Remarks to the Statute Law Society (edited)

The Rule of Law and Subordinate Legislation

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29 September 2021

Thank you for the invitation to speak.

This is not a talk about whether we should have a different constitution. In particular it's not a talk about whether we should have a fully-codified "written constitution". I doubt whether that will happen in my life-time and it would be a waste of time to try.

As a matter of principle, the use of subordinate or delegated legislation is clearly *possible* and *legitimate* within our constitution. It's a well-established and indeed indispensable feature of our system of legislation.

I recently gave a talk which used as its theme a dictum of the former Labour MP, Austin Mitchell, defining the constitution as "whatever the government can get away with". That may be simplistic. But there's something to it.

Under our constitution, with the doctrine of parliamentary sovereignty at its heart, it is open to Parliament to confer whatever powers it wants on Ministers, subject to whatever conditions, limitations and procedures Parliament wishes to impose. And Ministers are entitled to exercise those powers, subject to review by the courts.

And of course a government with a big majority can generally get Parliament to confer the powers it wants. The government can lawfully "get away with" legislating in that way. It's ultimately meaningless to describe that as "unconstitutional".

Some parliamentarians did go as far as to criticise the Brexit SI powers as being "unconstitutional", or at least as upsetting the balance of the constitution. The House of Lords Constitution Committee said this when the government introduced what became the European Union (Withdrawal) Act 2018:

> *The number, range and overlapping nature of the broad delegated powers would create what is, in effect, an unprecedented and extraordinary portmanteau of effectively unlimited powers upon which the Government could draw. They would fundamentally challenge the constitutional balance of powers between parliament and Government and would represent a significant – and unacceptable – transfer of legal competence.*[1]

These are and were valid concerns. But they are ultimately policy concerns – important ones – for Parliament to weigh up in deciding what powers to confer.

Because it is of course possible to criticise the over-use of secondary legislation, or the excessive use of Henry VIII powers, or particular powers as being too wide or too

[1] European Union (Withdrawal) Bill: interim report (parliament.uk), para 44.

vague, or the lack of meaningful parliamentary scrutiny over the exercise of delegated powers. Many commentators have long expressed concerns about all these things[2] (as I have done from my safe vantage point outside the Civil Service).

But there isn't a pre-existing constitutional dividing line between "acceptable" uses of secondary legislation – say, to make "minor, technical or ancillary" provisions – and "unacceptable" ones – say, to make "substantive policy changes". Even Henry VIII powers, which some view with particular disapproval, embrace a very wide range – from the genuinely minor or ancillary to the more substantial.

And in any case exceptional situations – like the huge constitutional and legal shift of Brexit, or a national emergency like covid – may call for exceptional responses.

So if we seek a constitutional or legally defined limit on the use of secondary legislation, we will look in vain. It's up to Parliament to decide.

But because something is constitutionally or legally possible, that doesn't mean it is in all circumstances desirable. Both Brexit and the covid pandemic have cast new light on the use of subordinate legislation and, I suggest, have exposed some problems with it.

I should declare a personal interest of sorts.

First, on Brexit, I take some responsibility for the model in the European Union (Withdrawal) Act 2018, under which existing EU law was captured in UK law as "retained EU law", with a power to amend it by regulations so that it worked after the UK ceased to be a member of the EU.

I will come back later to Lord Frost's recent statement about a proposed review of EU retained law[3].

But whatever changes are now envisaged, some model along those lines was probably inevitable. Some way needed to be found to ensure that there were not massive gaps in the statute book where EU law had been, once the UK left – either with or without a deal. And certainly there was no way that parliamentary time could have been found to make all the necessary changes by primary legislation.

