Public

Henry's legacy

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reflect on the dangers & prevalence of Henry VIII powers

IN BRIEF

- The Public Bodies Bill contains a number of Henry VIII clauses, allowing ministers by order to amend or abolish bodies that were established by primary legislation.
- These clauses have, in the past and recently, been heavily criticised for offending the principle of parliamentary supremacy.

The Public Bodies Bill currently going through Parliament has attracted a great deal of media attention. The main purpose of the Bill, which has been labelled a "bonfire of quangos", is to provide greater transparency and accountability of public bodies and to give ministers powers to reduce the costs of bureaucracy by abolishing, merging or transferring their functions. However, the principal concern among many of the Bill's opponents has not been its significant potential impact on public bodies and the possible erosion of public services, but the "Henry VIII" clauses contained in the Bill by which these changes will be effected.

> "The principle of parliamentary supremacy remains a cornerstone of the constitution"

Certain developments in the twentieth and twenty-first centuries, including the UK's membership of the EU and the enactment of the Human Rights Act 1998, have led some to suggest that the principle of parliamentary supremacy has declined. Arguably, this is truer in practice than in theory, as a result of Parliament's power to repeal the relevant legislation. However, the principle of parliamentary supremacy remains a cornerstone of the constitution and, for that reason, Henry VIII powers have attracted a great deal of criticism.

In 1932, the Donoughmore Committee argued that Henry VIII clauses should be used only in an emergency. More recently, in May 2010, the Select Committee for the Constitution (the Constitution Committee) has argued that "the use of Henry VIII powers, while accepted in certain, limited circumstances, remains a departure from constitutional principle. Departures from constitutional principle should be contemplated only where a full and clear explanation and justification is provided".

In June this year, the Lord Chief Justice, Lord Judge, also expressed concerns relating to Henry VIII powers, cautioning that by "allowing [Henry VIII clauses] to become a habit, we are already in danger of becoming indifferent to them, and to the fact that they are being enacted on our behalf". Having noted that at least 120 Henry VIII powers had been included in legislation passed during the last parliamentary session, Lord Judge went on to suggest that the "pernicious" Henry VIII clauses be included in the promised "Great Repeal" Act, warning that the alternative was to "risk the inevitable consequence of yet further damaging the sovereignty of Parliament and increasing yet further the authority of the executive over the legislature."

These concerns seem to have gone largely unheeded by the government, however. The Public Bodies Bill, which was introduced into the House of Lords by Lord Taylor in October 2010, contains seven key Henry VIII clauses. The clauses allow ministers by order to abolish, merge, modify or transfer the functions of certain public bodies that are listed in the schedules to the Bill, to authorise delegation of their functions, or to modify their constitutional or funding arrangements.

Adequate scrutiny?

If the Public Bodies Bill is enacted as it currently stands, none of the orders made under it would be seen until laid before Parliament under the affirmative resolution procedure. Under this procedure, the order in question cannot be amended and is afforded only a short debate in Parliament.

The Select Committee for Delegated Powers and Regulatory Reform, which is established by the House of Lords in each parliamentary session to examine whether the provisions of any bill inappropriately delegate legislative power and which published an initial report on the Bill on 12 November, noted that it is "very rare for either House to vote down subordinate legislation, whatever its concerns about them". The very limited level of parliamentary scrutiny under the affirmative resolution procedure is, of course, in stark contrast to the extensive debate that surrounded the primary legislation establishing many of the bodies that stand to be reformed or axed under the Public Bodies Bill. As the Constitution Committee has pointed out: "The Public Bodies Bill is concerned with the design, powers and functions of a vast range of public bodies, the creation of many of which was the product of extensive parliamentary debate and deliberation. We fail to see why such parliamentary debate and deliberation should be denied to proposals now to abolish or redesign such bodies."

Safeguards

The Bill does contain a number of restrictions on what may be done by order under it. Orders may not, for example, create criminal offences (cl 22) or powers of forcible entry, search or seizure, compulsion of the giving of evidence, or the making of subordinate legislation (cl 20). However, in a number of other senses, there is a distinct lack of safeguards or checks on the powers of ministers to make orders under the Bill.

