# 10

# Delegated Legislation in an Unprincipled Constitution

**HAYLEY J HOOPER***

## I. Introduction

This edited volume invites its contributors to provide sceptical perspectives on aspects of the British constitution. For such a project, the role and legitimacy of delegated legislation is an ideal subject. Over the last 30 or so years, the British constitution has been in an almost permanent state of development and flux. Yet, curiously, ever increasing recourse to delegated legislation in a constitutionally unprincipled manner has featured in the activity of all governments, regardless of their political hue. This practice undoubtedly reflects pressures on parliamentary time, and the sheer complexities of governing a modern state. Nevertheless, academic commentary has railed against this activity since Lord Hewart's *The New Despotism*, published in 1929. In this text, the author lambasted the broad delegation of rule-making powers to ministers, characterising such practices as a form of 'administrative lawlessness'.[1]

Regrettably, the aphorism *plus ça change, plus c'est la même chose* (the more things change, the more they stay the same) is entirely apposite.[2] So much so that Gabriele Ganz's concluding remarks in her pioneering study of delegated legislation published in 1997 still ring true. She explained that delegated legislation is

> a necessary evil. The classic reasons for its use, i.e. lack of parliamentary time, its technicality, flexibility, and detail, are as valid today as they ever were. The danger in recent developments is that the exceptional types of delegated legislation, which amount to government using non-legal means, may become the norm.[3]

* Thanks to Leah Trueblood, Alison L Young, Jonathan Greenacre and the editors for helpful comments. All errors and omissions remain mine alone.

[1] Lord Hewart of Bury, *The New Despotism* (London, Ernest Benn, 1929) ch 4.

[2] So apposite, in fact, that it forms the title of a report into the phenomena from 2020. See A Sinclair and J Tomlinson, 'Plus ça Change, Plus c'est la Même Chose: Brexit and the Flaws of the Delegated Legislation System' (London, Public Law Project, 2020).

[3] G Ganz, 'Delegated Legislation: A Necessary Evil or a Constitutional Outrage?' in P Leyland and T Woods (eds), *Administrative Law Facing the Future: Old Constraints and New Horizons* (Oxford, Oxford University Press, 1997) 80–81.

It might be reasonable to question the need to re-tread this well-worn path in 2022, then. After all, legislation (in all its forms) is often dismissed by academic common lawyers as 'block-heads' law', as on its face it offers considerably less intellectual stimulation than the reasoning of judgments.[4] Recent and ongoing trends in the use of delegated legislation suggests a ring of truth to former Labour MP Austin Mitchell's quip that the British constitution 'is whatever government can get away with'.[5] Although scholars tend to represent the constitution as underpinned by foundational constitutional principles such as parliamentary sovereignty, the rule of law and the separation of powers (among others), the use of delegated legislation serves as a sharp reminder that these principles are aspirations as opposed to entrenchments. The British constitution affords a government with a majority in the House of Commons ample opportunities to follow the path of least resistance in policy-making. Delegated legislation is one such path.

However, in the last 12–18 months, several parliamentary committees have once again sounded the constitutional alarm in relation to the proliferation and content of delegated legislation. The frequent and unprincipled resort to delegated legislation has been labelled 'democracy denied'[6] and 'government by diktat',[7] whilst another committee centred on threats to the rule of law posed using delegated legislation in the context of the pandemic.[8] Clearly, the twin challenges of Brexit and COVID-19 are not free-standing problems. In parliamentary terms, they are merely symptoms of a pre-existing condition.

Through examining the nature of delegated legislation, the methods by which it is scrutinised and the forms which it takes, this chapter echoes the need for a 'culture change' in the constitution in which the relationship between primary and secondary legislation is rebalanced in favour of the former, so as to give the fullest possible effect to 'the principles of parliamentary democracy, namely parliamentary sovereignty, the rule of law and the accountability of government to Parliament'.[9] If anything, delegated legislation demonstrates that our constitutional culture is continually 'up for grabs'. In recent years, the intensification of a constitutional culture which prioritises the dominance of Whitehall over Westminster[10] starkly illustrates that the 'good chaps' theory of the constitution, which recognises

[4] N Duxbury, *Elements of Legislation* (Cambridge, Cambridge University Press, 2012) 57.

[5] A Mitchell, 'The Mandate Man' *Prospect Magazine* (20 November 1997).

[6] Delegated Powers and Regulatory Reform Committee, *Democracy Denied? The Urgent Need to Rebalance Power between Parliament and the Executive* (2021–22, HL 106).

[7] Secondary Legislation Scrutiny Committee, *Government by Diktat: A Call to Return Power to Parliament* (2021–22, HL 105).

[8] Joint Committee on Statutory Instruments, *Rule of Law Themes from COVID-19 Regulations* (2021–22, HL 57, HC 600).

[9] *Government by Diktat* (n 7) [29].

[10] D Howarth, 'Westminster versus Whitehall: What the Brexit Debate Revealed about an Unresolved Conflict at the Heart of the British Constitution' in O Doyle, A McHarg and J Murkens (eds), *The Brexit Challenge for Ireland and the United Kingdom: Constitutions Under Pressure* (Cambridge, Cambridge University Press, 2021).

that the UK's uncodified constitution relies to an unprecedented degree on the 'self-restraint of those who carry it out',[11] is not a self-sustaining ecosystem.

