but its scope and validity was limited, usually to 12 months from the coming into force of the Act. The Donoughmore Committee was set up in 1929 to examine and report on the whole question of Ministerial powers following upon the publication in that year of a book called *The New Despotism*, a scathing attack on administration methods written by Lord Hewart, unusually while still serving as Lord Chief Justice.
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> Without proposing the total abolition of the Henry VIII clause, the Donoughmore Committee recommended that it "should be abandoned in all but the most exceptional cases, and should not be permitted by parliament except upon special grounds stated in the Ministerial Memorandum of the Bill". In the event, it was not used from the time of the publication of the Report up to the end of the Second World War.[5] It was accordingly demonstrated in such major Acts as the Local *Government Act 1933* and the *Public Health Act 1936* that its use could be avoided given

[4] The year in which the Donoughmore Committee's Report on the exercise of Ministerial powers was handed down.

[5] The sweeping powers in the Defence of the Realm Acts probably made Henry VIII clauses redundant. However, see note 8.

sufficient forethought in drafting the legislation.[6] This was feasible in spite of Departmental arguments that the Henry VIII clause is a regrettable necessity to ensure flexibility and so on.

It is therefore very misleading to believe that there are good historical precedents for what is happening today. Ministers now take power to amend and even repeal primary legislation almost as a matter of common form. Such orders, which cannot be amended, are not subject so any effective parliamentary control, whether or not they are expressed to be subject to either negative or affirmative resolutions. Nor is any time limit placed on the exercise of these extraordinary powers. In effect, we are continually passing legislation that virtually permits Governments to make new laws as they go along.

A typical example is to be found in the *Local Government Finance Act 1988*. Section 147(1) provides:

> The Secretary of State may at any time by order, make such supplementary, incidental, consequential or transitional provisions as appear to him to be necessary or expedient for the general purposes or any particular purpose of this Act or in consequence of any of these provisions or for giving full effect to it.

Subsection (2) states:

> An order under this section may in particular make provision for amending, repealing or revoking (with or without savings) any provision of an Act passed before or in the same session as this Act.

And subsection (5) states:

> In this section "Act" includes a private or local Act.

A similar provision in the *Local Government and Housing Act 1989* provides that the Secretary of State may make an order "amending, repealing or revoking, (with or without savings) any provision of an Act passed before or in the same session as this Act." Again, "Act" includes a "private" or "local" Act.

These statutory provisions are becoming common form. When we debated the Companies Act - [then] just passed - which contains similar powers, the then Secretary of State for Trade and Industry, Lord Young, not a lawyer and no doubt suitably briefed by his Department stated simply:

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[6] On reflection, perhaps Lord Rippon might have used "sufficient time". Moreover, I am sure he would have conceded that, even then, the demands on Parliamentary Counsel were unreasonable.

> Similar order making powers are contained in section 449(1B) of the Companies Act 1985, section 180(3) of the *Financial Services Act 1986*, and section 84(2) of the *Banking Act 1987*. These order making powers are not novel, they are part of the accepted form.[7]

I will now discuss the use of Henry VIII clauses in a number of Acts, including the *Children Act 1989*, the *Child Support Act 1991* and the *Railways Act 1993*.

2—The Children Act 1989

(a) Section 17(4)—a constitutional outrage

Thus, Lord Rippon summarised the legislative position and the problem.[8] He continued by saying that there were then signs, in the House of Lords at least, of an increasing awareness of "the danger of these arbitrary powers" and referred to clause 15 of the Children Bill (1988). But, before I move on, it should be noted that there is a very common Henry VIII clause that is seldom noticed by members of either House of Parliament. The clause I am referring to is the delayed commencement provision, which empowers a Secretary of State or Minister to fix the date of commencement of a statute (often piecemeal) by statutory instrument (which is usually in the form of an order). This gives the Secretary of State or Minister concerned enormous legislative power.

Clause 15(4) of the Children Bill (which, on enactment, became section 17(4) of the *Children Act 1989*) read as follows:

> The Secretary of State may by order amend any provision of Part I of Schedule 2 or *add any further duty or power* to those for the time being mentioned there. *[Emphasis added.]*

The scope of the subsection appears to be unlimited (apart from repeal) but presumably the additional duties or powers would have to be germane to the purposes of the Bill. But should this not have been stated? Indeed, why did the Members of the House of Lords not insist on it? Even assuming they were willing to do so, why should the courts have to fill in the blanks? Note that the statutory power enables the Secretary of State to prescribe *additional* duties or powers, but does not contemplate reducing them. The scope of section 147 of the *Local Government Finance Act 1988* is even wider. It allows the Secretary of

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7 The paper is published in (1989) 10 Stat. L.R. 205. The extract is quoted with the late Lord Rippon's permission.

8 At this stage, it may be noted that neither the Defence of the Realm Acts of 1914 nor the *Emergency Powers (Defence) Act 1939*, contains a Henry VIII clause. (The same is also true of the Emergency Powers (Defence) Acts that were passed in 1940.) However, once detention under the Acts of 1914 was lawful, the law operated to render the Habeas Corpus Acts inapplicable – *R. v. Secretary of State for Home Affairs* [1941] 1 KB 72. Section 1(4) of the 1939 Act, unlike either of the 1914 Acts, provided that instruments made under those Acts overrode other Acts and "their" instruments. Whether the section applied to subsequently enacted enactments is not clear.

State to amend any Act[9] on the ground of expediency. The reality behind this sort of provision is the fact that the United Kingdom statute book is now so enormous and complex that, in many cases, no one can be sure which of its provisions are relevant to a particular Bill, or their implications. The necessary research could of course be done, given enough time. But the combined efforts of Ministers and civil servants to control the operation of legislation conspire to prevent this. In consequence, a compliant Parliament has largely lost control of the situation, which is now one of labyrinthine complexity, with the potential for confusion and contradiction.

During the committee stage debate in the House of Lords on clause 15(4) of the Children Bill (1988), Lord Elwyn-Jones, a former Lord Chancellor, sought to have it deleted. In so doing, he said:

> Part 1 of Schedule 2 sets out some vital duties. Paragraph 4 of the Schedule deals with the duty on the local authority to prevent neglect or abuse of children. Paragraph [6] imposes upon the local authority the duty to—
>
> > provide services designed—
> >
> > (a) to minimize the effect on disabled children within their area of their disabilities; and
> >
> > (b) to give such children the opportunity to lead lives which are as normal as possible.
>
> Paragraph 6 sets out proposals for rehabilitation. Those are quite fundamental provisions.
>
> What is proposed [in the subsection], which I suggest to the committee should be deleted, is that the Secretary of State may by statutory instrument – that is to say, by his own order – modify or repeal any of those provisions. In other words, what is now embodied in the legislation through the schedule is to be removable by the summary process of a statutory instrument bypassing the ordinary legislative process in regard to propositions which are of quite fundamental importance. In my view, to turn something which is in primary legislation into a statutory instrument is a wholly and indeed an astonishing step. I know of no precedent for such proposals. There may be some …. But whether or not it is new, it should not be countenanced by this Chamber.[10]

The provision was also criticised by Lord Simon of Glaisdale:[11]

> When implementing a general provision in detail a government have two choices. A perfectly

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9 Whether the Act is public and general or local or personal.

10 502 H.L. Debs., col. 1293, 20 December 1988.

11 A Lord of Appeal in Ordinary.

> proper choice is to put the provisions into secondary legislation. If possible such legislation can be amended as circumstances change by affirmative – not negative – resolution. The other way is to put them into an Act of Parliament. But an Act of Parliament ought to be changed only by another Act of Parliament. With all respect I say that it is really a constitutional outrage for a Secretary of State to arrogate to himself the right to add to, repeal, replace or modify any provision of an Act of Parliament.[12]
>
> As enacted, [section 17(4)] confers no power either to modify or repeal but, as Lord Simon pointed out, "an 'amendment' can go right up to the 'edge of repeal'".[13]

In describing the (original) proposal as a "constitutional outrage", Lord Simon was supported by Lord Elwyn-Jones,[14] but to little avail. For, in dealing on behalf of the Government with the former Lord Chancellor's proposed amendment, his successor, Lord Mackay of Clashfern, rather blandly said:

> The general provision to [modify or repeal] is in clause 15. In [Part I of] the [second] schedule there are specific provisions to deal with detail which are equally important and equally vital. But they are provisions which the light of experience may well show can be improved. This is an area of great development in thinking and practice. The whole area of local authority support for children and families is a developing area. The Secretary of State wishes to have the power to keep up to date these detailed provisions. Of course, the provision is to be effected by order—he cannot do it by his own hand—in the sense that it can be interfered with by Parliament. The order would be capable of being annulled by the negative resolution procedure.[15] The Secretary of State's order could thus be prevented by Parliament from becoming effective.[16]
>
> However, it is important in this area that the details of specific powers and duties in should be updated line with current developments. Unless the intention is to freeze these details altogether, is not appropriate to have a power of modification in the Bill? I believe that it most desirable that these provisions should be kept up to date.

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[12] 502 H.L. Debs., cols. 1294-5, 20 December 1988. A statutory instrument cannot, in the absence of an express provision in the enabling Act or an amending Bill, be amended by a House (or both Houses) as distinct from being annulled. (I know of no such provision in British legislation.) [However, it should be noted that the New Zealand, Hong Kong and South Australian legislatures have power to amend statutory instruments. *Editor.*]

[13] 505 H.L. Debs., col. 349, 16 March 1989. What about "section … shall have effect as if the words '…' were deleted"; is that a repeal or an amendment?

[14] 502 H.L Debs., col. 349, 16 March 1988. Lord Rippon touched on this in his paper.

[15] See section 104(3).

[16] In theory at least!

I appreciate that this a matter of concern; but I submit that it is also a matter of concern to prevent this particular area from being fossilized or so encased in primary legislation that the only way to effect improvements in these detailed provisions would be to wait for another opportunity to do so. The Committee knows that an opportunity to cover such matters comprehensively, as we are now doing, does not come very often in view of the number of competing demands for the valuable commodity of parliamentary time.[17]

(b) Section 108(9): A constitutional outrage compounded?

The Children Bill, which had been introduced in the House of Lords, was in due course returned to that House with many amendments made by the House of Commons. One of those amendments (which ultimately became section 108(9)) read—

> The Lord Chancellor may by order make such amendments or repeals, in such enactments as may be specified in the order, as appear to him to be necessary or expedient in consequence of any provision of this Act.

Lord Mackay moved this amendment and also moved two other House of Commons amendments at the same time, but he was careful not to deal specifically with the prospective section 108(9). Further, despite earlier criticisms made by Members of the House of Lords when the Bill was being considered after introduction, nobody bothered to question the new provision as passed in the House of Commons. Had they been present when the Bill was returned to the House of Lords, one wonders how Lords Elwyn-Jones and Simon of Glaisdale would have reacted.[18] Lord Renton QC criticised the proposed (Commons) amendments but did not deal specifically with the sweeping powers proposed to be given to give the Lord Chancellor. This is surprising as this time it was the Lord Chancellor and not a Secretary of State who was the office-holder concerned. At any rate, Lord Mackay must have been greatly relieved, for, in dealing with what is now section 108(9), he had described it, and the other two amendments he dealt with at the same time, as dealing with transitional aspects of the Bill.[19] With the greatest respect, what is now section 108(9) is nothing of the kind. There is nothing transitional about it.

3—Annulment by negative resolution: Is it an empty formula?

It is very rare for either House to agree to a motion to oppose or annul a statutory instrument (whether

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17 502 H.L. Debs., col. 1293, 20 December 1988.

18 In this context, the remarks of Lord Meston regarding another Henry VIII amendment to the Bill are relevant: 512 H.L. Debs. Col. 842, 8 November 1989.

19 512 H.L. Debs., col. 854, 8 November 1989.

made under a Henry VIII clause or otherwise) or to fail to approve a draft laid before it.[20]

So the relevant provisions of the *Statutory Instruments Act 1946* are really no more than an empty formula.[21] Motions or prayers against statutory instruments do occur and debates do arise, both on such motions and on motions to approve drafts. But, although these proceedings may induce criticism of a particular government administration, in the end they do not involve an annulment or refusal to approve the instrument concerned (whether tabled in draft form or made but not yet commenced). In so far as they relate to instruments already in force, such proceedings are for the most part prompted by a report of the Joint Committee on Statutory Instruments[22] on which, as its name implies, members of both Houses of Parliament sit. In the House of Lords, in which practically all of the debates take place, less than one per cent of the annual number of statutory instruments are discussed.

Further, as a very experienced former parliamentary counsel has told me in a letter:

> I agree about annulment, etc. not being an effective check on statutory instruments. The whip is

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[20] Indeed, for many years there seems to have been a House of Lords convention that the House neither annuls (negatives) nor refuses to approve statutory instruments against the Government's wishes. This is not quite true. Motions to annul a statutory instrument or to decline to approve a draft instrument seem, because of convention, never to appear. But debates on motions to approve a statutory instrument sometimes include divisions with regard to amendments – which occasionally propose rejection – or to acceptance or rejection itself. However, the purpose of the debate is to demonstrate the nature of their Lordships' concern, which is presumably noted and future regard paid to it should analogous circumstances present themselves to those preparing a statutory instrument Accordingly, such motions are almost never pressed to a conclusion.

Motions in relation to statutory instruments have also been occasionally amended so as to include observations of their Lordships relating to the instrument concerned or even changing a motion's nature from one for an address to one calling upon the Government to agree to specified undertakings. Actual rejection is, as implied, very rare but, on 27 January 1998, the *Beef Bones Regulations 1997* appear to have been negatived on a division and, on 22 February 2000, two significant unconventional decisions were taken. Under the first, a motion for a Humble Address to annul the *Greater London Authority Election Rules 2000* was successful on a division and the rules were duly annulled by the Queen on 1 March.2000. Under the second, a motion for approval was amended on a division so that it became one declining approval. As a result, the *Greater London Authority (Election Expenses) Order 2000* failed to come into force. However, if there be significant feeling against a particular statutory instrument which has already been made, the procedure relates not to negativing by the House itself but, in the case of a statutory Order in Council, to move that an address be presented to the Government praying that the order or regulations be annulled (as was the case with the GLA Election Rules) and, in the case of other instruments, a motion calling on the Government to revoke the instrument. These motions are, after debate, by convention almost invariably withdrawn by leave of the House.

[21] On 18 June 1968, the House of Lords rejected the *Southern Rhodesia (United Nations Sanctions) Order 1968* and it was not until almost thirty-two years later – 22 February 2000 – that this power was exercised again! See note 24.

[22] In preparing a report, the Joint Committee will draw attention to such matters as the unusual use of a statutory power or whether the instrument might be ultra vires.

> almost invariably applied. It is even very difficult for a back-bencher to obtain time for an annulment debate, since either the Government or the Opposition have to surrender time they have allocated to "better" things. Even the opposition whips do not do so lightly.

Whips are the Prime Minister's eyes and ears in the Commons. "A ruling tenet of the Whip's office is that almost every Member of Parliament wants something…" says Michael Cockerill, who reported Tim Fortescue MP to have opined that a whip would say to a wavering backbencher; "You're ambitious aren't you—would you like to be a Minister? I'll make a note of that."[23]

Why was Parliament so lacking in spirit? Does anyone think that the world would end if a few of the vast number of United Kingdom statutory instruments made each year were annulled or not approved?[24] Dozens of statutory instruments amending primary legislation appear annually, but most of these seem to be made under the *European Communities Act 1972* [UK]. It is perhaps partly because of this that one hears criticism from members of the UK Parliament about the relative powerlessness of the European Parliament. But, regarding statutory instruments at least, this rather seems like the pot calling the kettle black.

The upshot was that, despite the efforts of Lords Elwyn-Jones and Simon of Glaisdale, clause 15(4) was enacted. Perhaps surprisingly, Lord Mackay's statement went unchallenged. Nobody asked for clarification or examples regarding the kind of change it was considered the Bill should be designed to cope with. As for Lord Mackay, he seems to have fallen for the administrator's ploy that all legislation, be it primary or subsidiary, is either "important" or "necessary." But more seriously, was the justification pleaded soundly based? Although the Act was enacted on 11 November 1989, section 17 was not brought into force until 14 October 1991 and it was not until 1996 that an order was made[25].Ten years on, no

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[23] *Spectator,* 20 May 1995, page 12, col. 3.

[24] Most United Kingdom statutory instruments are either subject to annulment (the negative procedure) or are tabled in both Houses of Parliament and do not come into force until approved by affirmative resolutions of those Houses (the affirmative resolution procedure). With the negative procedure, because a House has no power to amend subordinate legislation laid before it, it is forced either to let the legislation stand or to pass a resolution annulling it (which it almost never does). Parliament is in a stronger position, of course, where the affirmative resolution procedure is applicable.

Note that in some jurisdictions where the negative procedure is used, such as in Hong Kong, New Zealand and South Australia, the Parliament has power to amend subordinate legislation as well as a power to annul it.

With regard to the use of the affirmative resolution procedure, the last time that a draft statutory instrument failed to receive approval from the House of Commons seems to have been on 14 July 1978, when a motion to approve the Draft Dock Scheme was lost (954 H.C. Debs., cols. 1289-1326). Also, the last time the House of Commons annulled a statutory instrument seems to have been on 24 October 1979, when a motion to annul the *Paraffin (Maximum Retail Prices) Revocation Order 1979* (SI 1979/797) was agreed to (972 H.C. Debs., cols. 561-88).

[25] *The Children Act 1989 (Amendment) (Children's Services Planning) Order 1996*, S.I. 1996/785.

further order had been made. So much for the area of great development in thinking and practice, to say nothing of avoiding fossilization!

4—Cases of legislative addiction

(a) Is the Donoughmore report dead?

Having regard to the enactments referred to later, the increased awareness referred to by Lord Rippon appears to have been short lived. Section 4(1) and (2) of the *European Communities Act 1972*, may have been the precursor of the (modern) Henry VIII clause. Section 4(4) enables anything to be done by Order in Council or ministerial regulation, provided it is done for a purpose specified in section 4(2). The power includes power to *amend* or *repeal* enactments even though neither of the italicised words is expressly used.[26] One wonders whether the Parliamentary Counsel concerned with the 1972 Act had regard to the Donoughmore Report and the then existing sensibilities of both Houses at Westminster as regards having their constitutional functions usurped and so advised against such use. If so, how things have changed! However, although the powers conferred by the section are wide-ranging, they are in fact more limited than those conferred on the Lord Chancellor by section 108(9) of the *Children Act 1989*. Firstly, they are limited to Schedule 2 to the 1972 Act. Secondly, they must relate to the implementing, or enabling the implementation of, one or more (now) European Union obligations or United Kingdom/European Union rights, or to a related matter. Moreover, neither the Queen in Council or a designated Minister is required to determine whether provisions are necessary or expedient.[27] In contrast, because of the way in which section 108(9) is drafted, the Lord Chancellor appears almost to have a free hand. His order is not required to be for the purpose of giving effect to a provision of the 1989 Act nor is it required to be for the purpose of removing a difficulty. Provided the Lord Chancellor (reasonably) considers it to be necessary or expedient "in consequence of any provision of this [the 1989] Act", his order cannot be challenged. Despite the wide nature of the provision, I do not see how the Lord Chancellor could create an offence or prescribe a penalty under it. Nor do I think he could amend an enactment that creates or otherwise relates to an offence.

Even though not one Henry VIII clause was enacted by the United Kingdom Parliament during the Second World War, since then the situation has changed dramatically. Between 16 July 1989 and 21 July 1994, 61 statutes were enacted enabling statutory provisions to be repealed or amended by ministerial or other order. Other statutes contained provisions enabling them to be amended by regulation.[28] Of the 61

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[26] In contrast, section 3(2) of the very much less complex *European Communities Act 1972* (Ireland), plainly states that regulations under its section 3 may include provisions "repealing, amending or applying, with or without modification, other law, exclusive of this Act."

[27] However, they may have regard to the objects of the European Union.

[28] For example, see section 15(2) of the *Local Government and Housing Act 1989: "*Except in such cases as may be prescribed by regulations, …".

provisions mentioned, the power conferred by 18 of those is limited to varying a specified sum or percentage. Others, for example, section 1(6) of the *Criminal Justice Act 1993* and section 1 of the *Northern Ireland (Emergency Provisions) Act 1991*, require drafts to be laid before an order thereunder is made. But among the enactments referred to are some which confer wide-ranging powers to amend or repeal, and in at least one case to re-enact with or without modification. In most cases, the only restraint on their exercise is the prospect of an annulling resolution – in the final analysis a paper tiger if ever there were one. Further, in the unlikely even that a Minister were determined to use such a power to bring about a particular *ad hoc* state of affairs expressly contemplated, annulment could serve no practical purpose since there would presumably be an appropriate saving provision.

(b) Child Support Act 1991, section 58

It is not practicable here to examine all of the enactments referred to above. I have therefore chosen the following because they appear to be the most radical. The first is section 58 of the *Child Support Act 1991*. The salient provisions of the section are as follows:

> (1) This Act may be cited as the *Child Support Act 1991*.
>
> (2) Section 56(1) and subsections (1) to (11) and (14) of this section shall come into force on the passing of this Act but otherwise this Act shall come into force on such date as may be appointed by the Lord Chancellor, the Secretary of State or Lord Advocate, or by any of them acting jointly.
>
> (3) Different dates may be appointed for different provisions.
>
> (4) An order under subsection (2) may make such supplemental, incidental or transitional provision as appears to the person making the order to be necessary or expedient in connection with the provisions brought into force by the order, including such adaptations or modifications of—
>
> (a) the provisions so brought into force;
> (b) any provisions of this Act then in force; or
> (c) any provision of any other enactment,
>
> as appear to him to be necessary or expedient.
>
> (5) Different provisions may be in force for different periods.
>
> (6) Any provision made by virtue of subsection (4) may, in particular, include provision … regarding maintenance assessments.
>
> (7) The Lord Chancellor, the Secretary of State or the Lord Advocate may by order make such amendments or repeals in, or such modifications of, such enactments as may be specified in the order, as appear to him to be necessary or expedient in consequence of any provision made by

> or under this Act (including any provision made by virtue of subsection (4)).

