

Legislative Standards

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Introduction: standards-based scrutiny of bills and draft bills

- This lecture is about the legislative standards that have been developed by Parliamentary committees in recent years, and their potential effect upstream in government
- By ‘standards’ in the title I mean:
 - ‘certain standards which are independent of the terms and subject matter of the measure itself, and can and should be applied consistently to all measures which are scrutinised. The standards can be, and should be, chosen and applied so as to be largely unaffected by political, or at any rate party political, considerations’.¹
 - I have borrowed these words from Professor David Feldman, first legal adviser to the Joint Committee on Human Rights, in his 2002 article ‘Parliamentary scrutiny of legislation and Human Rights’.
 - Such standards are, then, politically neutral and generally ‘constitutional’ in nature.
- We are all used to the highly partisan, combative, party political and generally ‘at large’ /unstructured scrutiny process that takes place in public bill committees, and on the floor of the House of Commons, for instance in second reading debates and at report stage.
 - It is entirely appropriate that this style of scrutiny should take place as part of the process of the giving or refusing of consent to legislation by our elected representatives.
 - The importance of this aspect is emphasised in the words of enactment, ‘by and with the advice and consent’ of Parliament.
- We all know what the weaknesses of this process are
 - Timetabling limits the ability of MPs to pursue issues in public bill committees
 - Strict whipping in public bill committees undermines the ability of MPs to make independent judgments.
 - Resistance on the part of government to any amendments which imply loss of face.
 - Cursory scrutiny of some parts of bills.

¹ P.328.

- No scrutiny at all of others, often very important ones hidden away at the end of bills.
- So it is not surprising that, in parallel with the political scrutiny process for bills, other, standards-based scrutiny processes of bills and draft bills have developed.
- What is surprising is that this has only developed recently – since the 1990s.
- This follows on a period of
 - Increasing interest in specifically constitutional principles, both in Parliament and in the courts.
 - Rejection of the idea of the purely ‘political constitution’ towards a principled one.
 - A shift from a culture of authority to one of justification.

Permanent parliamentary committees in which standards-based scrutiny of bills and draft bills takes place are

- The Delegated Powers and Regulatory Reform Committee (particularly relevant in its scrutiny of delegated powers) was established in 1992 ‘to examine Bills before the Lords and report on powers proposed to be delegated to Ministers’.
- The Joint Committee on Human Rights was established in 2001 to examine
 - matters relating to human rights in the United Kingdom (but excluding consideration of individual cases)
 - proposals for remedial orders, draft remedial orders and remedial orders made under the Human Rights Act 1998
 - in respect of draft remedial orders and remedial orders, whether the special attention of the House should be drawn to them on any of the grounds specified in HC Standing Order No. 151 (Statutory Instruments (Joint Committee))
- The House of Lords Constitution Committee was also established in 2001 ‘To examine the constitutional implications of all public Bills coming before the House; and to keep under review the operation of the constitution’.
- In short, these three committees perform important politically neutral, independent, intra-parliamentary, abstract, constitutional preview scrutiny functions.

Towards concrete intra-parliamentary scrutiny standards?

- In the early 2000s interest was growing in the standards against which bills and draft bills are or should be scrutinised in Parliament, and the effectiveness of parliamentary scrutiny.