## II. What is Delegated Legislation?

Delegated legislation is sometimes alternately described as 'secondary' or 'subordinate' legislation, or collectively as 'statutory instruments'. As a matter of purely technical definition, 'delegated' legislation is any legislation which owes its authority to a parent statute.[12] However, this technical or 'source-based' definition alone is unpersuasive. After all, all Acts of the devolved legislatures owe their authority to parent Acts of Parliament. However, McHarg astutely noted in 2006 that Acts of devolved legislatures have 'more in common with primary than with delegated legislation'[13] because Westminster had 'delegated' authority to a representative democratic institution, as opposed to the executive alone.[14] In *AXA General Insurance v Lord Advocate*,[15] decided in 2011, the Supreme Court endorsed this argument. The true hallmark of delegated legislation, then, is not merely that it derives its validity from a 'parent' Act, but primarily that it is generated by the executive alone, with only a remote connection to wider democratic and parliamentary processes.

It is this remote relationship with legitimising institutions[16] and processes that explains why delegated legislation is generally tolerated by constitutional commentators, as opposed to celebrated. The lack of institutional legitimacy when compared with Acts of Parliament (primary legislation) means that delegated legislation can be invalidated by the courts using common law powers and through the process in section 6 of the Human Rights Act 1998. The Supreme Court noted that 'Although [delegated legislation] can be said to have been approved by Parliament, draft statutory instruments … are not subject to the same legislative scrutiny as bills; and, unlike bills, they cannot be amended by Parliament'.[17] This reduced engagement with, and validation from, the parliamentary process brings delegated legislation within the full jurisdiction of the courts. Unlike Acts of Parliament, delegated legislation is not imbued with the force of Parliament's sovereignty.

[11] A Blick and P Hennessy, 'Good Chaps No More? Safeguarding the Constitution in Stressful Times' (London, The Constitution Society, 2019) 5.

[12] UK Parliament, 'What Is Secondary Legislation?' www.parliament.uk/about/how/laws/secondary-legislation/.

[13] A McHarg, 'What Is Delegated Legislation?' [2006] *PL* 539, 561.

[14] ibid 561.

[15] *AXA General Insurance Ltd and Others v Lord Advocate and Others* [2011] UKSC 46, [2012] 1 AC 868.

[16] For a taxonomy of legislative legitimacy, see M Russell, 'Rethinking Bicameral Strength: A Three Dimensional Approach' (2013) 19 *Journal of Legislative Studies* 370.

[17] Sinclair and Tomlinson (n 2) [22].

However, there is no doubt that as 'a matter of principle, the use of subordinate or delegated legislation is clearly possible and legitimate within our constitution'.[18] Loveland goes further, asserting that it would not be 'possible to govern … solely through primary legislation'.[19] As a form of governance, delegated legislation is not merely necessary, it is ubiquitous. In 1993, the Delegated Powers Scrutiny Committee explained that the 'ever-increasing mass of detail in statutory instruments could not be scrutinised by Parliament if it formed part of primary legislation'.[20] Reducing the workload and 'enabl[ing] government to act expeditiously'[21] are the essential justifications for proliferating delegated legislation. *Erskine May*, the authoritative manual of parliamentary practice, notes that the benefits of delegated legislation are its 'speed, flexibility and adaptability'.[22] Delegated legislation, therefore, is a constitutional essential. In recent years, however, we have seen its use generate concerns that constitutional principles are being eroded.

## III. Creating and Scrutinising Delegated Legislation

Delegated legislation is a ubiquitous and necessary part of all mass liberal democracies. However, its ubiquity and how it is created challenges well-worn constitutional assumptions regarding the primacy of parliamentary and representative democracy in the British constitution. This is in large part due to the 'rules of the game' for creating delegated legislation not being the subject of any binding prior legal commitments. There is no equivalent in the British constitution of the USA's Administrative Procedure Act of 1946, which requires that draft delegated legislation is the subject of notice and public comment procedures designed to 'bring regularity and predictability to agency decisionmaking'.[23]

Every student of constitutional law or politics learns by rote that in the British constitution, Parliament is sovereign. The foundational articulation of this principle is that Parliament has 'the right to make any law whatever; and further, that no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament'.[24] This statement of the orthodox position of Parliament in the constitution is, in essence, a statement of unqualified supremacy.

[18] J Jones, 'The Rule of Law and Subordinate Legislation' www.statutelawsociety.co.uk.

[19] I Loveland, *Constitutional Law, Administrative Law, and Human Rights: A Critical Introduction*, 9th edn (Oxford, Oxford University Press, 2021) 120.

[20] *Democracy Denied?* (n 6) [23].

[21] R Fox and J Blackwell, 'Fox and Blackwell: Parliament and Delegated Legislation' (London, Hansard Society, 2014) 32.

[22] D Natzler and M Hutton (eds), *Erskine May's Treatise on the Law, Privileges, Proceedings and Usage of Parliament*, 25th edn (London, 2019) [31.1], erskinemay.parliament.uk/.

[23] C Copeland, 'The Federal Rulemaking Requirement' RL32240 (Washington DC, Congressional Research Service, 2013) 5.

[24] AV Dicey, *An Introduction to the Study of the Law of the Constitution*, 2nd edn (London, Macmillan, 1886) 36.