The relevant Bill was introduced in the House of Lords and was later amended by the House of Commons. Among the amendments passed by the House of Commons, was one that added subsections (4) to (8) to proposed section 58. On the Bill's return the House of Lords, Earl Russell moved a motion opposing that amendment. In the course of moving the motion, he said:

> I hope your Lordships will read the Commons amendment with some care. When I read it, it caused me a good deal of surprise. The parentage appears to me to be by Henry VIII out of Humpty Dumpty. Even in these permissive days, I have some doubt whether that is a legitimate parentage. I have no objection to the stated purpose of the clause as it is set out in the Notes on Commons Amendments. The notes state that—
>
> > these amendments allow for detailed provisions regulating the transitional period until the Child Support Agency is fully operational to be made through commencement orders or other orders.
>
> I have no problem with that. I want to know why another place [*i.e.* the House of Commons] has found it necessary to use such sweeping and arbitrary words to bring that provision into effect.
>
> In dealing with the Executive, there are two duties which rest on Parliament. There is a duty of scrutiny, and there is a duty of control. Until I hear the reply, I am engaged simply on the duty of scrutiny. I want to know why these powers need to be so sweeping. I want to know why all these powers are needed; and I want to know – and this is the most important one for our purposes – could they have been worded in a less arbitrary manner?
>
> This is a new commencement clause which emerged very late in the proceedings. *There was not a single word spoken about it in another place*. Therefore, we are going to hear today the first full explanation of why the Government want this clause. It may be simply to ensure the central purposes of the Bill. If so, I must say that this House has already approved the central purposes of the Bill. I would regard it as most improper at this stage to question them. However, I want to understand why it is necessary to have quite so much power to achieve the central purposes of the Bill.[29] *[Emphasis added.]*

[29] 531 H.L. Debs., col. 581, 22 July 1991.

Lord Russell continued by drawing attention to the use of ", in particular, include" in line 1 of what is now subsection (6), adding:

> That naturally leads me to ask what else could the Secretary of State do? [30]

As regards subsection (7) he said—

> I am even more concerned about the provision allowing the Secretary of State to vary any provision of any other enactment. I have already argued that the Bill puts the Secretary of State into the way of temptation to behave in a more and more arbitrary manner. I do not want to make that temptation more acute by equipping it with these quite extreme powers. In making these remarks, I mean nothing personal to the Secretary of State or indeed to any successor he may have in the future. I believe that these powers should not be trusted to anyone. I am reminded in fact of the comment of my American colleagues about a new mortgage. "If I were a banker, I would not lend me that much money." I do not believe that these powers are proper, whoever has them.[31]

The Earl Russell's tact in omitting a reference to the Lord Chancellor or the Lord Advocate in the context of subsection (7) was admirable but, as things turned out, unavailing. He was, however, immediately supported by Lord Simon of Glaisdale (as noticed, a Law Lord) who said—

> this Bill makes an extraordinary leap forward in the arrogation by the Secretary of State of powers traditionally vouchsafed to Parliament and to courts of law. This is an example of the invasion of traditional parliamentary rights; in other words, to amend legislation. I support the remarks made by the noble Earl. However, there is one other point that I venture to bring to the attention of your Lordships. I have in mind [section 58(6)]. I am especially concerned about paragraph (a). It gives the Secretary of State power to make regulations providing for—
>
> > the enforcement of a maintenance assessment (including the collection of sums payable under the assessment) as if the assessment were a court order of a prescribed kind.

Apart from the extent to which that goes constitutionally, the extraordinary thing is that the provisions of [section 58] are not subject to the affirmative resolution procedure under what is now [section 52(2)]. In other words, if there is any provision which ought to be subject to the affirmative resolution, it is [section 58(6)(a)]. It falls under both the first and second headings of the report of the Joint Select Committee of 1972-73. Because it is such a power, it is not trivial or consequential. Moreover, it also falls under the second heading in that it involves a charge on a citizen. It is too late now to make that[32] an affirmative

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30 Ibid.

31 Ibid.

32 The original text used 'than' but it is assumed that 'that' is what was intended here.

resolution provision. Therefore, it seems to me that the right course for us to take is to remove the whole provision as suggested by the noble Earl.[33]

The point about the affirmative resolution procedure is it necessitates debate. However, section 52(3) of the *Child Support Act 1991* provides that orders made under section 58(2) (to which subsection (4) of that section applies) are not even subject to annulment. Were such orders simple commencement orders this would be entirely reasonable but, having regard to the presence of subsections (4) and (6), this is not the case.

In referring to subsection (6), which relates to orders under section 58(2) of the 1991 Act, Lord Mackay said:

> I do not see that these provisions, which are in the nature of transition provisions, need the affirmative resolution procedure. After all, they are supplementary arrangements in a commencement order. That is the purpose. It is a commencement order for the statutory provisions. The idea is that, because of the nature of transition, the commencement order needs to be somewhat more complicated in this case than in many others. I believe that the negative procedure is appropriate in the circumstances.[34] It goes without saying that the provisions will be carefully considered before they are put into effect by Parliament.[35]

This rather suggests that sections 12(1) and 14 of the *Interpretation Act 1978* do not apply to an order made under section 58(2) of the 1991 Act. I doubt that this is so, if only because, having regard to section 58(4), section 58(2) is only *partly* transitional. In contrast, section 58(7) is not transitional at all. Furthermore, Lord Mackay appears to have overlooked the fact, already noticed, that the negative (or the affirmative) procedure does not apply to section 58(2) (see section 52(3)). Accordingly, Parliament has no say whatever!

Earl Russell concluded the debate on his motion as follows:

> Like alcohol Henry VIII clauses are addictive and prohibition is the only answer. The only way to bring them under control is to have it known that whenever they are put in Bills this House will divide against them. I urge this House to disagree with the Commons …"[36]

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[33] 531 H.L. Debs., col. 583, 22 July 1991.

[34] Which, because of their Lordships' convention already referred to, amounts to nothing as far as the House of Lords is concerned and as regards the House of Commons amounts to little more because of the unwillingness of that House to allocate parliamentary time.

[35] 531 H.L. Debs., col. 585, 22 July 1991.

[36] 531 H.L. Debs., col 586, 22 July 1991.

In opposing the motion, Lord Mackay, said:

> Before an order can be made under this provision it must be shown that the order is reasonably regarded as necessary or expedient in connection with—
>
> > "the provisions so brought into force;"
>
> by the order, as is stated in [subsection (4)(a)] … That includes such adaptations or modifications as are provided for. It is a cardinal principle of the interpretation of a statute of this kind that the powers are given only to effect the policy of the statute. It must be a reasonable[37] exercise of the power before it would be sustained. I suggest to your Lordships that in presenting his argument the noble Earl has perhaps naturally exaggerated the alleged subjective nature of the power. One cannot use the power unreasonably and then attempt to cloak that with the idea that it appeared to the person making the order to be necessary or expedient.[38] *[Emphasis added.]*

I do not agree that any question of reasonableness arises in the manner mentioned by Lord Mackay. In this context, two points arise. Firstly, section 58(4) does not qualify "necessary" with "reasonably", which is what Lord Mackay seemed very close to be implying. If an adaptation or modification (an amendment) of an enactment appears to be necessary or expedient and the person concerned acts in good faith, that, on the face of the section, seems to be all that is needed. Moreover, presumably, the Lord Chancellor must not act unreasonably or arbitrarily; but that would relate to a decision itself rather than its content.[39] Secondly, the emphasised words miss Earl Russell's point, which is that the powers are too sweeping. Generally speaking, the wider a power the more difficult it is to challenge it. Besides, the limitation referred to is an inherent one and so was irrelevant to the expressed concerns of Earl Russell and other peers.

But this time Lords Russell and Simon were not quite tilting at windmills. When Earl Russell's motion was put, 23 peers supported it but 42 did not. This shows that in 1991, at least, there was a significant opposition in the House of Lords to the use of Henry VIII clauses.

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37 Having regard to Lord Mustell's subsequent *dictum* cited below, I would have used "fair" or said nothing.

38 531 H.L. Debs., col. 584, 22 July 1991.

39 (a) Also, making an adaptation or modification that is not reasonable would not necessarily be arbitrary or unlawful. Furthermore, would it necessarily be unreasonable?

(b) Having regard to *Liversidge v. Anderson*, *Jones v. Robson*, *R. v. Comptroller General of Patents, Chemicals* and the *Japanese Reference* (all referred to below) exercise of the discretion given by section 58(7) of the *Child Support Act 1991* may well be beyond judicial challenge.

(c) Railways Act 1993 – Schedule 11, paragraph 3

Another extraordinary provision is paragraph 3 of Schedule 11 to the *Railways Act 1993*. That paragraph empowers the Secretary of State to make orders amending certain trust deeds.[40] In other words, the Secretary of State is being given a power that is usually exercised by courts, a power that nowadays in England and Wales is regulated by statute. Variations must normally be in the interests of the beneficiaries. The Act governing variation of trusts is the *Variation of Trusts Act 1958*, but limited powers to vary trusts are also conferred by section 57 of the *Trustee Act 1925* and by section 71 of the *Law of Property Act 1925*. Jurisdiction to vary trusts is conferred on the High Court, subject to the usual rights of appeal. Although applications to vary a trust are usually made by the relevant trustees, section 1(1) of the 1958 Act appears to allow anyone to apply. Apart from being in their interests, a variation must also be for the benefit of those on whose behalf it is proposed. In contrast, paragraph 3(1) of Schedule 11 to the *Railways Act 1993* enables the Secretary of State to amend any trust deed governing an existing pensions scheme.[41] In making such an amendment, he does not need to be satisfied that it is for the benefit of the persons who would be affected. Moreover, although he must consult the trustees concerned,[42] he can amend the relevant trust deed without their agreement. The provision does not give the beneficiaries any express right to make representations, but if any were made one would presume that the Secretary of State would hear them. Even so, it is somewhat surprising that no provision is made for an appeal to the High Court. I can only surmise that the absence of such an appeal is for bureaucratic convenience.[43] But in a situation of this kind, I would have thought the merits would be very important. Since the *Variation of Trusts Act 1958* is not disapplied or otherwise referred to, arguably the doctrine of implied repeal would operate.

I have already mentioned that, in the committee stage debate in the House of Lords on section 58 of the *Child Support Act 1991*, Lord Simon of Glaisdale opened his speech by describing the relevant Bill as making an extraordinary leap forward in the arrogation of powers traditionally vouchsafed to the courts. I argue that paragraph 3 of Schedule 11 to the *Railways Act 1993* is a serious escalation of this phenomenon.

(d) Other Acts

I will now briefly discuss the following enactments:

- section 191 of the *Water Act 1989*;

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40 Technically speaking this is not a Henry VIII clause but it bears the same hallmarks.

41 As defined for the purposes of that Act.

42 See paragraph 3(4) of Schedule 11 to the Act.

43 Judicial review would of course be available, but such a review would not affect the merits of the Secretary of State's decision.

- section 162(4) of the Environmental Protection Act 1990;
- section 14 of the Statutory Water Companies Act 1991;
- section 3(6) of the Local Government Finance Act 1992;
- section 6(6) of the Museums and Galleries Act 1992.

The powers conferred by these enactments are far reaching. For example, the *Local Government Finance Act 1992* enables the philosophical basis on which the Act operates (the meaning of "dwelling") to be changed by statutory instrument. Similarly, the *Museums and Galleries Act 1992* enables a statutory instrument to be made changing the basis on which gifts are held by certain museums. The other Acts mentioned also contain provisions enabling those Acts to be amended by statutory instrument. As far as I am aware, none of the enactments listed generated criticism during their passage through Parliament.[44]

5—House of Lords Select Committee on the Scrutiny of Delegated Powers and Regulatory Reform

In February 1992, the Select Committee on the Work of the House of Lords ("the Jellicoe Committee") noted growing disquiet "over the problem of wide and sometimes ill-defined order-making powers which give Ministers unlimited discretion" and recommended the establishment, I believe initially on an experimental basis, of a delegated powers scrutiny committee in that House. As a result, the Select Committee on the Scrutiny of Delegated Powers was appointed "to report whether the provisions of any bills inappropriately delegate legislative power, or whether they subject the exercise of legislative power to an inappropriate degree of Parliamentary scrutiny". Following the passage of the *Deregulation and Contracting Out Act 1994*,[45] the Committee was given the additional role of scrutinising deregulation proposals under that Act and the name of the committee was changed to the Select Committee on Delegated Powers and Deregulation. However, following enactment of the *Regulatory Reform Act 2001*, which expanded the application of the deregulation order-making power under the 1994 Act, the Committee's name was changed yet again – this time to the Select Committee on Delegated Powers and

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[44] There was no division on any of the provisions in the House of Lords probably because of the very large number of amendments made in the House of Commons. According to the House of Commons Public Information Office, the requisite information would "take several days of staff time to obtain." (Letter to author, 1 June 1995) I have not checked the relevant House of Lords debates.

[45] The *Deregulation and Contracting Out Act 1994* enables the Government to make an order amending or repealing any provision contained in primary legislation which it considers imposes a burden of a kind specified in the Act that could be reduced or removed without removing any necessary protection. The Department concerned must first draft a proposal and carry out specified consultations as regards it. After considering the results of the consultation exercise, the Government may decide to change all or part of the proposal, or even withdraw it completely. Also, under Part I of the Act, Ministers have wide-ranging powers to amend primary legislation by order. The purpose of such orders is to reduce burdens on business. Further, because of the scope of these powers, the 1994 Act provides for a special form of parliamentary scrutiny as regards orders made under it. The procedure is the affirmative one but includes additional (preliminary) parliamentary scrutiny.

Regulatory Reform. The Committee advises the House of Lords; it is for the House to decide whether or not to act on the Committee's recommendations. The Committee itself has no power to amend bills, although amendments are frequently tabled in response to its recommendations. In relation to *Government Bills*, the Government has in practice accepted most of the Committee's recommendations to the House. After appointment, the Committee published a review of its first year's working. The review stated that the committee considers each bill before it on its merits. In its first year—

> it considered a wide range of Henry VIII clauses and our conclusions have varied, including, in the different cases we have considered—
>
> (a) that the parliamentary scrutiny provided seems inappropriate and a tighter control is required (usually the affirmative procedure): such a power is always drawn to the attention of the House;
> (b) that sufficient safeguard is provided by the affirmative procedure;
> (c) that the negative procedure seems appropriate; and
> (d) that the absence of parliamentary control seems appropriate.[46]

Also, the committee looks "closely at all Henry VIII clauses to see whether the power is justified and, if it is not subject to the affirmative procedure, to ensure that an appropriate degree of scrutiny is provided for in each case".[47]

To give some idea of what the committee was up against, I quote paragraph 21 of its first review:

> It may be worthwhile setting out one example in rather more detail. This arose in the Local Government (Wales) Bill (session 1993-1994). The Committee drew attention to Clause 52(1), which allowed the Secretary of State power by order to make any "supplemental provision" he thought necessary or expedient for the purpose of the Bill. The Department's memorandum had said that the power could be used in potentially far-reaching ways and the Committee accordingly urged the House to consider whether the affirmative procedure would be more appropriate than the negative procedure provided for in the Bill. This was debated in Committee and on Report, when the Minister explained that the choice of words in the memorandum might have been "unfortunate": the power "could affect a wide-ranging nature of provisions [*sic*] … but … only in minor ways" and decisions of the courts meant that the vires of such a power were "very narrowly drawn". The amendments were withdrawn and a further amendment, making all orders under the Clause subject to the affirmative procedure, was defeated at Third Reading, after the Minister had advised that this would rather debase or devalue that important tool of your Lordships' House.

How can a procedure that is hardly ever invoked in either House of Parliament be described as important?

[46] Paragraph 19 of Review.

[47] *Op. cit.,* paragraph 24.

And, because the House of Lords so rarely annuls or refuses to approve a statutory instrument contrary to the Government's wishes, the statement is hollow indeed. I venture to suggest that the time of each House would be better spent in reviewing the activities of civil servants than in forging new legislative shackles. Of course, governments prefer to avoid having to move an affirmative resolution since this by its nature involves a debate. On the other hand, it is extremely rare for a statutory instrument to be debated when the negative procedure is used, the last occasion apparently being October 1979.[48]

It seems to me that the United Kingdom Parliament is powerless to control the Civil Service. Is it because of this that many people seem to be uneasy about what appears to be absolute legislative power,[49] power that has nothing to do with parliamentary sovereignty? The cause of this unease is the fact that Parliament is now so firmly controlled by the Executive that Members of Parliament and many peers have become mere voting fodder. However, it seems to me that the source of control is misconceived: Parliament is now under the firm hand of a bureaucracy, which, by drowning both the Government and Parliament in paper, gets its own way. This deluge, combined with official patronage, has seemingly induced a sort of political amnesia as regards, inter alia, arresting the ever-increasing tendency to resort to Henry VIII clauses. It seems to me that there is only one institution that can stem this tide, namely the judiciary. By using the remedy of judicial review, the judges already protect the citizen from administrative excesses and errors in the context of the law. Arguably, by analogy, they should also be able to subject Parliament to similar scrutiny. If they were to do so, it is surely likely that the judiciary would be regarded as protectors against administrative oppression.

6—The modern statutory instrument: its genesis

The modern statutory instrument seems to date from the early nineteenth century. A remarkably prophetic provision is section 23 of the *Recovery of Small Debts (Scotland) Act 1825,* which confers on justices a power to make rules and orders "for carrying into effect the provisions and purposes of this Act." Section 80 of the *Reform Act 1832*, authorised different days and times to be substituted for those specified in the Act, which, when substituted, were to be "deemed to be of the same force and effect as if they had in every instance been mentioned in this Act." Clearly, counsel who prepared the relevant Bill took no chances as regards effectiveness. But his prudence seems justified, as the question of Parliament's power to enable the making of what is now is called subordinate legislation had, until then, very probably never been considered by the judges. Giving either (or both) of the Houses a power to annul subordinate

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48 I use "seemingly" because there could have been motions to annul that were withdrawn or defeated.

49 Lord Hailsham referred to this state of affairs as "legislative tyranny": "Ministerial responsibility is the basis of the British system of representative democracy. Take it away and the system collapses." It now appears that some Government Ministers are no longer accepting responsibility for what their departments do and that their departmental servants are both advising on, and deciding, politically sensitive matters. When a minister resigns, departmental heads often roll (early retirement). The constitutional position is described by Woolf LJ in *Reg. v. Home Secretary, Ex p. Oladehinde* [1991] 1 AC 254, at 263H to 264D.

legislation came later. The earliest example I know of is section 118 of the *Lunacy Regulation (Ireland) Act 1871*,[50] which may be the first United Kingdom provision of its kind. If so, it is not the only time Ireland has played a significant part in the development of the British constitution.

As the nineteenth century drew to a close, powers to make subordinate legislation became ever more common and, by the 1890s, the average annual number was about 1,000, which is nothing compared with current annual output. As Allen noticed, in 1877, 1893 and 1901, Lord Thring and his successor as First Parliamentary Counsel, Sir Courtney Ilbert, defended the use of enactments that authorised the making of subordinate legislation. However, Allen does add that it is doubtful if either foresaw the kind and extent of delegation that was to occur later or, even if they had, that they would have been dismayed. This observation seems well made even if one only bears in mind Lord Thing's quoted statement that "any attempt to evade the vigilance of Parliament could always be checked by laying draft orders before the House."[51] How things have changed since 1877!

7—Constitutional constraints on delegating the power to make laws

The power to make laws for the United Kingdom is derived from two sources. Laws are either enacted by the Queen in Parliament or made under the royal prerogative.[52] Subject to the exigencies of war, the fields of operation are mutually exclusive, though the boundary between them has, for several centuries, been retreating in Parliament's favour. As regards each source, the power to legislate is sole and exclusive,

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[50] Though section 118 requires subordinate legislation to be tabled in Parliament, it fails to provide for anything done under an order made under the section before the order is annulled.

[51] Sir C.K. Allen, *Law and Orders* (3rd edn., 1965) at 34-35.

[52] Blackstone describes the prerogative as follows:

> By the word "prerogative", we usually understand that special pre-eminence, which the King hath, over and above all other persons, and out of the course of the common law, in right of his regal dignity. And hence it follows, that it must be in its nature singular and eccentrical; that it can only be applied to those rights and capacities which the King enjoys alone, in contradistinction to others and not to those which he enjoys in common with any of his subjects; for if once any one prerogative of the Crown could be held in common with the subject, it would cease to be prerogative any longer. And therefore, Finch lays it down as a maxim, that the prerogative is that law in the case of the King, which is law in no case of the subject. (Bl. Comm. 1, 239.)

Even though the prerogative is the product of, and is regulated by, the common law (the *Case of Proclamations*, (1611) 12 Co. Rep. 74), it is well settled that a court will not inquire into how a prerogative power is exercised once the power is recognised. (However, the late Professor R.V.F. Heuston suggested that exercise in bad faith might open the way for judicial review: Heuston, *Essays in Constitutional Law* (2nd edn, 1964).) This principle was established in *Darnell's Case* (1627) 3 St. Tr. 1, and reaffirmed in *Chandler v. DPP* [1962] 3 WLR 694.

though not absolute. However, the limitations on the sovereignty of each need not bother us.[53]

To me,[54] once the assent is given to a Bill relating to a particular matter, the prerogative to legislate on the same matter is in effect surrendered.[55] I say this because the Queen in Parliament is the supreme authority for making laws for the United Kingdom. Nonetheless, it seems that the royal prerogative may be subsequently exercised to override the provisions of a United Kingdom statute in wartime.[56] Presumably, this is because of the Sovereign's constitutional[57] or common law duty to defend the realm. As to the latter, see *Hampden's Case*[58] and also Duke LJ in *A-G v. De Keyser's Royal Hotel*.[59] Halsbury[60] states the position slightly differently:

> Where, by statute, the Crown is empowered to do what it might previously have done by virtue of its prerogative it can no longer act under the prerogative, and must act under and subject to the conditions imposed by the statute … [61]

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53 They are the Scottish and Irish Acts of Union and the European Union legislation, together with the constitutional limitation discussed and perhaps other such limitations.