- The HL Constitution Committee in its 2003-04 report on *The Legislative Process*² recommended the use of
 - ‘a clear and transparent checklist by committees engaged in legislative scrutiny as well as by committees at other stages of the legislative process’ to ensure a more systematic approach to scrutiny.³
 - That suggestion for a checklist was based on evidence given to the Committee by Professor John McEldowney of the University of Warwick.
 - The government response was that this was a matter for the two Houses. (No suggestion of the need for government agreement here.)
- In 2004 Professor Robert Hazell published an article in *Public Law* on ‘Who is the Guardian of Legal Values in the Legislative Process: Parliament or the Executive?’⁴
 - Having discussed the work of these three committees he concluded on a positive note that they ‘represent three new pillars of the constitution’.⁵ I agree.
 - He observed that the Cabinet Office *Guide to Legislative Procedure* (now revised as *Guide to Making Legislation*) devotes a chapter to each of the first two committees.
 - He regretted that the Constitution Committee did not receive the same attention (this is still the case).
- In 2006, also in *Public Law*, Hazell published ‘Time for a New Convention: Parliamentary Scrutiny of Constitutional Bills’.⁶
 - He analysed the parliamentary procedure for passing constitutional legislation between 1997 and 2005, including occasions on which bills had been considered by a Committee of the Whole House as being of first class constitutional importance.
 - He noted ‘how difficult it is to deduce any reliable rules’ for determining whether a bill meets the criteria for CWH consideration.
 - He proposed the adoption of a new set of procedural conventions to safeguard constitutional change (publication of green and/or white papers, cross party talks, consultation, publication of bills in draft, public bill committees empowered to call evidence, use of checklists to ensure systematic scrutiny etc).

² 2004-04, HL 173.

³ *Ibid.* paras 54, 57.

⁴ [2004] Public Law 495.

⁵ At p. 495.

⁶ [2006] Public Law 247.

- Hazell concluded that ‘The committee which is best placed to develop a set of scrutiny standards for constitutional bills is the Lords Constitution Committee’.⁷
- Other parliamentary committees, though not engaged in the scrutiny of bills and draft bills, have expressed concerns about the quality of parliamentary scrutiny and have recommended improvements.
- Most recently the Political and Constitutional Reform Committee of the House of Commons recommended in its report on *Ensuring Standards in the Quality of Legislation* (2013) the adoption of a code of good legislative standards, to be agreed between Parliament and the Government.
 - The committee was concerned that the standards should be politically neutral.
 - A draft code was annexed to the report.
 - Thus the standards in the code were not substantive in the sense of expressing constitutional principles.
- This recommendation was rejected by government out of hand:

‘The Government does not believe that a Code of Legislative Standards is necessary or would be effective in ensuring quality legislation’.
- That response leaves open the possibility of unilateral adoption of standards, codes or checklists by the two Houses and their committees.

The House of Lords Constitution Committee

- The Royal Commission on Reform of the House of Lords reported in 2000.
- One of its recommendations was that

‘The second chamber should establish an authoritative Constitutional Committee to act as a focus for its interest in and concern for constitutional matters’
(Recommendation 21, para 5.22).
- It should act as

‘a “constitutional long-stop”, ensuring that changes are not made to the constitution without full and open debate and an awareness of the consequences’.
- The committee was duly established in 2001.

⁷ P.297.

- Under its first chair, Professor Lord Norton of Louth, it defined the constitution as being made up of
 - parliamentary sovereignty
 - the rule of law
 - a union state
 - representative government
 - membership of the Commonwealth, the EU and other international organisations.
- These elements set the committee's parameters.
- They are descriptive rather than normative standards.
- The committee stated that it would focus on 'significant constitutional issues'.
 - 'Such an issue is one that is a principal part of the constitutional framework and one that raises an important issue of principle' – the two Ps test.
 - What the committee did not do at first, but has done very interestingly since, is to elaborate on what 'principle in 'an important issue of principle' means.
- It is assisted by experienced legal advisers and specialist advisers when needed.
- Increasingly its membership includes experienced lawyers – e.g. currently, Lords Lester, Goldsmith and Brennan
- In its reports it articulates constitutional and other legal principles, applies them to bills and draft bills, and reports and makes recommendations to Parliament.
- Committee members occasionally table amendments in the Lords to give effect to its recommendations.
- It published 149 reports between 2001 and the end of the 2013 session.
- The scrutiny process involves considerable communication/ dialogue with government ministers and the bill teams both before the Committee reports, and afterwards.
 - Legislative and Regulatory Reform Bill 2006 – proposals on use of HVIII powers restricted generally, including that a proposal must not be of constitutional importance.
 - Health and Social Care Bill 2011 – many meetings with officials, supported in HL by e.g. Lord Owen and others not members of the Committee - persuaded government to accept that the changes maintain individual ministerial responsibility to Parliament for the NHS.
- Ministers are expected to respond to committee reports within two months, and normally they do so.