Recently, the Supreme Court has sought to venerate and explain the good reasons for parliamentary supremacy in the constitution. The widely publicised cases brought by Gina Miller provide the foremost examples. In *Miller v Secretary of State for Exiting the European Union*,[25] the majority, led by Lord Neuberger, emphasised that the effect of giving notification to withdraw from the European Union under Article 50 of the Treaty on European Union 'will constitute [a] significant … constitutional change' which could not lawfully be achieved by the executive alone.[26] The principle of parliamentary sovereignty meant that beginning the process of Brexit negotiations required 'the authority of primary legislation' to authorise a paradigm shift in the UK constitution.[27]

Further flesh was put on the bones of parliamentary sovereignty by a unanimous eleven justice panel in *Miller; Cherry v Prime Minister*.[28] The Supreme Court held that proroguing Parliament for five weeks was unlawful. The prorogation would have prevented scrutiny of the withdrawal agreement from the European Union. Using the Royal Prerogative in this way went beyond the scope of the government's lawful powers and offended the constitutional principle of parliamentary sovereignty. Part of what made this breach of the principle of sovereignty so constitutionally offensive was that parliamentary sovereignty was the catalyst which gave effect to the principle of parliamentary accountability. The core legal wrong in the prorogation can be summed up in the following statement: 'the longer that Parliament stands prorogued, the greater the risk that responsible government may be replaced by unaccountable government: the antithesis of the democratic model'.[29]

But the constitution as described by the apex courts and viewed from the ivory towers of academe reads like mythology when we consider the role of delegated legislation. Both the volume of delegated legislation created and the minimalistic role of parliamentarians in scrutiny and amendment undermine parliamentary sovereignty, political accountability and democracy. The forward march of delegated legislation can be rendered compatible with foundational constitutional principles if we are willing to adopt impoverished and diluted versions of those principles. Tucker suggests that if we envision parliamentary sovereignty as merely 'a doctrine about supremacy, or who has the last word', then 'delegated legislation does not impinge on Parliament's authority'.[30] Unsurprisingly, such a narrow definition has proven unsatisfactory to most (the Supreme Court and this author included). The prevailing mood at the time of writing is summed up by a

[25] *R (on the Application of Miller and Another) v Secretary of State for Exiting the European Union* [2017] UKSC 5, [2018] AC 61.

[26] ibid [81].

[27] ibid [101].

[28] *R (on the Application of Miller; Cherry) v Prime Minister* [2019] UKSC 41, [2020] AC 373.

[29] ibid [48].

[30] A Tucker, 'Parliamentary Scrutiny of Delegated Legislation' in A Horne and G Drewry (eds), *Parliament and the Law* (Oxford, Hart Publishing, 2018) 359.

committee of the House of Lords, whose report declared that the ongoing 'abuse of delegated powers is in effect an abuse of Parliament and an abuse of democracy'.[31]

In numerical terms, the use of delegated legislation far outweighs Acts of Parliament. Delegated legislation 'is not merely a common practice … it is the standard form of law-making'.[32] Watson observes that legislation using Acts of Parliament, which receive full legislative scrutiny,[33] has been declining steadily over the last 40 years. In the 2010–20 decade, there were around 52 Acts per year, marking a slight increase in the previous decade. By contrast, the number of statutory instruments has risen exponentially since the 1990s, and approximately 3000 per year were created during the 2010–19 period.[34] In fact, the Cabinet Office's 'Guide to Making Legislation' contains a presumption in favour of rule-making by statutory instrument. This is because legislative slots are competitive. Government departments must 'bid' for a slot for their Bill on the legislative programme.[35] Central government departments are asked to appraise whether 'the ends they wish to achieve could be reached by purely administrative means [or] secondary legislation … before embarking on primary legislation'.[36] A Select Committee described the 'Guide to Making Legislation' as a 'functional document' lacking any sense of 'the fundamental principles underlying why Parliament … scrutinise[s] delegated powers so closely'.[37]

Compared with primary legislation, which can be scrutinised and amended by both Houses of Parliament, delegated legislation suffers from a severe democratic deficit. There is a patchwork of methods for scrutinising delegated legislation which have developed piecemeal over time. In their 2014 study, Fox and Blackwell explain that 'the majority of [Statutory Instruments] are not subject to any form of parliamentary scrutiny at all'.[38] Delegated legislation which receives no parliamentary scrutiny is simply 'made' (as opposed to 'laid') by the relevant government department and then signed off or 'made' by a minister.[39] An alternative to this is to simply lay the legislation before Parliament. This laying before Parliament of delegated legislation does not afford parliamentarians any opportunity for scrutiny either.

For delegated legislation that is subject to parliamentary scrutiny, there are three main procedures: the affirmative resolution procedure; the negative resolution procedure; and enhanced scrutiny procedures. The negative resolution

[31] *Democracy Denied?* (n 6) 5.
[32] Tucker (n 30) 350.
[33] Cabinet Office, 'Legislative Process: Taking a Bill through Parliament (Guidance)' (20 February 2013) www.gov.uk/guidance/legislative-process-taking-a-Bill-through-parliament/.
[34] C Watson, 'Acts and Statutory Instruments: The Volume of UK Legislation 1850–2019' Commons Library Briefing Paper 7438 (2019) 8.
[35] Cabinet Office, 'Guide to Making Legislation' (London, Stationery Office, 2017) [3.1].
[36] ibid [5.3].
[37] *Democracy Denied?* (n 6) [125].
[38] Fox and Blackwell (n 21) 5.
[39] ibid 5.

procedure allows legislation to be laid before Parliament. It is considered law on the day in which a minister signs it into force unless there is a motion in the Commons or Lords to reject it within 40 days. Affirmative resolution, by contrast, requires the active approval of both Houses of Parliament. Neither of these procedures permit the amendment of delegated legislation, only its wholesale rejection. Wholesale rejection is extremely rare. In 2016, it was reported that only 17 statutory instruments had been rejected in the last 65 years. During that period, almost 170,000 such instruments were made.[40]

Enhanced scrutiny procedures are only available if Parliament chooses to include them in the parent Act. This is the only process which allows parliamentarians to amend delegated legislation. Despite calls to create such a model, there is no standard template for enhanced scrutiny procedures.[41] In general terms, however, enhanced scrutiny involves a two-stage process. First, a proposal for a draft order is laid before Parliament. The draft order itself is then laid and subject to a specified time period for scrutiny. After the period expires, a revised or amended draft order may be laid before Parliament. The Northern Ireland Act 1998 and the Human Rights Act 1998 provide for enhanced scrutiny procedures. Section 85 of the Northern Ireland Act enables His Majesty to make provision about certain of the 'reserved matters' in Schedule 3 to the Act and section 10 of the Human Rights Act 1998 enables a minister or His Majesty to amend a provision of legislation to remove incompatibility with a European Convention on Human Rights right or a UK obligation under the Convention. The European Union (Withdrawal) Act 2018, Schedule 8, section 14 provides an enhanced scrutiny procedure for instruments which 'amend or revoke subordinate legislation under section 2(2) of the European Communities Act 1972 (including subordinate legislation implementing EU directives)'.[42] It is clear, then, that Parliament has chosen to adopt enhanced procedures in these Acts because their subject matter significantly impacts upon the constitution and legal system.

