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The Loophole is a journal for the publication of articles on drafting, legal, procedural and management issues relating to the preparation and enactment of legislation. It features articles presented at its bi-annual conferences. CALC members and others interested in legislative topics are also encouraged to submit articles for publication.

Submissions should be no more than 8,000 words (including footnotes) and be accompanied by an abstract of no more than 200 words. They should be formatted in MSWord or similar compatible word processing software.

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Editor's Notes

The 2017 CALC Conference in Melbourne assembled a host of speakers on a wide range of topics under the theme *Beginning with the End in Mind – Legislative Drafting in the Context of 21st Century Challenges*. This issue of the *Loophole* provides a taste of the papers presented at the conference as well as three complementary articles. At first glance they might seem to address disparate topics, but they have points in common and demonstrate remarkable agreement on major drafting concerns at the beginning of the 21st Century.

This issue opens with Jeannine Bednar-Giyose's account of the drafting challenges in a major piece of reform legislation in South Africa: the *Financial Sector Regulatory Reform Act* of 2017. This sweeping piece of legislation exemplifies what complex legislation is and her article provides a comprehensive account of the policy and drafting issues involved and how they were addressed.

The next article by Roger Jacobs also looks at complexity, but from a more theoretical perspective, incorporating concepts and ideas from other disciplines, notably health-sciences and management. However, Roger brings this down to earth by considering an attempt to deal with complexity through the delegation of legislative powers. His article is a thought-provoking piece that links drafting issues to problem-solving generally.

Lee Harvey picks up the delegation theme of Roger's article. Indeed, when she gave her presentation at the Sydney workshop, Lee also provided an account of Roger's paper as a frame for her analysis, which drills more deeply into delegation issues and the rhetorical implications of the label "Henry VII clause".

And continuing on the topic of delegation, Ian Brown's paper – *Despotism Revisited* – provides a pragmatic series of considerations for determining the appropriate breadth of a delegated power. He presented it at the annual Joint Conference of the Canadian Associations of Parliamentary and Legislative Counsel in August 2017. It resonates with Lee's paper on the other side of the world, but considers powers more broadly, encompassing non-legislative powers as well.

This issue concludes with Bilika Simamba's paper on constitutional and legislative provisions dealing with judicial review, which had originally been planned for presentation at the CALC Conference session on human rights. Judicial review is a vital aspect of the control of delegated powers, reminding us that while the drafting of delegation provisions is important, the courts have an equally important role in controlling the exercise of delegated powers. Bilika's article describes the various elements of judicial review and how they have been treated legislatively in two Caribbean countries and elsewhere. He goes on to consider the ambiguity that can arise as to the relationship between constitutional and legislative provisions enacted in the same jurisdiction.

This issue should whet your appetite for more to come from the 2017 CALC Conference.

John Mark Keyes

Ottawa, October, 2017

Complexity and Interconnection in Financial Sector Legislation in South Africa

Jeannine Bednar-Giyose¹



Abstract

This article addresses complexity in legislation and the necessity of ensuring that it is appropriately addressed in the development of legislation. It focuses on the Financial Sector Regulation Act, 2017 of South Africa and considers how various aspects of complexity were addressed, including the substantive content of the Act, its structure and its interconnection with other laws and standards. The article underscores the role of legislative counsel and other legislative drafters in addressing complexity.

Introduction

The article considers complexity in legislation by looking at the financial sector regulatory reform process currently being undertaken in South Africa. It considers the following aspects of this topic:

- complexity in the content of legislation (the scope and the technicality of the content);
- complexity in the structure of legislation and of legislative provisions;
- complexity arising from the need to ensure the appropriate interconnection, alignment and integration of the legislation that is being developed
 - with the Constitution;
 - with administrative law;
 - with other legislation; and
 - with international standards;

¹ Director: Financial Sector Legislation and Regulation, National Treasury, Republic of South Africa.

- complexity arising from the process of establishing a new integrated legislative framework to address a specific area of law.

Measures that have been undertaken to address these aspects of complexity during the development and processing in Parliament of the *Financial Sector Regulation Act, 2017*² (“the FSRA”) are described. Finally, the role of the legislative drafter in addressing complexity in legislation is examined.

Why complexity in legislation is significant for legislative drafters

Complexity is a significant consideration that legislative drafters must almost invariably grapple with when developing legislation. In many instances complexity may be unavoidable in that legislation must address a significant scope of content and complex technical matters. Legislation must be integrated within the broader constitutional and administrative law context, as well as the general legislative context within which the legislation must operate.

If complexity is not appropriately addressed, the likelihood of enacting accessible and effective legislation, or of establishing an accessible and effective regulatory regime, will be significantly diminished. Poorly addressed complexity can be seen when there is a failure to achieve clarity, precision, unambiguity, and accessibility, which have been identified as key tools for achieving effective legislation and regulatory regimes.³

The vital task for the drafter, then, is to effectively address complexity so that it does not undermine the accessibility and the ultimate effectiveness in the legislation. Complexity can be appropriately addressed by careful attention to the structure of legislation and legislative provisions, and by drafting in clear, precise, and unambiguous language.

To appreciate the importance of accessibility in legislation, and the necessity of appropriately addressing complexity in legislation, it may be helpful to consider potential unintended effects that could result if it is not appropriately addressed in the specific context of the financial sector reform process in South Africa. As an emerging economy, South Africa is particularly concerned with development and the transformation of the economy (which suffers from extremely high levels of unemployment) and the legal system. A substantial majority of the population was previously excluded from meaningful access to and participation in the economy, and was denied human rights and other legal rights and opportunities by the apartheid legal system. Transformation and development, in this context, requires facilitating full access to the economy and the legal system for those who

² Act No. 9 of 2017, available at <https://www.gov.za/documents/financial-sector-regulation-act-9-2017-english-sepedi-22-aug-2017-0000> and https://www.gov.za/sites/default/files/41060_22-8_Act9of2017FinanSectorRegulation_a.pdf.

³ For a detailed consideration of the essential legislative drafting tools of clarity, precision, and unambiguity, see Xanthaki, Helen *Drafting Legislation— Art and Technology of Rules for Regulation* Oxford: Hart Publishing (2014), in particular Chapters 1 and 5.

previously were excluded and disadvantaged. Accessible legislation is essential to facilitate these transformation objectives.

In relation to transformation of the financial sector of the economy, one focus is on increasing ownership in the financial sector by emerging entrepreneurs from the sector of society that was previously excluded or hindered from participation in the financial sector. Another focus is on financial inclusion, which seeks to enable new financial customers who were previously excluded from, or had very limited access to financial products and services, to be able to access them to meet their needs.

Complexity in financial sector legislation, if not appropriately addressed, could unintentionally hinder the promotion of transformation of ownership in the financial sector. For example, complexity might make it difficult to determine and comply with the applicable requirements that must be met to become a licensed financial institution; or complexity may make it difficult to clearly understand and comply with the obligations that a financial institution must adhere to on an ongoing basis. As a result, emerging entrepreneurs might be hampered in establishing and subsequently successfully operating new financial institutions.

The ability for emerging entrepreneurs to establish and operate financial institutions may in turn have an impact on promoting the financial inclusion of new financial customers. Emerging entrepreneurs may be more likely and keen to provide financial products and services to new financial customers than long-established, very large financial institutions. Emerging entrepreneurs may also be more interested in developing new types of financial products and services for new financial customers. Emerging entrepreneurs may be more familiar with and have a better understanding of those new financial customers' needs and desires. If the establishment of new financial institutions by emerging entrepreneurs is hindered due to complexity, the promotion of financial inclusion that those new financial institutions would facilitate may be hindered. And if complexity makes it difficult to clearly understand and comply with requirements relating to the provision of financial products and financial services, it may hinder the development of new types of financial products and services for new financial customers that would meet their needs and desires.