The volume of Brexit SIs was very large: by exit day on 31 January 2020, 622 Brexit SIs had been laid[4]. That was less than the figure of 800-1000 originally predicted (although SIs have continued to be made after exit day – roughly 30 by my reckoning). But the instruments laid tended to be longer and more complex than in previous sessions, reflecting the fact that some instruments were combined. According to the Institute for Government, the Treasury and HMRC between them produced over a million words of regulations in the 2017-19 session (not all on Brexit) – "roughly equivalent to the entire series of Harry Potter books" (and no doubt just as magical). But equally many of the changes made by Brexit SIs were indeed

[2] See for example "Plus ça change? Brexit and the flaws of the delegated legislation system" - Sinclair & Tomlinson, Public Law Project.
[3] Lord Frost statement to the House of Lords: 16 September 2021 - GOV.UK (www.gov.uk).
[4] Secondary legislation | The Institute for Government.

highly technical, repetitive and in some cases deeply boring, and wholly appropriate to be made in secondary legislation.

Next covid. I was in post as Treasury Solicitor at the beginning of the pandemic. It was a national emergency calling for an urgent response. I saw at first hand the valiant efforts of government lawyers to produce complex, controversial instruments at high speed, to give effect to – shall we say – sometimes last-minute and rapidly evolving policy decisions. As of 28 September 2021, according to the Hansard Society[5], the government had made 504 covid-related statutory instruments, accounting for 31% of all SIs laid before Parliament in the period since the beginning of 2020.

Again extensive use of secondary legislation to respond to the pandemic was probably inevitable and essential. It had certainly been envisaged by Parliament, which had conferred wide powers on Ministers, particularly in the Public Health (Control of Disease) Act 1984, and the Coronavirus Act 2020 itself. In total, powers under 134 Acts have been used to make secondary legislation for the pandemic[6].

Much work has been done to analyse the Brexit and covid regulations – their content, the powers under which they were made and the procedures applicable to them. I would mention in particular the Hansard Society[7], the Public Law Project[8] and the Institute for Government[9], together with a number of parliamentary committees, including the House of Commons Justice Committee which published a report on covid and the criminal law last week[10], and to which I gave evidence. I don't propose to repeat that analysis, though I will refer to it. But I want to draw out a few themes.

Because I do think the use of subordinate legislation over the last few years gives a number of causes for concern.

I was particularly asked to talk about subordinate legislation and the rule of law.

What do we mean by the rule of law? I'm not going to attempt a comprehensive definition: I haven't got time and I'm not daft. Last week's Justice Committee report refers to the eight "principles" expounded by Lord Bingham in his book *The Rule of Law.* Not everyone accepts Lord Bingham's definition as holy writ (he acknowledges that others would come up with different principles or express them differently), and not all of them are relevant here. I will focus on the first of Lord Bingham's principles:

> *The law must be accessible and so far as possible intelligible, clear and predictable.*

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[5] Coronavirus Statutory Instruments Dashboard | Delegated legislation and Coronavirus SIs in Parliament | Hansard Society.
[6] Hansard Society dashboard – footnote 5.
[7] See footnote 5.
[8] See footnote 2.
[9] See footnote 4.
[10] Covid-19 and the criminal law (parliament.uk).

Lord Bingham's second principle might also be pertinent:

> *Questions of legal right and liability should ordinarily be resolved by application of the law and not the exercise of discretion*

But I think recent use of subordinate legislation raises wider questions about the *quality* of the law more generally, and its democratic legitimacy.

"Quality" could mean a number of things. It includes what Lord Bingham calls the intelligibility and clarity (and perhaps predictability) of the law.

Let me take head-on the quality of drafting. As a former drafter of SIs perhaps I can say this. I think it is inevitable that instruments produced at high speed, in response to rapidly changing policy, with final decisions produced at the last minute, and minimal or no time for checking, will be liable to include avoidable mistakes. Drafters are human. We all make mistakes. But we can probably agree that they are best avoided if possible. It seems clear that the demands of legislating for the pandemic have resulted in an increased error rate. The Hansard Society[11] gives details of those covid SIs which have had "omissions, technical mistakes and drafting shortcomings", including examples of Ministers signing the wrong version of an instrument.

There is another aspect to the quality of drafting. We're all familiar with the "sorry for the long letter, I didn't have time to write a short one" syndrome. The same can be true of legislative drafting. When time is short the only option may be the least elegant one – for example, bolting a load of new text on to an existing instrument. The result may be technically correct, but with more time the drafter might have been able to devise something more streamlined and user-friendly.