Several problems emerge clearly from this patchwork. The most serious issue is that there is no mechanism or principle for determining what process should be used. Neither the subject matter of the legislation nor the breadth of the powers is determinative. In 2021, the Delegated Powers and Regulatory Reform Committee decried a culture in Whitehall 'which appears to encourage a tendency to see the delegation of legislative powers as a matter of political expediency'.[43] The Hansard Society derided the approach to allocating forms of scrutiny to delegated legislation as 'neither rigorous nor rational'.[44]

[40] House of Lords Constitution Committee, *Delegated Legislation and Parliament: A response to the Strathclyde Review* (2015–16, HL 116) [40].

[41] Delegated Powers and Regulatory Reform Committee, *Strengthened Statutory Procedures for the Scrutiny of Delegated Powers: Third Special Report* (2010–12, HL 19) [2].

[42] European Union (Withdrawal) Act 2018, sch 8, s 14.

[43] *Democracy Denied?* (n 6) 4.

[44] Fox and Blackwell (n 21) 171.

Although parliamentary sovereignty is repeatedly reaffirmed as the 'bedrock'[45] of the constitution, Parliament rarely exercises its right to reject delegated legislation. On the one occasion in recent memory when it did so, the government sought to undermine that exercise of power, even by suggesting it was unconstitutional. In October 2015, the House of Lords rejected the Tax Credits (Income Thresholds and Determination of Rates) (Amendment) Regulations 2015. Baroness Manzoor tabled this amendment because the regulations, if passed, would make draconian cuts in the budget for welfare, amounting to £12 billion.

Far from accepting the autonomy of the Lords, let alone the wider sovereignty of Parliament, the immediate response of the government was to suggest that peers in the Lords were in breach of a constitutional convention (a politically enforceable rule of the constitution considered binding on the actors to whom it applies in the context of their official role).[46] According to a statement issued by John Penrose MP, the House of Lords had breached the 'long-standing convention' that they do 'not seek to challenge the primacy of the elected House on spending and taxation'. The House of Lords also 'does not reject statutory instruments, save in exceptional circumstances'.[47]

The government commissioned an independent review into the actions of the House of Lords (the Strathclyde Review). The Review returned three recommendations regarding the Lords' relationship with delegated legislation. The first, and furthest-reaching, recommendation was that the House of Lords should play no further role in the scrutiny of delegated legislation. The second, somewhat more moderate, recommendation was that the House retain its power in relation to delegated legislation, but should nonetheless pass a resolution to define 'in a more precise way, the restrictions on how its powers to deny approval or to annul should be exercised'. The final recommendation was that a new statutory procedure should be created which would allow any defeats imposed on delegated legislation by the Lords to be overruled by the House of Commons.[48]

The Review was not well received by Select Committees.[49] By way of response, the Commons Public Administration and Constitutional Affairs Committee (PACAC) noted that, contrary to the government's assertion, there was 'no consensus as to whether there is a convention regulating the House of Lords' ability to exercise its formal powers to block secondary legislation'.[50] There was some suggestion that 'a convention had developed whereby the House of Lords did not

[45] *Jackson v Attorney General* [2005] UKHL 56, [2006] 1 AC 262, [9] (Lord Bingham).

[46] A McHarg, 'Reforming the United Kingdom Constitution: Law, Convention, Soft Law' (2008) 71 *MLR* 853, 860.

[47] HM Government, *Strathclyde Review: Secondary Legislation and the primacy of the House of Commons* (Cm 9177, 2015) 18.

[48] ibid 18.

[49] *Democracy Denied?* (n 6) [49] summarises the conclusions of all the reporting Select Committees.

[50] Public Administration and Constitutional Affairs Committee, *The Strathclyde Review: Statutory Instruments and the Power of the House of Lords* (2015–16, HC 752) [24].

defeat Statutory Instruments' save in exceptional circumstances. However, PACAC concluded that 'there is not universal agreement on what precise form this convention might take and this therefore indicates that no clear convention exists'.[51] PACAC conceded that the Lords' vote to reject the tax credits regulations 'may have been political drama and an embarrassment for the Government, but they did not constitute a constitutional crisis'. It stated pithily that the House of Lords 'was behaving well within the powers available to it on statutory instruments'.[52] It would be highly unusual, not to mention wholly unwise, to allow a convention to crystallise which seeks to limit parliamentarians from holding the executive's powers of legislation to account. This is especially true in view of the unprincipled and limited scrutiny procedures to which delegated legislation is subject.

## IV. The Subject Matter of Delegated Legislation

Compromises to parliamentary sovereignty and representative democracy inherent in the scrutiny of delegated legislation would be tolerable if its subject matter were purely technical or trivial. There is an instinctive pull towards the argument that the absence of meaningful opportunities for parliamentary scrutiny should mean that such legislation should be restricted to the 'technical refinement of previously agreed policy'.[53] Acts of Parliament, by contrast, seem to be the most legitimate way of ensuring scrutiny of substantive policy-making. However, Jones notes that there is no '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"'.[54] In short, the constitutional rules pertaining to the content of delegated legislation are either absent, or unprincipled.