Linked to financial inclusion, the protection of financial customers, particularly new financial customers, is another concern that must effectively be addressed in financial sector legislation in South Africa. Again, accessibility of legislation is critical, and appropriately addressing complexity is a vital concern. If complexity is not appropriately addressed, customers may not be aware of, or understand, the protections afforded to them, and what recourse they may have for unfair or unlawful conduct by financial institutions. Financial institutions potentially may not understand what their obligations are in relation to financial customers, and as a result they may be more likely to contravene the legislation, even if unintentionally.

Complexity in financial sector legislation, if not appropriately addressed, could also make it more challenging for financial sector regulators to regulate financial institutions, and could also leave regulators' decisions and actions open to legal challenge.

Addressing complexity appropriately to ensure that the accessibility and the ultimate effectiveness of legislation is not compromised is important in respect of all legislation. The necessity of appropriately addressing complexity is particularly highlighted in the context of countries such as South Africa, where transformation of the economy and the legal system are major concerns to promote development.

Drafters should, to the extent possible, consider the potential implications that may arise if aspects of complexity are not appropriately addressed in the legislation they are developing. If the intended objectives and effects of the legislation are clearly identified, draft legislation can be examined to assess if there are aspects of complexity in the legislation that may potentially hinder the achievement of any of those intended objectives and effects.

It can be challenging for drafters to identify these potential implications. Government officials that drafters may work with in developing legislation, and stakeholders and commentators in public consultation and Parliamentary processes, can be very helpful in identifying important potential consequences that may arise from aspects of complexity in the legislation that might not have been appropriately addressed. Revisions can then hopefully be developed to address those shortcomings in the legislation.

The Financial Sector Regulatory Reform Process in South Africa

The financial sector regulatory reform process in South Africa is establishing a new regulatory regime that provides a comprehensive system for regulating the financial sector and prioritizes financial customers and the protection of their funds. A coherent and integrated regulatory approach is being established, to replace the existing fragmented regulatory approach that is contained in numerous pieces of financial sector legislation.

The new regulatory regime has two main aims:

- to strengthen financial stability and the soundness of financial institutions (which is referred to as “prudential regulation”) by creating a dedicated Prudential Authority;
- to protect financial customers and ensure they are treated fairly by financial institutions (which is referred to as “conduct regulation”) by creating a dedicated Financial Sector Conduct Authority.

The new regulatory regime will establish a harmonised, consistent and complete system of licensing, supervision and enforcement, which will hopefully be more effective than the current financial sector legislative framework.

The regulatory reform process commenced with the publication of a policy document on financial sector reform in 2011.⁴ Drafting of the foundational framework legislation, the FSRA, was undertaken from 2012-2015, and two rounds of public consultation took place on draft versions of the legislation prior to its introduction in Parliament. The Financial Sector Regulation Bill, 2015,⁵ was finally introduced in Parliament on 27 October 2015. Parliament finally passed the Bill on 22 June 2017. The FSRA was assented to on 22 August, 2017.

This extensive reform process is being undertaken in two phases. The first phase was the enactment of the FSRA. In the second phase of further legislation is already being processed by Parliament, or is being developed.

An Insurance Bill to provide for the appropriate regulation of the insurance sector, in accordance with the FSRA has been tabled in Parliament and is currently being considered by the Standing Committee on Finance of the National Assembly. Forthcoming legislation will provide for the resolution of what are referred to as “systemically important financial institutions”, whose failure would have an impact on the stability of the financial system.

A Conduct of Financial Institutions Bill (CoFI Bill), which will provide for the regulation of the conduct of financial institutions in relation to financial customers, is currently being developed. Public consultations on the CoFI Bill are taking place this year, and that Bill will be introduced in Parliament in 2018.

The regulatory reform process will ultimately result in the consolidation of much of the existing financial sector legislation into a few core pieces of legislation. The reform process will continue for the next few years, while the core legislation in the framework is enacted and the remaining financial sector legislation is aligned to the core legislation.

Complexity of the Financial Sector Regulation Act (FSRA)

Due to the role of the FSRA in establishing the foundation of the new regulatory framework, it is necessarily complex. It addresses the following matters:

- financial stability,⁶ which was previously not significantly addressed in legislation;
- the establishment of two new financial sector regulators (“the financial sector regulators”) – the Prudential Authority and the Financial Sector Conduct Authority – and providing for their powers and functions;⁷

⁴ *A safer Financial Sector to serve South Africa better*, National Treasury Policy Document, Republic of South Africa, published 23 February 2011, available at <http://www.treasury.gov.za/documents/national%20budget/2011/A%20safer%20financial%20sector%20to%20serve%20South%20Africa%20better.pdf> .

⁵ B34-2015.

⁶ Chapter 2.

⁷ Chapters 3 and 4.

- co-operation and collaboration between the financial sector regulators, and between the financial sector regulators and other regulators;⁸
- the procedures by which the financial sector regulators can take administrative actions;⁹
- empowering the financial sector regulators to make delegated legislation, referred to as “standards” and prescribing a consultation procedure that the financial sector regulators must adhere to when making delegated legislation;
- clarifying Parliament’s role in the oversight of delegated legislation;¹⁰
- the licensing of financial institutions;¹¹
- enabling the financial sector regulators to effectively supervise financial institutions by empowering them
 - to conduct supervisory on-site inspections and investigations of financial institutions,
 - to enforce the legislation, and
 - to impose administrative penalties;¹²
- the regulation of significant owners of financial institutions and financial conglomerates, which was not previously addressed in legislation;¹³
- enabling consumer complaints in relation to financial institutions to be addressed through financial sector ombud schemes that are overseen by an Ombud Council;¹⁴
- the establishment of a Tribunal where persons who are unhappy with decisions of the financial sector regulators, the Ombud Council, and other designated entities, may apply for those decisions to be reconsidered by the Tribunal;¹⁵ and
- authorizing fees and levies to be imposed to fund the financial sector regulators, the Tribunal and the Ombud Council.

The regime enables strong market conduct regulation, which is currently not extensively dealt with in legislation. It also facilitates the sharing of information by the financial sector regulators with other regulators, including foreign regulators. Other necessary general and

⁸ Chapter 5.

⁹ Chapter 6.

¹⁰ Chapter 7.

¹¹ Chapter 8.

¹² Chapters 9, 10 and 13.

¹³ Chapters 11 and 12.

¹⁴ Chapters 14 and 16.

¹⁵ Chapter 15.

transitional measures are provided for to facilitate the implementation of the new regulatory framework, as well as certain offences.¹⁶

Schedule 4 to the FSRA contains the extensive necessary repeals and consequential amendments to the existing financial sector legislation. The consequential amendments enable the amended financial sector legislation to be administered and implemented by the financial sector regulators.¹⁷

Addressing complexity in the Financial Sector Regulation Act

A key consideration during the development of the FSRA was ensuring that the structure of the Act was logical and accessible. The structure (the order of Chapters, parts, and provisions) and content of the legislation was adjusted substantially in various drafts in light of extensive consultations with the existing regulators (the South African Reserve Bank and the Financial Services Board), engagements with industry bodies, and public consultation processes.