And although it is a common and accepted drafting technique – I've used it myself – there is no point pretending that this type of thing is immediately intelligible to the user:

> *In regulation 4 … in paragraph (2) … in sub-paragraph (b), omit the words from "indoor fitness studios" to "other".*[12]

… particularly when a single SI may contain multiple examples of the same thing, when the original instrument may already have been amended several times, and where the new changes may be due to come into force very soon – a point I'll come back to.

But quality of legislation of course goes much wider than quality of drafting. Policy developed at speed and finalised at the last minute, with minimal consultation even inside government, let alone outside, will tend to be worse policy – less well thought-

[11] Coronavirus Statutory Instruments Dashboard | Delegated legislation and Coronavirus SIs in Parliament | Hansard Society.

[12] Regulation 2 of the Health Protection (Coronavirus, Restrictions) (No. 2) (England) (Amendment) (No. 2) Regulations 2020, SI 2020/788.

through, more inconsistent, more prone to unintended gaps and anomalies. And hence more liable to require amendment in short order.

Linked to that is the lack of parliamentary scrutiny. Many Brexit and covid SIs received minimal or no parliamentary scrutiny[13]. Of the 504 covid SIs, only about 30 were debated in Parliament before coming into force. 56 SIs came into force before even being laid before Parliament. Of those subject to the negative procedure, 54.7% breached the 21 day rule. In a number of instances instruments were made only very shortly before coming into force – a matter of days or even hours.

In a national emergency, it may be right and necessary for the government to have very wide powers, and to be able to act at speed. However the risk is that legislating at the last minute, with little or no parliamentary scrutiny, becomes the norm. Because Ministers can get away with acting in this way, they carry on doing so.

It's fair to say that, in his evidence to the House of Commons Justice Committee, the then Health Minister, Lord Bethel, did not agree with what I said about the lack of parliamentary involvement in the formulation of the covid legislation. He said the government had "continued to evolve its approach" and pointed to instances where Parliament *had* had the opportunity to scrutinise some of the main regulations before they came into force[14]. So perhaps things did get better. Nonetheless, this kind of thing still seems to be happening …

… almost 18 months after the onset of the pandemic, regulations making changes to the testing and self-isolation requirements for people arriving in the UK were made on Thursday 5 August, laid before Parliament on Friday 6th, and mostly came into force at 4 am on Sunday 8 August[15] …

… and the latest regulations extending the transitional period for imports of animal products were made at 10.17 am yesterday [28 September 2021], laid before Parliament at 2.30 pm, and came into force today, i.e. at midnight[16].

In each case the regulations will obviously have received no consideration by Parliament.

And what do the government have in mind for retained EU law? Some of you listening to this may know better than I. What Lord Frost has said about it gives pause for thought. In his recent statement to Parliament[17] he talked about reviewing the substantive content of EU law to see what policy and legislative changes are needed now the UK has left the EU – that is obviously legitimate and to be expected. But he also said this:

> *"We will consider all the options for taking this forward, and in particular look at developing a tailored mechanism for accelerating the repeal or amendment*

[13] See the Hansard Society dashboard, footnote 5.
[14] Covid-19 and the criminal law (parliament.uk), para 27.
[15] The Health Protection (Coronavirus, International Travel and Operator Liability) (England) (Amendment) (No. 8) Regulations 2021 (legislation.gov.uk).
[16] The Official Controls (Extension of Transitional Periods) (England and Wales) (Amendment) Regulations 2021.
[17] Lord Frost statement to the House of Lords: 16 September 2021 - GOV.UK (www.gov.uk).

of retained EU law in a way that reflects the fact that laws agreed elsewhere have intrinsically less democratic legitimacy than laws initiated by the Government of this country".

There are a number of questions about that, but I will confine myself to waiting with interest to see what tailored or accelerated mechanism might be introduced, whether the involvement of Parliament in that process has more or less democratic legitimacy than the one it is replacing, and whether it is even less than that which applies to ordinary secondary legislation.