King observes an 'unmistakable trend towards the expanded use of delegated powers to deal with questions of sometimes quite substantial policy'.[55] This trend has been undoubtedly 'accentuated by Brexit and the pandemic', resulting in a change in 'the balance of power between Parliament and government'.[56] However, the absence of any concrete principle against executive legislation on matters of substance has not prevented concerns being raised. The phenomenon discussed in the remainder of this chapter represents a worrying 'general strategic shift'[57] away from the principles of parliamentary democracy and the rule of law.

[51] ibid [24].
[52] ibid [28].
[53] *Government by Diktat* (n 7) [17].
[54] Jones (n 18).
[55] J King, 'The Province of Delegated Legislation' in E Fisher, J King and A Young (eds), *The Foundations and Future of Public Law: Essays in Honour of Paul Craig* (Oxford, Oxford University Press, 2020) 154.
[56] *Government by Diktat* (n 7) [15].
[57] ibid [24].

One long-standing issue with delegated legislation is the use of Henry VIII powers. These powers are found in Acts of Parliament, but they confer a discretion on a minister to amend primary legislation unilaterally, using delegated legislation. The name itself calls to mind 'the King's "impersonation of executive autocracy"'.[58] The term itself comes from the Statute of Proclamations in 1539, which gave Henry VIII, as the sitting monarch, the power to amend parliamentary legislation by proclamation.[59]

Henry VIII clauses are constitutionally problematic because they 'entrust the executive, or potentially some other body, with the power to overturn prior Acts of Parliament'.[60] Generally speaking, such clauses exist to permit the alteration of pre-existing legislation. But Barber and Young, writing in 2003, note that the most remarkable species of Henry VIII powers 'create a power to change Acts of Parliament passed after the empowering Act'.[61] Clauses of this nature are present in the Parliament Acts 1911 and 1949, the Devolution Acts and the Human Rights Act 1998. Ironically, all of these Acts are generally deemed by courts[62] and scholars[63] to fall within the definition of 'constitutional statutes', a designation that denotes a category of statutes which are, by virtue of their important subject matter, only subject to repeal by the most explicit statutory language.

In more recent years, Henry VIII powers have been fiercely criticised by a senior member of the judiciary as resulting from 'bad precedents, invaluable to someone seeking arbitrary powers, like Henry VIII, and bad on that ground alone'.[64] The process of legislating for withdrawal from the European Union has led to the enactment of legislation replete with such clauses.[65]

Henry VIII clauses are frequently created by a species of Act of Parliament known as 'skeleton legislation'. This term describes an Act which sets out the 'general shape and structure of the intended law, but leave[s] all the detail to be provided in secondary legislation'.[66] The name 'skeleton legislation' comes from a critique of the practice advanced in a report by the Scrutiny of Delegated Powers Committee. It proclaimed that Bills which left large swathes of substantive policy-making to the executive amounted to 'little more than a licence to legislate and so give flesh to the "skeleton" embodied in the bill'.[67]

[58] *Report of the Committee on Ministers' Powers ('Donoughmore Report')* (Cmd 4060, 1932) in N Barber and A Young, 'The Rise of Prospective Henry VIII Clauses and Their Implications for Sovereignty' [2003] *PL* 112, 113.

[59] Delegated Powers and Regulatory Reform Committee, *Third Report* (2017–19, HL 22) [93].

[60] Barber and Young (n 58) 113–14.

[61] ibid 112.

[62] *Thoburn v Sunderland City Council* [2002] EWHC 195 (Admin), [2003] QB 151.

[63] F Ahmed and A Perry, 'Constitutional Statutes' (2017) 13 *OJLS* 461; T Khaitan, '"Constitution" as a Statutory Term' (2013) 129 *LQR* 589.

[64] Lord Judge, 'Ceding Power to the Executive; the Resurrection of Henry VIII' (Public Lecture, King's College London, 12 April 2016) www.regulation.org.uk/library/2016_Henry_VIII_powers-Lord_Judge.pdf./.

[65] Sinclair and Tomlinson (n 2) 4.

[66] Fox and Blackwell (n 21) 19.

[67] *Democracy Denied?* (n 6) [59], citing Scrutiny of Delegated Powers Committee, *1st Report* (1992–93, HL 57) [15].

The Welfare Reform Act 2012 is a central example of skeleton legislation. It was intended to reform social security law, which is highly complex in and of itself. However, the Bill was 174 pages in length and made provision for a mind-boggling 374 delegated powers.[68] By way of justification for this approach, Chris Grayling MP, the minister sponsoring the Bill, employed the following metaphor. He explained that the Bill would 'create a bookcase on which we can lodge the books of the detail of the future benefits system. [The] Bill and the debate are about building that bookcase … the debate is not about the detailed content of every single book.'[69] Regardless of how apt the metaphor might have been (this author reserves judgement), one parliamentarian was less than impressed in the Bill's committee stage, remarking that the House could not scrutinise the Bill because 'Ministers have not yet decided what the legislation is'.[70]

Specific numbers on the use of skeleton Bills are not available, but the Delegated Powers and Regulatory Reform Committee expressed its concern that in recent years their use has 'grown markedly'.[71] Examples of the subject matter of skeleton Bills include Brexit legislation, the Childcare Bill and the Civil Liability Bill. The same Committee took the view that the practice 'signifies an exceptional shift in power from Parliament to the executive'. The central wrong in this shift, according to the Committee, is that 'the real operation of the legislation [is] to be decided by ministers'. In constitutional terms, then, this practice 'will rarely be justifiable'.[72]

