

LIBERTY

PROTECTING CIVIL LIBERTIES
PROMOTING HUMAN RIGHTS

**Liberty's Written Submissions to the
House of Lords Constitution Committee
Inquiry into the Legislative Process:
Delegated Powers**

January 2017

About Liberty

Liberty (The National Council for Civil Liberties) is one of the UK's leading civil liberties and human rights organisations. Liberty works to promote human rights and protect civil liberties through a combination of test case litigation, lobbying, campaigning and research.

Liberty Policy

Liberty provides policy responses to Government consultations on all issues which have implications for human rights and civil liberties. We also submit evidence to Select Committees, Inquiries and other policy fora, and undertake independent, funded research.

Liberty's policy papers are available at

<http://www.liberty-human-rights.org.uk/policy/>

Contact

Bella Sankey

Director of Policy

Direct Line 020 7378 5254

Email: bellas@liberty-human-rights.org.uk

Rachel Robinson

Policy Officer

Direct Line: 020 7378 3659

Email: rachelr@liberty-human-rights.org.uk

Sara Ogilvie

Policy Officer

Direct Line 020 7378 3654

Email: sarao@liberty-human-rights.org.uk

Silkie Carlo

Policy Officer (Technology & Surveillance)

Direct Line 020 7378 5255

Email: silkiec@liberty-human-rights.org.uk

Sam Hawke

Policy Assistant

Direct Line 020 7378 5258

Email: samuelh@liberty-human-rights.org.uk

1. As a domestic human rights organisation, Liberty will focus on our longstanding concerns with so-called 'Henry VIII powers' and our even greater concerns with their proposed use as part of any 'Great Repeal Bill to legislate for the UK's exit from the European Union.
2. Liberty has longstanding concerns with these powers, which are corrosive of Parliamentary democracy and provide for the erosion of rights protections by the backdoor.¹ Henry VIII clauses risk emboldening Ministers to make sweeping changes to vast swathes of law – even law protecting fundamental rights – with the extremely brusque scrutiny which secondary legislation receives.
3. As others have pointed out, the term is in fact a misnomer. The powers granted to Henry VIII by the 1539 Statute of Proclamations only gave orders made under the Royal Prerogative the same force as legislation and could not change existing laws, including Acts of Parliament.² Even these more limited clauses the philosopher David Hume described as “a total subversion of the English constitution”.³
4. Modern 'Henry VIII clauses', by contrast, have done far more, permitting Ministers to alter statute by executive fiat with drastically diminished review. Today's powers permit alterations to Parliament-made law by Ministerial decision, the latter having none of the democratic imprimatur and procedural protection provided by Parliamentary scrutiny.
5. Such powers may sometimes be permissible, where strictly limited in their scope to areas that concern, for example, technical matters or where provision is needed to tie up small arenas of legislation to avoid inconsistency. But the use of such powers

¹ See, for example, Liberty, 'Liberty's Report Stage Briefing on the Digital Economy Bill in the House of Lords', February 2010, available here: <https://www.liberty-human-rights.org.uk/sites/default/files/digital-economy-bill-house-of-lords-report-briefing.pdf>, 'Liberty's Report Stage Briefing on Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Bill in the House of Lords', February 2012, available here: <https://www.liberty-human-rights.org.uk/sites/default/files/liberty-s-report-stage-briefing-on-part-1-of-the-laspo-bill-feb-2012-.pdf>, 'Liberty's Committee Stage briefing on Part 4 of the Criminal Justice and Courts Bill in the House of Commons', March 2014, available here: [https://www.liberty-human-rights.org.uk/sites/default/files/Liberty's%20briefing%20on%20Part%204%20of%20the%20Criminal%20Justice%20and%20Courts%20Bill%20for%20Committee%20Stage%20in%20the%20House%20of%20Commons%20\(Mar%202014\).pdf](https://www.liberty-human-rights.org.uk/sites/default/files/Liberty's%20briefing%20on%20Part%204%20of%20the%20Criminal%20Justice%20and%20Courts%20Bill%20for%20Committee%20Stage%20in%20the%20House%20of%20Commons%20(Mar%202014).pdf).

² See the analysis of The Rt. Hon. Lord Judge, in 'Ceding Power to the Executive; the Resurrection of Henry VIII', transcript of speech given at King's College London on 12 April 2016, available here: <https://www.kcl.ac.uk/law/newsevents/newsrecords/2015-16/Ceding-Power-to-the-Executive---Lord-Judge---130416.pdf>.

³ Hume, D., *The History of England*, Volume III, available here: <http://quod.lib.umich.edu/cgi/t/text/pageviewer-idx?cc=ecco;c=ecco;idno=004853754.0001.001;node=004853754.0001.001%3A6.1;seq=237;page=rot;view=text>.

anywhere else, let alone in matters of fundamental rights, raises serious constitutional concerns.

