Centre for Policy Studies

Pointmaker

DANGEROUS TRENDS IN MODERN LEGISLATION

…AND HOW TO REVERSE THEM

Daniel Greenberg

SUMMARY

- Dangerous legislative trends are emerging that threaten the effective protection of the rule of law.
- In particular, the length of new Bills and the number of clauses they include is becoming so great that Parliament is unable to properly scrutinise them.
- Over the past 50 years, the number of Acts passed by governments has stayed approximately the same. However, the average number of clauses included within them has doubled.
- Between 1960 and 1965, the average number of clauses included in a new Act was 24; between 2010 and 2015 the average number of clauses included in a new Act had risen to 49.
- The 1960 Annual Volume of Public General Acts – the official edition of all Acts passed in that year – was 1,200 A5 pages long. In 2010 the same document had grown to 2,700 A4 pages.
- This factor and others that reduce the effectiveness of parliamentary scrutiny of legislation are allowing the Executive to wield ever greater power over Parliament.
- The "line-by-line" scrutiny process has become diluted to such a degree that it can no longer be described as taking place. There are often lengthy and significant parts of a Bill that receive no detailed scrutiny at all at any point in its Parliamentary passage.
- Publicity could offer a solution. By focusing attention on the adequacy of scrutiny, renewed pressure would be placed on Ministers to prioritise it. This paper proposes the introduction of two new elements to the legislative process:
  - The Explanatory Notes for each Bill and Act should record the scrutiny given to the legislation in each House; they should also record incidents of certain powers for subordinate and quasi-legislation that undermine Parliamentary control;
  - This information should be consolidated into a yearly review, which would be debated in both Houses of Parliament.
- These measures would be inexpensive and require neither legislation nor procedural change to implement.

1. INTRODUCTION

A number of recent developments in legislation and the legislative process can be seen to have concentrated power in the hands of the Executive and to have diluted the role of Parliamentarians.[1] The concern is that these trends threaten the effective protection of the rule of law.

Publicity could offer or lead to a solution for at least some of the problems identified, in a range of different ways?[2] In particular, two new elements of publicity in relation to the legislative process could be considered:

- Should the Explanatory Notes for each Bill and Act quantify the scrutiny given to the legislation?
- If so, should that information be consolidated into a yearly review, which would in turn be debated in both Houses of Parliament?

These suggestions could both be implemented without too much difficulty or delay on the basis of cross-party consensus, and, in particular, without formal procedural change. The public finance implications of both suggestions are minimal. Overall, it is hoped that these ideas would together make a significant contribution to improving legislation and the legislative process.

2. THE PROBLEM

The common theme of the problems identified in *Dangerous Trends in Modern Legislation* is that of insufficient or ineffective scrutiny by Parliament of legislative proposals.

There are two aspects to this: procedural and substantive.

In procedural terms, it is open to argument whether or not there were one or more past "golden ages" in which legislation received full and effective scrutiny; what is not open to argument, however, is that it does not do so now.

In substantive terms, the use of subordinate legislation and various forms of quasi-legislation has become extended in recent years in ways that give the Executive significantly greater powers and make it difficult or impossible for Parliament to scrutinise effectively the exercise of those powers.

3. COMMITTEE SCRUTINY

The procedural issues limiting effective scrutiny of legislation can be illustrated by focusing on the Committee stage in each House. The Committee stage of a Bill in each House of Parliament is often described as the "line by line" scrutiny of the Bill. But it is an incontrovertible fact that the scrutiny almost never takes place at that level of detail throughout the Bill, and that there are often lengthy and significant parts of a Bill that receive no detailed scrutiny at all at any point in its Parliamentary passage.[3]

In the House of Commons, almost all Bills are subject to what used to be called a Guillotine Motion and is now in most cases given the more harmless-sounding name of Programme Motion. The effect of those Motions is that when one of the "knives" falls, a number of clauses of the Bill are voted on, often *en bloc*, without any discussion at all. The House of Lords does not

---

1 These are summarised by the author is an earlier article, *Dangerous Trends in Modern Legislation*, Public Law [2015] P.L., Issue 1 96 -110.

2 This concern was discussed as a seminar held in January 2016 at the Centre for Policy Studies at which senior parliamentarians, academics, lawyers and journalists discussed the issues highlighted in the original article; and to consider a number of possible partial solutions to the problems identified.

3 The *Dangerous Trends* article gives a couple of particularly troubling examples, including the criminalisation of trespass.

operate formal programming of that kind; but the Usual Channels routinely reach agreements on progress in Committee that have the same or a similar effect; and where a Bill is considered over a long session of several hours and is still being considered late at night, a degree of fatigue inevitably intervenes to make scrutiny more superficial or selective than may be consistent with the importance and complexity of the provisions being approved.