54 But not apparently to Lord Keith of Kinkel and other judges.

55 Although the prerogative is part of the common law, as Blackstone points out (see note 52), it is uniquely related to the Sovereign in person. Having regard to this and to the constitutional consequences of its replacement by statutory provisions, I think that the ordinary principle whereby statute law operates to suspend the relevant common law does not apply. To my mind, Swinfen Eady MR, in using "merged" in *De Keyser* was nearer the constitutional mark than Lord Atkinson. Successive Sovereigns have, in giving their assent to innovative Bills, engaged in a long process of surrendering constitutional power. For this reason, I consider the "surrender" best describes the position.

56 *Lord Advocate v. Strathclyde Regional Council* ("The Faslane Fence Case") 1988 SLT 546 at 550E per Emslie LP: "As I have already said parties were at one in recognising that the question whether the Crown is bound by particular statutory provisions is one of construction (see *Madras Electric Supply Corporation Ltd. v. Boarland*). We are not accordingly concerned with the very different question which would arise in circumstances in which the Crown was in a position to claim the right in the exercise of the Royal prerogative — for example, in the emergency of war — to override the provisions of a statute which, in ordinary circumstances, would bind the Crown."

57 In Scotland?

58 3 How. St. Tr. 825.

59 [1919] 2 Ch. 242 *et seq.*

60 8 Halsbury's Laws of England (4th edn Reissue, 1996), para. 369.

61 This was cited by Morritt LJ in *R. v. Secretary of State for the Home Department, ex parte Fire Brigades Union and Others* [1995] All ER 888, 910a, but he did not mention the Scottish *dictum*. Further, the giving of Assent does not mean the Crown is automatically bound by a statute. See also the speeches of Lord Parmoor and Lord Atkinson in *De Keyser* [1920] AC 508 at 575 and 539-40, respectively, and see also *Laker Airways Ltd v. Dept. of Trade* [1977] QB 643 at 722.

But just as the powers embodied in the prerogative derive from the common law, so also do those of Parliament, and its inability to abdicate its powers to legislate is a constitutional restraint imposed by that law. It is a consequence of this constitutional impediment that the courts enjoy their powers of judicial review regarding the exercise of statutory powers. Furthermore, the restraint probably indirectly operates to apply the vires principle to subordinate legislation. In other words, Parliament is not entirely free to do as it likes.[62] And, if each of the two powers to legislate in the United Kingdom is, within its particular scope or sphere, exclusive, to what extent can it be "delegated", if at all?[63] In relation to the use of the prerogative, the problem probably does not arise. This is because any powers are conferred directly on the person who is enabled to exercise them on the Crown's behalf. Accordingly, the making of subordinate legislation probably does not arise, though the question of sub-delegation might. But, in relation to Parliament, there is the question of the extent to which it can enable others to make orders, regulations or other instruments having legislative effect. This matter was referred to by Hanna J. in *Pigs Marketing Board v. Donnelly (Dublin) Ltd*:[64]

> It is axiomatic that powers conferred on the Legislature to make laws cannot be delegated to any other body or authority. The Oireachtas[65] is the only constitutional agency by which laws may be made. But the Legislature may, it has always been conceded, delegate to subordinate bodies or departments not only the making of administrative rules and regulations, but the power to exercise, *within the principles laid down by the Legislature*, the powers delegated and the manner in which the statutory provisions shall be carried out. The functions of every Government are now so numerous and complex that of necessity a wider sphere has been recognized for subordinate agencies, such as boards and commissions. This has been specially so in this State in matters of industry and commerce. Such bodies are not law makers; they put into execution the law as made by the governing authority and strictly in pursuance therewith, so as to bring about, not their own

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In *Fire Brigades,* the question whether an uncommenced enactment displaced the prerogative was considered. (What was contemplated by the enactment was at odds with what was subsequently done under the prerogative.) The Court of Appeal held, in effect, that it did to a significant extent but, having regard only to the report cited, it seems that the effect of giving the Royal Assent itself was not raised in any of the courts. Everyone appears to have agreed that the prerogative survived pending commencement, albeit in a limited or reduced form, the limiting factor being the "piecemeal" commencement section (s. 171(1)) of the Criminal Justice Act 1988. However, in the appeal to the Lords, Lord Keith of Kinkel (who dissented) said the prerogative continued "unimpaired" – [1995] 2 All ER 246, 247h – and added that, if sections 108 to 117 of the 1988 Act had been brought into effect, the relevant prerogative powers would have been subsumed under the *De Keyser* principle.

62 See Turner J, *Reade v. Smith* [1959] NZLR 996, 1003.

63 I have used quotation marks because, constitutionally speaking, Parliament cannot really delegate any of its legislative functions.

64 [1939] IR 413.

65 The Irish Parliament.

views, but the result directed by the government.[66]

This passage, which is based on constitutional common law,[67] was adopted as a correct statement of the Irish constitutional position by Hedderman J. in *The State (Gilliland) v. Governor of Mountjoy Prison*[68] who added that he wished only to emphasise that the powers conferred on the Legislature [by the Irish Constitution] to make laws cannot be delegated to the Government or any member thereof.[69] Although neither Hanna J nor Hedderman J expressly said so, I think they inferred that, when powers are given to make subordinate legislation, parameters must be set by the Oireachtas by reference to which it would be possible to decide what, in a particular case, may be included in the subordinate legislation. In other words, the principle of vires, or constitutionality in an Irish context, must be applicable in every case even though an Act might provide that the validity of an order is not to be open to question in legal proceedings. For, if vires is not applicable, I suggest it would be the enabling [Irish] enactment, not the exercise of a purported power, which would be invalid. Further, in my view, the theoretical British constitutional position as regards creating statutory powers is no different.[70] But I contend that the United Kingdom Parliament has no constitutional power to deliver a carte blanche in relation to making subordinate legislation. And one last point: the Parliament Acts do not apply to delegated legislation. Thus, assuming that the House of Lords were to annul a statutory instrument (which is most unlikely), the instrument could not have effect even if the House of Commons had approved it.[71]

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66 [1939] IR 413, at 421, emphasis added.

67 However, Article 15.2.1 of the Irish Constitution vests the power to make laws for the State solely and exclusively in the Oireachtas. I return to this aspect later.

68 [1987] IR 231.

69 Or, for that matter, to anyone else.

70 I will return to these questions in sections 12 and 13 below.

71 The Royal Commission on the House of Lords regarded the powers of the present House of Lords in relation to statutory instruments as being "more absolute than those it has in respect of primary legislation." This, it suggested, was a disadvantage to that House. It thought those powers were "too drastic" and so the Lords used them only very rarely. The Commission recommended that the House's power of veto as regards subordinate legislation be replaced with a statutory power of delay. The Government, in its White Paper, *The House of Lords: Completing the Reform*, published in November 2001, accepted this recommendation. The White Paper said: "While a reduction in the *nominal* power to reject statutory instruments absolutely, this change will in practice render the Lords more effective in assuring the quality of secondary legislation, since the House will be able to point out flaws and urge some recasting of a statutory instrument, without rejecting it outright." (Since "should" was not used, it rather appears that the Government expected a fully reformed House of Lords to do what it is told.) To me, this describes the current (2005) position. Moreover, as the Commission pointed out, not having a power of outright rejection would still leave the House of Lords unable to "force the Government or the House of Commons to take its concerns seriously". And, since that House would still have no power to amend a statutory instrument, I suspect that the Commission may have assumed that, if such an instrument were delayed, it would be withdrawn and then replaced by another instrument, which presumably would take account of the Lords' criticisms. Also, as the proposed delaying power

The extent of Parliament's sovereignty is a feature that might well be unique to the British constitution. It appears to be a sort of spectre that haunts the courts, so that even in 1995 Lord Mustill could say: "Parliament has a legally unchallengeable right to make whatever laws it likes."[72] But, though the spectre referred to induces judicial caution lest the judges imperil judicial independence, one of the constitution's cornerstones, it is significant that Lord Mustill continued by saying:

> The Executive carries on the administration of the country in accordance with the powers conferred on it by law. The courts interpret the laws, and see that they are obeyed. This requires the courts on occasion to step into the territory which belongs to the Executive, not only to verify that the powers asserted accord with the substantive law created by Parliament, but also, that the manner in which they are exercised conforms with the standards of fairness which Parliament must have intended. Concurrently with this judicial function, Parliament has its own special means of ensuring that the Executive, in the exercise of delegated functions performs in a way which Parliament finds appropriate. Ideally, these latter methods should be used to check executive errors and excesses; for it is the task of Parliament and the Executive in tandem, not of the courts, to govern the country. In recent years, however, the employment in practice of these specifically Parliamentary remedies has on occasion been perceived as falling short, and sometimes well short, of what was needed to bring the performance of the Executive into line with the law and with the minimum standards of fairness implicit in every Parliamentary delegation of decision-making function. To avoid a vacuum in which the citizen would be left without protection against a misuse of executive powers the courts have had no option but to occupy the dead ground in a manner, and in areas of public life, which could not have been foreseen 30 years ago. For myself, I am quite satisfied that this unprecedented judicial role has been greatly to the public benefit. Nevertheless, it has its risks, of which the courts are well aware.[73]

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would cover only statutory instruments to which the affirmative resolution procedure applied, the White Paper's statement as regards its prospective effect is too wide.

If the proposed power of delay were conferred by statute, as opposed to being regulated by constitutional convention (e.g. a new practice allowing the commencement of a statutory instrument to be delayed), presumably members of the House of Lords would not be inhibited in making decisions as to the appropriateness of exercising their new statutory power. If so, it seems likely that the new power would have, as regards instruments subject to the affirmative resolution procedure, the effect claimed in the White Paper. *(Emphasis added.)*

72 *R v. Secretary of State for the Home Department, ex parte Fire Brigades Union* [1995] 2 All ER 244, 267j. It seems that Lord Mustill momentarily overlooked the European Court at Luxembourg and the House of Lords decision in *Factortame* [1990] 1 AC 603.

73 *Fire Brigades* (HL 267j, 268d).

8—Delegation not abrogation

As far as the modern cases are concerned, in the context of "English" common law,[74] the two earliest decisions both came from Australia.[75] In *Roche v. Kronheimer*[76] it was submitted (*inter alia*) that the Australian Constitution does not permit a federal legislative power to be vested in any body other than the Commonwealth Parliament and, as an alternative, that there is no power to hand over to the Commonwealth Executive the whole power of that Parliament to legislate as regards a particular matter. The case concerned section 2 of the *Treaty of Peace Act 1919*,[77] which enabled the Governor-General to make "such regulations and do such things as appear to him to be necessary for carrying out and giving effect to the provisions of" Part X (Economic Clauses) of the Treaty of Versailles.[78] By giving the Governor-General such a wide power, this enactment is surely a Henry VIII clause *par excellence*. Both of the arguments referred seem to have been based on the assumption that the Australian Constitution[79] separates legislative and executive functions in the sense expounded by Montesquieu. Although the court upheld the validity of the challenged regulations, unfortunately neither of the judgments in *Kronheimer* expressly deals with the arguments mentioned. Although the joint judgment of Knox CJ, Gavan Duffy, Rich and Starke JJ refers to several decisions that seem relevant,[80] the question of separation of powers, though germane, was not discussed in any of those decisions.

In *Dignan' s* case,[81] 10 years later, questions broadly similar to those in *Kronheimer* were again in issue and long and detailed judgments were delivered by Dixon and Evatt JJ and others. This time, the High Court of Australia was concerned with section 3 of the *Transport Workers Act 1928-1929*,[82] another Henry VIII clause.[83] Under this section, the *Transport Workers Regulations* were made. The Regulations

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74 Or, if you prefer, non-US common law.

75 The fact that the decisions relate to a written constitution is, I suggest, of minor importance in the context of this article.

76 (1921) 29 CLR 329.

77 Of the Commonwealth of Australia.

78 Note that the treaty itself was not incorporated into the domestic law of Australia.

79 Originally enacted as a Schedule to the *Commonwealth of Australia Constitution Act [1900]* (UK).

80 See (1921) 29 CLR 329, at p. 337.

81 *Victorian Stevedoring and General Contracting Co. Pty Ltd v. Dignan* (1931) 46 CLR 73.

82 Of the Commonwealth of Australia

83 Section 3 provided that the Governor-General might make regulations, not inconsistent with the Act, which, "notwithstanding anything in any other Act but subject to the *Acts Interpretation Act 1901-1918* and the *Acts Interpretation Act 1904-1916*, shall have the force of law, with respect to the employment of transport workers, and in particular for regulating the engagement, service and discharge of transport workers, and for regulating or prohibiting the employment of unlicensed persons as transport workers, and for the protection of transport workers."

were subject to section 46A of the *Acts Interpretation Act 1901*, [84] which enabled either House of Parliament to disallow regulations. The regulations, having been tabled in the Commonwealth Senate, were subsequently disallowed as provided by the section. It was submitted that in *Baxter v. Ah Way*[85] the Court had already accepted the proposition that the Parliament could not delegate power to make the law. The doctrine of the separation of powers was again referred to, but less emphatically than in *Kronheimer*. Indeed, as Dixon J. observed, the decision in *Kronheimer* could have been reached without reference to the doctrine at all.[86] As to *Baxter*, there is nothing in the judgments to suggest that that decision was regarded by the Court as authority for the submission mentioned above. Again, the validity of the relevant enactment was partly questioned on the grounds that its enactment was an attempt to grant to the Commonwealth Executive part of the legislative power vested in the Legislature and that such an attempt was inconsistent with the distribution of the Commonwealth legislative, executive and judicial powers conferred by the Constitution.

Dixon J. pointed out that the Australian constitutional provisions closely followed the Constitution of the United States and went on to examine the relevant Australian sections.[87] He remarked that, as far as he was aware, there was (then) no decision of the Supreme Court of the United States allowing Congress to empower the Executive to make regulations or ordinances that might overreach existing statutes.[88] He also remarked that the maxim *delegatus non potest delegare* had been applied in the context of the United States Constitution but that the consequent prohibition had no application to the Australian Constitution.[89] He added that the restrictions that the doctrine of separation of powers imposes are the consequences of that principle and do not derive additional support from the American principle of non-delegation.[90] Thus, Dixon J. could be said to have summed up the Australian constitutional position in saying:

> When, at the beginning of [1931], a regulation made under section 3 of the *Transport Workers Act* came before us in *Huddart Parker Ltd. v. Commonwealth*,[91] the attack upon the validity of the section was based rather upon the scope of the commerce power, and but little reliance was placed upon the legislative character of the power conferred on the Executive. But in the judgments of

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84 Also of the Commonwealth of Australia. This section has been since repealed and its substance is now to be found in section 42 of the *Legislative Instruments Act 2003*.

85 (1909) 8 CLR 626.

86 See *Dignan* at p. 99.

87 *Ibid.* at p. 94.

88 *Ibid.* at p. 94.

89 *Ibid.* at p. 94.

90 *Ibid.* at p. 95.

91 (1931) 44 CLR 492.

> *Starke J.* and of *Evatt J.* with which *Rich J.* expressed his agreement, the question was stated whether it was within the power of Parliament to make a law which, in the language of *Starke J.*[92] "prescribes no rule in relation to such employment: it remits the whole matter to the regulation of the Governor in Council" and the answer given by each of us was that *Roche v. Kronheimer*[93] decided that it is within the power of Parliament to do so. A reconsideration of the matter has confirmed my opinion that the judgment of the Court in that case does so mean to decide. It may be true that the nature of the case and the authorities cited as the ground of the decision are consistent with the explanation that it did no more than illustrate the potency of the defence power. But I think the judgment really meant that the time had passed for assigning to the constitutional distribution of powers among the separate organs of government, an operation which confined the legislative power to the Parliament so as to restrain it from reposing in the Executive an authority of an essentially legislative character. I, therefore, retain the opinion which I expressed in the earlier case[94] that *Roche v. Kronheimer* did decide that a statute conferring upon the Executive a power to legislate upon some matter contained within one of the subjects of the legislative power of the Parliament is a law with respect to that subject, and that the distribution of legislative, executive and judicial powers in the Constitution does not operate to restrain the power of the Parliament to make such a law. *This does not mean that a law confiding authority to the Executive will be valid, however extensive or vague the subject matter may be, if it does not fall outside the boundaries of Federal power. There may be such a width or such an uncertainty of the subject matter to be handed over that the enactment attempting it is not a law with respect to any particular head or heads of legislative power. Nor does it mean that the distribution of powers can supply no considerations of weight affecting the validity of an Act creating a legislative authority.*[95]

Evatt J. also examined with great care the constitutional issues raised and as regards the Montesquieu principle said:

> In dealing with the doctrine of separation of legislative and executive powers, it must be remembered that, underlying the Commonwealth frame of government, there is the notion of the British system of an Executive which is responsible to Parliament. That system is not in operation under the United States Constitution. Nor, indeed, had it been fully developed in England itself at the time when Montesquieu first elaborated the doctrine or theory of separation of governmental powers. But, prior to the establishment of the Commonwealth of Australia in 1901, responsible government had become one of the central characteristics of our polity. Repeatedly, its existence

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92 Ibid., at page 506.

93 (1921) 29 CLR 329.

94 I.e. *Huddart Parker Ltd. v. Commonwealth*, ibid.

95 *Dignan* at pp. 100-1, emphasis added.

> in the constitutional scheme of the Commonwealth has been recognised by this Court.
>
> This close relationship between the legislative and executive agencies of the Commonwealth must be kept in mind in examining the contention that it is the Legislature of the Commonwealth, and it alone, which may lawfully exercise legislative power.[96]

Also, as regards the constitutional ability of the Commonwealth Parliament to vest in others the power to make statutory instruments, Evatt J. observed:

> It is very difficult to maintain the view that the Commonwealth Parliament has no power, in the exercise of its legislative power, to vest executive or other authorities with some power to pass regulations, statutory rules, and by-laws which, when passed, shall have full force and effect. Unless the legislative power of the Parliament extends this far, effective government would be impossible.[97]

And later:

> In my opinion every grant by the Commonwealth Parliament of authority to make rules and regulations, whether the grantee is the Executive Government or some other authority, is itself a grant of legislative power. The true nature and quality of the legislative power of the Commonwealth Parliament involves, as part of its content, power to confer law-making powers upon authorities other than Parliament itself. If such power to issue binding commands may lawfully be granted by Parliament to the Executive or other agencies, an increase in the extent of such power cannot of itself invalidate the grant. *It is true that the extent of the power granted will often be a very material circumstance in the examination of the validity of the legislation conferring the grant.* But this is for a reason quite different and distinct from the absolute restriction upon parliamentary action which is supposed to result from the theory of separation of powers.[98]

Notice that none of the Australian dicta cited are as positive as that already mentioned of Hanna J. in *Donnelly*. The present Irish Constitution came into force in 1937 and *delegatus* does not arise under it in the context being considered. The relationship between the legislative, executive and judicial branches of

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96 *Ibid.* p. 114.

97 *Ibid.* p. 117.

98 (a) *Ibid.* at p. 119 (emphasis added). The question was touched on by the High Court in *R. v. Kirby, ex parte Boilermaker's Society of Australia* (1956) 94 CLR 254.

(b) Vile distinguishes between the "pure doctrine" of the separation of powers (*i.e.* as applied by the United States Constitution) and the United Kingdom, or, for that matter, the Australian or Irish, position: M.J.C. Vile, *Constitutionalism and the Separation of Powers* (1967).

the Irish government is (except in two respects that are not material) generally similar to that pertaining in the United Kingdom and Australia. Accordingly, the position as regards the perceived abdication by the legislature of its legislative power is broadly the same in each jurisdiction. The *dictum* of Hanna J. would thus be applicable to all. As noticed, Evatt and Hanna JJ accepted the notion that their respective Parliaments were not competent to "abdicate" their powers to legislate. But what are the reasons in the Anglo-Irish context?

9—Valid delegation of legislative power: the criterion

To answer this question it is appropriate to bear in mind the fact that, subject to constitutional constraints, Acts of Parliament are the highest source of law. "What the statute itself enacts cannot be unlawful, because what the statute says and provides is itself the law, and the highest form of law known to this country."[99] So, if this is so, why are the parliaments nonetheless not free to delegate their power to legislate?

Earlier, I quoted Lord Mackay's speech in the House of Lords made in opposing Earl Russell's motion to reject the amendment adding subsections (4) to (8) to proposed section 58 of the (then) Children Bill. It will be recalled that in the course of that speech, Lord Mackay said "It is a cardinal principle of the interpretation of a statute of this kind that the powers are given only to effect the policy of the statute". This could be said to imply that a statute must set parameters by laying down principles as regards an enabling power to make statutory instruments. But, of course, the speech is not authoritative. In contrast, the Irish position was clearly stated by O'Higgins CJ in *Cityview Press Ltd. v. An Chomairle Oliúna*.[100] However, I have slightly adjusted[101] the Chief Justice's statement to take account of the United Kingdom's largely unwritten constitution:

The giving of powers to a designated Minister or subordinate body under a particular statute has been a feature of legislation for many years. The practice has obvious attractions in view of the complex, intricate and ever-changing situations which confront both the Legislature and the Executive in a modern State … Nevertheless, the ultimate responsibility rests with the Courts to ensure that constitutional safeguards remain, and that the … authority of … Parliament in the field of law-making is not eroded by a delegation of power which is neither contemplated nor permitted by the *common law*. In discharging that

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[99] *Cheney v. Conn* [1968] 1 All ER 779, 782 *per* Ungoed-Thomas J. In the Irish context, this must be qualified having regard to the fact that the Oireachtas is subject to express constitutional constraints. The United Kingdom Parliament has to take account of the Acts of Union of 1706 and 1800 and, in both Ireland and the United Kingdom, membership of the European Union imposes limitations on parliamentary sovereignty. Parliaments of other common law countries, such as Canada and Australia, are also subject to constitutional constraints on their powers to make laws. Nonetheless, the general tenor of the *dictum* of Hanna J seems appropriate for present purposes.