The Constitution Committee noted, for example, that, unlike the Legislative and Regulatory Reform Act 2006 (the 2006 Act), the Bill does not provide for a super-affirmative procedure, which "requires Ministers to take into account any representations, any resolution of either House, and any recommendations of a parliamentary committee, in respect of a draft order (a draft order being laid for a period of 60 days)". Instead, cl 8 of the Bill stipulates that the objectives to which ministers must have regard when making orders under the Bill are those of achieving increased efficiency; effectiveness and economy in the exercise of public functions; and securing appropriate accountability to ministers in the exercise of such functions. Clause 8(2) also restricts ministers to making an order only if the minister considers that it does not remove any necessary protection or prevent any person from continuing to exercise any right or freedom which that person might reasonably expect to continue to exercise.

The Constitution Committee report also notes that "the Bill does not import the other tests in... the 2006 Act: that the effect of the order is proportionate to the policy objective; that it strikes a fair balance; and that it is not constitutionally significant". Also unlike the 2006 Act, the Bill contains no requirement on ministers to consult with interested or affected parties before an order is made. The Constitution Committee report also highlights that, as drafted, the Bill appears to allow for changes to a number of diverse public bodies, which may even be concerned with unrelated policy spheres, to be rolled up in a single ministerial order.

The Bill was the subject of extensive debate in the House of Lords during the second reading on 9 November, which again raised a number of specific concerns about the powers being proposed in the Bill. The second reading included a rare motion to commit the Bill to a Select Committee for the committee stage, which prompted Lord Taylor to make a number of commitments, as a result of which the motion for a Select Committee was defeated. The minister stated his intention to bring forward amendments in committee to address concerns about ensuring the independence of bodies charged with delivering important public functions. He also accepted the Constitution Committee's concerns "and the need to meet them by devising a parliamentary procedure that will ensure proper public consultation and enhanced parliamentary scrutiny before any proposals to act under the legislation are approved. We will also seek to amend the Bill to include safeguards to give independence to public bodies against unnecessary ministerial interference when performing technical functions, and when their activities require political impartiality and the need to act independently to establish facts".

On 23 November, the Delegated Powers and Regulatory Reform Committee produced a further report assessing the amendments so far proposed by the government. The report found that the amendments did not go far enough to address the concerns raised in its initial report about inadequate parliamentary scrutiny of orders. In particular, the committee noted that "the insertion of a super-affirmative procedure cannot by itself bring a misconceived delegated power within the bounds of acceptability", as government, not Parliament, would retain the ability to make amendments to orders.

Vote

On the same day as the publication of the Delegated Powers and Regulatory Reform Committee's second report on the Bill, in the first sitting of the Committee stage, the House of Lords voted against the Bill for a second time, making it more likely that it will be revised before being enacted. The debate included an amendment proposed by Lord Lester QC, a Liberal Democrat member of the Conservative-led coalition, and Lord Pannick QC, a crossbencher who added his name to the amendment, to prevent a minister from amending or abolishing a body in a way that was incompatible with judicial independence, incompatible with human rights, or disproportionate. Under pressure from the government, Lord Lester requested leave to withdraw the amendment, but the government's opponents forced a vote, passing the amendment, with Lord Lester voting against it.

It is not surprising that the House of Lords has so roundly rejected the Bill in its current form, because, as the Constitution Committee report stressed, the Bill "hits directly at the role of the House of Lords as a revising Chamber". As the Constitution Committee report concludes: "The Public Bodies Bill strikes at the very heart of our constitutional system, being a type of... legislation that drains the lifeblood of legislative amendment and debate across a very broad range of public arrangements."

In light of this, and in light of the promise in the Queen's Speech on 25 May 2010 that the "Government will propose parliamentary and political reform to restore trust in democratic institutions and rebalance the relationship between the citizen and the state", it will be interesting to see how the debate surrounding the Public Bodies Bill develops as it progresses through Parliament and, in particular, whether the Henry VIII powers will be tempered by any amendments. It will be a battle well worth watching. NLJ

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A royal declaration

- Henry VIII clauses (so called after the 1539 Statute of Proclamations, in which Henry VIII gave his own declarations the same force as legislation enacted by Parliament) have long been the subject of controversy and debate.
- Unlike ordinary delegated powers, which create a mechanism to supplement primary legislation, such clauses enable the amendment or repeal of statutes by the executive, thus offending the fundamental principle of the sovereignty of Parliament which provides that Parliament is the supreme and sole legislative authority in the UK, with the power to create, amend or repeal any law. The executive and the judiciary, on the other hand, cannot introduce or overrule primary legislation.