The complexity of provisions of the FSRA were carefully considered and addressed. The content of the key concepts of “financial product”,¹⁸ “financial service”¹⁹ and “financial stability”²⁰ are each addressed in separate sections of the Act. The delineation of the scope of application of the FSRA, and the powers of the Prudential Authority and the Financial Sector Conduct Authority are linked to the concepts of “financial product” and “financial service”. A mechanism was included within the sections that addresses these concepts to enable additional activities that may in future be identified to be designated by the Minister of Finance as being a financial product or service that falls to be regulated.²¹ The exercise of the important powers granted to the South African Reserve Bank to maintain financial stability depended upon an appropriate conception of what constitutes “financial stability”.²² Extensive discussions took place and submissions were received in relation to the content of those concepts, and the relevant sections were significantly refined as a result. The entire extensive set of definitions that are contained in in section 1 of the FSRA were examined and refined during the drafting process, and some definitions received further refinement during the Parliamentary process.

Comments received through public consultation processes and in deliberations in Parliament (including from Committee members) were considered and incorporated to improve the

¹⁶ Chapter 17.

¹⁷ Schedule 4.

¹⁸ Section 2.

¹⁹ Section 3.

²⁰ Section 4.

²¹ Section 2(1)(i) and (2); section 3(1)(i) and (3).

²² Chapter 2.

clarity, precision, and unambiguity of many provisions in the FSRA. Certain Chapters and provisions, for example Chapter 15 that deals with the Tribunal and section 251 on information-sharing were significantly refined during the Parliamentary process. Public comments and the Parliamentary process proved to be very important for promoting the clarity, precision, unambiguity, and the overall accessibility of the FSRA.²³ The submissions helpfully highlighted provisions and content that needed refinement and clarification.

The structure of complex and technical provisions was reviewed and refined to, as far as possible, promote clarity, precision, unambiguity and accessibility. Adjusting the structure of provisions proved helpful in lengthy provisions that initially were perceived by stakeholders and commentators as being somewhat unclear, confusing or ambiguous. Attention to structure also proved very important in lengthy provisions that contained substantial content. Examples include the provisions on making standards²⁴ and issuing directives²⁵ by the financial sector regulators.

Alignment and integration of legislation with the Constitution and administrative law

An important matter that must be addressed in all legislation, and which can introduce complexity in the development and drafting of legislation, is ensuring that the legislation is appropriately aligned with the Constitution, and is appropriately aligned and integrated with administrative law. In South African law, constitutional and administrative law are intimately intertwined through the incorporation of the right to just administrative action in section 33 of the Constitution.²⁶ Legislation must ensure that administrative power is appropriately delineated in a manner that is consistent with the Constitution and administrative law. All powers granted to the Executive and to administrative bodies and officials must be assessed in this regard by drafters when legislation is developed, and by Parliament when considering legislation.

The constitutionality of the FSRA was rigorously assessed, both during the development process, and during the Parliamentary process. Constitutional issues were raised in public consultation processes and during the Parliamentary process that needed to be considered and appropriately addressed.

One constitutional issue was in respect of powers granted to the financial sector regulators to conduct supervisory on-site inspections and investigations to determine if financial institutions are complying with financial sector legislation. The issue arose in Parliament when the President referred another piece of legislation, the Financial Intelligence Centre

²³ For a detailed consideration of the essential legislative drafting tools of clarity, precision, and unambiguity, see Xanthaki, Helen *Drafting Legislation— Art and Technology of Rules for Regulation* Oxford: Hart Publishing (2014), in particular Chapters 1 and 5.

²⁴ Sections 105 to 110.

²⁵ Sections 143 to 150.

²⁶ [Constitution of the Republic of South Africa, 1996](#).

Amendment Bill,²⁷ back to Parliament,²⁸ raising concerns about the constitutionality of provisions that would permit warrantless searches of private premises in certain instances during regulatory inspections.²⁹

It was necessary to review the provisions relating to supervisory on-site inspections and investigations in Chapter 9 of the FSRA, and develop appropriate revisions to align the provisions in the FSRA with the revised provisions in the Financial Intelligence Centre Amendment Bill that were adopted by Parliament after it reconsidered and passed a slightly amended version of that Bill.³⁰ Revisions to Chapter 9 were developed and proposed to the Select Committee on Finance of the National Council of Provinces and were adopted by the National Council of Provinces. Slight amendments to those revisions were proposed by the Standing Committee on Finance of the National Assembly.

Another constitutional issue that was carefully considered during the development of the FSRA, and which was also given significant attention during the deliberations of the Standing Committee on Finance of the National Assembly, was in relation to the powers granted to the financial sector regulators to make delegated legislation, which are referred to in the FSRA as standards.³¹ Concerns were raised about the ability of Parliament to delegate legislative powers to a regulator, instead of a member of the Executive (in this case, the Minister of Finance). Additional concerns were raised about the extent of the delegated legislative powers that were impermissibly broad.

Case law of the Constitutional Court and the Supreme Court of Appeal has established that it is permissible and appropriate, in a modern regulatory state, for certain legislative powers to be delegated by Parliament to regulators. The case law has also defined the extent to which legislative powers may be delegated.³² A thorough assessment of the powers to make delegated legislation was carried out during the development of the FSRA, to try to ensure that the delegated legislative powers were not impermissibly broad, and that sufficient guidance was provided on the exercise of those powers by the Financial Sector Regulators.

²⁷ The Financial Intelligence Centre Amendment Bill [B33B-2015].

²⁸ In terms of section 79(1) of the Constitution, the President must either assent to and sign a Bill passed in terms of this Chapter or, if the President has reservations about the constitutionality of the Bill, refer it back to the National Assembly for reconsideration.

²⁹ In a letter to Parliament dated 30 November 2016,

³⁰ The Financial Intelligence Centre Amendment Bill [B33D-2015].

³¹ Part 2 of Chapter 7, sections 105-110.

³² See Hoexter, Cora *Administrative Law in South Africa* 2nd ed. (Cape Town: Juta and Co. Ltd., 2012), at 24-27. Relevant cases addressing the important aspect of delegation of powers are *Minister of Health v New Clicks South Africa (Pty) Ltd* [2005] ZACC 14; *Bezuidenhout v Road Accident Fund* 2003 (6) SA 61 (SCA); *Executive Council, Western Cape Legislature v President of the Republic of South Africa* 1995 (4) SA 877 (CC); *Akani Garden Route (Pty) Ltd v Pinnacle Point Casino (Pty) Ltd* 2001 (4) SA 501 (SCA); *Minister of Education v Harris* 2001 (4) SA 1297 (CC); *Permanent Secretary, Department of Education and Welfare, Eastern Cape v Ed-U-College PE (Section 21) Inc* 2001 (2) SA 1 (CC). A relevant article is Deon Rudman "Delegation by Parliament of its Legislative Powers: a South African Perspective", [The Loophole Aug. 2008](#) (2008.1) at 45.

A process of public consultation that the financial sector regulators must follow when making delegated legislation³³ was also included and provision was made to afford Parliament the opportunity to scrutinise delegated legislation before it is promulgated.³⁴ The provisions dealing with delegated legislation were further refined during the Parliamentary process, to ensure clarity.