[100] [1980] IR 381, 398.

[101] The alterations are italicised.

responsibility, the Courts will have regard to where and by what authority the law in question purports to have been made. … the test is whether that which is challenged as an unauthorised delegation of parliamentary power is more than a mere giving effect to principles and policies which are contained in the statute itself. If it be, then it is not authorised; for such would constitute a purported exercise of legislative power by an authority which is not permitted to do so under *common law*. On the other hand, if it be within the permitted limits – if the law is laid down in the statute and details only are filled in or completed by the designated Minister or subordinate body – there is no unauthorized delegation of legislative power.[102]

In delivering the judgment of the Irish Supreme Court in *Mulcreevy v. The Minister for Environment etc. and Others*,[103]Keane CJ went further than either O'Higgins CJ or Hanna J.[104] Having referred to Article 15.2.10 of the Irish Constitution, he said:

> It is well established that the exclusive role assigned to the Oireachtas in the making of laws by this Article does not preclude the Oireachtas from empowering Ministers or other bodies to make regulations for the purpose of carrying into effect the principles and policies of the parent legislation.

Then, having referred to *Cityview Press*, he continued:

> But it is also clear that such delegated legislation cannot make, repeal or amend any law and that, to the extent that the parent Act purports to confer such a power, it will be invalid having regard to

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[102] This test was referred to more than once, and impliedly accepted, by the Irish Supreme Court in *In the matter of Article 26 of the Constitution and the Health (Amendment) (No. 2) Bill 2004,* [2005] 1 ILRM 401.

[103] [2004] 1 IR 72 at 87.

[104] Neither of the passages cited by Keane CJ from the judgments in *Cooke v. Walshe* [1984] IR 710 and *Harvey v. The Minister for Social Welfare* [1990] 2 IR 232 completely ruled out amending or repealing a statutory provision by delegated legislation. Nor does the dictum of O'Higgins CJ in *Cityview Press* (referred to earlier) do so. Indeed, the passage cited by the learned Chief Justice from his predecessor Findlay's judgment in *Harvey* seems to have been deliberately phrased to avoid such a sweeping proposition. As to the effect of Article 15.2.1 on lawmaking, two considerations arise. Firstly, I suggest that Article 49.2 of the Irish Constitution proscribes the kind of literal interpretation of Article 15.2.1 advocated in *Mulcreevy*. This is because Article 49.2 saved the prerogative power exercisable in the Irish Free State (Saorstát Éireann) immediately before the 1937 Constitution commenced (but only to the extent that that power was consistent with that Constitution). Secondly, surely making a law is precisely what every statutory instrument does. What if, say, a dog licence fee has been specified in an old statute and a later one gives a Minister power to vary it? Taking *Mulcreevy* at its face value, if the Oireachtas substituted a new section that stated that (say) the fee is to be that specified for the time being in section X, then things would be constitutionally in order. But if it had legislated by reference they would not! And what of an enactment that purports to enable a Minister to make an order removing difficulties or ambiguities arising in a complex statute? Are affected parties to be forced to litigate?

> the provisions of the Constitution.

Thus, as far as Ireland is concerned, Henry VIII clauses are now constitutionally repugnant.

The only officially reported English case I know to be relevant to this difficult question is *Britnell v. Secretary of State for Social Security*,[105] a decision of the House of Lords. The case related to the *Social Security (Payments on Account, Overpayments and Recovery) Regulations 1987*. Section 89(1) of the *Social Security Act 1989* empowered the Secretary of State to make regulations providing for the inclusion of transitional provisions and for modifying specified enactments (i.e. a Henry VIII clause). The House of Lords applied *Stevens v. General Steam Navigation Co. Ltd.*[106] in holding that the word "modification" enabled regulations to be made amending the specified enactments by adding to them. But, in delivering the (unanimous) decision of the House, Lord Keith of Kinkel said:

> In using the word "modifying" in section 89(1) Parliament must therefore have intended to authorize the Secretary of State to enlarge to some extent the provisions of the 1986 Act, including section 53. Counsel for the appellant argued that the power to modify should be strictly construed, and in this context could not cover what was said to be the radical innovation of causing section 53 to apply to past overpayments of benefit. Reference was made to the case in the Court of Appeal of *McKiernon v. Chief Adjudication Officer*.[107] The case was concerned with a claim to disablement benefit on the ground of occupational deafness, a prescribed disease for purposes of the relevant provisions of the *Social Security Act 1985*. Section 165A(2) of the 1975 Act (as added by section 17 of the 1985 Act) provided:
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> > Regulations shall provide for extending … the time within which a claim may be made in cases where it is not made within the prescribed time but good cause is shown for the delay.' Section 77(2) provided: 'In relation to prescribed diseases … regulations may provide – (a) for modifying provisions of this Act relating to … disablement benefit, and the administration of such benefit …

A regulation made by the Secretary of State in 1979 allowed for extension of the time for claiming where good cause was shown for the delay, but a further regulation made in 1985 disapplied that of 1979 and put nothing in its place. It was held that the regulation of 1985 was ultra vires. The principal ground for the decision was that it did not purport to modify section 165A(2) but simply ignored it. It would in any event have been strange if a power to modify had been construed as authorizing the annulment of a mandatory provision. The judgments contain passages to the effect that a power to modify the provisions of a statute

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[105] [1991] 2 All ER 726.

[106] [1903] 1 KB 890.

[107] *The Times*, 1 November 1989. (The decision seems not to have been reported elsewhere.)

should be narrowly and strictly construed, and that view is indeed a correct one.[108]

However, why the power to modify a statute should be so construed was not explained. But, as has been noted, in the United Kingdom context, although the power is derived from the British constitution, there are nevertheless constitutional constraints. Because of this, provisions of the kind with which *Britnell* was concerned are to be construed narrowly, since Parliament must, if possible, be taken to have acted within the limits of those constraints. Accordingly, United Kingdom legislation should be construed and applied in a manner that is consistent with Parliament's having so acted. Professor Driedger approaches this constitutional aspect from a different direction in saying:

> It is not enough to ascertain the meaning of a regulation when read in light of its own object and the facts surrounding its making; it is also necessary to read the words conferring the power in the whole context of the authorizing statute. The intent of the statute transcends and governs the intent of the regulation.
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> The result is that the principles to be followed in construing statutes may require a double application – once to the regulation and once to the statute. Thus, if it is urged that a presumption of intent has been rebutted it is not enough to find the rebuttal in the regulation; it must be found in the statute also.
>
> Words conferring legislative power must be carefully considered from a strict literary and grammatical point of view, for the extent of the power conferred depends much on the formula used.[109]

In other words, it is to be assumed that the legislation will establish principles, lay down guidelines or otherwise fix a parameter, a point also touched on by Hanna J. in *Donnelly*.[110] Further, I suggest that there is a constitutional duty on British courts to save an enactment – Parliament's expressed will – if they possibly can. These constitutional imperatives could be accommodated by applying a rebuttable presumption that Parliament has acted with constitutional regularity. Also, the need to apply such a rebuttable presumption seems inherent in Lord Keith's statement that power to modify[111] an enactment by statutory instrument is to be narrowly and strictly construed. I say this because so construing is the way which is most likely to achieve a result which avoids transgressing the constitutional requirements regarding legislative "abrogation".

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[108] [1991] 2 All ER at 731-2

[109] E.A. Dreidger, *Construction of Statutes* (2 Edn) (1983) 247.

[110] See *Pigs Marketing Board v. Donnelly (Dublin) Ltd*. [1939] IR 413.

[111] Or, indeed, otherwise to amend.

10—Common law limitations on delegation of Parliament's law making function

There remains the question why the United Kingdom Parliament is not free at common law to "abrogate" its legislative power. The reason for this is not because Parliament is bound to perform any of its legislative functions,[112] for it is free not to do so.[113] Nor is the reason attributable to the doctrine of separation of powers, which might be seen to prevent Parliament from authorising a delegate to make instruments having legislative effect (which is now done as a matter of course). In my view, the reason is that, unless there is an appropriate statutory saving provision,[114] each Act enacted by Parliament must, under common law, establish principles or prescribe guidelines as regards, or otherwise determine, the extent or scope of the Act's provisions. A law by which Parliament gave all its law-making authority to a specified delegate, such as a Secretary of State or statutory body, would be defective because it failed to meet the common law requirement just mentioned. In other words, it would lack a characteristic that the word "law" itself connotes. Take the following (if unlikely) example: an Act that merely provided that occupational pensions schemes were to be properly managed and then went on to give a Secretary of State power to make such regulations as were considered necessary to give effect to the Act would, in my view, fail to meet this requirement, assuming there to be no saving provision. But on what basis could this suggestion be judicially accepted? I suggest that, even though the legislative powers of (for example) the Australian Commonwealth or the Irish Republic are not derived from common law, the *dicta* referred to earlier (particularly that of Hanna J.) support my statement as regards the requirements of the common law regarding the scheme of United Kingdom legislation. However, it must be said that as a practical matter the requirement previously mentioned could only be employed to set aside subordinate legislation. The fact that the unwritten provisions of the British constitution are no more than conventions make it most unlikely that, apart from the case of European Union legislation, a British court would impugn an enactment of the United Kingdom enactment. As for subordinate legislation, if there were a presumption that Parliament acts with constitutional regularity, I suggest it is also to be presumed that that is its intent. And so, if a provision in subordinate legislation were found to be outside the limits the British constitution imposes, it could be assumed that Parliament did not intend to extend the relevant devolved power to cover it.

11—Constitutional testing of certain enactments

It is now appropriate to test against common law principles three of the most "outrageous" of the enactments expressly or impliedly criticised above. These are—

- section 147 of the *Local Government Finance Act 1988*,[115]

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[112] See *dictum* of Dixon CJ in *Dignan* (1931) 46 CLR 73 at pp. 99-101.

[113] Clearly this would not happen as regards (say) supply.

[114] Discussed later, in section 14.

[115] The text of section 147(1), (2) and (5) is set out in section 1 of this article.

- section 108(9) of the *Children Act 1989*, and [116]
- section 58(7) of the *Child Support Act 1991*.[117]

The first point to notice about these enactments is that the powers conferred on Ministers are not expressed to give full or further effect to any of the Acts mentioned. Nor are they expressed to be referable to fulfilling obligations, resolving inconsistencies or difficulties or making adaptations or modifications of a consequential nature. Apart from section 147, the enactments are not even stated to be exercisable for achieving the objects of the relevant Act or for giving effect to all or any of its provisions. And in this respect, because of the words following "purposes of this Act", section 147(1) is not really confined or circumscribed. In the Children Act, the actual words used as regards the person making an order are "as appear to him to be necessary or expedient in consequence of any provision of this Act". In the Child Support Act, the corresponding words are "as appear to him to be necessary or expedient in consequence of any provision made by or under this Act (including any provision made by virtue of subsection (4))."[118] The position under section 147 is similar.[119]

As between these Acts, the powers conferred by the Child Support Act are slightly wider than those conferred by the other two Acts in that they enable enactments[120] to be "modified".[121] But in all of the Acts concerned, the crucial words are "*as appears to him to be necessary or expedient*", which, when used in conjunction with "in consequence of", used in all three, are surely just another way of saying "because of this Act", in which case they do not limit the powers conferred. But could the phrase "as appear to him to be *necessary or expedient*" impose any restraint? In other words, must the delegate act reasonably?[122] Perhaps politically in the sense that the delegate would be answerable to Parliament. But would it be open

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[116] Section 108(9) reads as follows:

> The Lord Chancellor may by order make such amendments or repeals, in such enactments as may be specified in the order, as appear to him to be necessary or expedient in consequence of any provision of this Act.

[117] The text of section 58(7) is set out in section 4(b) of this article.

[118] Subsection (4) enables supplemental, incidental or transitional provisions to be made by an order under subsection (2), including adaptations or modifications of any provision of any other enactment. Thus, transitional provisions are covered by subsection (4).

[119] It authorises "such supplemental, incidental or transitional provision as appears to the person making the order necessary or expedient in connection with the provisions brought into force by the order, including such adaptations or modifications … as appear to him to be necessary or expedient."

[120] Section 23 of the *Interpretation Act 1978* does not provide that references to enactments in Acts to which it applies are to be construed as applying to subordinate (subsidiary) legislation (statutory instruments).

[121] Would "amend" not have been good enough?

[122] I do not see how Lord Mustill's *dictum* as regards fairness could be applied as regards either section. Fair to whom?

to a court to inquire? In the light of the following authorities, I doubt it.

In *Liversidge v. Anderson,*[123] the validity of a detention by the Secretary of State under regulation 18B of the *Defence (General) Regulations 1939* was questioned. Detention depended on the Secretary of State's having reasonable cause to believe. It was held that the Secretary of State could not be compelled to give particulars of the grounds for so believing. Viscount Maugham said "... there is no preliminary question of fact which can be submitted to the courts."[124] In *Jones v. Robson*[125] section 67 of the *Coal Mines Regulation Act 1896*, which provided that "a Secretary of State on being satisfied that any explosive is or is likely to become dangerous may, by order … prohibit the use thereof", was considered. It was held that having made the order was itself sufficient evidence that the Secretary of State was so satisfied. In other words, there could be no inquiry whether the Secretary of State had acted reasonably.[126] In *R. v. Comptroller General of Patents, ex parte Bayer Products Ltd.*[127] Scott LJ said, in relation to section 1(1) of the *Emergency Powers (Defence) Act 1939*, "the effect of the words 'as appears to be necessary or expedient' is to give His Majesty in Council a complete discretion to decide what regulations are necessary for the purposes named in the subsection. That being so, it is not open to His Majesty's courts to investigate the question whether or not the making of any particular regulation was in fact necessary or expedient for the specified purpose."[128] These decisions were made in wartime or other time of emergency but there is nothing in the judgments, two of which were given by the House of Lords, to suggest this was a relevant factor. In each case, the decision was by reference to the provisions of the relevant enactment itself. So there seems to be no reason to distinguish them having regard to the general circumstances prevailing when they were given.

Having referred to the cases cited in the previous paragraph, Professor Dreidger continues in his

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123 [1942] AC 207.

124 *Ibid.* p. 224. Today it is generally thought that Lord Atkin, who dissented, was correct in stating, at p. 245, that "in English law every imprisonment is *prima facie* unlawful and … it is for the person directing imprisonment to justify his act". For example, see *Khawaja v. Secretary of State* [1983] 1 All ER 765, 781. So it is unlikely to be followed today. Nonetheless, I do not think that, if *Liversidge* were to be decided today, the decision would be different. I think it could be argued that the Sovereign's constitutional duty to defend the realm enables a court to decide that Lord Atkin's *dictum* is not applicable in cases of this kind. It is of interest to note that, because of his dissent in *Liversidge*, Lord Atkin was "sent to Coventry" by his brother Law Lords, which goes to show how dangerous aroused political passions can be, even in the most exalted places!

125 [1901] 1 KB 673.

126 Ibid. at 679. Moreover, see Clauson LJ in *R. v. Comptroller General of Patents, ex parte Bayer Products Ltd*. [1941] 2 KB 306, 316.

127 *Ibid.* 679. See also *Commissioners for Customs and Excise v. Cure and Deeley Ltd.* [1962] 1QB 340 as regards making regulations that "appear to be necessary".

128 *Ibid.* at 311, 312.

Construction of Statutes as follows:[129]

> In *Point of Ayr Collieries v. Lloyd George*[130] the Court considered the effect of Defence Regulations, which authorized the Minister to make an order controlling an industry if it appeared to him that in the interests of public safety, the defence of the realm or the efficient prosecution of the war or for maintaining supplies …, it was necessary. It was held that no jurisdiction could interfere with the minister's decision, and that he was the sole judge whether or not a case for the exercise of the powers had arisen.
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> In the *Chemicals Reference*[131] the Supreme Court of Canada considered the [Canadian] *War Measures Act*, which provided that the Governor-in-Council "may do and authorize such acts and things, and make from time to time such orders and regulations, as he may by reason of the existence of real or apprehended war, invasion or insurrection deem necessary or advisable for the security, defence, peace, order and welfare of Canada." Chief Justice Duff said that "when Regulations have been passed by the Governor in Council in professed fulfilment of his statutory duty, I cannot agree that is competent to any court to canvass the considerations which have, or may have, led him to deem such Regulations necessary or advisable for the transcendent objects set forth."[132] In *Attorney General for Canada v. Haller & Carey Limited* [133] Lord Radcliffe quoted the foregoing passage from Chief Justice Duff's judgment in the Chemicals case as "the true answer to any invitation to the court to investigate the Order in Council on its merits".
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> In the Japanese Reference, Lord Wright said "Determination of the policy to be followed is exclusively a matter for the Parliament of the Dominion and those to whom it had delegated its powers"[134].

As regards section 108 of the 1989 Act, at this stage it is relevant to compare subsections (8) and (9). In the case of subsection (8), the enabling power is limited to transitional provisions or savings. No such restriction is imposed by subsection (9). Again, compare subsections (4) and (7) of section 58 of the 1991 Act. Once more, the scope of one subsection[135] is limited while that of the other is not. In my view, these

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[129] E.A. Dreidger, *Construction of Statutes* (2nd Edn., 1983) at p. 247.

[130] [1943] 2 All ER 546.

[131] [1943] SCR 1.

[132] See [1943] SCR 1, at 12.

[133] [1952] AC. 427, 445

[134] [1947] AC 87, 102.

[135] Subsection (4) is confined to supplemental, incidental or transitional provisions, whereas subsection (7) gives the Lord Chancellor *et al.* a free hand.

distinctions are crucial: they mean that subsections (8) and (4) pass the test for constitutionality while subsections (9) and (7) do not. In other words, neither of those subsections provides a benchmark by reference to which the judges can decide whether something done under either subsection is within the powers purported to be given by it.

12—"Saving the bacon"

The Irish Supreme Court's decision in *Mulcreevy* seems likely to mean the end of Henry VIII clauses in Ireland.[136] In contrast, I believe a court in Australia would probably take a view analogous to the views expressed by O'Higgins and Finlay CJJ, and Hanna J, that are referred to in section 9. In the United Kingdom, on the other hand, the inclusion of an appropriate provision in the relevant Bill declaring that that the validity of a statutory order of a specified kind, or orders generally under the Act in question, is not to be open to challenge in legal proceedings would, at first sight, seem to meet the United Kingdom situation. However, I do not believe this form of provision would affect the relevant constitutional common law. One could therefore argue that a Henry VIII clause of the kind referred to could be protected only if the relevant common law had been expressly excluded as regards legislative delegation under the Bill. Furthermore, I suggest that such an exclusion would enable British Judges to consider the validity of such a delegation, not on the basis of finding jurisdiction, but rather by having regard to British constitutional law.

13—Results of the tests

From the cases discussed in section 11, it would seem that the powers conferred by two of the enactments concerned can be exercised without the possibility of judicial review. Moreover, neither of those enactments in any way limits the kind of statutory provisions in respect of which those powers can be exercised. To adapt somewhat freely the dictum of Hanna J. in *Donnelly*, Parliament has not prescribed any criterion against which the validity of an order can be tested. In other words, what the United Kingdom Parliament did in each case was to confer on the Executive the whole of its power to legislate on the matters with which the primary legislation was concerned, since the delegation is not confined to any specified matter. The extent to which the purported power is exercisable in a particular case is left entirely to the discretion of the delegate. Furthermore, the question of *ultra vires* cannot arise if Parliament has

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[136] See section 9 of this Article. Also see N. Maddox, "The Legality of Henry VIII Clauses", *Bar Review*, 2004, 9(5), pp. 188-191. Having reviewed the Irish case law, Maddox convincingly argues that, despite *Mulcreevy,* a statutory amendment made by order under an Irish Henry VIII clause would be valid if its effect related to the amended statute's form and not to its substance. If this is so, then an Irish Henry VIII clause would not be constitutionally repugnant *per se*.
See also the observations on Henry VIII clauses made by the Regulations Review Committee of the New Zealand Parliament. (See R. Malone, *Regulations Review Committee Digest*, New Zealand Centre for Public Law, Victoria University of Wellington, Ch. 13.)

failed to provide a touchstone by reference to which that question can be determined.[137]

I now consider section 147 of the *Local Government Finance Act 1988.* That section contains two restrictive provisions. First, the power it confers is restricted to Acts, or instruments made under Acts, passed before the end of the 1987-1988 session. I do not believe this restriction would save the constitutional bacon as it lays down no objective criterion that can be applied. However, because of subsection (1), orders under the section are limited to making *supplementary, incidental, consequential or transitional provisions* and, although the scope of the statutory power is fairly wide, there is nevertheless a criterion against which it is possible to determine the validity of an order made under the section. Also, the phrase "or for giving full effect to it" also supplies a criterion, but not one that applies to all cases. The restrictions imposed by subsection (1) could hardly be described as stringent. Nevertheless, they protect from attack the section on the ground of unconstitutionality and Parliament on the ground that it has purported to delegate to another its power to make laws regarding a particular matter.

14—"Unconstitutional"—judicially unmentionable?