Nevertheless, there is an element of truth in Jones's supposition that 'exceptional situations – like the huge constitutional and legal shift of Brexit, or a national emergency like covid – may call for exceptional responses'.[73] Most, if not all, constitutional orders either feature explicit constitutional provisions dealing with emergencies or have similar provisions in ordinary legislation. For example, the UK has the Civil Contingencies Act 2004, which includes an 'event or situation which threatens serious damage to human welfare in a place in the United Kingdom' within its definition of an emergency.[74] The definition of 'serious damage' includes the loss of human life.[75] However, the processes in the 2004 Act were disregarded in favour of the 'much weaker' scrutiny processes of the Coronavirus Act 2020 in a move that has been characterised as a 'neglect of constitutionalism'.[76]

Critics of the use of delegation in response to Brexit and the pandemic have been acutely aware of the challenges posed to the government by these successive crises.[77] Yet, there remains pervasive support for the idea that the practices

[68] Fox and Blackwell (n 21) 133.
[69] ibid 134, citing HC Deb 29 March 2011, vol 526, col 171.
[70] ibid 135, citing S Timms (Lab) citing HC Deb 29 March 2011, vol 526, col 169.
[71] *Democracy Denied?* (n 6) [63].
[72] ibid [66].
[73] Jones (n 18).
[74] Civil Contingencies Act 2004, s 1(1)(a).
[75] ibid s 1(2)(a).
[76] A Blick and C Walker, 'Why Did the Government Not Use the Civil Contingencies Act?' *The Law Society Gazette* (2 April 2020) www.lawgazette.co.uk/legal-updates/why-did-government-not-use-the-civil-contingencies-act/5103742.article.
[77] See, eg *Rule of Law Themes from COVID-19 Regulations* (n 8) [4]; *Democracy Denied?* (n 6).

surrounding delegated legislation during Brexit and the pandemic pose risks to Parliament's position at the apex of the constitution and respect for the rule of law.

The rule of law is a deeply contested constellation of ideals.[78] To that end, its role in the British constitution is dynamic, not static. It occupies no fixed position. Definitions range from the barest procedural criteria to the inclusion of fundamental human rights and substantive moral values. However, most definitions, ranging from thin to thick conceptions (sometimes described as 'formal' or 'substantive' models), agree that legal rules which comply with the rule of law promulgate laws which vindicate the values of 'generality; publicity; prospectivity; intelligibility; consistency; practicability; [and] stability'.[79] In layman's terms, legal rules must apply to everyone as opposed to specific individuals, be well publicised and easy to understand, and apply only to future conduct. They cannot sanction someone for a wrong that was legal yesterday. Additionally, legal rules must treat similar cases in a consistent manner, and must be practical, somewhat predictable and stable, as opposed to fleeting.

Beatson demonstrates that rule-of-law values are in general decline in Britain. Large bodies of legislation remain inaccessible to the ordinary public,[80] and the criminal law (which requires rules to be particularly clear) suffers from increasing complexity.[81] On top of these concerns, we can see that delegated legislation has been used during Brexit and the COVID-19 pandemic in several ways which are frankly inimical to even the most basic definitions of the rule of law. Justifications of 'emergency' or 'necessity' can only offer so much in the way of mitigation when we step back and view the practices surrounding delegated legislation as part of the routine compromise of foundational constitutional principles.

There are four practices in the promulgation of delegated legislation which raise real rule-of-law concerns: circumventing scrutiny procedures; the sub-delegation of legislative power (known as 'tertiary legislation'); blurring the boundary between law and guidance; and the creation of new criminal offences.

Procedures for scrutinising delegated legislation may be scant, but the exigencies of Brexit and COVID-19 saw even these meagre safeguards being pushed aside. In its report on the challenges posed to the rule of law by the pandemic, the Joint Committee on Statutory Instruments observed that 'of the 461 coronavirus instruments laid before Parliament by 5 July 2021, more than one in nine were made to come into force before being laid'.[82] In relation to Brexit, Sinclair

[78] J Waldron, 'Is the Rule of Law an Essentially Contested Concept (in Florida)?' (2002) 21 *Law and Philosophy* 137; J Raz, *The Authority of Law: Essays on Law and Morality* (Oxford, Oxford University Press, 1979) ch 11; L Fuller, *The Mortality of Law* (New Haven, Yale University Press, 1954); T Bingham, *The Rule of Law* (London, Penguin, 2010).

[79] J Waldron, 'The Rule of Law', *The Stanford Encyclopedia of Philosophy* (2016) [5.1].c.

[80] J Beatson, *Key Ideas in Law: The Rule of Law and the Separation of Powers* (Oxford, Hart Publishing, 2021) 33.

[81] ibid 36.

[82] *Rule of Law Themes from COVID-19 Regulations* (n 8) [68].

and Tomlinson have highlighted the poor explanations given to parliamentarians regarding the purpose of various statutory instruments. Deficiencies in the explanatory memoranda which accompany statutory instruments are described as 'pervasive'. The authors note that the nadir of this situation came in relation to the explanatory note to the Law Enforcement and Security (Amendment) (EU Exit) Regulations 2019.[83] This 75-page document was described by the Secondary Legislation Scrutiny Committee as 'impenetrable'. Its report asked the Home Office to relay the instrument with an improved memorandum.[84] Both of these practices undercut minimal rule-of-law requirements, namely, that laws promulgated should be clear, intelligible and prospective in their application.