Ensuring alignment and appropriate integration of the FSRA with administrative law was another important consideration during the development of the FSRA and the Parliamentary process. The FSRA was carefully analysed to ensure that Chapter 6 (which addresses administrative action by the financial sector regulators), Chapter 15 (which deals with the Tribunal), and the Act as a whole were aligned with section 33 of the Constitution (which provides for a constitutional right to just administrative action), and were also aligned and appropriately integrated with the *Promotion of Administrative Justice Act*³⁵ (which is constitutionally mandated legislation that gives effect to the right to just administrative action in section 33 of the Constitution).

Chapter 15, which deals with the Tribunal, was also the subject of extensive engagement and discussion. Queries were raised in relation to the version of the Bill that was tabled in Parliament³⁶ about whether it was sought to establish the Tribunal as a Court, and if so, whether the Tribunal might impermissibly oust the jurisdiction of the High Court. That was not the intention, and this was clarified through revisions proposed and adopted during the Parliamentary process.

The powers of the Tribunal were also the subject of significant engagement with the existing regulators, the Financial Services Board (“the FSB”) and the South African Reserve Bank (“the SARB”). There were discussions concerning whether the Tribunal should only be able to conduct a review of a financial regulator’s decision, or whether it should be able to conduct a full appeal. The existing financial sector legislation administered by the two regulators provides, in the case of banking legislation administered by the SARB, for review by a board of review, on fairly limited grounds,³⁷ and the financial sector legislation administered the Financial Services Board provides for an appeal to an appeal board.³⁸ To reconcile these differences in approach in the current legislation, an approach was adopted to avoid references to “review” or “appeal” and instead to use the phrase “reconsideration of a decision”. The nature of the orders that the Tribunal could make were also discussed and

³³ Sections 98-102, 104.

³⁴ Section 103.

³⁵ No. 3 of 2000.

³⁶ Financial Sector Regulation Bill [B34-2015].

³⁷ Section 9 of the *Banks Act* No. 94 of 1990.

³⁸ Sections 26A and 26B of the *Financial Services Board Act* No. 97 of 1990.

refined, which effectively defines the scope of the powers of the Tribunal in relation to the applications that are made to it for the reconsideration of decisions.³⁹

To ensure alignment with the Constitution and administrative law, the FSRA was generally assessed during its development to ensure that the scope of regulatory powers granted to the financial sector regulators were appropriately delineated.

Interaction with legislation administered by other government departments

Another important aspect of the appropriate interconnection, alignment and integration of legislation that can add complexity to the drafting of legislation if not effectively addressed is ensuring that the legislation being developed interacts appropriately with other legislation, which is frequently legislation administered by other government departments. Therefore, the legislation being developed must clearly state which legislation will apply if there is a conflict with that legislation and any other legislation.⁴⁰

It may be very tempting, and a seemingly easy solution from a drafting perspective, to insert “blanket override” provisions, an example of which would be a provision that states that, “In the event of any inconsistency between this Act and any other law other than the Constitution, the provisions of this Act prevail”. However, this approach results in confusion when such provisions are included in many pieces of legislation. It may then be necessary to resort to applying to a court and referring to principles of statutory construction to determine which piece of conflicting legislation in fact takes precedence. As a result, it has become the practice of the State Law Advisers in South Africa to reject the inclusion of “blanket override” provisions, and to insist on more carefully crafted provisions that deal in a tailored manner with the interaction of a piece of legislation with other legislation.

Inserting override provisions can also potentially lead to tensions between government departments, when one department seeks in legislation it administers to override legislation administered by another department. The proposed override may be viewed by the other department as being intended to undermine, or having the effect of undermining, the legislative regime that is established by the legislation that it administers. It is, therefore, necessary to conduct careful analysis and develop specific and limited provisions to address actual legislative conflicts. It is also necessary to have discussions between the relevant government departments, when legislation is being developed which may contain provisions that conflict with provisions of legislation administered by another department, to hopefully agree upon an approach to address the conflict.

Section 9 of the FSRA deals with any conflicts between the FSRA and any of the other financial sector legislation administered by the Minister of Finance, and between delegated legislation made under the FSRA and delegated legislation made under another financial

³⁹ Section 234.

⁴⁰ See also the discussion below under the heading “Overlapping jurisdiction of regulators” at page 15.

sector law.⁴¹ Section 10 deals with the interaction of the FSRA with other legislation, including

- the *Consumer Protection Act*,⁴² which is administered by the Department of Trade and Industry;
- the *Competition Act*,⁴³ which is administered by the Department of Economic Development, in respect of mergers and acquisitions of financial institutions; and
- the *Companies Act*,⁴⁴ which is administered by the Department of Trade and Industry, in respect of the business rescue of a financial institution that is in financial distress.

Discussions were held with the Department of Trade and Industry to obtain agreement regarding the interaction of the FSRA with the *Consumer Protection Act* and the *National Credit Act*.⁴⁵ In respect of alignment with the *National Credit Act*, there were also discussions with the National Credit Regulator that is responsible for administering the Act. In relation to consumer protection matters, as section 10 of the FSRA provides that the *Consumer Protection Act* does not apply to financial institutions regulated under the new regulatory framework established by the FSRA, it was agreed with the Department of Trade and Industry to provide in the FSRA for a Financial Sector Inter-Ministerial Council. The Minister of Trade and Industry can submit any financial sector law or delegated legislation made or proposed under a financial sector law to the Council for consideration of whether the legislation provides for at least a similar level of protection for consumers that the *Consumer Protection Act*, and delegated legislation made under it provide.⁴⁶

It was also necessary to ensure the appropriate alignment of section 251 of the FSRA – which provides for information-sharing by the financial sector regulators and the South African Reserve Bank with other regulators – with the *Protection of Personal Information Act*⁴⁷ – which gives effect to an important aspect of the constitutional right to privacy. The *Protection of Personal Information Act* is administered by the Department of Justice and Constitutional Development, and discussions took place with the Department of Justice and Constitutional Development to ensure that the final wording of section 251 was appropriately aligned with that Act.

⁴¹ A “financial sector law” is the legislation that is listed in Schedule 1 of the Act, which is legislation that is specifically designated to fall within the regulatory framework that is established by the FSRA.

⁴² No. 68 of 2006.

⁴³ No. 89 of 1998.

⁴⁴ No. 71 of 2008.

⁴⁵ No. 34 of 2005.

⁴⁶ Part 3 of Chapter 5.

⁴⁷ No. 4 of 2013.

Overlapping jurisdiction of regulators

Another aspect of the appropriate integration of legislation that legislative drafters may potentially need to address, is overlapping jurisdiction between regulators. In areas where there is overlapping jurisdiction, there may be the potential for conflicting regulatory actions, confusion for those subject to regulation, and regulatory arbitrage by those who are subject to regulation.

In the financial sector in South Africa, with the advent of the FSRA, there is overlapping jurisdiction of regulators in relation to financial institutions:

- the South African Reserve Bank has a mandate to protect the financial stability
- the Prudential Authority is responsible for the prudential regulation of financial institutions, which entails ensuring they are financially sound and do not pose a risk to financial stability;
- the Financial Sector Conduct Authority has responsibility for regulating the conduct of financial institutions and ensuring the protection of financial customers;
- the National Credit Regulator regulates consumer credit, which is provided by financial institutions under the *National Credit Act*;⁴⁸
- the Financial Intelligence Centre regulates financial institutions in relation to anti-money laundering and counter-terrorism financing under the *Financial Intelligence Centre Act*;⁴⁹
- the Council for Medical Schemes regulates medical schemes under the *Medical Schemes Act*,⁵⁰ who are effectively providing comprehensive medical insurance, and which also needs to be appropriately supervised under the new financial sector regulatory framework established by the FSRA;
- the Competition Commission regulates mergers and acquisitions by companies in terms of the Competition Act, while the FSRA in section 10 provides that mergers and acquisitions of financial institutions will be approved in accordance with that section, instead of in terms of the *Competition Act*.⁵¹

It was necessary in the FSRA to address the overlaps in the jurisdictions of the financial sector regulators and the other regulators. It was also necessary to ensure that the powers and functions of the financial sector regulators were appropriately defined and clearly delineated, and to make provision for the regulators to exercise their powers and perform their functions in a manner that is collaborative and appropriately co-ordinated.