There seems to be an extraordinary reluctance, among British judges at least, to consider whether an enactment is "unconstitutional". This may be a side-effect of their deference to the notion of Parliamentary sovereignty or (despite Viscount Simond's dictum in *Belfast Corporation v. O.D. Cars Ltd*.[138]) a possible reluctance to take account of ideas from the world's largest common law jurisdiction, the United States. No British judge would countenance the possibility of declaring an enactment to be repugnant to the British constitution. Yet practices such as the giving by the Inland Revenue Commissioners of extra-statutory concessions, besides being unconstitutional, could well be unlawful precisely because they are so repugnant.[139] Even in cases involving the *Bill of Rights 1688*, constitutionality seems rarely to be mentioned. In *Liversidge v. Anderson,*[140] a constitutional case if ever there were one, constitutionality is not referred to. The same is true of *R. v. Home Secretary, ex parte Greene.*[141] But whether judges specifically refer to constitutionality or not does not matter. I suggest that the fact is that all the branches of government are constitutionally bound, with the result that anything done in the course of a Bill's passage that is in breach of constitutional convention is no less unlawful for

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[137] Schedule 1 to the *Northern Ireland Act 1974*, enables the Queen by Order in Council to "make laws for Northern Ireland …". Could any power be wider? However, that Act was enacted to make "temporary provision for the government of Northern Ireland". Thus, I think it is a constitutional instrument and special considerations apply.

[138] [1961] NIR 60, 86.

[139] See G.W. Thomas; "The Constitutionality of Extra-Statutory Concession", (1979) 76 *Guardian Gazette* 637.

[140] Mentioned in section 11, above.

[141] [1941] 3 All ER 104.

having been done by Parliament or one of its Houses.[142] And so I also suggest that each House of Parliament, in passing both section 108(9) of the *Children Act 1991*, and section 58(7) of the *Child Support Act 1991*, disregarded the relevant constitutional restraint, which is that it breached the constitution by purporting to grant to the Executive a portion of the legislative power vested in the Queen in Parliament.

In *Dignan,* Dixon J. said:

> In English law, much weight has been given to the dependence of subordinate legislation for its efficacy, not only on the enactment, but upon the continuing operation of the statute by which it is so authorised. The statute is conceived to be the source of obligation and the expression of the continuing will of the Legislature.[143]

In my view, this constitutional analysis is as valid today as it was in 1931. Accordingly, I believe that any order made in exercise of the powers that the questioned sections purport to confer could be set aside by the courts. Meanwhile, a constitutional presumption of validity or regularity may exist that any challenger would have to rebut. As mentioned earlier, in the House of Lord's debate on the Children Bill (1989), Earl Russell observed that the propensity to enact Henry VIII clauses was addictive. This view appears to have been shared by the House of Lords Select Committee, which, in its first review also said:

> There can be no doubt that the increasing use of such provisions, and the increasing scope of the powers delegated, contributed to the pressure which led to the establishment of this Committee.

And later:

> Our attention was drawn to the nature of Henry VIII clauses in evidence to our initial enquiry and we concluded [by reason of the wide range of existing Henry VIII clauses that it] would not be profitable to lay down in advance precise criteria as to what is or is not appropriate.[144]

15—Developments since 1993

It has been put to me that, before the commencement of the *Deregulation and Contracting Out Act 1994* (UK), Henry VIII powers were in practice "seldom, if ever, exercised, except in relation to detail." However, since 1993 there have been three very significant developments. Firstly, under the Act just

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[142] Even though the courts at present desist from inquiring as regards what happened during a Bill's passage. For example, would anyone suggest that the new UK Parliament (1801) could have lawfully repealed the *Union with Ireland Act 1800* in, say, 1805?

[143] (1931) 46 CLR 73, at 102.

[144] Review *(October 1994) of the first year's work of the House of Lords Select Committee on the Scrutiny of Delegated Powers*, paras 16 and 17. Note that the review seems to accept Henry VIII clauses as being inevitable

mentioned, the Government is empowered to make orders amending or repealing any provision of primary legislation that is thought to impose a burden of a kind specified in the Act (so long as the burden could be reduced or removed without loss of any necessary protection). However, the relevant Department must first draft a proposal and carry out specified consultations. After considering the results of the consultation, the Government can if it wishes change all or part of the proposal, or even withdraw it completely. In addition, , Government Ministers have wide-ranging powers under Part I of the 1994 Act to amend primary legislation by order. The purpose of such an order is to reduce burdens on business. Because the scope of these powers has been extended by the *Regulatory Reform Act 2001* [UK], the 1994 Act provides for a special form of parliamentary procedure to scrutinise orders made under it. As well as requiring an affirmative resolution of both Houses of Parliament before such an order can take effect, the procedure provides for enhanced preliminary parliamentary scrutiny.

Secondly, section 10 of the *Human Rights Act 1998* provides that, if primary legislation is found by a superior court (or by the European Court of Human Rights) to be incompatible with the European Convention on Human Rights, a Government Minister can make an order making such amendments to the legislation as are considered necessary to remove the incompatibility.[145]

And thirdly, in a briefing document issued by what is now the House of Lords Select Committee on Delegated Powers and Regulatory Reform, the Committee said:

> We note … that in two of the bills … considered by the Committee [during the 2003-04 Session] – the National Insurance and Statutory Payments Bill and the Horserace Betting and Olympic Lottery Bill – *there are powers to make incidental, supplementary or similar provision which are not Henry VIII powers but are included in commencement orders to which no parliamentary procedure applies*. In the Child Trust Funds Bill, there is a similar provision applying to all regulations and orders under the bill (not excluding commencement orders).
>
> It is well established for commencement orders not to be subject to any Parliamentary procedure, and for them to contain saving or transitional provision. The power to include incidental, supplementary and consequential provision in commencement orders is also not unusual. Of the Public and General Acts passed from 1998 to 2003, about one-fifth contain provision enabling commencement orders to include incidental, supplementary or consequential provision. The Committee do not believe that the use of such provisions is increasing … *[Emphasis added*.]

Clearly, remedial orders under the Human Rights Act will include substantive amendments of primary legislation. And, if one can judge from past practice, these will seldom, if ever, be debated in the Commons and as regards the Lords the situation will be little better. As for amendments to primary

[145] Providing the Minister finds there are "compelling reasons" to do so. Such an order is known as a remedial order, and is subject to a special procedure that is set out in Schedule 2 to that Act.

legislation by commencement order, is this Whitehall's latest ploy to sideline Parliament? Furthermore, there is a vast number of European Union Directives and Regulations emanating from the European Commission, most of them never discussed by either House of Parliament.[146]

As to the growing concern referred to in 1992 by the Jellicoe Committee,[147] by December 2002, the Lords Select Committee on Delegated Powers and Regulatory Reform appears to have partly relegated it to the back of its collective mind, for, in a Special Report,[148] it said:

> We have no doubt, however, that there are occasions when Henry VIII powers to make incidental, consequential and similar provision are justified,[149] for example, when the number of incidental, consequential etc. amendments would cause a disproportionate increase in the length of a bill or when, as a matter of practicality, it would be difficult to anticipate the full extent of such amendments during the passage of a Bill.

Nonetheless, the report merely accepts the reality of the ever increasing complexity of legislation. It does not envisage the prospective use of a Henry VIII clause to substantively amend primary legislation.

16—Henry VIII's bounteous legislative legacy

The addiction to Henry VIII clauses is also found not only in the United Kingdom. For example, in referring to several New Zealand Acts containing Henry VIII clauses,[150] Phillip Joseph observes:

> Henry VIII clauses are tolerable when for facilitating consequential adjustments to enactments which may have been overlooked when the principal Act was passed. Such clauses may be linked to a 'sunset' provision limiting their operation in time.[151] However, none of the above clauses was

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146 The proposed EU Constitution has proposals in this regard but as a practical matter they seemingly amount to no more than window dressing.

147 See section 5, above.

148 Its third report in the 2002-03 Session.
The report considers whether a standard form of words could be used in Henry VIII clauses and quotes a letter (9 December 2002) in this regard from the First Parliamentary Counsel, which clearly shows the very difficult decisions Parliamentary Counsel have to make as regards ancillary and consequential provisions when preparing more complex Bills.
The report also recommended that, as regards Henry VIII clauses, there should be a presumption favouring the use of the affirmative resolution procedure and that reasons for any departure from that procedure should be set out in the explanatory memorandum relating to the relevant Bill.

149 The bold print appears in the report.

150 Including *Reade v. Smith* [1959] NZLR 996 and *Combined State Unions v. State Services Co-ordinating Committee* [1982] 1 NZLR 742.

151 This was normally the case with British Acts enacted before 1932. See Lord Rippon's observations above.

> for a 'housekeeping' purpose but was integral to the legislative scheme. Such clauses could not have been farthest from Dicey's mind when he pronounced the absence of a rival [to Parliament's] law-making power.[152]

As Lord Rippon recalled in the passage quoted at the beginning of this article, the former Lord Chief Justice of England, Lord Hewart, attacked the practice of delegating law-making powers to the Executive. In 1929, Lord Hewart, had this to say:

> A mass of evidence establishes the fact that there is in existence a persistent and well-contrived system, intended to produce, and in practice producing, a despotic power which at one and the same time places government departments above the sovereignty of Parliament and beyond the jurisdiction of the courts. If it appears that this system springs from and depends upon a deep-seated official conviction, which in turn it nourishes and strengthens by each successive manifestation of its vigour, that this, when all is said and done, is the best and most scientific way of ruling the country, the consequences, unless they are checked, must be in the highest degree formidable. That there is in existence, and in certain quarters in the ascendant, a genuine belief that parliamentary institutions and the Rule of Law have been tried and found wanting, and that the time has come for the departmental despot, who shall be at once scientific and benevolent, but above all a law to himself, needs no demonstration.[153]

These criticisms have been described as "extreme and almost hysterical" and compared with those "expressed … in a more balanced way"[154] by Allen.

As Joseph observes, Lord Hewart's criticisms were countered by the Donoughmore Committee, which, however, became bogged down in making fine distinctions between, such terms as "legislative", "quasi-legislative", "judicial", "quasi-judicial" and "administrative."[155] Nonetheless, the Committee's report had a beneficial and long-lasting effect. In commenting on Lord Hewart's quoted observations, Allen had this to say:

> If this be a true picture, it is certainly "in the highest degree formidable", for it amounts to nothing less than a deliberate conspiracy to overthrow democracy. There is evidence in support of the indictment, though it goes very far to say that it "needs no demonstration". The civil service contains persons of extremely autocratic temper. They have been at close quarters with the practical working of politics and politicians and their experience has made them cynical. I have

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[152] P.A. Joseph *Constitutional and Administrative Law in New Zealand*, Law Book Co: Sydney (1993), at p. 432.

[153] G.H. Hewart (Lord Hewart of Bury), *The New Despotism* (1929) p. 14.

[154] See M.J.C. Vile, Constitutionality and the Separation of Powers (1967) at p. 231.

[155] E.A. Dreidger; *Construction of Statutes* (2nd Edn) 1983, at p. 748.

known some who did not disguise their contempt for Parliament and all its works nor their confidence in the efficacy and superiority of their own methods. Such officials regard all restraints on their influence as, as the best, pedantry, and, at the worst, malicious obstruction of good order and government. Some have reached this conclusion out of sheer disillusionment and others by way of political conviction. That there is, within the administration, a body of opinion of this kind can hardly be doubted. Considering that it is held by many persons outside the Civil Service, it would be surprising if it did not have adherents inside it.

But to represent the Civil Service, or any considerable part of it, as a dark and insidious conspiracy is sheer melodrama. It is little short of absurd to conceive the average civil servant as a cloaked Guy Fawkes placing barrels of gunpowder under the Houses of Parliament. It is also mischievous, because it will lead us to lay the emphasis in the wrong place and to apply ineffectual remedies to imaginary ills.

Many civil servants are just as much alive and hostile to dangerous executive tendencies as any other members of the public; and their criticisms, on the rare occasions that they are able to express them publicly, are all the more pertinent because they have had exceptional opportunities of observing the dangers. It is significant when an eminent authority, Sir Warren Fisher, who has been official Head of the whole system, has issued the following warning:[156]

> Simultaneously with the sapping of the independence of individual Members of Parliament there has been for some years [*i.e.* prior to 1944] an equally dangerous movement to diminish the House's effective say on legislation and replace it by ministerial legislation in the form of innumerable rules, regulations and orders having the force of law. The electors should insist on their representatives being freely chosen and when in Parliament acting as representatives and not merely as party hacks.

But the evils of bureaucracy, and, in particular, its tendency to arbitrariness, do not spring from the sinister designs or the perverted views of individuals. They spring from the inherent and insidious characteristics of the system. And for the system, it is not the civil servant, and it is not even Parliament who is responsible. It is the Nation. Let it, by all means, be properly informed of what is happening: but, so informed, it cannot escape its responsibility.[157]

It is just over 40 years since publication of the third edition of Allen's *Law and Orders* and more than 75 since Lord Hewart wrote *The New Despotism*. Although Lord Hewart's remarks may have been overstated at the time, they closely represent the position today. As for Fisher's comments, the independence of parliamentarians has largely disappeared and the warnings given by the quoted

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[156] Addressing the Manchester Luncheon Club, as reported in *The Times*, 27 October 1944.

[157] Sir C.K. Allen *Law and Orders* (3rd Edn) (1965) at pp. 295-6.

commentators constitute have surely been justified. But will the public accept its responsibility for the current situation? Almost eight decades later, this seems less likely than ever.

The past 50 years have seen a proliferation of political appointments in the British bureaucracy. In addition, many matters for which ministers were previously responsible have been hived off to government or quasi-government agencies. Many decisions on other areas that were formerly the concern of the British Government are made by the institutions of the European Union. All this has occurred with the enthusiastic approval of the United Kingdom Parliament, thereby setting itself on a course leading to its having no more political power than Hong Kong's Legislative Council had prior to the Patten reforms of the early 1990s.[158]

Because the United Kingdom Parliament has largely cast aside its role of guardian of citizens' liberties, the steadily approaching omniscient State is forcing British judges, to quote Lord Mustill in *Fire Brigades*, "to the very boundaries of the distinction between court and Parliament established in, and recognized ever since, by the Bill of Rights 1688."[159] Those boundaries remain, so would for example a court in striking down a provision such as any of those that I have referred to in this article overstep them? Although that distinction is still crucial, the role of the judiciary in setting aside unlawful exercises of executive power and in giving decisions to counter the emergence of an autocratic bureaucracy remains of great constitutional significance. I believe that, very unlikely though it seems,[160] were British judges to decide that British constitutional law operates to render invalid any of the enactments previously discussed in this article (or other similar enactments), those boundaries would not be violated. After all, the apparently painless decision of the House of Lords in *R. v. Secretary of State for Transport, ex parte Factortame Ltd*.[161] effectively confirmed what many had believed for years, which is that the United Kingdom Parliament has ceased to be sovereign (if indeed it ever has been). One of *Factortame's* remarkable features is the absence from the speeches of any discussion of British constitutional principle.

17—The Metamorphosis

Until recently, it might have been a source of comfort to note that the United Kingdom Parliament was not the Commonwealth leader in the commission of "constitutional outrages". For, while it seems that the situation has now changed in this respect, consider the following, a product of the legislature in British

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158 The powers of the Hong Kong Legislative Council were enhanced in the early 1990s as a result of reforms introduced by the last colonial Governor, Sir Christopher Patten.

159 The fact that judges are now more frequently appointed to hold inquiries could be an influencing factor.

160 Why would any court stir up a constitutional hornet's nest when Parliament could easily suspend the relevant common law? Indeed, this sort of situation makes the case for a written British constitution unanswerable.

161 [1990] 1 AC 603.

Columbia. Section 52(1) of the *Hydro and Power Authority Act 1996* states:

> Notwithstanding any specific provision in any Act to the contrary, except as otherwise provided by or under this Act, the authority is not bound by any statute or statutory provision of the Province.

This seems to apply to British Columbia statutes and subordinate legislation, both present and future. However, subsection (5) provides:

> The Lieutenant Governor in Council may, by order, make applicable to the Authority any statutory provisions.

Subsection (6) then applies a number of specified British Columbia Acts or specified provisions of those Acts to the Hydro and Power Authority.

Finally, what of the metamorphosis mentioned in the title to this article? That occurred in the course of the preparation of the article for publication. In November 2006, the *Legislative and Regulatory Reform Act 2006* was passed by the United Kingdom Parliament. As far as I am aware, Parts 1 and 2 are unlike anything previously proposed for enactment in the United Kingdom. Although, at first sight, the Act seems less radical than section 52(1) of the *Hydro and Power Authority Act*, its effect appears to be immeasurably more far-reaching. For, while that subsection exempts the Hydro and Power Authority from the application of British Columbia statute law, the exercise of the powers conferred on the Lieutenant Governor by section 52(5) can affect only that body. On the other hand, an order under Part 1 of this Act could, for example, affect every limited company incorporated in England and Wales. Furthermore, the powers exercisable in the United Kingdom under a Henry VIII clause have usually (although not always) been severely constrained by coupling them to specific provisions elsewhere in the enabling statute. In other words, their nature can be regarded as being particular rather than general.

Before going further, let us consider Part 1 of this radical piece of legislation.[162] That Part empowers a Minister of the Crown to make an order that amends, repeals or replaces any statutory provision or rule of law. The power is constrained in a number of respects.[163] Some of the constraints are rather complex. For example, not only has the effect of an order to be proportionate to the policy objective that the instrument seeks to achieve, but, when taken as a whole, it must strike a fair balance between the public interest and the interests of any person adversely affected by it.[164] And, although an order may create

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[162] Sections 1 to 20.

[163] See sections 3 to 7.

[164] Section 3(2).

offences, the power is limited.[165] That said, the scope of the proposed ministerial power is vast,[166] with the main limiting factors being that the exercise of the power must be related in some way to existing legislation or an existing rule of law, or designed to implement (with or without change) a recommendation of one of the United Kingdom's Law Commissions. That being the case, it is hardly surprising that the Bill provoked widespread adverse criticisms, particularly when its main justification was to allow such measures to be implemented without increasing the burden on parliamentary time.

The Act raises a number of constitutional problems and other difficulties. I will deal with just two of them, both which would have been apparent to any experienced legislative counsel.[167] The first concerns the complex preconditions in sections 3, 4, 12(2), 13 and 14. The second concerns the question of whether it will "create a major shift of power in the State … in which the winner would be the Executive, and the loser Parliament".[168]

What would be the consequences of failure to comply with the preconditions in a particular case? One possibility is that that it could give rise to proceedings for judicial review. Assuming that a court found that one or more of the preconditions had not been complied with,[169] what relief might the court provide? On the face of the Act, it would seem that non-compliance would impliedly invalidate the relevant order in its entirety. However, if one looks beyond the Act, it is probable that any applicant seeking to impugn anything in an order would, in judicial proceedings, be required to identify a provision in respect of which a precondition had not been complied with. And assuming the court were satisfied that the precondition had not been complied with, I think it likely that the court would follow the current practice that is generally applied to statutory instruments (which is that, having identified the provisions of the order with which it was not satisfied, the court would set them aside while leaving the others in place).

Because the preconditions are so complex, judicial proceedings would be both lengthy and costly. As a practical matter, these factors would probably deter most challenges to the legislation. On the other hand (and in contrast to the position regarding an enacted statute), if those who opposed a provision of an order moved quickly, they would have a remedy, provided they could prove that the preconditions had not been

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[165] Section 6. In England and Wales, the maximum terms of imprisonment that can be prescribed for an offence created by an order are 51 weeks (on summary conviction) and 2 years (on conviction on indictment), which is surely quite draconian.

[166] E.g. clause 2(2) would enable a quasi-government authority (including one which may charge fees) to be established if the provisions constituting it replaced an existing enactment. It would also enable the functions assigned to such an authority to be added to or the scope of its existing functions to be widened.

[167] And so would have been almost certainly considered during the preparation of the Bill.

[168] The quoted words are taken from a letter regarding the Bill jointly written by six Cambridge law professors, J.R. Spencer, Sir John Baker QC, Davis Feldman, Christopher Forsyth, David Ibbetson and Sir David Williams QC, published in *The Times* on 16 February 2006.

[169] Because, perhaps, a Minister had unreasonably exercised a discretion given him by the Act.

complied with in relation to the provision.

Among the concerns of the signatories to the letter to *The Times* mentioned above was whether the provisions relating to Parliament's role in the legislation would ensure effective parliamentary scrutiny and control. So what are those provisions?

First, a draft of an order, together with a covering explanatory document, must be laid before each House of Parliament.[170] Secondly, the explanatory document must include a ministerial recommendation as to which of the three parliamentary resolution procedures—negative, affirmative or "super-affirmative"—should apply,[171] together with reasons for so recommending. Thirdly, if the relevant Minister recommends the use of the negative procedure, either House may within 30 days,[172] by resolution, require the affirmative resolution procedure (or even the super-affirmative resolution procedure) to be applied instead. If the Minister recommends the use of the affirmative resolution procedure, either House can require the super-affirmative resolution procedure to be applied.

If the Minister recommends the affirmative or the super-affirmative resolution procedure, the position is likely to be not much different as far as the House of Commons is concerned. Because Government backbenchers invariably support the Government's line and opposition members seem to have little interest in challenging statutory instruments,[173] the Minister's recommendation is likely to prevail. In any case, nothing in the Act is likely to stimulate Members of Parliament to action. Why should they bother when they would have no power to amend any draft laid before them, even if the contents of the draft were really controversial? Making things a little more difficult for a Minister may occasionally be stimulating, even for Members on the Government side, but they would soon come to appreciate the pointlessness of doing so in the case of a draft order under this Act. In any case, Members would

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[170] Section 14. This is something of a novelty. Civil servants tend to dislike having draft statutory instruments tabled in Parliament as this necessitates parliamentary debate. Hence, statutes require it comparatively rarely.

Note that subsections (2) to (4) contain several statutory information requirements with which the explanatory document must comply. However, I believe it unlikely that a consequence would flow from non-compliance.

[171] Section 15. This innovative provision requires the Minister tabling a draft order to take account of representations made within a 30-day period, or any resolution relating to it passed within that period by either House or by any House committee that has to consider the draft. The Minister is also empowered to table a further (revised) draft in certain specified circumstances

[172] Despite being increased from an initial 21 days, this period is absurd and seems to have been included so that making such a "generous concession" would be a "painless" way of currying favour at committee stage, as things now stand in the House of Lords. Alternatively, perhaps those concerned regarded the Bill as the start of a process the ultimate object of which is to reduce the Parliament at Westminster to a state of impotence akin to that of the European Union Parliament.