- Ministers' responses are published by the committees on their websites.
- And the committee may respond in a further report.
- It also produces Annual Reports.

The Constitution Unit/Constitution Society Report on 'The Constitutional Standards of the House of Lords Select Committee on the Constitution, January 2014

- This report publication 159 is on the UCL Constitution Unit website www.ucl.ac.uk/constitution-unit/publications/tabs/reports/edit/unit-publications/159
- The research project had three objectives:
 - To draw attention to the normative foundations of the work of the Constitution Committee.
 - To provide a potential resource for those involved in the legislative process, within Parliament, upstream in government, and for the public.
 - To contribute to debate about the development of general legislative standards, building on the work of the PCRC, noted above, notwithstanding the rejection of those proposals by government.
- The report identifies some 124 constitutional standards used by the Committee under a limited number of constitution related headings.
- The report divides the standards extracted from the Constitution Committee's reports and organises them into five sections, 'a code' as follows:
 - 1) The rule of law
 - 1.1 Retrospective legislation
 - 1.2 legal certainty
 - 2) Delegated Powers, delegated legislation and Henry VIII clauses
 - 2.1 Defining the power
 - 2.2 safeguards in delegation of legislative powers
 - 2.3 Appropriate use of delegated powers
 - 2.4 The parliamentary justification of delegated powers, delegated legislation and Henry VIII powers
 - 3) The separation of powers
 - 3.1 The judiciary
 - 3.2 The Government

- 3.3 Parliament
- 4) Individual rights
 - 4.1 General principles
 - 4.2 Access to justice
 - 4.3 Due process and procedural fairness
- 5) Parliamentary procedure
 - 5.1 Pre-legislative scrutiny
 - 5.2 Explanatory notes
 - 5.3 Bills with constitutional implications
 - 5.4 Fast-track legislation
 - 5.5 Responding to a committee's report
 - 5.6 Amendments
 - 5.7 Post-legislative scrutiny.

Examples of standards

Here are a few examples of standards and illustrations of how they are expressed:

- The Rule of Law: Retrospective legislation
 - should only be used when there is a compelling reason to do so ...
 - [it] should be justified on the basis of 'necessity' and not of 'desirability' (two standards)
- Delegations of legislative power
 - Should be framed as narrowly as possible.
 - The policy aims of a Ministerial power should be included in the bill itself.
 - The scope of a Henry VIII power should be limited to the minimum necessary to meet the pressing need for such an exceptional measure.
 - HVIII clauses cannot be used to alter constitutional arrangements.
 - Ministers should provide Parliament with their justifications for the delegation of legislative powers.
 - Ministerial assurances as to the purpose of order-making powers are not a substitute for legal safeguards on the face of the bill.
- Separation of powers
 - Ouster clauses should be avoided.
 - The roles of Parliament and the judiciary should not be conflated.

