Legislative and Regulatory Reform Act 2006 (UK)

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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to make secondary legislation in the form of statutory instrument to reform legislation that is perceived to be "outdated, unnecessary or over-complicated".[4] A similar procedure under the Regulatory Reform Act enabled a Minister to make Regulatory Reform Orders (RROs).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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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,

[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.

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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.