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Legislating badly?

Measures introduced in the Queen's Speech risk fuelling legislative bad habits. Nick Wrightson sets out why

The 2022 Queen's Speech did more than just crown the state opening of parliament. It also showcased two of the UK's principal legislative (bad) habits.

In recent years it has become normal for parliament to pass 'framework' or 'skeleton' bills, ie legislation that expresses general policy principles but leaves the fine print to be filled in later by ministers through statutory instruments. So-called 'Henry VIII' powers have also proliferated, enabling ministers to amend acts of parliament. As a result, secondary legislation has arguably become the UK's dominant form of law-making.

Separately, policymakers have embraced 'principles-based regulation', ie legislation that identifies broad standards and objectives, but says little about how they must be attained. This leaves certain tricky questions about what the law does and does not require to be resolved later in court.

Neither of these legislative habits is bad in itself. Indeed, the UK cannot do without secondary legislation because parliament cannot realistically satisfy the demand for new rules alone. Nor are detailed, prescriptive rules always to be preferred. By expressing broad standards and objectives using 'open-textured' language, lawmakers empower the courts to keep those standards and objectives current by interpreting them in a way that reflects society's changing experience over time.

These legislative habits may, however, become bad (ie constitutionally corrosive) if the executive starts making key rules without adequate parliamentary oversight. The same may apply if ministers begin blaming judges for how they interpret the imprecise standards and objectives they have been given. In these circumstances, confidence in legal certainty within the UK may suffer, as may the reputation of our judges. These risks could arise in relation to two of the bills announced in the 2022 Queen's Speech.

Legislating for the next phase of Brexit by statutory instrument

The Brexit Freedom Bill seems a logical next step in the legal progress of Brexit. It will simplify the process of overhauling laws inherited from the EU. The government's background briefing notes says it aims to: (a) '[e]nsur[e] that retained EU law can be amended, repealed or replaced with legislation which better suits the UK, without this taking decades of parliamentary time to achieve', and (b) '[m]odernis[e] the UK's approach to making regulations'. Those aims are uncontroversial, but the intended methods for achieving them may not be.

A key intention is to give ministers stronger powers to modify retained EU law through secondary legislation. That raises two risks: (a) it could contribute to the trend of the government bypassing parliament in the legislative process; and (b) the government could use the new simplified procedure to make major changes without adequate safeguards. It was one thing for ministers to be empowered for a two-year period (under s 8 of the European Union (Withdrawal) Act 2018) to make secondary legislation directed at tackling deficiencies in retained EU law. It would be quite another to grant ministers open-ended powers to amend, repeal or replace retained EU law generally. Large areas of UK law are derived from EU law (eg key provisions of employment, competition and environmental law), and the government could potentially override them unilaterally with these powers.

Without extensive safeguards and parliamentary controls (going well beyond the level of safeguards in s 8) these powers could effectively permit the executive to legislate by proclamation in important areas of UK social and economic life.

Legislating to curtail human rights

The Human Rights Act 1998 (HRA 1998) is quintessentially open-textured legislation. It reflects a commitment by 46 states to uphold certain broadly framed fundamental rights, enshrined in the European Convention on Human Rights. Both the Convention and HRA 1998 leave it to the courts to establish the full implications of each protected right and keep the rights up-to-date. The way the courts have approached these tasks has, however, become immensely unpopular with the current government.

The proposed Bill of Rights is intended as the antidote. The background briefing notes say that it will 'ensur[e] that UK courts can no longer alter legislation contrary to its ordinary meaning and constrai[n] the ability of the UK courts to impose "positive obligations" on our public services without proper democratic oversight by restricting the scope for judicial legislation'.

Given that the courts generally apply the Convention much as intended, rhetoric like this risks unduly eroding public confidence in our judiciary. It glosses over the fact that politicians and lawmakers deliberately left the ambit of Convention rights to the courts, perhaps partly to avoid the consequences of imposing unpopular restrictions themselves. It appears the government's appetite to incur those political costs remains limited. The Bill of Rights appears set to dilute various rights and diminish executive accountability, yet the government's rhetoric of 'restor[ing] the balance of power between the legislature and the courts' scarcely spells that out.

Conclusion

Both of the legislative habits described above can deliver positive outcomes if not taken too far, and may sometimes even be necessary. The government's briefing notes on the Brexit Freedoms Bill and the Bill of Rights, however, suggest that it is willing to risk constitutionally corrosive consequences. Hopefully when the proposals take shape that concern will prove to be unfounded. The rule of law is precious to UK social and economic life so we must be vigilant about the risks of key rules being made without adequate parliamentary oversight and judges being blamed for doing their job. NLJ

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