4. PORTMANTEAU BILLS

The length of Bills is partly responsible for this situation. In particular, the "portmanteau" Bill – a Bill of several hundred clauses dealing with disparate changes to an area that may be broad as planning, education or health – is a relatively recent development; or at least, while it used to be the occasional exception it has become the expected norm. The implications of this for the length and effectiveness of the Committee stage are obvious.

The starting point is that allowing an average allowance of one hour for each substantive clause is likely to give time for genuinely effective line-by-line scrutiny (that should include time for front-bench opening and closing speeches and a fair selection of back-bench speeches on particular aspects of a proposal). So a Bill of 20 substantive clauses could be reasonably thoroughly considered in two or three days in Public Bill Committee in the Commons,[4] and two or three days in Committee of the Whole House or Grand Committee in the Lords. By the same calculation, a Bill of 300 substantive clauses would require between 30 and 45 days in Committee in each House.

Any Government or Opposition Business Manager[5] would immediately recognise that as a completely unrealistic figure. It would lead to a single large Bill monopolising the legislative capabilities of the Houses and leaving insufficient time for other important measures. But a Bill doesn't require less scrutiny per clause simply because there are more clauses; on the contrary, the longer the Bill the more important it is to have time for parliamentarians to satisfy themselves that there is no devilry lurking in the detail. So if Parliament cannot find time to allow a sensible time-per-clause average for the scrutiny of lengthy Bills, it must consider limiting the size of Bills.

At present, there is no kind of conventional constraint on the number of clauses that each House tries to enact each year. The number of Bills varies only relatively slightly over the years, between limits set on the lower side by the need to appear to be active and on the upper side by the division of days in each House between Government and other business. But the number of clauses[6] grows inexorably over the years,[7] and is directly responsible for the dilution of the "line-by-line" scrutiny process to such a degree that it can no longer be seriously described as taking place.

5. THE SOLUTION

An attempt to impose rigid rules on the management of Parliamentary business would be bound to fail for a number of reasons. Apart from

4 Assuming two sittings each day of around three hours each, and ignoring time for taking oral evidence.

5 The Leaders of the Houses and the Chief Whips, and their Shadows, collectively constitute the Business Managers for these purposes.

6 And pages would for some purposes be a better measurement, for obvious reasons.

7 Over the past 50 years the number of Acts passed by government has stayed approximately the same, however the total number of clauses included with them has increased by 400% – from a total of 496 Clauses in 1960 to 2,495 in 2010.

In 1960 the Public General Act was 1,200 A5 pages long, in 2010 the same document was 2,700 A4 pages.

the impossibility of identifying even a sensible working assumption of an average minimum Committee time per page of primary legislation, if such an assumption were made and enacted in Standing Orders it would in practice be impossible to enforce.

Experience of other aspects of the law-making process suggests, however, that published parliamentary oversight of a potential problem can in practice deliver all or part of its solution. Perhaps the most powerful example is the Joint Committee on Statutory Instruments[8] ("JCSI"). The JCSI is required by Standing Orders to consider most subordinate legislation and report on a number of grounds, including defective drafting and doubtful *vires*. There is no effect of a negative report by the JCSI, either procedurally within the Houses or legally outside.[9] So the JCSI is a dog with rubber teeth; but its bark is peculiarly effective. For a number of obvious reasons, Ministers are strongly averse to having subordinate legislation made by them publicly categorised as possibly unlawful or definitely defective. The proof that they are anxious to avoid adverse reports by the JCSI is the care taken by Departmental lawyers to engage with Committee officials in advance, so far as permitted by the practices and limited resources of the Committee, to anticipate possible objections.

It is not proposed that a similar Committee should be established in relation to primary legislation. The Houses themselves are expected to perform the function of scrutinising Bills, and although there are limits on how effectively they can or do perform that scrutiny it would be a very retrograde development to abdicate responsibility even partially by delegating scrutiny to a technical Committee. The effectiveness of scrutiny of legislation is a key rule of law issue that each parliamentarian should see as a personal responsibility, and not as something that is appropriate for relegation to a specialist Committee.

What is proposed is that published reports about the limitations of scrutiny of primary legislation should be used to draw attention to the problem, and thereby give Government a practical incentive to solve it.