The next practice which engages rule-of-law concerns is known as legislative sub-delegation, also called the creation of 'tertiary' legislation. In this situation, an Act of Parliament confers 'a legislative power [to the executive] which may, in turn, include provision for further delegation of legislative power'.[85] This 'tertiary' legislation carries the same force as any other form of delegated legislation. However, the nature of the body to which legislative powers are sub-delegated means that these powers cannot be scrutinised by Parliament. Examples of this sub-delegation include leaving powers conferred upon the minister to local actors (such as local authorities and prison governors) to vary pandemic safety rules at short notice in specific local areas.[86] This practice was described by the Delegated Powers and Regulatory Reform Committee as a 'potentially more egregious'[87] erosion of democratic accountability than ordinary delegation. It also has a less immediate, albeit no less severe, rule-of-law cost. The threat to the rule of law is manifested in the government's attempt to construe the powers in statutory instruments very broadly. On this basis, the Committee claimed sub-delegation was lawful. When interpreting statutes, however, the courts apply a general presumption against the sub-delegation of legislative power.[88] The arguments about modern statutory construction permitting such sub-delegation were considered by a parliamentary committee tasked with investigating the rule-of-law implications of the pandemic. They described the government's position on tertiary legislation as unable to 'survive the 2016 decision of the Supreme Court in *Public Law Project*',[89] which endorsed general presumptions against the sub-delegation of broad statutory powers. This common law presumption is underpinned by broader theoretical presumptions within the rule of law, namely, that the law should be clear, stable and predictable.

[83] SI 742/2019.
[84] Sinclair and Tomlinson (n 2) 25.
[85] *Democracy Denied?* (n 6) [107].
[86] *Rule of Law Themes from COVID-19 Regulations* (n 8) [14]–[28].
[87] *Democracy Denied?* (n 6) [111].
[88] D Greenberg, *Craies on Legislation*, 12th edn (London, Sweet & Maxwell, 2020) paras 3.5.1–3.5.4 and 19.1.22.6.
[89] *Rule of Law Themes from COVID-19 Regulations* (n 8) [17].

During the pandemic, the boundary between law and guidance was also frequently blurred. The amount of non-legally binding guidance proliferated significantly under the Coronavirus Act 2020. The guidance expressed commands which exceeded the legal powers conferred by the Act. Obligations such as staying two metres apart from anyone outside was a rule which appeared in guidance as opposed to law. However, it was presented to the public at large as law, despite having no legal force of its own. Ewing comments that guidance which stated that 'every citizen is instructed to comply with these new measures' was 'oblivious to [the] basic constitutional formality' that restrictions on general liberties could not be imposed by non-legal means.[90]

Parliamentarians also expressed concerns about the 'disturbing new trends'. including 'disguised law' and over-reliance upon guidance as a means of rule-making. The phenomenon of 'disguised law' refers to an increase in recourse to 'instruments which are legislative in effect but often not subject to parliamentary oversight'.[91] Examples of this included 'mandatory guidance', 'Requirements "to have regard to" guidance' and 'powers to make a "determination", to make "directions", to determine "arrangements", and to issue a "code of practice", a "protocol" or a "public notice"'.[92]

Enshrining legal rules in mandatory guidance has the effect of what the Leader of the House of Commons described as 'circumvent[ing] the usual way of regulating a matter'.[93] The Justice Committee of the House of Commons expressed rule-of-law concerns regarding the impact of this practice during the pandemic. The Committee emphasised that

> [i]n 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.[94]

Undoubtedly the most egregious wrong – when viewed through the lens of constitutional principle – was the use of delegated legislation to create new criminal offences. This practice is not new, however. A Law Commission consultation from 2010[95] expressed concerns about the increased resort to criminal sanctions in the regulatory context, including under the Consumer Protection Act 1987.[96] The Consultation Report expressed 'concerns about the use of delegated powers to create criminal offences, especially when these offences can be met with a sentence

[90] K Ewing, 'Covid-19: Government by Decree' (2020) 31 *King's Law Journal* 1, 18.
[91] *Democracy Denied?* (n 6) [89].
[92] ibid [90].
[93] ibid [94].
[94] House of Commons Justice Committee, *COVID-19 and the Criminal Law* (2021–22, HC 71) [44]
[95] Law Commission, 'Criminal Liability in Regulatory Contexts: A Consultation Paper, No 195 (London, The Law Commission, 2010)
[96] ibid [3.83] onwards.

of imprisonment'.[97] The Law Commission took the 'provisional view' that criminal offences should only be created using primary legislation.[98]

During the pandemic, this advice went unheeded. The Joint Committee on Statutory Instruments pointed out that offences created using delegated legislation in response to the pandemic were both unclear and irrational. The difficulties ranged from the relatively benign – failure to adequately define a 'suitable place' in a regulation concerning accommodation[99] – to the ridiculous. The Health Protection (Coronavirus, Local COVID-19 Alert Level) (Medium, High and Very High) (England) (Amendment) (No 3) Regulations 2020, enacted by the Department of Health and Social Care, made it a criminal offence to remain open for the purposes of selling alcohol at certain times. However, in a parliamentary evidence session, a representative of the Department admitted to the ridiculous implications of this prohibition. It would have been 'entirely lawful' for an off-licence to remain open and to allow customers to enter and select their preferred alcohol without making a purchase. Immediately upon leaving the shop, they could 'telephone to the counter … and place an order, and … re-enter the shop and buy the alcohol'.[100] One cannot help but speculate that a drafting error which produced such absurd results may well have been intercepted and corrected by the parliamentary process if it had appeared in primary legislation.