[173] Only a very small minority of Members of Parliament would have the experience (let alone the interest) necessary to enable them to handle with ease the complex measures that reform so-called "lawyers' law".

probably have plenty of less tedious and otherwise more agreeable things to do.

On the other hand, based on their past track record, Members of the House of Lords appear more likely to scrutinise a draft order and to use their powers under clause 15. However, because they too would be powerless to amend a draft, it is unlikely that they would embark on proceedings of this kind with much enthusiasm.[174] But, even if I am wrong on this, the fact remains that neither House would be able to revise a draft. And, having regard to the scope of the Act, this to me seems its greatest shortcoming. Accordingly, particularly because of the unwillingness Members of Parliament to confront their Whips, I would agree with the assertion that the Act constitutes "a major shift of power" through which the Executive has gained and Parliament has lost. I suggest that the Act be amended to address this shortcoming.

It is now very common for United Kingdom Bills to undergo extensive revision during their passage through Parliament. I understand this is mostly because Parliamentary Counsel are not given as much time to consider instructions as they would wish. Indeed, some Bills are introduced with such haste as to make one wonder whether the principal purpose of introducing them is either to inflate ministerial egos or to avoid media criticism. So, apart from an order that is wholly based on a draft Bill produced by one of the Law Commissions, is it not very likely that a draft order tabled under clause 14(1) would require similar revision? One way to provide for this would be to establish a revising body whose principal function would be to examine a final draft order.[175] I envisage that the members of the revising body would be suitably qualified to deal with statutory revision and, in order to avoid "packing", that only a minority would be appointed directly by the Executive. The others would be nominated by non-government organisations. The revising body, which would act in a consultative capacity, could make recommendations, which would be confined to a technical revision of the draft, and not to the policy it reflected. Its proceedings would be conducted in private and it would consider representations. I would not expect the revising body to be consulted in the case of an order wholly based on a draft produced by a Law Commission (or produced jointly with another such Commission). In the case of an order partly based on such a draft, the revising body would be restricted to considering the differences between the original draft and the relevant ministerial draft. On completing its deliberations, the revising body would issue a brief report, which would include any recommendations that it wished to make. If appropriate, either House of Parliament could pass a resolution adopting all or some of the recommendations.[176]

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[174] There is also the possibility that if Members of the House of Lords, powerless though they would really be, proved to be more active regarding these orders than the Executive liked, it would use this as an excuse to start a campaign for the abolition of that House. This stick could probably be used effectively!

[175] By which I mean the version prepared after ministerial consultations had been concluded.

[176] In the case of the House of Commons, I advocate that the legislation should provide that motions for such resolutions should be the subject of a free vote, even at the risk of some Members claiming that the inclusion of such a provision would infringe "the sovereignty of Parliament".

I believe that the establishment of a revising body on the lines I have suggested would remove the serious shortcoming to which I have referred and would have other advantages. First, as its proceedings would be held in private, it could suggest changes affecting policy. However, implementation of any such changes, with or without modification, would be entirely a matter for the relevant Minister, who would of course be entitled to be heard in the proceedings Secondly, as a minority of its members would have been appointed by the Executive, it seems likely that orders would, apart from subjects covered by Law Commission recommendations, be confined to other aspects of "lawyers' law". Thus, the implementation of an unmodified Law Commission recommendation would not be impeded.

Now that this extraordinary Act has been passed, is it not likely that, sooner rather than later, the following two questions will fall for judicial determination. First, can the United Kingdom (otherwise than in order to discharge obligations arising under an international agreement) delegate to another authority a legislative power conferred on it by the British constitution?[177] And, if the answer to the first question is "yes", then what are the constitutional constraints (if any) [178] on the delegation of that power or the exercise of a power conferred by such a delegation?

[177] See D. Morris, "Parliament cannot delegate its legislative power: A British constitutional reality or myth", *The Loophole* (2001), p. 32.

[178] E.g. Henry VIII clause amendments—

(a) must be of an administrative or regulatory character; or

(b) must not purport to alter the policy that an enactment implements.

Editor's postscript

Just as this issue was about to be despatched, news came to hand of a rather remarkable recent example of a Henry VIII clause. The Control of Intoxicating Liquor (Enabling Provisions) (Guernsey) Law, agreed to by the States in November 2006 and believed now to be awaiting the Sanction of the Queen in Council, provides, in section 3(3):

> Without prejudice to the generality of the foregoing provisions of this Law, an Ordinance under this Law—
>
> …
>
> (e) may repeal, replace, amend extend, adapt, modify or disapply—
>
> (i) any enactment (including, without limitation, this Law), but only to the extent that it has force of law in Guernsey, and
>
> (ii) any rule or custom of law, and
>
> (f) without prejudice to the generality of the foregoing, may make any such provision of any such extent as might be made by Projet de Loi, but may not provide that a person is to be guilty of an offence as a result of any retrospective effect of the Ordinance.

Legislative and Regulatory Reform Act 2006 (UK)

Duncan Berry[1]

Introduction

After much debate, the UK Legislative and Regulatory Reform Bill received the Royal Assent on 8 November 2006. The new Act, which replaces the *Regulatory Reform Act 2001*, purports to cut *"*red tape*"* by purporting to give Government Ministers new powers to "strip away" statutory regulations.

As originally drafted, the Bill was extremely controversial. It would have given Government Ministers wide powers to make secondary legislation that could amend, repeal or replace Acts of Parliament and other secondary legislation by what is known as a "Henry VIII clause".[2] However, as a result of Opposition pressure, the Government agreed to include provisions to ensure that members of Parliament can block controversial secondary legislation.[3]

What the Act does

So what does the Act do? Part 1, which is headed "Power to reform legislation", enables a Minister to make secondary legislation in the form of statutory instrument to reform legislation that is perceived to be "outdated, unnecessary or over-complicated".[4] A similar procedure under the Regulatory Reform Act enabled a Minister to make Regulatory Reform Orders (RROs). A review of the first 4 years of operation of the Regulatory Reform Act, published by the Cabinet Office in July 2005, concluded that the Regulatory Reform Act "presented a number of hurdles which inhibited the production of RROs". Furthermore, its powers were "too technical and limited" and it was considered that the procedure should be "extended to deliver non-controversial proposals for simplification".[5]

Under section 1 of the Act, a Minister can only make an order for one of two purposes:

- reforming legislation, or

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1 LL.M, MPP, SJD, Consultant Parliamentary Counsel, Office of the Parliamentary Counsel to the Government of Ireland.

2 This edition of *The Loophole* contains a timely article by Dennis Morris on "Henry VIII clauses".

3 Often referred to as subordinate legislation, subsidiary legislation, delegated legislation, statutory rules or statutory instruments.

4 "New Bill to enable delivery of swift and efficient regulatory reform to cut red tape", Jim Murphy, MP, Cabinet Office press release, CAB/001/06, 11 January 2006.

5 See the Bill's explanatory notes, paragraph 5.

- implementing, with or without changes, recommendations made by the Law Commission, the Scottish Law Commission or the Northern Ireland Law Commission.

One of the justifications claimed for the Act is that reports of Law Commissions are often not acted on for several years after they have been published. Under section 2, an order may amend, repeal or replace any Act or secondary legislation. Section 3 provides that, before such an order can be made, the relevant Minister has to be satisfied that a legislative change is required to secure the policy objective, and that the proposed order—

- is "proportionate",
- "strikes a fair balance" between the public interest and the interests of any persons adversely affected,
- does not remove any "necessary protection", and
- does not prevent anyone from exercising rights or freedoms that they "might reasonably expect to continue to exercise".

The Act contains express limitations. These include—

- section 5, which prevents the Act from being used to "impose or increase taxation",
- section 6, which prevents orders under the Act from being used to create new criminal offences that are punishable by imprisonment for more than 2 years,
- section 7, which prevents the Act from being used to authorise any forcible entry, search or seizure, or to compel the giving of evidence (subject to exceptions relating to the restatement of existing legislation and the implementation of recommendations of a Law Commission),
- section 9, which prevents orders being made in relation to matters within the legislative competence of the Scottish Parliament,
- section 10, which prevents orders from being made to amend or repeal Northern Ireland legislation, and
- section 11, which prevents orders being made to alter the functions of the Welsh Assembly without its prior consent.

A Minister is required to consult widely before making an order under the Act and must lay a draft of a proposed order before Parliament together with a comprehensive explanatory document. The draft order may become a statutory instrument by being approved by Parliament—

- under the existing "negative resolution" or "affirmative resolution" procedures (sections 16 and 17), or
- under a new "super-affirmative resolution" procedure (section 18).

Part 2 of the Act, which is headed "Regulators", implements recommendations of a review conducted by Philip Hampton (the Hampton Report[6]). Under section 21 of the Act, regulators must have regard to two principles when exercising particular regulatory functions. These are that regulatory activities—

- must be carried out in a way that is "transparent, accountable, proportionate and consistent", and
- should be targeted only at cases in which action is needed.

Section 22 enables a minister to introduce a mandatory Code of Practice with which a regulatory agency must comply.

Part 3 of the Act, which is headed "Legislation Relating to the European Communities etc", makes provision about legislation relating to the European Union, with a view to reducing the number of UK Statutory Instruments required to transpose European Union legislation into domestic UK law. These provisions were taken from the European Union Bill, which is currently before the UK Parliament, but has made little progress.

Arguments advanced in favour of the legislation

When the legislation was originally introduced in January 2006, it was described by the House of Commons Select Committee on Regulatory Reform[7] as being "potentially one of the most constitutionally significant Bills that has come before the House for some time". While supporting the move to cut "red tape", the Committee asked for extra safeguards to avoid potential "abuse" of the powers in the legislation.[8] Earlier in January, the House of Lords Select Committee on the Constitution had written to the Lord Chancellor to express its concern that the Bill "could markedly alter the respective and long-established roles of Ministers and Parliament in the legislative process".[9] The Committee also expressed its disappointment that the Bill was not published in draft.

In winding up the debate on Second Reading on 9 February 2006, the responsible Government Minister, Jim Murphy, gave the House of Commons a clear undertaking that orders made under the legislation would not be used to implement highly controversial reforms.[10] However, there is no such restriction in the text of legislation itself.

One of the few people to support the legislation outside Parliament was Francis Bennion, legal textbook writer and former Parliamentary Counsel, who, in a letter to *The Times* on 20 February 2006, claimed that

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6 Phillip Hampton, *Reducing administrative burdens: effective inspection and enforcement,* March 2005.

7 Select Committee on Regulatory Reform; First Special Report, HC 878, 31 January 2006.

8 BBC News, 6 February 2006.

9 Letter from the House of Lords Select Committee on the Constitution to the Lord Chancellor, 23 January 2006.

10 *Hansard*, Col. 1101, 9 February 2006.

"The Bill opens the door to much-needed reforms in what is called lawyer's law".

In May 2006, a report from the House of Lords Select Committee on Delegated Powers and Regulatory Reform found that clause 1 of the Bill was "not far different" from the power granted under the Regulatory Reform Act 2001, and thus not inappropriate. Although the Committee recognised that there were situations in which it might be necessary for order-making powers to be sub-delegated, it considered that the case for unlimited sub-delegation was not sufficiently made out and that some limits should be imposed, for example, by specifying categories of person (such as local authorities) to whom powers could be delegated. According to the report, the powers of Parliamentary supervision in the amended Bill were adequate, but the ability for a Minister to change the law to implement recommendations of Law Commission or to consolidate and simplify legislation were considered inappropriate, since it was for Parliament to make statute law, not Ministers.[11]

Criticisms of the legislation

The order-making powers in the Act are potentially very wide and have attracted much criticism. Although, for example, the Act cannot be used to introduce new taxes, there is nothing to prevent the Act from being used to amend itself. Furthermore, the tests that a Minister has to satisfy before making an order are very subjective. Although in theory an order would be subject to judicial review, in practice it would be difficult to establish that a Minister was not "satisfied" that the requirements for making an order were met.

During its passage through Parliament, the legislation was extensively criticised in articles and correspondence published in the press. For example, one journalist described it as the "Bill to End All Bills".[12] And a member of the UK Parliament called it the "Abolition of Parliament Bill".[13] The Green Party passed a motion at its conference condemning the Bill as a threat to the foundations of democracy.[14]

The legislation also attracted considerable criticism from a number of legal professionals during its passage through Parliament. Before the Bill was read a second time in the House of Commons, the Law Society published a briefing note,[15] expressing concerns that—

- the safeguards were too weak,
- secondary legislation should not be able to authorise further secondary legislation,

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11 *Delegated Powers and Regulatory Reform, Twentieth Report, Legislative and Regulatory Reform Bill*, HL 192, 24 May 2006.

12 Daniel Finkelstein: "How I woke up to a nightmare plot to steal centuries of law and liberty", *The Times, 15 February 2006.*

13 David Howarth, "Who wants the Abolition of Parliament Bill?", *The Times*, 21 February 2006.

14 "Greens attack 'Abolition of Parliament' Bill", Green Party press release, 18 March 2006.

15 Legislative and Regulatory Reform Bill, House of Commons - Second Reading, 9 February 2006.

- the powers of non-Ministers acting under delegated powers were not restricted, and
- there was no procedure for Parliament to challenge use of the Bill.

In a letter published in *The Times*, six law professors from the University of Cambridge wrote that the legislation could be used to—

- create a new offence of incitement to religious hatred, punishable by 2 years' imprisonment;
- curtail or abolish trial by jury;
- introduce house arrest;
- allow the Prime Minister to sack judges;
- rewrite the law on nationality and immigration; and
- "reform" the Magna Carta,

saying that "It would, in short, create a major shift of powers within the State, which in other countries would require an amendment to the constitution; and one in which the winner would be the Executive, and the loser Parliament."[16]

Criticisms by legal commentators include the following:

- Joshua Rozenberg, who wrote in the *Daily Telegraph* that the law firm, Clifford Chance, had pointed out that the Bill "usurps the power of Parliament",[17] and
- David Pannick QC, who wrote in *The Times* that the Bill "would confer astonishingly broad powers on ministers to make the law of the land".[18]

Two barristers, Sir Jeremy Lever QC and George Peretz, pointed out in a letter to *The Times* on 23 February 2006 that the Solicitor General told Parliament on 13 July 1972 that the similar powers in section 2(2) of the *European Communities Act 1972* would be used only for "consequential amendments of a small, minor and insignificant kind", although they have been used subsequently to implement European Union legislation that has made substantial changes to UK law.[19]

An article in *The Guardian* compared the Bill to the *Civil Contingencies Act 2004*, claiming that the Bill was presented as modernising measure but actually gave Ministers arbitrary powers, taking "another chunk out of our centuries-old democracy".[20] An article published in *The Independent* in June 2006 that

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16 *The Times*, 16 February 2006.

17 "Three more reasons to be depressed", *Daily Telegraph*, 9 February 2006.

18 "Another blow to Parliament?", *The Times*, 28 February 2006.

19 *The Times*, 23 February 2006.

20 "How we move ever closer to becoming a totalitarian state", *The Guardian*, 5 March 2006.

analysed the last nine years of legal reform attacked the Prime Minister and his Government, claiming that the numerous changes and laws passed since it has been in power have reduced the power of democracy in the UK; the Bill was just one example that the journalist gave of the kinds of methods being employed to do this.[21]

After the Bill completed its committee stage in the House of Commons, it was reported that the House of Commons Procedure Committee had complained that the Bill "tips the balance between the executive and Parliament too far in the Government's favour".[22] A second report published by the House of Commons Select Committee on Public Administration on 20 April 2006 stated that, "As currently drafted, the Legislative and Regulatory Reform Bill gives the Government powers which are entirely disproportionate to its stated aims."[23] In May 2006, the House of Lords Constitution Select Committee published a report in which it drew attention to a number of issues. The report levelled a number of criticisms at the Bill, including—

- the manner in which the Bill was introduced,
- that the consultative process was "lamentable",
- that the Bill was not debated on the floor of the House of Commons in accordance with the long accepted practice for Bills of first class constitutional importance, and
- that the late amendments, while welcome, were "something of an indictment of the processes of policy-making and legislation".

The report also noted that, as was the case with the *Regulatory Reform Act 2001*, the Bill authorised the delegation of "unprecedentedly wide power" to Ministers and enabled them to change primary legislation to implement recommendations of the Law Commission. Although the report concluded that the Bill, after amendment, was more balanced than before, it was still "over-broad and vaguely drawn", and further safeguards were necessary.[24]

Conclusion

Personally, I find it difficult to disagree with the arguments of the critics of this legislation. In any country having a written constitution, such legislation would be most unlikely to survive the "blue pencils" of the judges of the country's Supreme Court, even if it managed to get enacted in the first place. That this legislation circumvents normal democratic processes is incontrovertible; since its stated aim is to do just that in order to secure the "enactment" of legislation that might be delayed for several years because of the alleged difficulty in allocating parliamentary time to deal with it. Does the end justify the means? I think

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21 "Blair Laid Bare: the article that may get you (arrested for reading)", *The Independent,* June 2006.

22 "MPs angry at 'Bill to end all Bills' ", *Daily Telegraph*, 18 March 2006.

23 *Public* Administration - *Third* Report - *Legislative and Regulatory Reform Bill*, HC 1033, 20 April 2006.

24 *Constitution – Eleventh Report – Legislative and Regulatory Reform Bill*, HL 194, 24 May 2006.

not and certainly not in this case. At the end of the day, more power is concentrated in the Executive, and democratic procedures that have taken centuries to work out are significantly eroded. Although the House of Commons has sat for over 200 days in six years since 1979, on average it sits on only about 160 days a year. So, if it is necessary to find time to deal with legislation emanating from Law Commission reports and the like, then surely it can be found.

Polishing what others have written: the role of the European Commission's legal revisers in drafting European Community legislation

William Robinson[1]

"The drafting of legislation does not consist in polishing what others have written .... Even assuming that a perfect Bill is submitted to the draftsman, he must still subject it to the complete drafting process, for how else can he discover that it is a perfect Bill and satisfy himself that it will give legislative effect to the intended policy? Draft measures prepared by inexperienced persons are usually defective, and then the draftsman must spend much time in undoing what has been done. This is particularly awkward where the draft has been circulated and discussed before submission to the draftsman, because those who have seen it expect that the final draft will closely resemble it and will resist any attempts to alter its fundamental structure".[2]

Outline of the European Community legislative process

The role of the different institutions

Almost all European Community (EC) acts start life in the European Commission. Most substantive legislation is now adopted by the European Parliament and the Council although in certain fields it is adopted by the Council alone. As part of the institutional balance, however, the EC Treaty generally requires the proposal for an act to be drawn up by the Commission. Under the Treaty on European Union the Commission does not have the same "monopoly of legislative initiative" since acts may also be adopted at the initiative of Member States. This article focuses on the drafting of proposals for EC legislation.

Apart from drafting the proposals for legislative acts, the European Commission itself adopts a large number of essentially implementing and administrative acts, generally under one of the procedures involving committees composed of representatives of the Member States.

Drafting in the European Commission

Each technical department or Directorate-General (DG) is responsible for preparing and drafting all acts in its own field. It carries out any necessary consultations and impact assessments and may issue Green Papers to expound problems and invite comment and White Papers to outline its ideas. On that basis it

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[1] Co-ordinator in the Legal Revisers Group of the European Commission's Legal Service. The views expressed are his own and do not necessarily reflect those of the Commission. The author wishes to thank the colleagues who have given him much invaluable assistance.

[2] Professor Elmer A Driedger, *The Composition of Legislation* (2 edn, 1976).

produces a preliminary draft which will form the basis for all subsequent discussions within the European Commission. The first drafts are produced by technical experts, who rarely are lawyers or have specific drafting expertise.

A few DGs that generate large numbers of acts, for example in the field of agriculture, have, within their legal departments, lawyers who will offer some help with drafting.

Once a DG has formulated its preliminary draft, it submits it to the other DGs concerned as part of the Inter-Service Consultation (ISC). The Legal Service must be consulted on all draft acts. Within the Legal Service, compliance with the rules on drafting is checked by the legal revisers while a lawyer specialising in the technical sector concerned examines the substantive aspects.

The revisers' comments on drafting will generally be incorporated in the Legal Service response to the ISC and taken into account by the DG responsible for the text. In some cases the DG, the reviser and the lawyer may work together to resolve problems.

The Legal Service's opinion will in most cases be accepted by the DG but the Legal Service cannot actually block the adoption of a text. A DG can override a negative Legal Service response to an ISC if it is prepared to put the matter to the vote of the full European Commission. The Legal Service will give a negative response generally for substantive legal reasons and only exceptionally on grounds of drafting quality alone.

The originating DG takes account of the comments it has received from the ISC, some of which may be in the form of textual amendments, and may if necessary carry out further internal and external consultations. It then submits its revised draft for formal adoption by all the members of the European Commission. The text may again be revised by the legal revisers.

All these procedures are overseen by the European Commission's Secretariat-General which coordinates the legislative programme and ensures that any necessary impact assessments and consultations are carried out.

Drafting languages

With effect from 1 May 2004 the Community has 20 official languages. Irish will become the 21st from 1 January 2007. As soon as Romania and Bulgaria become members, their languages will be official languages as well. All regulations and other documents of general application must be drafted and published in the *Official Journal of the European Union* in all the official languages[3]. All the language

[3] See Articles 4 and 5 of EEC Council Regulation No 1 determining the languages to be used by the European Economic Community, OJ 17, 6.10.1958, p. 385/58.

versions are available free of charge on the Europa website EUR-Lex[4]. They are all authentic and the European Court of Justice (ECJ) will never interpret one version in isolation.

To enable the institutions to operate efficiently, however, almost all acts are originally drafted in either French or English. The drafting language is determined by the DG or unit. There is no requirement for the person producing the first draft to be a native speaker of the language concerned. The institutions are obliged to recruit their staff on the broadest possible geographical basis from the Member States[5]. The proportion of staff who are native English and French speakers is therefore quite small and most drafters will have to work in a foreign language. A draft act passes through all the internal discussion stages within the European Commission in just one language but it must be translated into all the official languages before it can be submitted to the European Commission for adoption.