- Coercive powers that restrict a constitutional right should be exercised by the judiciary rather than the executive.
- *Laws should not risk or impair the principle of individual ministerial responsibility to Parliament: Health and Social Care Bill 2011
- *The government should provide Parliament with its justification for the constitutional implications of legislation when it introduces a bill: Health and Social Care Bill 2011
- Laws should not impede effective parliamentary scrutiny.
- The Government should not unduly restrict parliamentary deliberation.
- Individual rights
 - The restriction of individual rights should be proportionate.
 - Voluntary assurances should not be regarded as a satisfactory substitute for legally enforceable rights.
 - Laws should respect the constitutional right of access to justice
- Parliamentary procedure
 - When a bill is not published in draft, the Explanatory Notes should set out the reasons.
 - A committee considering a draft bill should be supplied with the findings of a consultation exercise, and the government's response to those findings should be made available to it.
 - Explanatory Notes ...should include .. a clear and developed explanation of the purpose of the Bill, incorporating or accompanied by the criteria by which the bill, once enacted, can be judged to have met its purposes.
 - When the government introduces a bill it should provide a written ministerial statement which indicates whether, in each minister's view, the bill provides for significant constitutional change, if so What is the impact of the proposals upon the existing constitutional arrangements.... (i.e. A Constitutional Impact Statement).
 - The government should provide parliament with its justification for the constitutional implications of legislation when it introduces a bill....
- Etc etc

Comments on Constitution Committee standards

- Each of the standards is drawn directly from reports of the CC and follows as far as possible the wording of those reports.
- Some standards require provision of explanation and justifications from Government
 - Note echoes here of the HRA s19 provisions for the Minister in charge of a bill to state that the bill is compatible with Convention rights, or that if it is not the Government nevertheless wishes to proceed with it.
- The standards do not challenge parliamentary sovereignty
 - They only require that if Parliament is to pass ‘unconstitutional’ laws, it should know what it is doing and what the implications might be.
- The very fact that the Committee raises many issues about the ‘constitutionality’ of provisions in bills suggests either that the government was not aware of the implications of its proposals or that, if it was aware, it wished to proceed with them in any event.
 - If that is not the case, surely these issues should have been filtered out ‘upstream’ – a point to which I shall return shortly.
 - These reports have an educational function.
- Although it is not always easy to define *laws* or proposed laws as ‘constitutional’ or ‘of first class constitutional importance’, it is possible
 - to identify and articulate *constitutional principles*
 - especially when examining specific proposals for legislation
 - to measure proposals against them
 - to make proposals for amendments.
- This is what is happening with the work of the House of Lords Constitution Committee
 - In effect the operation of the committee entails a traditional, very English or British ‘common law’ technique: the incremental development and articulation of principles, based on examination of specific drafts and bills/ problems.
 - Legisprudence!
 - Owned by Parliament, not by government.
 - Effectiveness and application of standards does not depend upon government prior agreement.

Summary

- The reports of the House of Lords Constitution Committee (and other parliamentary constitutional scrutiny committees) provide valuable sources of constitutional norms.

- The committees are of mixed political membership including cross benchers.
- Many are distinguished lawyers.
- They are non-partisan.
- They thus enjoy strong political legitimacy.
- They are widely respected in Parliament.
- Their reports ought to produce positive effects upstream (ministers, departmental lawyers, Cabinet Committees) on the quality of bills and explanatory notes.
 - But they are hardly mentioned in *Guide to Making Legislation* or *Ministerial Code*. They should be, both as particular committees to note, and as part of the necessary ‘handling strategy’ in the legislative process.
 - The next revised version of GML should recommend publication of a Constitutional Impact Assessment with the bill, as is the case with human rights, environments impacts, regulatory impact assessments etc.
 - Ideally an equivalent of a section 19 HRA statement should be required, that the bill is compatible with constitutional standards, or that if it is or may not be, the Government nevertheless wishes to proceed.
- It may be that, if the Committee continues to be determined and to pursue its concerns by publishing follow up reports and getting support from other expert members of the House of Lords, the government will come into compliance, even very reluctantly.

Conclusions

- We are moving incrementally towards a principled rather than a strongly political constitution.
- The principles are internally generated in Parliament.
- They place responsibility for the constitution largely on Parliament and government.
- They enable the system to maintain its basis in parliamentary sovereignty.
- And thus to avoid resort to constitutional judicial review of primary legislation.
- They preserve the comity between institutions on which the UK constitution and the rule of law rely.