In particular, the following information should be published in respect of each Bill, first in the Explanatory Notes marking arrival in the second House and secondly in revised form in the Explanatory Notes as re-issued following Royal Assent:

- the number of hours spent in Committee on each Part or group of clauses;
- the number of hours spent at other amendable stages;
- the number of amendments tabled by the Government;
- the number of amendments tabled by others, and the percentage of those amendments that were given substantive consideration;
- a list of those clauses on which no substantive discussion took place in Committee and at each other amendable stage (whether because of the descent of a programme motion knife or for other reasons).

---

8 In respect of which the author declares an interest as a paid adviser.

9 And Article 9 of the Bill of Rights prevents a report of the JCSI from being cited in the course of legal challenge to an instrument; although it does not of course prevent a challenger from reading and replicating the argument of the Committee in its report.

6. INTENDED RESULT

The aim and predicted result of the specific publication proposed is to focus minds on the adequacy of scrutiny.

Those who believe that for the most part existing scrutiny is adequate and effective would acquire data to support their view.

But if there is a problem, parliamentarians and others would be able to see the size of it, and bring pressure to bear on Ministers both to limit the size of Bills so as to permit effective scrutiny and to organise Bill programming and other parliamentary arrangements for the same purpose.

Internally within government, because of the sharper public focus on the adequacy of scrutiny, Business Managers would then exert pressure on Departmental Ministers to limit the size and number of Bills. Although the effects of that would necessarily be limited and frequently outweighed by political drivers, any constraining effect would be a good thing in itself, as it would serve the deregulatory agenda, reduce industry and other compliance costs associated with changing legislation, and make the government think harder about whether new primary legislation is really necessary. The aim is for there to be less legislation; and for the legislation that is enacted to be better scrutinised.

7. SUBSTANTIVE ISSUES

In addition to information about the process of scrutiny as applied in relation to each Bill, the reports should include information about certain substantive issues identified by the *Dangerous Trends* article as presenting a particular threat to the rule of law. Again, routine publicity would assist in focusing minds within government, Parliament and elsewhere on whether provisions can really be justified in each context.

A cogent example given in the *Dangerous Trends* article is the routine inclusion in any Act of significant size of a power for Ministers to "give full effect" to the Act by making supplementary provision by subordinate legislation. Very often this provision includes power to amend the Act itself. This is a particularly extreme form of Henry VIII Provision, since not only is it empowering the Executive to alter the details of primary legislation as enacted by Parliament, but it is in an extremely wide form that depends only on what Ministers choose to consider as giving full effect to the Act. This is a relatively recent development and one that is particularly dangerous in rule of law terms. Apart from its inherent breadth, it is an incentive to lowering standards for primary legislation since matters can be left to be amplified (or on occasion even expressly corrected) by subordinate legislation at will. Parliamentarians may increasingly feel there is little point in line-by-line debate of details which can then be altered by the Executive at will.

The Government already submits a memorandum to the House of Lords Delegated Powers and Regulatory Reform Committee explaining in relation to each Bill what enabling powers it contains and what level of Parliamentary scrutiny is to be applied to their exercise. It is proposed that the Explanatory Notes published after Royal Assent should draw specific attention to the inclusion of any power to make supplemental provision along the lines described.

Another rule of law issue of concern to many is the enormous growth since around 2000 of the use of powers to make quasi-legislation in the form of guidance, codes, schemes and other instruments which have legislative effect but are not given the formality or scrutiny associated with subordinate legislation. They are not published on the National Archives legislation site, and although in principle published on the government's central website they can be difficult or impossible to find, even if

one knows of their existence.[10] It is proposed that the Explanatory Notes should include separate information about all powers taken to make quasi-legislation, together with information about the expected timetables to be followed and the arrangements to be put in place for publication.

Similarly, the Explanatory Notes could contain separate information about any other provisions in the Bill identified as raising rule of law issues. The *Dangerous Trends* article gives a few examples from recent Bills, but of course the class is an open one, and rather than being prescriptive in advance about what issues should be regarded as relevant to the rule of law, it should be open to Parliamentarians to identify them, and ask the Government to mention them in the Explanatory Notes to the Act. The mechanism for allowing Parliament to identify rule of law issues could be flexible, and should not require any delay or expense; in particular, for the reasons given above it is not proposed that a new Committee should be created for this purpose. There are a number of existing Committees that can and do consider rule of law issues in connection with Bills,[11] and in addition to inclusion in published Committee reports, it could be left to Members in the course of debate to identify issues as having rule of law implications and to request their inclusion in the relevant part of the Explanatory Notes. There would be no suggestion that inclusion of a provision implied that it was improper, but simply that it had raised specific rule of law issues that Parliament had been invited to consider carefully and of which the public should be separately informed.