I'm not naif about the reality of parliamentary scrutiny. Even in ordinary times, such scrutiny is limited[18]. A majority government exercises as much control over this as it does over any other parliamentary business. Most meaningful scrutiny takes place in the specialist committees, which do valuable work. Secondary legislation cannot of course be amended. Most negative instruments are not even debated: only 3% were debated in the 2015-16 parliamentary session. SIs are very rarely rejected. The last time the House of Commons prayed against a negative SI was in 1979, the Lords in 2000. The last time the Commons failed to pass an affirmative instrument was in 1978 – the Lords in 2015 (very controversially, delaying cuts to tax credits).

But I suggest that the *discipline* of laying an instrument before Parliament, the publicity inherent in that, with time for MPs and the public to consider legislation a decent period before it comes into force, and the *possibility* of a debate in which Ministers might be required to justify the content of an SI, even if only exceptionally, is an incentive towards better, more transparent law-making which should not lightly be discarded.

I've mentioned the timing point. Making instruments only days or even hours before they come into force is, as I've said, likely to be inimical to good policy-making and to the best drafting. It's also bound to prevent proper advance scrutiny, by Parliament or anyone else. But it also means that the legislation is not available to those affected by it – businesses, schools, individual members of their public, or their lawyers – in time for them to understand it, prepare for it and comply with it. All too often, when we have known from Ministerial announcements or press statements that changes to the law are coming shortly, we have seen commentators on Twitter and elsewhere – including legal and policy experts – frantically asking "where can I find the new regulations?".

And crucially it has also meant that the police and others responsible for *enforcing* the law have similarly only had sight of the text of the legislation very late in the day, even if the outline of the policy has been trailed beforehand. As we know, and as highlighted by the Justice Committee, this has contributed to confusion about what the law says and inconsistency in its enforcement.

Part of the problem has been what the Justice Committee calls a "blurring [of] the line between government guidance and the law".

[18] See the Public Law Project report cited at footnote 2.

The Committee believes this blurring:

> *"… has potentially damaging long-term consequences, including for the rule of law. In a free society that respects the rule of law, only legislation can criminalise conduct, and it should be open to a person to decide whether to follow government guidance. The Government has a responsibility to ensure that the public and the police have a clear understanding of the distinction between guidance and the law"*[19].

I respectfully agree with that.

Where we have ended up is that, in 2019 – to take a real example which I've selected at random and about which I'm admittedly making some assumptions – a simple SI[20] which made a modest increase in the fee payable by professional bodies for insolvency practitioners in order to be recognised by the Secretary of State would (I assume) have been planned probably months in advance; would have been prepared and polished in an iterative process between drafter and policy official; I expect was the subject of prior consultation or notice to affected bodies; would have been checked by a second and possibly a third pair of legal eyes; and was published and laid before Parliament 2 months before it came into force …

… whereas at various times during the pandemic, we have seen legislation imposing the most profound, intrusive restrictions and requirements on our national life, on us all as individuals, on businesses, schools, universities, cultural organisations – being made at high speed, on the basis of policy created and announced by Ministerial statement, drafted often overnight with (one must assume) minimal time for checking, no or limited parliamentary consideration or other external consultation, coming into force within days or even hours. And then quite often needing to be corrected or changed again at short notice.

So – some conclusions, and some suggestions.

Secondary legislation is plainly with us to stay. It's a necessary part of our legislative system. There are no constitutional rules to define acceptable and unacceptable uses of it. In the end it's up to Parliament (and in practice that usually means the government), subject to review by the courts.

But there is good practice and less good practice. For all the hard work and dedication of civil servants, especially drafting lawyers, the demands of Brexit and covid have produced some instances of poor practice. And while I understand the reasons for that, I believe there are some lessons to be learned – for the reasons I've set out:

- Rushed, poorly scrutinised legislation is more likely to be bad law, both in policy and drafting terms.

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[19] Covid-19 and the criminal law (parliament.uk), paras 17 and 44.
[20] The Insolvency Practitioners and Insolvency Services Account (Fees) (Amendment) Order 2019 (legislation.gov.uk).

- If law is published only at the last minute, is difficult to follow, or is otherwise inaccessible, this presents difficulties for those who have to comply with it, and their advisers, as well as those whose job it is to enforce it.

- Legislation produced in this way is likely to lack democratic legitimacy. The politicians who represent us (apart from the government – and probably not all of them) will have little or no say or stake in it.