## V. Cementing Principles in an Unprincipled Landscape

The above analysis of delegated legislation aims to stir the consciences of those committed to representative democracy and the rule of law. It is a source of personal frustration and disappointment that this chapter (and many others) continues to repeat the same grievances over the course of a generation. Perhaps this is because public law scholars tend to suffer from both naivety and utopianism. Much of what is discussed in this chapter may be undesirable when measured against abstract principles, but it is perfectly constitutionally permissible. Perhaps Griffith was right when he lamented that: 'Societies are by nature authoritarian. Governments even more so.'[101] In this volume, Professor Harlow's illuminating chapter points out that Griffith never defined the political constitution in his Chorley lecture, and he recognised the need for 'a strong executive government capable of pushing through a reformist agenda'.[102] But, as Harlow remarks, he was 'no authoritarian'[103]

[97] ibid [3.112].
[98] ibid [3.145].
[99] *Rule of Law Themes from COVID-19 Regulations* (n 8) [30], citing The Health Protection (Coronavirus, Restrictions) (Steps) (England) Regulations 2021, SI 364/2021.
[100] *Rule of Law Themes from COVID-19 Regulations* (n 8) [34].
[101] JAG Griffith, 'The Political Constitution' (1979) 42 *MLR* 1, 3.
[102] C Harlow, 'Judicial Encroachment on the Political Constitution?' ch 2 in this volume.
[103] ibid.

either. He strongly recognised the role of the political institutions of the constitution in securing accountability for executive action.

Delegated legislation and the damaging practices which surround it cast our well-worn and lazy assumptions about principles in the British constitution into sharp relief. The enduring legacy of Griffith's essay is the sentiment that the (somewhat skeletal) architecture of the British constitution means 'that we get no more or no less than the constitution we as a polity deserve'.[104] Principles in the British constitution are not conveniently built into a pre-existing, entrenched framework. Their continued presence requires consistent effort on the part of the government, parliamentarians and the electorate. Like the crumbling edifice of a historic building, constitutional principles must be consistently and assiduously maintained.

In this regard, the efforts by various Select Committees suggesting that resort to delegated legislation should be the subject of last resort and eschew policy choices are to be welcomed. A 'culture change' in the practices surrounding the making and scrutiny of delegated legislation which places the principle of parliamentary democracy at its centre is undoubtedly required.[105] This should include, among other measures, an amendment to the 'Guide to Making Legislation' to include a 'statement of principles of parliamentary democracy, with a requirement that it should underpin to the fullest extent possible decisions about proposed delegations of legislative power'.[106] But the flexibility of our constitutional settlement means that any such commitment requires political will. There is no doubt that if we want a principled constitution, then we must all commit, in short, to being 'good chaps'.[107]

Brexit and the pandemic left a severe (potentially indelible) dent in the constitutional landscape. Ewing observed that the pandemic saw parliamentary accountability recede in favour of 'briefings by ministers (flanked by government experts) in an empty room with journalists, not MPs, on the receiving end remotely to ask questions. Broadcast live to the nation, the spectacle reinforces the marginalisation of Parliament.'[108] This constitutional shift has not gone unobserved. In February 2022, the Institute for Government launched a review of the British constitution, because the time had come to 'consider whether reforms are necessary to make the UK's constitutional order more coherent, effective and legitimate'.[109]

[104] H Hooper and V Fikfak, *Parliament's Secret War* (Oxford, Hart Publishing, 2018) 237.
[105] *Democracy Denied?* (n 6) [164] 'Box 2'.
[106] ibid [165] 'Box 3'.
[107] Blick and Hennessy (n 11).
[108] Ewing (n 90) 24.
[109] M Thimont Jack, J Sargeant and J Pannell, 'A Framework for Reviewing the UK Constitution' (London, Institute for Government, 2022) 11.

## VI. Conclusion

There is no doubt that executive power has increased, and we now stand at a crossroads between two potential models of the British constitution. Howarth, a former parliamentarian, dubs these competing models (first proposed by AH Birch)[110] the 'Westminster' and 'Whitehall' models.[111] The Whitehall model views the executive as the dominant constitutional entity. According to Howarth, on this view, the party which wins a general election 'is not merely entitled to implement its manifesto (to exercise its "mandate") but obligated to do so'.[112] Therefore, the Whitehall model sees 'parliamentary activity that tends to obstruct the implementation of the winning party's manifesto … as anti-democratic'.[113] The Westminster view, by contrast, celebrates Parliament as the central constitutional actor. It is no mere ideal.[114] On this model, Britain is viewed as 'a representative democracy in which members of parliament exercise their own judgment, in the tradition of Edmund Burke, and do not automatically follow the views of their party'.[115] In this regard, what happens in Parliament matters: it has real consequences, including ministerial resignation when the confidence of the Commons is lost.

Obviously, the prevalence of each model shifts according to time and circumstance. Ideally, neither should dominate entirely and for all time coming. Whilst hierarchies in constitutions and legal systems are inevitable to some degree, constitutionalism inherently requires and promotes tension between institutions and the continued justification of the exercise of public power.

The role of delegated legislation in the last 30 or so years is a poignant illustration that constitutional principles are contingent and even potentially illusory. The dicta from the Supreme Court in the *Miller* cases illustrate how starkly understandings of the constitution can vary between its key actors at any point in time. The Supreme Court adopted a view which was 'very much Westminsterist' in marked contrast to 'the determinedly Whitehallist' views of the government and other political actors.[116] The efforts of various Select Committees which have highlighted the desire to return Parliament to the centre of the legislative process come at an important time in history. After all, its function in this author's view is to 'protect us from authoritarianism, from despotism, from an over mighty monarch, but also from an over mighty executive'.[117]

[110] A Birch, *Representative and Responsible Government: An Essay on the British Constitution* (London, Allen & Unwin, 1964).
[111] Howarth (n 10) 217.
[112] ibid 218.
[113] ibid.
[114] ibid.
[115] ibid 218–19.
[116] ibid 238.
[117] Lord Judge (n 64).