⁴⁸ No. 34 of 2005.

⁴⁹ No. 38 of 2001.

⁵⁰ No. 131 of 1998.

⁵¹ No. 89 of 1998.

Chapter 5 of the FSRA deals with co-operation and co-ordination between the financial sector regulators and with other regulators, such as the Financial Intelligence Centre, the National Credit Regulator, the Financial Intelligence Centre, the Council for Medical Schemes, and the Competition Commission.

Discussions took place with the National Credit Regulator during the development and processing in Parliament of the FSRA, to ensure that the relationship between the Prudential Authority, the Financial Sector Conduct Authority, and the National Credit Regulator was appropriately provided for in the FSRA. It was also ensured that the provisions relating to the powers of the Financial Sector Conduct Authority in respect of financial services related to credit agreements were appropriately crafted, and that the standard-making powers of the Financial Sector Conduct Authority in relation to credit agreements do not overlap with the powers of the National Credit Regulator in relation to credit agreements.⁵²

Alignment with International standards

In an increasing range of areas of law, national legislation is expected to align with international standards developed by standard-setting bodies. In the financial sector, legislation must align with G-20 commitments and standards set by bodies such as the International Monetary Fund (“IMF”), the Basel Committee for Banking Supervision, the International Association of Securities Commissions, and the International Association of Insurance Supervisors.

The IMF, with its Financial Sector Assessment Programme, assesses countries’ financial sector legislation and countries are expected to address legislative gaps and shortcomings that are identified.

In certain instances, if international standards are not met in legislation and properly implemented by regulators, there may be implications for the ability of financial institutions to conduct transactions and business with foreign financial institutions.

It was necessary to assess and ensure that the FSRA is appropriately aligned with relevant international standards (for example, in respect of financial stability and the independence and regulatory and supervisory powers of regulators). It was also necessary to enable the incorporation of international standards in the regulatory and supervisory approaches of the financial sector regulators, and in the delegated legislation that the financial sector regulators make.

Challenges with establishing a new regulatory framework

When a legislative drafter is developing legislation that establishes a new regulatory framework in an existing area of law, challenges arise in terms of addressing the matters necessary to establish the new framework and bringing the existing legislation that will be

⁵² See the definition of “credit agreement” in section 1(1); section 2(1)(g); section 58(2); and section 106(5).

retained within a new regulatory framework. In respect of existing legislation that it is to be repealed, it is necessary to ensure that any elements of the legislation that should be retained are incorporated within new legislation.

The financial sector legislation in South Africa that is being brought within the ambit of the new regulatory framework includes 14 pieces of legislation enacted between 1956 and 2014. As a result, there are significant differences in drafting style, and there are also differences in the regulatory approach among the different pieces of legislation.

There currently is no overarching regulatory framework for the financial sector. The legislation is rather fragmentary, with individual pieces dealing with a narrow area of the financial sector (such as banking, insurance, and financial markets). In the current legislation, a specific official (a “registrar”) is designated as being responsible for administering and implementing a piece of legislation. The regulatory and supervisory powers granted to the registrar under the different pieces of legislation differ somewhat. There is an array of delegated legislation and other instruments issued under the various pieces of legislation, which has contributed somewhat to confusion regarding whether some of the instruments constitute delegated legislation or not.

The new regulatory framework being established by the FSRA seeks to provide a consistent regulatory approach; to streamline the types of delegated legislation that will be made and other instruments that will be issued by the financial sector regulators; and to provide for a consistent approach for making delegated legislation and issuing other instruments.

The existing regulators, the South African Reserve Bank (“SARB”) and the Financial Services Board (“FSB”), have differing histories and regulate different types of financial institutions. The SARB regulates banks, while the FSB regulates quite a diverse range of financial institutions, including insurers, pension funds, collective investment schemes, financial services providers, and the financial markets. The SARB and the FSB have developed somewhat differing regulatory and supervisory approaches as a result of their current regulatory mandates, in terms of existing legislation, and their experience with the types of financial institutions that they currently regulate.

The FSRA establishes two new regulators:

- the Prudential Authority, within the SARB; and
- the Financial Sector Conduct Authority (the FSB will be dis-established).

The financial sector regulators jointly regulate financial institutions under their different mandates under the FSRA. As a result, the financial sector regulators must have regulatory and supervisory approaches that are consistent, complementary and integrated. Extensive discussion with the existing regulators was therefore critical for developing the FSRA.

The new regulatory framework moves from a prescriptive “rules-based” approach to a more principles-and-outcomes-based approach. This is quite a shift in regulatory mind-set, both

for the regulators, and for the regulated financial institutions. It also moves from quite detailed, “transitive” primary legislation that includes much or all of its prescriptions in primary legislation, to less detailed, “intransitive” framework legislation that provides for much of the regulatory detail to be provided for in delegated legislation.⁵³ For both constitutional and practical reasons, it is critical in the FSRA, and in the financial sector legislation as a whole, to strike an appropriate balance between what needs to be included in primary legislation, and what can most appropriately be dealt with in delegated legislation. Chapter 7 of the FSRA, which deals with regulatory instruments, was reviewed, both during its development and during the Parliamentary process, to ensure that the appropriate balance was struck. This assessment will also be undertaken in respect of the next phase of legislation (“the phase 2 legislation”).

Complexity of the legislative and regulatory reform process

A comprehensive and complex legislative reform process is being undertaken to develop a much more coherent, streamlined and consistent regulatory framework. The initial overarching framework legislation, the FSRA, is necessarily complex in scope and content.

Due to the extent of the legislative reform required, which can only be achieved in phases, providing for the necessary transitional arrangements in the FSRA was critical. Extensive consequential amendments to the existing financial sector legislation are included in Schedule 4 of the Act. The consequential amendments repeal several pieces of legislation whose relevant content has been incorporated in the FSRA⁵⁴. The bulk of the voluminous consequential amendments are necessary to enable the financial sector regulators to implement the existing financial sector legislation that will be retained, pending further consolidation in terms of the phase 2 legislation.

The phase 2 legislation – which is the Insurance Bill, legislation providing for the resolution of systemically important financial institutions, and the Conduct of Financial Institutions Bill – needs to align with the FSRA. In the process of drafting the Conduct of Financial Institutions Bill, an important task will be to assess what can and should be consolidated in the Conduct of Financial Institutions Bill, and what should remain in separate legislation for specific areas of the financial sector. It will also be considered if some refinements might need to be made to certain provisions in the FSRA. The phase 2 legislation will deal with important new matters which are not currently dealt with, or not dealt with significantly, in

⁵³ This is discussed in detail in Seidman, Ann; Seidman, Robert B & Abeyesekere, Nalin, *Legislative Drafting for Democratic Social Change: A Manual for Drafters* (Kluwer Law International Ltd.: The Hague, 2001) at 155-166.