All translations are produced by the Translation Directorate-General (DGT) which has a large staff of its own permanent translators and a network of free-lances. DGT has to translate documents across all fields ranging from economic or scientific reports to publicity material. It does not have units specialising in the translation of legislation although some of its translators do have legal qualifications. DGT also offers an editing service to improve the linguistic quality of texts of all kinds written by non-native speakers.

Legal revision in the European Commission

It is clear that such a drafting process can give rise to particular problems. The Legal Revisers Group in the Legal Service attempts to resolve some of those problems. Set up over 30 years ago, the Group now consists of some 55 revisers with legal qualifications covering almost all the Member States and language skills covering all the official languages. They check compliance with the rules on drafting[6] and ensure that the different language versions all produce the same legal effects.

The Legal Revisers Group has responsibility for the drafting quality of acts across all areas of the European Commission's activities but is split into three units in order to allow a degree of specialisation. Its main work is revising draft acts but it also issues rules and other guidance, provides direct drafting assistance, devises standard forms and templates and gives courses in drafting.

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4 http://europa.eu.int/eur-lex/lex/en/index.htm

5 See Article 27 of the Staff Regulations of officials of the European Communities.

6 In particular the Joint Practical Guide of the European Parliament, the Council and the Commission for persons involved in the drafting of legislation within the Community institutions (http://europa.eu.int/eur-lex/en/search/search_lip.html), the Commission's Rules on legislative drafting (RTL), Annex IV to the Rules of Procedure of the Council (OJ L 230, 28.8.2002, p.7), the Council's Manual of precedents, and the Interinstitutional style guide drawn up by the Office for Official Publications of the European Union (http://publications.eu.int/code/en/en-000300.htm).

In 2004, when some 3500 Community acts (regulations, directives and decisions) appeared in the Official Journal, the legal revisers examined 1100 texts. Many of the texts which were not revised covered routine management of the agricultural markets.

Revision of preliminary drafts

Revision at the relatively early stage of the ISC offers major practical advantages because the text is still in one language only and the time pressures are generally not so great. If the revisers identify problems, they can work with the author and the lawyer to find solutions.

Improving the quality of the draft at this stage makes all the work downstream easier. Discussions and consultations will be based on a clearer text, leaving less scope for misunderstandings or confusion between departments. It will be quicker and simpler to determine what has been agreed.

The translators' job should be made easier and the translations more accurate. As a result, the final product in all the languages should be of a better quality.

Revision of final drafts

There may be a further opportunity to improve the quality of the text when a proposal is tabled for adoption by the full European Commission. Revision at this stage may be requested by the DG concerned. More often, though, it will have been suggested by the Legal Service at the earlier revision stage either because the text had been heavily revised and needed rechecking or because it was in an area where terminological problems might be expected.

By now the draft act has been translated and revised in all the official languages and it is hard to make changes to the original, however flawed, because so many people have had a hand in its preparation who are neither lawyers nor drafting specialists and are not native speakers of the language.

Such revision must be limited in scope because the draft has passed through almost the entire procedure within the European Commission and been the subject of consultations both internally and externally. The text is almost certainly the fruit of compromise and may in consequence contain deliberate ambiguities. Other ambiguities may simply be the result of bad drafting or the incorporation of textual changes suggested by a non-native speaker.

Any such flaws will have been addressed by 19 skilled translators who, with their background knowledge and extensive research facilities, will have found thoughtful solutions. They have a difficult balancing act: should they be faithful to the original and reproduce any ambiguities or should they make the meaning clear. Their natural inclination to clarify ambiguities is dangerous since it may lead to translations which are quite clear but open to a quite different interpretation from the original.

Even the author of the first draft can no longer be sure of the precise meaning of the text because it has been redrafted "by committee" at every level. If a textual change was demanded by another DG or

delegate, the author of the first draft may be uncertain of the precise intention underlying the change.

Since the text is due to be adopted by the European Commission within a matter of days, revision must focus on ensuring total consistency between the language versions rather than on rewriting or restructuring.

Quality controls in the subsequent legislative procedure

The proposal from the European Commission is passed to the European Parliament and the Council acting together in the co-decision procedure (in certain fields the Council acts alone). In the European Parliament the proposal is assigned to the appropriate standing committee of Members of the European Parliament and a rapporteur is designated. The committee reports to the plenary and generally proposes amendments to the proposal.

Within the Council, the proposal is examined by a working party composed of representatives from all the Member States. They are generally technical experts rather than lawyers and their work focuses on technical issues and the text of the proposal before them. The proposal then passes to the Permanent Representatives Committee (Coreper), made up of the Member States' ambassadors or their representatives, which ensures consistency in the work and resolves technical-political questions before submitting the dossier for decision by a vote of Ministers from the Member States.

At the very end of the procedure when the European Parliament and the Council have reached political agreement on the proposal, and often after its formal adoption, it is vetted by the legal revisers of those institutions. The text is finalised at a meeting of the revisers for each language attended by representatives of the Member States, who can veto changes suggested by the revisers.

Problems inherent in such a decentralised drafting system

Problems facing drafters

European Commission staff called upon to draft legislation may have complete technical mastery of the subject matter but struggle with the unfamiliar task of legislative drafting. Commonly they are not lawyers and have been given little or no training in legislative drafting. Often the only guidance they have received is from their immediate colleagues, who are likewise technical experts, not drafting specialists. Under the internal procedural rules, they will have few contacts with the only European Commission staff who do specialise in drafting legislation, the legal revisers. Most of them will be obliged to work in a foreign language.

The drafters have to create their own structure for their act, sometimes with difficulty. But then they have to incorporate in it suggestions that may fit awkwardly in the chosen structure. They know the legal framework in their sector well but, if not lawyers, they will not appreciate all the needs of legislation or have the reflex to aim for consistency and coherence. Even the drafters who have legal qualifications will rarely have specific expertise in legislative matters.

The drafters will have carried out preliminary consultations and possibly published Green and White Papers, often with drafts of the proposed rules posted on the Internet. Increasingly impact assessments are being carried out to analyse what effect new rules will have in practice. Drafters may be unwilling to accept any changes to the draft rules for fear that they will call in question the preliminary work.

From an early stage the main statement of the policy is in draft rules and any attempt to influence the policy takes the form of changes to the text of the draft rules. There is plenty of scope for misunderstanding because of the language problem. Those consulted may have misconstrued the original draft and make comments based on false premises. The drafter may not grasp the precise rationale of textual changes suggested by others and fail to take proper account of them.

It is often hard for drafters to accept that their drafts must be substantially altered. No-one likes to be corrected but it is worse when the corrections can be seen by all other participants in the process, as happens in the European Commission system.

As a rule, novice drafters and those without legal qualifications tend to welcome help and to recognise the improvements while older hands and lawyers will resent having their handiwork changed and may challenge the changes suggested by the revisers.

The greater the effort that the drafters have put into the first draft, the more they will tend to resist changes. It is even worse when hard-won compromises have to be unravelled, especially when concessions made to obtain consent have to be withdrawn. A typical example is where a drafter has inserted words in the statement of reasons for an act to satisfy concerns of another department which would really have liked a provision in the articles but those words are deleted by the revisers because the rules require all the statement of reasons to relate to the articles.

There is also a danger that drafters who have taken a lot of trouble in preparing an important new text will believe that only a light final polish is required. They may then fail to allow enough time for a thorough revision and be surprised at the number of changes suggested by the revisers.

Problems facing revisers

If a first draft is very poor, it may be impossible for the revisers to grasp exactly what was intended and it will certainly be hard to raise the quality to a satisfactory standard. In particular, if the original structure is bad, it will be difficult to straighten it out fully in the course of revision.

It is all too common for revisers to misunderstand the drafter's intentions. Since the drafters are generally not native speakers of the language they have to use, not lawyers nor even specialists in drafting, nothing can be taken at face value. In fact, revisers often need some knowledge of the language of the drafter in order to understand the words and constructions used in the draft.

It is relatively simple for the revisers to ensure superficial or formal consistency within the text before

them at a given moment. But since they are not specialists in the subject-matter, they do not know the wider context, the legal framework of the sector, well enough to ensure substantive consistency and coherence. For example, they will not necessarily recognise that draft provisions submitted to them are modelled on parallel provisions in the same sector or a neighbouring sector. They are, to some extent, reliant on the contextual knowledge and terminology of the drafter. Unfortunately, for procedural reasons they cannot always have all the contact they would wish with the drafter or the lawyer concerned.

Revisers tend to preserve as much as possible of the original draft and to make changes only where there are actual mistakes of language or form or breaches of the drafting rules. They do this so that they can get through their work in the time available and maintain cordial working relations with the clients but also because they lack in-depth knowledge of the subject matter. As a result, if two drafts are submitted that have been drawn up on two different models, they may be revised in different ways even by a single reviser. Indeed this should be the result if the original is respected and changes are made only where there is a breach of an express rule.

Drafters often use as a model their own drafts of earlier acts. The risk is that they will rely on their draft before revision; as a result, the new draft will repeat the mistakes of the past. Revisers have to try to spot them all again, as well as deal with any new problems in the text.

Revisers may be blinded by the draft, particularly if it is superficially well presented with all the requisite parts, an apparently satisfactory structure and plausible wording. Some revisers focus on certain aspects such as protocol rules or avoidance of jargon or Latin and may overlook other defects. Since only a small number of the revisers are native speakers of the drafting languages and it is not possible to assign one of them to each job, some linguistic errors are not corrected.

Revisers must always be aware of the need not to revise just what is on the page but also to think whether others provisions should be added, for example on transitional measures, review or repeals. They also need to step back to consider the broader picture: is the act as drafted needed or could the result be achieved in some other, simpler way?

Long and complex draft acts can present very serious problems for revisers. It can be difficult to straighten out the structure if it is fundamentally misconceived. The revisers' analysis may reveal so many inconsistencies, ambiguities, omissions or even "black holes" that a simple revision process is not enough. Such texts may have to be altogether redrafted in meetings between the technical experts, lawyers and revisers concerned. Each redraft may bring to light further problems and in some cases the process can take many weeks as the text passes through numerous redrafts.

Decentralised drafting systems

In some countries legislation is drafted by a corps of staff who specialise exclusively in legislation. Others have decentralised drafting systems more akin to that in the Community institutions. In most of those systems, however, the staff who produce the first drafts will be lawyers and they will always be writing in

their native language. Stringent checks are built in, often with a final comprehensive review by a high-ranking independent authority such as the French Conseil d'État.

The Community's present system was apparently satisfactory in the early days, perhaps because of a combination of the following factors.

The fabric of Community law was loosely woven. There were fewer earlier acts for new ones to be fitted around. Such acts as did exist were less technical, tending to be confined to broad principles which would be filled in by administrative practice.

Fewer acts were adopted each year than is the case now. The process was slower, there was time to check and polish. Most acts were adopted by the Council alone, while the EP had only a consultative role. Once the proposal had been formulated by the European Commission, it had to be adopted only by the Council with just six Member States, rather than having to pass through both the European Parliament and the Council, each with representatives from 25 countries.

In the early days there was a single working language for all the institutions, French. It was an official language of three of the six original Member States, namely the three in which all the main offices of the institutions were located. All officials developed a good standard of French because it was the first foreign language learned in most of the original Member States and a good knowledge of it was a condition for recruitment and advancement in the institutions. French is a language with a lot of grammatical rules and there is often only one right way to say something. Moreover, almost all documents were prepared by secretaries who could correct mistakes and improve linguistic quality as they worked.

Community acts were drafted in quite simple language and the European Court of Justice (ECJ) did not take a literal approach to interpretation but took account of the purpose and context, sometimes going to lengths that are surprising to lawyers from common-law systems.

Advantages of a decentralised system

The decentralised system may be satisfactory for short, routine texts. Staff who have had basic training and make full use of the templates, guidance and checklists provided are able to produce texts which, after fairly light checking by trained revisers, are of an acceptable standard. It is flexible because large number of people can draft and there is no bottleneck at the level of a single drafting unit whose staff require long training periods before they can become operational.

It is generally easier for non-native speakers who are not lawyers to draft acts than to draft precise instructions; they are familiar with all the technical terminology and with the sectoral legal framework. They can express themselves more concisely and rely on existing formulations rather than have to express policy in abstract terms.

If the precedents chosen are appropriate and well drafted, repetitive acts can be produced efficiently and

rapidly and a degree of consistency with existing acts is automatic.

Trained and experienced revisers are able to work out what was intended quickly. They see drafts through new, critical eyes and are aware of common problems. Because they have before them a complete draft, they can approach the text from a different perspective from the drafter.

Good communications between the departments concerned are essential. If the revisers are able to obtain clarification of the drafter's intentions, their work is easier and of a higher quality. If the revisers' comments are understood by the drafter, if necessary after further consultation, and then incorporated properly, the system can work effectively.

Improving the system

In the 1990s concerns began to be expressed about the quality of Community legislation in various Member States[7]. Eventually those concerns led to a major initiative to improve drafting.

Intergovernmental Conference of 1997

At the Amsterdam Intergovernmental Conference in 1997 the heads of State and government adopted Declaration No 39 on the quality of the drafting of Community legislation[8]. It called on the institutions to "establish by common accord guidelines for improving the quality of the drafting of Community legislation … and [to take] the internal organisational measures they deem necessary to ensure that these guidelines are properly applied".

1998 Interinstitutional Agreement on Quality of Drafting

The European Parliament, the Council and the Commission then adopted the Interinstitutional Agreement of 22 December 1998 on common guidelines for the quality of drafting of Community legislation.[9] That agreement laid down 22 guidelines on drafting, based partly on suggestions from Member States, and listed organisational measures to make sure the guidelines were actually applied. Those measures were essentially aimed at improving the drafts produced by the DGs at an early stage.

The European Commission has taken a number of measures. The *Joint Practical Guide for the drafting of*

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7 See in particular: the report of the French Conseil d'état of 1992; the Declaration of the European Council in Birmingham in 1992 including the words: "We want Community legislation to be clearer and simpler"; the Koopmans report from the Netherlands in 1995; the conference on the quality of European and national legislation organised by the Netherlands and the European institutions in 1997.

8 OJ C 340, 10.11.1997, p. 139.

9 OJ C 73, 17.3.1999, p. 1.

Community legislation has been made widely available in booklet form and on the internet[10]. Drafters are being made aware of the need for better drafting by means of circulars, seminars and other actions. They are being offered basic courses in legal drafting. DGs were encouraged to set up specialist drafting units.

The legal revisers are brought in to make drafting suggestions earlier. They have been given more staff and have created an internal structure to allow a degree of specialisation. As they have become embedded in the drafting process, they have developed their skills in response to the increasing demands made for drafting expertise.

The Translation DG has set up a specialist editing service to improve the quality of texts drafted in French and English by non-native speakers.

Concluding remarks

Suggestions for improving the drafting quality of Community legislation include establishing an independent body to review proposals for legislation just before they become law or a drafting office to serve all the Community institutions. Either of those solutions would entail major changes to the present structures and possibly amendment of the Treaties. Within the present framework, however, drafting quality could still be improved by practical steps such as the following:

Language skills—Greater attention should be focused on language skills, especially in the internal working languages. A decentralised system apparently works satisfactorily in various monolingual national systems. To make it work better in the Community institutions, further efforts are required. Staff must realise that the slips, infelicities and obscurity that are inevitable in a multilingual environment and are tolerated in internal and informal communications cannot be allowed to spill over into formal communications. More rigour is needed, for it is all too easy for fuzzy language to conceal confused thinking.

It is possible that in time English will come to be the sole internal working language, as French used to be, and that the standard of English in the institutions will improve as a result. However, fluency in everyday English is no guarantee of ability to communicate effectively on technical matters. Computer tools to highlight language problems in texts may come to offer some assistance.

Drafting skills—Drafting, especially legislative drafting, must be recognised as a specific skill to be mastered. All departments have designated drafting specialists. Non-native speakers should be given specialised language courses but even staff who are native speakers of the

[10] See footnote 4.

language or are lawyers should be given specific drafting training and back up. No staff should be allowed to draft without supervision until they have attained a certain level of competence.

Differentiated approaches—A differentiated approach to preparing legislation should be adopted. The present system may work for short, routine acts but it is inadequate for bigger, more complex ones. For such acts, skilled drafters should be involved from an early stage. Each DG should have its own legally trained, specialist drafters. For complex acts they should form a team with the technical specialists. The team should take the time necessary to develop a well thought out first draft. It should consult the Legal Service, including its revisers, at an early stage and again allow the necessary time for revising the draft.

Unified responsibility and control—Drafting Community legislation is a fragmented process in which no one person takes full responsibility and control.

Each participant may assume that others will sort out the problems. Within the European Commission itself, the drafter may think that the editing service will correct any language errors and the legal revisers will address technical drafting problems. The legal reviser may assume that the drafter has resolved all substantive issues correctly. Various DGs intervene to address one single concern each. The European Commission then submits its proposal to the other institutions where such problems recur.

The creation of drafting teams will help to solve the problem of fragmented responsibility within the European Commission. To tackle the problem at the inter-institutional level, the European Commission could take a more active role at the final stage of the adoption process when the act is in the hands of the European Parliament and the Council. The European Commission is still a key player in the process by virtue of its right under the EC Treaty to withdraw its proposal at any time before the adoption of the act, thus making it impossible for the act to be adopted. At that stage the European Commission has traditionally focused chiefly on substantive issues but it could in theory use that leverage to improve the technical quality of the act adopted on the basis of its proposal. The European Commission drafting team, with its valuable knowledge of the early drafting stages, could intervene in the final polishing of the act by the European Parliament and Council revisers to ensure coherence and drafting quality.

Legal briefs and lawful shorts—Are they for you?

Janet E. Erasmus[1]

Tired of writing legislation? Want to explore a little elegant variation in your text? Looking for less anonymity and more control? This article is for you.

What am I on about, you will be asking. Well, this is an article about legal newsletters — why an Office of Legislative Counsel might choose to become involved in one, and British Columbia's experience with such a newsletter.

Why a legal newsletter?

Many of you will be familiar with newsletters put out by law firms. They provide general legal information, and often a little entertainment, in relation to the interests of a firm's continuing clients. Specialist firms will have a newsletter related to their particular practice area. Large firms with a broad practices may publish a number of targeted newsletters. Why do they do this? It is all about marketing.

Newsletters are considered among the most tried and true — and cost-effective — marketing strategies available for preserving a firm's client base and expanding the firm's practice. As the benefits of an external newsletter are described by Sheila Hoffman, an editorial services professional whose business NewslettersAndMore develops newsletters for non-profit organizations as well as business:

> "...newsletters let you communicate frequently with a highly specific audience, establish yourself as an authority and market leader, enhance your image and credibility, develop good service or product identification, [and] offer potential users, buyers or members a personalized contact."

Legislative Counsel, and other lawyers working within government, generally do not need to market their services. But we do have continuing clients, and newsletters for our organizations share many of the business benefits, as well as providing some significant additional public service benefits.

By publishing a legal newsletter for senior government officials, we are able to:

- Establish ourselves as authorities in relation to legislation or other public law matters. By indicating the breadth and importance of issues addressed by government lawyers, our image and credibility is enhanced.

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1. Senior Legislative Counsel with the Office of Legislative Counsel, Ministry of Attorney General, British Columbia, Canada. The views expressed are presented with the usual disclaimer: they are those of the author and should not be attributed to that Office or Ministry.

- Communicate outside the usual circumstances of a problem that requires legal involvement (such as advice on a contract issue, response to a legal proceeding against the government or the drafting of legislation). Our services are provided without time or policy pressures, to be seen as preventive care rather than costly repair.
- Establish an advance connection so that, when officials do need to work directly with us, they do this with the sense of having an existing relationship.
- Provide education about relevant legal issues so that other government officials are better able to do their work and so that they are better able to work with us.
- Sensitise these officials to when they should be coming to us with issues in advance of a problem.
- Provide timely information about legal decisions and legislative changes that have impact across government.

Why Legislative Counsel are well-placed to contribute to a legal newsletter

We have the knowledge. We are specialists in statutory interpretation, knowledge that is relevant to every Ministry that administers legislation. We have a broad understanding of the structure of government and its relationship with Parliament and the courts. As a central office, we are able to identify key issues that have relevance across government. Being consulted by government lawyers who are defending legislation from challenge, we have early warning of potentially significant legal issues. We are aware of and often involved in government's responses to significant legal cases.

We have the writing skills. Legislative drafters are writers – technical writers, yes, but writers with an exquisite sense of the precision of language and the rules of grammar. We are used to writing with a journalist's brevity, even to the style of having only one or two sentences per paragraph. And today, many of us will have had some training in the techniques of plain language writing for effective communication.

Why Legislative Counsel Offices are well-placed to publish a legal newsletter

We have the publishing skills. Information technology has had a significant impact on legislative drafting. See, for example, the articles by Peter Quiggin and Don Macpherson in the March 2005 issue of *The Loophole*. It has also affected the functions of our Legislative Counsel Offices, in many cases turning us effectively into publishers with in-house authors. To our historical writing and editing skills, we have added knowledge and skills regarding document design and formatting. Applying all these skills to a different form of publication is a challenge, but it is also a refreshing change for drafters, editors and administrative support.

We have the contacts. Legislative Counsel Offices have a direct connection with and, in some cases, are in fact part of the Cabinet Secretariat. We provide centralized services to all Ministries, with contacts at senior levels in those Ministries. We are able to identify appropriate distribution for a general legal newsletter.

Legal Briefs and Lawful Shorts — the British Columbia experience

In British Columbia, the "government's law firm" (as we have been known to call ourselves) is the Legal Services Branch of the Ministry of Attorney General. All legal services for other Ministries are provided by or through this Branch. It has five major divisions: the Office of Legislative Counsel, the Civil Litigation division, the Constitutional and Administration Law division, the Aboriginal Law division and the Solicitors Division. With a size of over 150 lawyers, and with a specialisation in public law, the Legal Services Branch is certainly a candidate for having a legal newsletter.