8. YEARLY REVIEW AND DEBATE

In order to enhance the level of scrutiny necessary to ensure that these issues relating to legislation are taken seriously, it is proposed that the information included in Explanatory Notes as proposed above should be consolidated into a yearly review published by the Government. This would be an opportunity for the Government to demonstrate that scrutiny had been effective in the previous year and that it had given due consideration to rule of law issues arising in the context of legislation; and it would be an opportunity for Parliament and the public to satisfy themselves on both matters, and to draw attention to any perceived inadequacies.

This report would also be an opportunity for the Government to clarify what use had been made of the wide powers for supplementary provision or for quasi-legislation mentioned above. This would facilitate general scrutiny of the use of these mechanisms and allow Parliament to reassure itself that they were being used in line with the purposes for which they were stated to have been required, and in a proportionate and generally appropriate way.

The report might also include information on what provisions had been commenced in the previous year, and what provisions remained to be commenced. At one stage the Government came under pressure to publish regular details of the legislation that was enacted but never brought into force; and for a while that was done. But there is no longer a regular and systematic publication of information on this key rule of law, and the yearly

[10] Almost unbelievably, in 2015 the author had to resort to a Freedom of Information Request to discover the up-to-date text of a number of determinations made under a statutory power, and the Government refused the request on the grounds that it did not yet have a fully updated text of the determinations but was intending to prepare and publish one in the near future; despite reminders, the determinations – which are law and determine people's legal rights and obligations – have not yet been published.

[11] Including the House of Lords Constitution Committee and the Joint Committee on Human Rights.

reviews on the legislative process would be an opportunity to revive and formalise the practice.

It would be the responsibility of Government to produce the yearly review; and this responsibility could be accepted by a collective decision of the Cabinet, probably taken after discussion in the Legislation Committee, without requiring legislation or a change in the procedures of either House. In order to ensure that the report was confined to the provision of raw data, the same approach could be applied as to Explanatory Notes to Bills (from which most of the information would be compiled): they would be prepared by the Government and published by the two Houses, with it being the responsibility of the Clerks to satisfy themselves that the report was confined to facts and information and did not include argument or justification.

With a view to enhancing publicity and scrutiny, it is also proposed that what used to be annual debates on general legislative matters in the House of Lords,[12] should be revived on a more formal basis and extended to both Houses. The Government would be expected to find time for a short debate in each House on a motion to consider its yearly review, again giving the Government an opportunity to report satisfactory progress on scrutiny and giving anyone concerned an opportunity to draw attention to perceived failures and to seek assurances as to future practice.

9. CONCLUSION

The measures proposed in this paper would require neither legislation nor procedural change to implement. They involve creating no new expensive committees or other mechanisms. Their implications for public finance are limited to a small amount of civil service time taken in including additional information in Notes already published, and the compilation of a statistical yearly review.

No business of any size would allow its Board and shareholders to take strategic decisions without the inclusion in its end-of-year report of detailed information about its progress and activities in the past year: Parliament, which is in the business of controlling the lives of citizens through a range of legislative activities, should feel the need to ensure that both it and its citizen-shareholders are properly informed.

[12] For many years these took place on the basis of Oral Questions asked by Lord Renton or Lord Simon of Glaisdale, leading to short debates strongly supported by legal and other peers.

THE AUTHOR

Daniel Greenberg is a lawyer specialising in legislation and the legislative process. He served in the Office of the Parliamentary Counsel from 1991 to 2010 and now works as a consultant in Berwin Leighton Paisner LLP, where he has an international drafting, training and advisory practice, and as an adviser in the Office of Speaker's Counsel, House of Commons. He is the General Editor of Westlaw *UK Annotated Statutes* and *Insight Encyclopaedia*, the Editor of *Craies on Legislation, Stroud's Judicial Dictionary* and Jowitt's *Dictionary of English Law* and the Editor in Chief of the *Statute Law Review*; he is also an Associate Research Fellow of the Institute of Advanced Legal Studies, University of London.

The aim of the Centre for Policy Studies is to develop and promote policies that provide freedom and encouragement for individuals to pursue the aspirations they have for themselves and their families, within the security and obligations of a stable and law-abiding nation. The views expressed in our publications are, however, the sole responsibility of the authors. Contributions are chosen for their value in informing public debate and should not be taken as representing a corporate view of the CPS or of its Directors. The CPS values its independence and does not carry on activities with the intention of affecting public support for any registered political party or for candidates at election, or to influence voters in a referendum.

ISBN 978-1-910627-28-0