- All this, together with confusion between legislation and guidance, is damaging to public confidence in the law.

And this matters more, not less, when the legislation in question makes major changes to our legal order, our liberty, our way of life and the economy – as both Brexit and covid legislation has done, in varying ways.

What should be done about it?

I suggest there is a strong case for a kind of reset of our use of subordinate legislation. I accept that this will require political and ultimately governmental impetus. It may be doubtful whether the current government will see this as a priority, or indeed as being in its own interests. But there may be things that Parliament, including the scrutiny committees, and the civil service can do. And at least we as practitioners, commentators or users of secondary legislation can talk about it.

The principles that should govern such a reset are not all especially new or earth-shattering. In some respects they reflect existing good practice. They could include the following:

- Tighter scrutiny of the *scope* of powers, the purposes for which they are granted, and the parliamentary procedures which apply to their exercise. To an extent this is already policed by the Lords Delegated Powers and Regulatory Reform Committee. I've said earlier that there is no constitutional bright line between appropriate or inappropriate use of secondary legislation. But it might be possible to articulate some high-level tests or assumptions: for example that secondary legislation cannot be used to set policies or principles but only for "administrative or regulatory" purposes[21].

- In addition it might be possible to codify, or at least set out examples, of the types of parliamentary procedure which should apply to particular kinds of powers. So for example we might set a presumption that instruments which amend primary legislation (Henry VIII powers), or which create or extend criminal offences (a particular focus of the recent Justice Committee report) are subject to enhanced scrutiny procedures.

[21] Compare the position under the Irish Constitution, Article 15(2). See Neil Maddox: Legislation by Delegation - the Principles and Policies Test in Irish Law.

- In my view there is a case for going further, and making some categories of statutory instrument amendable.

- There should be an assumption that making subordinate legislation with no opportunity for prior Parliamentary consideration is absolutely exceptional, defined as tightly as possible, and with Ministers having to justify any such exceptions. Linked to that, there should be a general rule that instruments must be published for a minimum period before they come into force. There are good reasons for the 21 day rule: it should be reasserted and if anything strengthened.

- There should be clearer protocols for the publication and accessibility of secondary legislation, especially when (exceptionally) it is necessary for instruments to come into force very quickly. Put simply, it should be easy to find an authoritative version of any instrument as soon as it has been made. The website legislation.gov.uk is invaluable, and there are other useful sites, such as the Hansard Society covid dashboard. But they can take time to catch up. We should never be in a position where it is near impossible to find the text of the law hours before it is due to come into force.

- There should be more systematic consideration of publishing a consolidated, amended version of the law when an SI amends previous legislation – what is sometimes called a Keeling schedule, though there are different ways of doing this. Again legislation.gov.uk does this but it takes time. Particularly where the amendments made are very complex, or (again) are due to come into force at short notice, publishing a simultaneous consolidated version would greatly aid transparency and comprehensibility of the law.

These suggestions can be read alongside the recent recommendations of the Justice Committee. For example that:

- explanatory notes to SIs should be more explicit about the reasons for the creation of new criminal offences and the level of penalty applied[22]; and

- government should review how public health measures are communicated to the public, so that people are clear about what is law and what is guidance[23] (indeed that could go beyond health measures).

These changes would not involve constitutional change, but they would be a way of improving balance, democratic legitimacy and quality of law-making within our existing constitution. Some of these changes should I believe be embodied in an amended Statutory Instruments Act. I realise this may be of no interest to the current government. I also realise that even if enacted, any such principles or

[22] Para 31.
[23] Para 46.

controls could of course be overridden by future statutes. But for the time being at least they would set a much-needed standard.

Short of legislation, there may be scope for refreshed guidance, which might be canvassed between the government and the scrutiny committees.

In the absence of such a re-set, my fear is that the government – maybe any government – will persist in bad habits – in extracting from Parliament ever wider powers, minimising scrutiny of their exercise, legislating essentially behind closed doors and at the last minute – leading to poorer, less transparent, less accessible, less accountable law-making.

I won't hold my breath. But I hope I've given some food for thought.

(Ends)