6. As the Bingham Centre for the Rule of Law has stated, Henry VIII clauses threaten the rule of law “by conferring power without limits on the Executive that can be exercised unreasonably since the power may be established and defined by the Executive itself”.⁴ And as the Constitution Committee said in its report on the Protection of Freedoms Bill, which contained such powers, “We have consistently raised concerns about the evident tendency of the executive to resort to wide-ranging Henry VIII clauses at the expense of Parliament in general and of the House of Lords as a revising chamber in particular.”⁵
7. When matters of fundamental rights are at stake, the most stringent safeguards are needed. To ensure that grave mistakes are not made, and that decisions are invested with legitimacy, the utmost democratic scrutiny is required. This can only be provided by primary legislation.
8. But in all areas of law, the Parliamentary process provides for crucial oversight and brings the stamp of democracy. The passage of primary legislation allows for a public assessment of the Government’s proposals, giving the public and the press time to consider the matters raised and Members of Parliament to voice their objections. Over the course of a Bill, amendments may be made, or even whole Bills defeated. This is what democracy demands.
9. The process by which statutory instruments are passed, by comparison, is almost summary in its want of deliberation and excess of speed. They are either expressly approved by both Houses of Parliament (known as affirmative resolution), or may pass simply for lack of any objection (known as negative resolution). Around 90% of statutory instruments are thought to be passed by means of the latter procedure, becoming law without *any* debate in Parliament at all.⁶ Even when deliberation does occur, there is only one occasion per House for discussion, and no process for considering and passing amendments.

⁴ Bingham Centre for the Rule of Law, ‘Briefing Paper: Parliament and the Rule of Law in the Context of Brexit’, 29 September 2016, available here: http://www.biicl.org/documents/1284_briefing_paper_-_parl_and_rol_in_brexit.pdf?showdocument=1, p. 5.

⁵ See House of Lords Select Committee on the Constitution, ‘Protection of Freedoms Bill: Report’, 20th Report of Session 2010-12, 3 November 2011, available here: <http://www.publications.parliament.uk/pa/ld201012/ldselect/ldconst/215/215.pdf>, p. 4.

⁶ Rosen, G., ‘Making Parliament Fit for Purpose’, Reform, 2014, available here: <http://www.reform.uk/wp-content/uploads/2014/11/Making-Parliament-fit-for-purpose.pdf>.

10. The lack of democratic scrutiny is demonstrated by statistics relating to their passage. As Lord Judge found, only 0.01% of statutory instruments have been defeated by either House,⁷ with the last defeat in Commons taking place in 1979.⁸ Even figures cited by the Government as to defeats of secondary legislation in the House of Lords since 1950 place the number at 35.⁹ This is roughly the same as the average number of times the Government has been defeated in the Lords over provisions of Bills *each year* since 2005.¹⁰ These figures prove the truth of the Constitution Committee's claim that reliance on statutory instruments over primary legislations "strength[ens] the Executive at the expense of Parliament's legislative authority."¹¹

11. Indeed, as we have stated in respect of proposed powers in the Public Bodies Bill to dissolve public bodies created by primary legislation:

"Amendments to legislation should be properly debated and considered by Parliament with the ability for amendments to be proposed and implemented. Secondary legislation, which is not subject to a full and proper parliamentary debate, should not amend primary legislation in relation to anything other than the most minor details. Allowing a Minister to make an order abolishing or fundamentally restructuring bodies created by established democratic process, gives an unacceptably broad power to the executive."¹²

12. As the Constitution Committee concluded in respect that Bill, the use of such powers "strikes at the very heart of our constitutional system", amounting to a "departure from constitutional principle" which "drains the lifeblood" of Parliamentary scrutiny.¹³

⁷ Lord Judge, 2016.

⁸ See HC Deb, 22 March 1979, cols 1833-59, referenced in Select Committee on the Constitution, 'Response to the Strathclyde Review', 2016, p.9..

⁹ Parliament, 'Delegated Legislation: Government Defeats: Written question - HL7415', 25 April 2016, available here: <http://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Lords/2016-04-11/HL7415/>.

¹⁰ The Constitution Unit, UCL, 'Government Defeats in the House of Lords', available here: <https://www.ucl.ac.uk/constitution-unit/research/parliament/house-of-lords/lords-defeats>. Mean average taken from annual figures for sessions from 2005 to 2016.

¹¹ House of Lords Select Committee on the Constitution, 'Delegated Legislation and Parliament: A response to the Strathclyde Review', 9th Report of Session 2015-16, 23 March 2016, available here: <http://www.publications.parliament.uk/pa/ld201516/ldselect/ldconst/116/116.pdf>, p.2.