⁵⁴ The *Inspection of Financial Institutions Act*, No. 80 of 1998, which is incorporated in Chapter 9 of the FSRA that deals with supervisory on-site inspections and investigations, the *Financial Services Ombud Schemes Act* No. 37 of 2004, which is addressed in Chapter 14 of the FSRA that deals with the Ombud Council and financial sector ombud schemes, and the *Financial Services Board Act* No. 97 of 1990 are repealed, as well as a substantial portion of the *Financial Institution (Protection of Funds) Act* No. 28 of 2001, which is also incorporated in Chapter 9.

the current financial sector legislation. Comparative research and engagement with relevant stakeholders is being undertaken, to develop appropriate legislative approaches that will be included in the finalised legislation that will be submitted to Parliament.

The role of the legislative drafter in addressing complexity and ensuring the appropriate integration of legislation

Various aspects of legislative complexity almost inevitably arise when drafting legislation. The task of and challenge for the drafter is to effectively address the aspects of complexity that arise in relation to the legislation they are developing so that complexity does not undermine the accessibility, and ultimately the effectiveness, of the legislation. This objective can certainly be difficult, sometimes almost impossible to achieve. It is, however, a critical objective to strive towards in the development and processing legislation.

The experience with financial sector reform in South Africa has demonstrated that addressing complexity involve quite a lengthy and iterative approach. Perhaps to some extent this process of continuing refinement throughout the development and processing of the legislation is necessary, and even valuable. It requires patience, meticulous attention to detail, diligence, and some degree of fortitude. It is beneficial for a drafter to be open to the receipt of comments and inputs from as wide a range of commentators as possible.

While a drafter can endeavour to apply techniques to effectively address aspects of complexity, it may be difficult for a drafter alone to identify in draft legislation all instances where complexity may not yet be adequately addressed. Inputs from colleagues, departmental officials who are also involved in the development of the legislation, stakeholders, public comment processes, and parliamentary processes can be invaluable in identifying outstanding aspects of complexity that need further attention.

To address complexity in legislation that arises when legislation contains very technical content, or covers an extensive range of matters, the drafter can develop a logical and accessible structure for the legislation, and employ all available drafting tools to develop legislation that is as clear, precise and unambiguous as possible. Similarly, when developing provisions in legislation that are very technical or cover a significant amount of content and are lengthy, the skilful structuring of the provision can significantly assist in addressing the effects of complexity. Louise Finucane and Maria Mousmouti, in their excellent presentations at the 2017 CALC Conference on “drafting with the end in mind”, highlighted the critical importance of structure and legislative design.

When seeking to address complexity that arises from the need to ensure appropriate integration of the legislation with the Constitution, administrative law, other legislation, and with international standards, it is necessary for a drafter to thoroughly research, assess and analyse where alignment and integration issues arise, and skilfully apply the full range of legislative drafting techniques to develop carefully crafted provisions that address the identified issues of alignment and integration. Discussions with other departments and

regulators are very important to enable drafters to develop appropriate solutions to address legislative conflicts and any jurisdictional overlaps between regulators.

Discussions with departmental officials and officials at relevant administrative agencies who have significant practical expertise in the area that the legislation will regulate, can assist legislative drafters to develop legislation that has a sound practical basis. They can also be very helpful with identifying and developing appropriate solutions to address aspects of complexity that are identified. They can also provide valuable comments regarding the clarity, precision, and unambiguity of draft legislation, which can assist in the finalisation of the legislation. These inputs can promote the accessibility and effectiveness of the legislation that is finally produced.

Inputs received from stakeholder discussions during the development of a Bill, comments received during public comment processes and submissions made during Parliamentary processes can be invaluable in identifying aspects of the Bill, or specific provisions where aspects of complexity may not have been adequately addressed, and may require refinement to promote clarity, precision, unambiguity and accessibility. Comments and submissions may also identify areas of misalignment with administrative law or other legislation, and areas of jurisdictional overlap that need to be addressed. A drafter can assist in identifying issues raised in submissions and comments that need to be addressed in the legislation, and in developing appropriate solutions to those issues.

When involved in developing legislation that is part of a significant regulatory reform process where existing legislation must be integrated into a new regulatory framework, a drafter can assist in proposing an appropriate plan for the phased reform of legislation. The drafter must provide for appropriate transitional provisions and undertake the painstaking development of consequential amendments to repeal legislation that will become obsolete, and to enable the existing legislation that will be retained to be implemented during the transitional period while the new regulatory framework is being established.

A drafter can, through the employment of the full range of drafting skills and tools, including those described above, and by taking appropriate steps and implementing measures to address complexity in the process of developing legislation, promote the development of consistent, coherent, accessible, and hopefully an ultimately effective piece of legislation, that is part of an integrated and effective regulatory framework.⁵⁵

Addressing complexity appropriately is essential for the development of accessible legislation, and for potentially achieving the ultimate objective of effectiveness in legislation.

⁵⁵ See Xanthaki, Helen *Drafting Legislation — Art and Technology of Rules for Regulation* (Oxford: Hart Publishing, 2014), in particular Chapters 1 and 5.

Legislation in a complex and complicated world

Roger Jacobs¹



Abstract

In the context of systems thinking and complexity theory a distinction is made between 'complicated' and 'complex'. This distinction is both important and useful to the design of legislation. To that end, this article gives a brief outline of the nature of complexity and compares it to matters that are simple or complicated. The article then suggests that legislation that is to be used to influence or regulate complex social systems requires a greater degree of delegation than Parliaments may be used to. An understanding of the nature of complexity can provide a framework within which to debate the degree of delegation and, to some extent, to justify it.

Introduction

As our societies become more complex, so do the social systems that policy makers wish to influence or regulate. Where legislation is required it becomes correspondingly more complicated. Systems thinking and complexity theory have something to offer in terms of thinking about complexity generally and in terms of the design of the legislative schemes used to influence or regulate complex social systems. When referring to systems in this article I include situations and processes.

This paper is not intended to be a rigorous description of complexity or complexity theory. I have made a number of generalisations, and taken a few short cuts, to get to the main point, which is about the level of delegation in legislative schemes. For a more rigorous treatment of complexity and associated ideas, the references and further reading at the end of this article provide a starting point.

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Complicated or complex

To understand the significance of the complicated/complex distinction, it may be easiest to start by distinguishing simple, complicated and complex systems.²

A *simple system* is known. How it works is self-evident as the relationship between cause and effect is obvious. You don't need to be an expert to understand it. For example, a straightforward set of instructions for a simple process.

A *complicated system* is one that is not simple, although it may have simple elements within it. Its complicated nature derives from a combination of the following: large scale, many components, the need for coordination and the need for specialist knowledge. For example, building a car or launching a rocket. The system may not be simple, but it is knowable. It is susceptible to analysis so an understanding of the parts of the system will yield an understanding of the whole system. Further, a complicated system is generally predictable. Once you have successfully launched one rocket the chances of further successes are quite high.

Compare that to *complex systems*. Examples include ecosystems, financial markets, weather systems, families, indeed any human organisation. These systems may include elements that are simple or complicated, but are not reducible to them. Launching a child into life is complex. It is not predictable. What works with one child may not work with the next and success with one child does not predict success with the next. In a complex system the relationship between cause and effect can only be understood in retrospect.