The impetus for such a newsletter came out of one of those "strategic planning" processes that governments and other large organisations engage in from time to time — an outside consultant comes in and talks about paradigm shifts, visualizations, service orientation and other abstracts, then committees are formed to create something concrete from it all. In our 1995 process, one of the committees was given the name "information partnering" (translation: improving communications with clients) and I was its coordinator. Our recommendations included the development of a legal newsletter for senior levels of government.

The proposal was accepted, and the first issue came out in June 1996 as *Legal Briefs and Lawful Shorts*. (The title was chosen through a name-our-newsletter contest for the Branch.) The response to each issue has been immensely positive. Time and time again there is article that is so immediately helpful that we get notes of thanks.

Organization, publication and other practicalities

The editorial board structure is, shall we say, loose. Membership is on a volunteer basis with an annual call for new recruits. It includes lawyers, legal assistants and support staff. It has always had participation from the Officer of Legislative Counsel, currently two drafters, one editor and our manager of legislation (who doubles as a formatting and design wizard). We rotate the editor-in-chief position for each issue, also on a volunteer basis — share the labour, share the glory.

The editorial board identifies appropriate topics for articles in the upcoming issue and appropriate authors for those articles. Most of the members write from time to time, but more often our assignment is providing contact, editorial and timely chasing services to other members of the Branch who have had their shoulder tapped for an article.

We usually publish two issues a year, although we have been known to do a special issue if there is information on a new court decision or piece of legislation that needs to get out earlier. For example, the *Freedom of Information and Protection of Privacy Act* was amended with a view to keeping personal information (such as medical records) inside Canada and away from the reach of foreign access under legislation such as the *U.S. PATRIOT Act*. These amendments had significant impact on government operations, particularly in relation to contracts with IT service providers, and a special issue of *Legal*

Briefs and Lawful Shorts was prepared.

When we first began, *Legal Briefs* (our short title for conversations) was published in hard copy, with all the effort and cost that entailed. Within a short time government email systems had improved immensely and we now do the distribution electronically using Adobe Acrobat (.pdf) format. It is cheaper and faster, delivery is more certain — and it allows us to do these quick, short issues on significant issues.

The distribution is not centralized — and this is for reasons of client relations. Each Ministry has a Legal Services Branch lawyer assigned as Client Service Coordinator. The Coordinator is a central contact for all issues regarding legal services provided to the Ministry, and is responsible for negotiating the annual level of committed funding from the Ministry. (We have a charge-back system for most legal services, although not Legislative Counsel services, in case you are wondering.) The *Legal Briefs* distribution is set up so that it comes out to a Ministry through their Client Service Coordinator.

What to write about

New and significant cases and legislation will always be suitable topics, but there are also general topics that provide us articles. The following are some of these general topics and examples of articles that have been published on them:

Practical matters related to litigation — for example, when a public service employee may be asked to swear an affidavit on behalf of the government court case or what is involved in having to be a government witness in an examination for discovery.

Issues involved with the Freedom of Information and Protection of Privacy Act — for example, the rules regarding access to legal opinions, the circumstances in which personal information about public service employees is subject to disclosure or the scope of the obligation to search for requested records.

Timely information — for example, new reporting obligations for public servants if they considering government is about to make an unauthorized expenditure.

New government initiatives — for example, consultations on civil liability reform, the promotion of mediation and other alternative dispute resolution processes or changes to government contracts with IT service providers.

Services provided by the Legal Services Branch — for example, a free course on administrative law principles for statutory decision makers or a new Guide to Preparing Drafting Instructions available from the Office of Legislative Counsel.

General information — for example, general rules on obtaining injunctions to stop breaches of the law, the role of the Attorney General in relation to judicial independence or videotaping in the

context of regulatory inspections.

General interest — for example, "Do Kangaroos work like Beavers?" by Australian Parliamentary Counsel, Michelle Fletcher, describing her work exchange experience with our Office of Legislative Counsel.

What might go in an issue

The following are a few examples taken from our Table of Contents records.

The first issue:

Volume 1 – Issue 1 (June 1996)

A very large issue:

Volume 7 – Issue 1 (April 2002)

A special issue:

Volume 9 – Issue 2 (December 2004)

Contributions by Legislative Counsel

Almost every issue has had one or two articles by a Legislative Counsel. As discussed above, as a central officer we have information that is relevant across government. Topics on specific legal issues have ranged broadly and include the following:

- Judicial appetite for Hansard: "peppering" the Bills;

- Bills, media briefings and parliamentary privilege;
- What happens to Ministers and Cabinet when a general election is called;
- The Queen Proposed and Parliament Disposes — sources for government spending authority;
- Benefit programs under voted appropriations — Pharmacare and the power to establish entitlement rules without statutory authority.

The largest contribution has been a continuing series on statutory interpretation, with the series title *How to Read an Act*. Specific articles have covered:

- Introduction to the Interpretation Act;
- Persons, ministers and government;
- Record, deliver and mail;
- Calculating time;
- When an Act comes into force;
- Must we? May we? And what if we don't?

Judging by the number of positive responses to these articles, these are topics that hold great interest in the public service. It was, as the advertising industry might say, a market waiting for a product.

A continuing value

The responses received directly from client Ministries have been excellent. Equally as interesting are the anecdotal reports we have from other members of the Legal Services Branch.

Ministries contact their advising lawyers because an article has made them realize there is an issue that needs to be addressed before it becomes a larger problem. Meeting a Ministry official for the first time, a lawyer will be greeted by the recognition: "Aren't you the one who wrote …?" Advising solicitors are able to print off and provide the relevant article when a client comes with a general question.

The final question

Legal Briefs and Lawful Shorts — Is a legal newsletter something for you and your Office?

The effect of poorly written legislation in a bilingual legal system

Duncan Berry[1]

Hong Kong is unique in having legislation that is written in both the English and Chinese languages. Until the late 1980s, it was the policy for Hong Kong legislation to be drafted and enacted only in the English language. It was only with the enactment of the *Official Languages (Amendment) Ordinance 1987* (No. 17 of 1987) (HK) and the *Interpretation and General Clauses (Amendment) Ordinance* (No. 18 of 1987) (HK) that this policy was changed.[2] Soon afterwards, the first Chinese language versions of Hong Kong legislation appeared and a program to produce Chinese language versions of existing Hong Kong legislation was established.

Under section 10B(1)[3] of the *Interpretation and General Clauses Ordinance* (Cap. 1) (HK), both the English and Chinese texts are equally authentic and both texts are regarded as having equal status.[4] The normal Hong Kong practice is for the English text to be drafted first and for that text to be basis for preparing the Chinese text. This may be contrasted with Canada where, at the federal level at least, separate English and French texts are drafted contemporaneously by Anglophone and Francophone legislative counsel.

During the period immediately after the introduction of the new policy, the Chinese language versions of legislation were basically translated texts. Legislative counsel concentrated on closely adhering to the style and format of the English texts and ensuring that legislative concepts in the English version were accurately replicated, even at the expense of readability and comprehensibility. In other words, in preparing the Chinese version of a legislative provision, readability and comprehensibility were sacrificed for accuracy if alternative (but more readable and comprehensible) Chinese versions would result in an interpretation different from the interpretation of the English version. One reason for this was that the drafters of the Chinese versions were then relatively inexperienced in original legislative drafting. Nevertheless, according to Yen,[5] a Chinese version of a legislative provision would not be adopted if it would depart so far from the grammatical norm in the Chinese language that it would fail to convey

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1 LL.M, MPP, SJD, Consultant Parliamentary Counsel, Office of the Parliamentary Counsel to the Government, Ireland; formerly Deputy Principal Government Counsel, Hong Kong Department of Justice. The views expressed in this article are the views of the author alone.

2 The principal catalyst for the change in policy was the signing of the Sino-British Joint Declaration of 1984 on the restoration of Chinese sovereignty over Hong Kong.

3 As inserted by section 4 of the Interpretation and General Clauses (Amendment) Ordinance 1987 (No. 18 of 1987) (HK).

4 Article 9 of Hong Kong's Basic Law does not say so explicitly. However, it does provide that English may be used as an official language.

5 Tony Yen, Law Draftsman, Hong Kong Department of Justice.

accurately, or even adequately, its technical meaning (Yen, 1997: 4).

In recent years, Sinophone legislative counsel have gained more experience and confidence in the preparation of the Chinese versions of Hong Kong legislation and so those versions are no longer a word for word translation of the English text. Nevertheless, the meanings that Sinophone users elicit from the Chinese version of the legislation are still expected to be the same as those elicited by Anglophone users who read the English version.

Despite the improvements in the Chinese drafting style that have evolved during the past 3 or 4 years, I contend that the Chinese version of Hong Kong legislation will still be difficult to understand if the English text from which it is derived is itself not readily comprehensible. Because of the semantic, grammatical and syntactic differences between the English language and the Chinese language, achieving exactly the same legal effect of the English statutory provisions by Chinese translation is far from easy. The difficulty lies in the structural differences between the English and Chinese languages. This can result in legislative texts that differ in effect. If therefore the English text is obscure, production of the Chinese version becomes nightmarish. According to Fung and Watson-Brown (1994)—

> Without clarity, the law becomes a trap. What relevance is that to translation? Before the translator can hope to being understood, he must understand. The translator should not be led into the trap of misunderstanding the law. In recognising the issues that blur communication, the translator is able to work his way through the complexity of the law.

It should therefore come as no surprise to learn that at least some Chinese versions of Hong Kong legislation have been described as being difficult to read and comprehend. However, some of the critics may be unaware of the constraints imposed on those responsible for producing the Chinese version of a legislative document. Others may not yet have become used to using Chinese as a "legal language". The problem of ensuring that legislation is both readable and comprehensible is not unique to the Chinese texts. Users of the English versions of legislation make similar complaints.[6]

Many older Hong Kong statutes and regulations are modelled on old English Acts that are drafted in archaic English and in a convoluted, opaque style that is difficult to understand. According to Yen (1997: 4), it has been particularly difficult to create readable and comprehensible Chinese language versions of these statutes and regulations. Hong Kong Sinophone legislative counsel have on many occasions told me how much easier it is to create readable and comprehensible Chinese versions of legislation when the English texts from which they are derived are themselves drafted in clear, user-friendly English, with shorter and less complex sentences and more familiar words.

In order to determine whether or not this view was valid, I identified what I considered to be fairly

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[6] For example, see Fung (1998: 28, 29). Other contributors to the *Hong Kong Lawyer* have voiced similar criticisms about the complexity of the Chinese texts of Hong Kong legislation.

difficult sections in the *Police Force Ordinance* (Cap. 232) and the *Fixed Penalty (Criminal Proceedings) Ordinance* (Cap. 240) and, as part of a legislative drafting training exercise, asked some of the legislative counsel[7] who were participating in the exercise to provide me with interpretations of the them. Each of the provisions was misinterpreted by at least one of the counsel. I subsequently redrafted the provisions with a view to making them more readable and more intelligible and asked one of the Sinophone legislative counsel in the Department to say whether those versions would enable a Sinophone version to be produced that would be easier for a Sinophone to read and understand than the original[8] Chinese versions. One of the sections that I redrafted for the purpose of this exercise was section 9A of the Fixed Penalty (Criminal Proceedings) Ordinance. The section reads as follows:

> **9A. Additional penalty in proceedings on complaint**
>
> Where a person, having notified the Commissioner of Police, in accordance with a notice under section 3(3), that he wished to dispute liability for a scheduled offence [9]or having been given leave under section 3B(1)(*a*) *and* having been served with a summons, does not appear before the court or, having appeared, offers no defence or a defence which is frivolous or vexatious, the magistrate shall, in addition to any other penalty and costs, impose an additional penalty equal to the amount of the fixed penalty for that offence.

In my view, the section is too long; it is too compressed; and it contains too many ideas for the reader to absorb on first reading. Furthermore, the section is ambiguous.[10]

My redraft of the section is as follows:

> **9A. Additional penalty in proceedings on complaint**
>
> (1) A magistrate who hears the proceedings in respect of a scheduled offence[11] must impose on a person to whom this section applies an additional penalty in addition to any other penalty and costs if the person–
>
> (a) does not appear before the magistrate; or
>
> (b) having appeared, either offers no defence or offers a frivolous or vexatious defence.

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7 All of the counsel involved in the training exercise were employed in the Legislative Drafting Division of the Hong Kong Department of Justice and were well-qualified lawyers who had been regularly exposed to Ordinances and subsidiary legislation for at least 2 years. Far from being a reflection on them, their inability to accurately interpret the sections concerned is a reflection on the readability and comprehensibility of those sections.

8 I.e. the existing versions.

9 "Scheduled offence" is a term defined in the interpretation (definitions) section of the Ordinance.

10 It is not clear which of the preceding clauses the clause "*and* having been served with a summons" modifies.

11 Ibid.

(2) The additional penalty must be equal to the amount of the fixed penalty for the offence.

(3) This section applies to a person who –

(a) has given a notice of an intention to dispute liability for a schedule offence to the Commissioner of Police under section 3(3); or

(b) has been given leave under section 3B(1)(a) and served with a summons.

Although the redraft contains more words than the original, it arguably expresses the ideas in a way that is more readable and comprehensible. The comments of the Sinophone legislative counsel[12] on the redrafted section are as follows:

> "The tabulation of the English text of section 9A[13] improves its comprehensibility greatly and also helps to remove ambiguities contained in the original text. If correspondingly structured, the Chinese version will be much more focused with the legal subject (the magistrate) and the legal action (imposition of the additional penalty) stated upfront. Placing the circumstances and conditions under which the law operates in a tabulated subsection (3) can offload the original Chinese sentence, streamline its syntax and convey its meaning much more clearly."

Along with others, I have proposed to the Hong Kong Department of Justice that the English versions of older Hong Kong statutes and regulations could be re-written in plain, modern language that would be much easier for Anglophone users to read, understand and use. If this suggestion were implemented, it would surely facilitate the creation of Chinese versions of those statutes and regulations that Sinophone users would find much easier to read, understand and use. Although the proposal has been favourably received by the Department, it remains to be seen whether there is sufficient political will to implement it in the foreseeable future.

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12 I would normally provide an attribution here, but the Sinophone counsel concerned preferred to remain anonymous.

13 [of the *Fixed Penalty (Criminal Proceedings) Ordinance*]

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Book Review

B. R. Atre, *Legislative Drafting: Principles and Techniques*,[1] reviewed by V.R Krishna Iyer[2]

We are slaves of the law that we may be free and everyone is deemed to know the law. Both these propositions are fictions; nevertheless, held binding for practical reasons. Obviously, legislative literature, which governs our activities in almost all spheres, has a considerable control over our lives and puts every citizen on the alert to obey the law. Ignorance of law is no excuse. The democratic State must, therefore, make the meaning of legislation easily legible especially because legal literacy is limited in our people. The paramount social value of juristic lucidity and legislative clarity springs from the need to avoid the litigious potential and interpretive ambiguity of ill-drafted Bills. A popular English jingle once published in London Times enlivens my criticism:

> I am the parliamentary draftsman;
> I compose the country's laws.
> Of half the litigation in the nation,
> I am undoubtedly the cause.

I am reviewing here a learned work on legislative drafting where, in a little lovely foreword, Justice Lahoti begins with a neat quote. The learned judge writes:

> "G. C. Thornton began his preface to the first edition of his work of *Legislative Drafting* by quoting Gulliver: 'This society has peculiar cant and jargon of their own that no other mortal can understand and wherein all their laws are written, which they take care to multiply.
>
> The preface to the third edition commences by quoting the wisdom of a car bumper sticker observed in Queensland 'Do it today. Tomorrow it may be illegal'."

The two quotations taken together speak volumes about the fast changing pace and complexity of laws, the need for settling principles of legislative drafting and the uncertainty which is likely to prevail in the absence of clarity and precision in legislative drafting.

I wholly agree. Some laws are long, involved, anfractuous, and so incomprehensibly hedged in with exceptions, explanations, provisos and sub-clauses that by the time the reader reaches the end, his mind will be in mid-air, the beginning having taken leave of his fatigued attention. Simplicity amidst complexity in the text of the law is an art, a value, a democratic desideratum, since law cannot be abracadabra.

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[1] Universal Law Publishing Co., C-FF-IA, Ansal's Dilkush Industrial Estate, G.T. Karnal Road, Delhi-110033.

[2] This review was first published in *The Hindu*, 12 February 2002.

Courts usually complain that legislations are obscure, ill-drafted and create conundrums. While the impression is partly justified because of the riddles and mystiques of legalese and the use of enigmatic jargon, they create an iron curtain between the layman and legislation. Unfortunately, the Westminster style of drafting laws is what we have adopted and even today these winding vintage methods vitiate our Bills. However, judges too are to blame because they do not bother to adopt a "Brandeis" approach of seeking the social milieu, the mischief sought to be remedied and the object proposed to be advanced. Lexical dexterity is not imaginative interpretation when the need is socially sensitive penetration of the purpose of the law. An etiological perception, missing in judicialese, is the imperative need. Here, Lord Denning, that jural marvel of a judge has set the record straight. The author, B.R. Atre, has wisely excerpted this passage in his preface.

> "Whenever a statute comes up for consideration, it must be remembered that it is not within human powers to foresee the manifold sets of facts which may arise; and that, even if it were, it is not possible to provide for them in terms free from all ambiguity."

English language is not an instrument of mathematical precision. Our literature would be much the poorer if it were. This is where the draftsmen of the Acts of Parliament have often been unfairly criticised by the judge, believing himself to be fettered by the suppose ruled that he must look to the language and nothing else and laments that the draftsman have not provided for this or that, or have been guilty of some or other ambiguity.

It would therefore certainly save the judges trouble if Acts of Parliament were drafted with divine precision and perfect clarity. In the absence of it, when a defect appears, a judge cannot simply fold his hands and blame the draftsman. A judge must not alter the material of which it is woven but he can and should iron out the differences.

The long legislative experience of the author has been an invaluable aid for him in enunciating the principles and techniques of legislative drafting. His chapter "Wise handling of a complicated subject" certainly does credit to his rich familiarity with it. There is a practical dimension to the author's instruction when he deals with basic techniques of legislative drafting. The drafter — a gender-neutral word — the author rightly emphasises, must follow a dedication to simplicity and clear thinking.

Illustratively, I may mention but one of his prescriptions, among many:

> "A statute is drafted in accordance with the rules of grammar that normally apply to every document. It should be seen that the terminology used must also be as simple as possible, depending on the complexity of the subject in question. Expressions borrowed from foreign languages must be kept to a minimum. The drafter's responsibility is very great in terms of terminology, especially in technical and scientific fields. The statute must use correct language. The drafter must suggest to the legislature the best way to make it understandable to the public".

The other "commandments" the book contains are educative. The governing rule is that the audience of the Bill must understand the sense; and the style must observe "consistency, coherence and clarity". Then, again, a few among many prescriptions may be noted!

- The law should avoid any designation of gender. A statute speaks to both women and men and expressions that appear to refer only to men should be avoided. Clearly, some provisions will apply to only men or only women. Thus, a statute governing the working conditions of working women will necessarily make a distinction on the basis of the gender of the persons concerned.
- It must be remembered that the meaning of a provision is not dependent solely on its punctuation. Punctuation is an element of the sentence. However, if the meaning of a provision can be changed simply by changing the punctuation the provision must be rewritten.
- It is preferable for an Act to speak in the active voice. Moreover, this is essential when a duty is imposed or a power is conferred. Use of the passive voice should not automatically be rejected. It is perfectly justified in case of general prohibitions or where the context clearly designates the persons responsible for applying the rule.
- An Act speaks in the present tense. The future and the past are used only to express the temporal relationship between two events.
- An Act does not express desires or wishes nor does it justify. It orders, authorises, prohibits, governs or imposes penalties.
- Different words must not be used to express the same idea. The same word must not be used to express different ideas. In legislative drafting, monotony is a positive quality.
- The chapter on techniques is replete with numerous recipes. Highly instructive and easily acceptable directives make the chapter on basic techniques a bible for the beginner in the job.

To dwell on more details may make the review a mini-textbook and so I desist. Says the author:

> "The drafter shall normally observe the following rules in structuring the draft legislation to make it simple and concise".

Other useful and pragmatic hints galore are prescribed. Good; but "a custom more honoured, in the breach than the observance in our statutes."

Every time a drafter has a Bill to be drawn up he must remember the golden rules of Atre but the challenge is not easy unless radical changes in the methodology are adopted. Moreover, when the highest court reveals a flaw, the law must, without delay, be altered so that the goal of the legislature is not defeated by judicial misreading.

After all, the law is what the judges say it is. There must be an institutional courier between the court and the Legislature to convey the message, from the Bench to the Chair, to avoid miscarriage of statutory intent.

The anatomy of a legislation is worth a close study before a draftsman can play the creative craftsman. This aspect has claimed a whole chapter with an apt annexure of the *General Clauses Act, 1897*.

An edifying addition is the study of the preparation of the legislative scheme with a grasp of the subject-

matter, varying as it does in our complex society, necessitating a versatile wealth of special information. Foreign legislations are a fascinating fasciculus supplied by the author to illumine the technology of legislative preparation and schematic arrangement.

A significant part of the book is devoted to drafting constitutions, a difficult, delicate and spinal process to master, which is necessary to make a competent draftsman.

Elaborate attention is paid to this branch since all corpus juris must submit to the values of the Constitution. Inevitably, judicial review figures in the discussion.

Federalism, unitary State, their fundamental features and the key rules to be considered while drafting constitutional instruments — all these have been briefly but adequately dealt with by the author.

On the whole, the book is a good one, especially useful in a rare field of legal literature, where a good addition has a special attraction.

I commend Atre's contribution to judges, lawyers, legal draftsman and law teachers for equipping themselves better in an area where more such books are needed dealing with other dimensions of the jurisprudence of legislative draftsmanship.

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