¹² Liberty, 'Liberty's Second Reading Briefing on the Public Bodies Bill in the House of Lords', November 2010, available here: <https://www.equalityhumanrights.com/en/file/6171/download?token=G1mzn3vO>.

¹³ See House of Lords Select Committee on the Constitution, 'Public Bodies Bill [HL]: Report', 6th Report of Session 2010-11, 4 November 2010, available here: <http://www.publications.parliament.uk/pa/ld201011/ldselect/ldconst/51/51.pdf>, p. 5.

13. Liberty believes that Henry VIII powers are, in general, offensive to the UK's constitution. They render Parliament less sovereign and less strong, allowing Government to avoid democratic scrutiny. Except in rare cases of technical or tying-up provisions, they should be avoided – especially where they effectively hand Ministers the power to repeal fundamental rights.

The 'Great Repeal Bill'

14. In respect of the UK's exit from the European Union, these concerns are intensified and the use of such powers even less justified. Whilst it is accepted that lawmakers face a serious challenge in legislating for withdrawal, Ministers must not be handed virtually untrammelled power to make and unmake matters needing real democratic scrutiny and legitimacy.

15. As the Constitution Society suggested prior to the referendum, the highly controversial powers proposed in the Public Bodies Bill were significantly less constitutionally objectionable than their suggested use in legislating for Brexit.¹⁴ Indeed, our and others' criticisms of the Public Bodies Bill centred on its proposals to hand to the executive powers to dissolve public bodies, and they were defeated in view of their sweeping and unjustified scope. It is an understatement to say that this must apply even more strongly to any proposal to use these powers to amend or repeal over 40 years of EU regulation affecting vast swathes of the UK's national life and the lives of its inhabitants – including some of their fundamental rights and entitlements.

16. It would therefore be an extraordinary and unprecedented abuse of these powers to allow Ministers to pull apart longstanding provisions of UK law after Brexit. Whilst there may be some areas in which technical or tying-up changes may be needed, and in which these powers may be appropriate, Henry VIII clauses cannot be permissibly used in respect of substantive areas of law – much less to repeal fundamental rights by Ministerial fiat.

17. This is why we have called for a comprehensive and independent audit of all EU-law human rights obligations – either directly effective in UK law or implemented by any other means – to ensure that they are directly incorporated into primary legislation as part of any 'Great Repeal Bill'.¹⁵ We call for these hard-won protections to be

¹⁴ The Constitution Society, 'Brexit: The Immediate Legal Consequences', 2016, available here: <http://www.consoc.org.uk/wp-content/uploads/2016/05/Brexit-PDF.pdf>, p. 27-8.

¹⁵ See, for example, Liberty, 'Liberty's submissions to the Joint Committee on Human Rights' Brexit Inquiry', October 2016, available here: <https://www.liberty-human->

preserved. At the very least, any suggestion of amendment to these crucial areas of law must be undertaken through the process of primary legislation – not the scrutiny-light procedures for statutory instruments.

18. Indeed, without anything approaching proper democratic scrutiny, the use of Henry VIII powers create a real risk that EU-law rights protections will be eroded – even eliminated entirely – by Ministerial fiat. We must guarantee a human rights-compliant Brexit, and this must be done by serious scrutiny and review. As we have said in respect of Bills whose constitutional significance is dwarfed by that of the forthcoming ‘Great Repeal’, real parliamentary scrutiny creates a vital opportunity for grave errors in new laws to be amended whilst giving the public and press the time to properly review and consider the changes proposed. This could hardly be more important as the UK legislates to leave the EU.
19. Moreover, it hardly needs stressing that the proposed use of Henry VIII powers in legislating for Brexit would dramatically undercut the very basis on which its supporters sought this momentous change. The sovereignty of Parliament was central to the case of those campaigning to leave the EU. The use of Henry VIII powers attacks the foundations of this principle, strengthening the executive and weakening Parliament. Parliamentary sovereignty demands real Parliamentary scrutiny.
20. Liberty continues to warn against any retrenchment on fundamental rights after Brexit. Strong rights protections will be crucial to the UK’s future after the referendum. Whilst there may be some technical matters which may be arranged through statutory instrument, primary legislation will be the only route to ensure real debate and to guarantee a human rights-compliant Brexit. As the Bingham Centre agree, “[T]he pressure from the extraordinary circumstances of Brexit ought not result in fundamental UK constitutional principles being eroded or disregarded entirely.”¹⁶
21. We strongly urge Parliamentarians to reject any ‘Great Repeal Bill’ which hands dangerously untrammelled powers to the executive to make and unmake years of law – sapping the strength of Parliament when its scrutiny is most needed.

Sam Hawke