Broadly speaking, complex systems have the following characteristics:

- They have many components or agents, which act with various degrees of independence. For example, flocks of birds in flight.
- They are unpredictable because the relationship between cause and effect can only be understood in retrospect.
- They are usually non-linear, that is there is no proportionality between cause and effect.
- They exhibit emergence, that is they are not static, they evolve with new characteristics emerging over time.
- Different patterns of behaviour of the system coalesce from time to time.

² See Kurtz, C. F. and Snowden, D. J., "The new dynamics of strategy: Sense-making in a complex and complicated world" (2003), 42-3 *IBM Systems Journal* (retrieved from <https://pdfs.semanticscholar.org/5abe/fd95a98540c9d875d1bee1a4a3e26bcd0346.pdf>) and Snowden's Youtube clip explaining the Cynefin Framework (<https://www.youtube.com/watch?v=N7oz366X0-8>), which describe 4 domains of order, simple, complicated, complex and chaotic. See also Allan, W. (2003) *Complicated or complex – knowing the difference is important* (retrieved from <http://learningforsustainability.net/post/complicated-complex/>).

- They are not susceptible to analysis; they cannot be understood simply by studying the individual parts of the system; they are usually more than the sum of their parts.
- There are almost inevitably different and competing interpretations of the system.

Complex systems often give rise to difficult policy problems, what some people refer to as “wicked problems” or “messes”. These are intractable policy problems for which there seems to be no solution. For example, climate-change, influxes of refugees, drug-related health and crime issues and indigenous disadvantage. One of the characteristics of wicked problems is that there is not much agreement, if any, as to what the problem really is or how to go about fixing it. This is in part because no single perspective can give a complete description of the system.

For example, the issues associated with indigenous health problems in Australia look quite different from the perspective of a community nurse, a federal bureaucrat, an indigenous community leader or a State politician.

Policy makers sometimes want to fix wicked problems or aspects of them. That is, they want to influence or regulate aspects of the complex systems that give rise to those problems. However, interventions in complex systems often don’t produce the results expected because of their unpredictability and non-linearity. Sometime perverse results occur.

For example, the issue of obesity in children. One approach is to remove all “unhealthy” food from school canteens. This was tried in some Australian schools. The result was that some children skipped lunch, saving their school lunch money to buy junk food at the shops on the way home from school. Not only did the intervention not help solve the problem, but it created a new one: an inducement to skip lunch.³

It is also important to work out what type of system or problem we are faced with, and then deal with it accordingly.⁴ To assume that a problem is simple and fail to seek specialist help is a mistake. Equally, to not recognise that a situation is complex and just get in a consultant to write a report is a mistake.

³ Australian Public Service Commission, *Tackling Wicked Problems: A Public Policy Perspective*, (Australian Government: Barton, 2007) at 12. Retrieved from Australian Government website: http://www.apsc.gov.au/data/assets/pdf_file/0005/6386/wickedproblems.pdf.

⁴ See Kurtz and Snowden, above n. 2 and Snowden, above n. 2, and Glouberman, S and Zimmerman, B (2002) “Complicated and Complex Systems: What Would Successful Reform of Medicare Look Like?” Commission on the Future of Health Care in Canada, Discussion Paper No. 8. Retrieved from http://c.ymcdn.com/sites/www.plexusinstitute.org/resource/collection/6528ED29-9907-4BC7-8D00-8DC907679FED/ComplicatedAndComplexSystems-ZimmermanReport_Medicare_reform.pdf.

So, if we have decided that a situation we are faced with is complex, and that we can't just get in an expert, what do we do? This is where soft systems methodologies⁵ or a sense-making approach⁶ may be useful. These approaches attempt to deal in a systematic way with the complexity of the systems *and* the divergent views held by stakeholders in the systems. For our purposes, I emphasise 2 important ideas:

- That we often don't know how to study a complex system with any rigour until we have started studying the system. We learn how to study the system as we go, via a series of experiments or interventions in the system.
- Those experiments or interventions should be small. Snowden suggests that they be "safe to fail" experiments.⁷ Since complex systems are non-linear and unpredictable, we don't know how the system will react to an intervention – a significant intervention may result in a significant failure.

It follows, I think, that solutions emerge overtime. To put it another way, we need to proceed carefully, trusting that the answer to "What do we do next?" will emerge.

Legislation

So how does all this relate to legislation? In my view, legislation fits the description of complicated (or even simple) but not of complex. A legislative scheme is, until it is amended, fixed. With sufficient time and expertise, it can be fully analysed. Once we understand all of the parts, we can understand the whole system.⁸ Legislative schemes are largely predictable. In and of themselves, they do not bear the characteristics of a complex system.

That may not appear to be the case. There can be endless disputes about the meaning and application of even simple legislation. I suggest that this arises from legislation interacting with social systems, the unpredictable people in those systems, the role of the courts and the nature of language. So there will always be elements of unpredictability and complexity.

However, for our purposes, I assert a simpler characterisation. Legislative schemes are not complex in themselves, but complexity can arise when the scheme is applied to life. Like chess, the rules may be simple enough, but how the game is played is not.

⁵ For example, P. Checkland and P. Scholes, *Soft Systems Methodology in Action*, (John Wiley & Sons: Chichester 1990).

⁶ For example, Kurtz and Snowden, above n. 2, and Culmsee, P. "From Open Space to Action in 10 hours: A Dialogue Mapping Case Study" (18 June 2017), *Medium*. Retrieved from <https://medium.com/@paulculmsee/from-open-space-to-action-in-10-hours-3b302c7a6f5e>.

⁷ Snowden, above, n. 2.

⁸ Leaving aside that some things cannot be known with certainty until there has been an authoritative determination by a court.

In this article I am concerned with legislative schemes that are used to influence or regulate complex elements of social systems (which, for ease, I'll just refer to as complex systems from here on).

Can a legislative scheme, which is a relatively fixed system, be used to intervene effectively in a complex system, a system that may not be predictable, is non-linear and exhibits qualities of emergence, or, to put it more prosaically, a system that will not do what it's told and will be different in a year's time anyway?

To add to the potential difficulties, legislation is written from a particular perspective. As I have already said, complex systems usually have a number of different and competing perspectives or explanations and no single explanation of such a system can be sufficient. However, an Act of Parliament, is a fixed authoritative statement of the law on the matters addressed.

I have overstated this to make the point, but the point remains: using a fixed legislative scheme to regulate or intervene in a complex system is not likely to lead to successful policy outcomes unless frequent adjustments of the legislative scheme can be made by the Parliament in a timely manner.

A legislative scheme that is to be used to regulate or intervene in a complex system should have one or more of the following design features, according to the nature of the system:

- flexibility to accommodate evolution of the system;
- the capacity for regulators to choose different methods of regulation to suit the situation, for example, the choice not to regulate, to allow for voluntary codes of practice, or to impose mandatory codes of practice or a licensing scheme or direct regulation via subsidiary legislation;
- the capacity to undertake small (safe to fail) interventions;
- flexibility to accommodate and learn from results of experimentation.

This, to a large extent, requires a devolved system. The legislature needs to confer sufficient legislative and administrative powers to allow for that flexibility and experimentation. Of course, in a parliamentary democracy there need to be limits and controls so that the Parliament retains ultimate control over the scheme that it creates. The primary legislation, the Act of Parliament that establishes the scheme, would include those limits and controls. This would usually be in the form of the Act delimiting the field of activity to which the legislative scheme is to apply, setting out the basic rules or purposes of regulation, giving specified powers to regulators and other actors and providing for review and accountability processes. None of these features are, in themselves, unfamiliar. The matter of debate is the extent of devolution and the level of control of the powers conferred.

An example: energy market regulation in Australia

An example of a devolved legislative scheme in Australia is the national legislation that regulates the domestic energy markets for gas and electricity. That legislation is constituted by the National Electricity Law, National Gas Law and National Energy Retail Law.⁹ These National Laws are, in the main, enacted or applied by all States and Territories of Australia, except Western Australia. The gas and electricity networks in Western Australia are not connected to the networks of the other jurisdictions and so Western Australia has not been a participant in these national schemes.

The primary legislation provides for the scope of the scheme, which transport systems are covered by the scheme and which market participants and consumers are covered. It empowers the making of the day-to-day rules by which the markets are regulated and establishes various regulatory bodies, including those that run the markets and those that change the market rules from time to time. This is a devolved system, in which market regulators perform their day to day functions under the market rules, with mechanisms to change the market rules. This allows for the rules of the market to evolve as the market evolves and for policy interventions via changes to the rules.

Not everyone approves of this level of devolution. In 2016 Western Australia sought to fully enact the National Laws. Bills for the primary legislation were introduced into the Western Australian Parliament¹⁰. The Bills were referred to the Joint Standing Committee on Uniform Legislation and Statutes Review.¹¹

The sponsoring Department, in its submission to the Committee, described the legislation in these terms:

All regulatory frameworks for energy ... operate at a high level of delegated authority, and the national frameworks for energy are no different. It is no surprise that energy regimes are structured in this way. This is because the nature of the subject matter ... (a detailed blend of electrical engineering and other technical considerations, principles applicable to the operation of financial markets and legal considerations) does not readily lend itself to treatment in principal legislation. Principal legislation is better

⁹ These National Laws are set out in the Schedule to the following South Australian Acts: the National Electricity (South Australia) Act 1996, the National Gas (South Australia) Act 2008 and the National Energy Retail Law (South Australia) Act 2011.

¹⁰ The National Electricity (Western Australia) Bill 2016 and the National Gas Access (WA) Amendment Bill 2016.

¹¹ See Standing Committee on Uniform Legislation and Statutes Review, Legislative Council Western Australia, Report 103, *National Electricity (Western Australia) Bill 2016, National Gas Access (WA) Amendment Bill 2016, Energy Legislation Amendment and Repeal Bill 2016* (Sept 2016). Retrieved from [http://www.parliament.wa.gov.au/Parliament/commit.nsf/\(Report+Lookup+by+Com+ID\)/B8B39198A9F4C9344825803600D5B9C/\\$file/us.neb.160922.rpf.103.xx.pdf](http://www.parliament.wa.gov.au/Parliament/commit.nsf/(Report+Lookup+by+Com+ID)/B8B39198A9F4C9344825803600D5B9C/$file/us.neb.160922.rpf.103.xx.pdf).

suited to establishing the high level architecture or structural elements of the framework and to mandate ... the principally desired policy outcomes.¹²

The Committee was not convinced, describing the Bills as “skeletal ... as they propose to delegate, and subdelegate, much of the substantive and operational detail of the energy schemes”.¹³ The Committee decided that “the bills did not strike the appropriate balance between maintaining Parliamentary sovereignty on the one hand, and providing sufficient legislative flexibility and responsiveness on the other”.¹⁴

Conclusion

In a Parliamentary democracy, it is necessary and desirable to have a debate about what is the “appropriate balance”. I hope that the ideas in this paper encourage a wider debate about the “appropriate balance”, and contribute to developing a framework within which that debate can occur, a framework that can accommodate the increasing complexity of our societies and the issues facing them.

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¹² Ibid. at 11.

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Delegating legislative power: from modern day complexity to Henry VIII

Lee Harvey¹



Abstract:

This paper is about the delegation of legislative powers in increasingly complex societies. It considers a pejorative label sometimes attached to provisions that delegate these powers: “Henry VIII clauses”. There is considerable variety in these provisions and the article demonstrates that they are not all objectionable. It argues for a more restricted use of the label, confining it to “real” Henry VIII clauses – those that authorize making amendments to primary legislation.

What is a Henry VIII clause?

To start at the beginning: Henry VIII obtained parliamentary authority giving the same force of law to his proclamations on legislative powers, taxing powers and judicial powers as if they were Acts of Parliament². That exercise of power was objectionable then and would be as objectionable today.

Henry VIII’s actions have led to certain powers that enable the amendment of Acts of Parliament by subsidiary legislation being characterised as “Henry VIII powers”. It is definitely a catchy phrase with a nice touch of drama and history but do people who use it really know what it means?

Consider the following provisions:

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² *Statute of Proclamations* 1539, 31 Henry VIII, c. 8.

Cat Act 2017

1. Term used: roaming cat

(1) In this Act —

roaming cat means a cat of a breed listed in Schedule 1.

(2) Schedule 1 may be amended by the regulations.

1. Term used: roaming cat

In this Act —

roaming cat means any of the following —

- (a) a British Shorthair;
- (b) a Devon Rex;
- (c) a cat of a prescribed breed.

1. Term used: roaming cat

In this Act —

roaming cat means a cat of a prescribed breed.

Are these all examples of Henry VIII clauses? Similar provisions to all 3 examples have been identified as such by parliamentary committees. Is there any *real* difference between the provisions? The outcome could be the same in each case.

This is an area that can be frustratingly difficult. Recently I was asked by a Minister to provide advice as to what constituted, or, more importantly, did not constitute, a Henry VIII clause. I didn't think it would be difficult to give the advice but, in the end, I wasn't convinced that I could give a conclusive answer. It is unfortunate that a term without any readily apparent meaning has become linked to a supposedly firm prohibition without a definitive description of the problem intended to be addressed.

The UK Committee on Ministers' Powers (the Donoughmore Committee) conducted one of the earliest, and most frequently cited, reviews of Henry VIII clauses. Its 1932 report described the comparison between Henry VIII's statutes and the modern usage of the term "Henry VIII clause" as "far-fetched".³ Usage of the term "Henry VIII clause" in 2017 differs significantly from usage in 1932 and it may be unreasonable to apply the prohibitions set out in that review to all clauses that are currently tagged as Henry VIII clauses.

³ *Report by the Committee on Minister's Powers* (the Donoughmore Committee) (His Majesty's Stationery Office, London, 1932) at 36. See also *Thoburn v Sunderland* [2003] QB 151 at para. 13 where Laws, LJ said: "I doubt whether this is a just memorial to his late Majesty, who reigned 100 years before the Civil War and longer yet before the establishment of parliamentary legislative supremacy..."

The question of “what is a Henry VIII clause” becomes very important when you have parliamentary committees who are charged with a duty to identify, and generally object to, Henry VIII clauses.

The House of Lords Delegated Powers and Regulatory Reform Committee has applied the principle that every Henry VIII power should be clearly identified and a full explanation giving the reason for choosing that procedure should be provided.⁴ That sort of approach is becoming widespread. In Western Australia, the Standing Committee on Uniform Legislation and Statutes Review takes the approach that explanatory memoranda for a Bill should identify every provision that is a Henry VIII clause.⁵ Parliamentarians become irritated when the provisions are not identified:

I do not know what it is about parliamentary counsel and some government agencies, but they just do not seem to recognise what Henry VIII clauses are, and it is not unusual for us to discover them in this chamber.⁶

Obviously, if that is a requirement it is necessary for there to be a very clear meaning for the term. The most reasoned response may be:

“Henry VIII clause” is a popular derogatory slogan, not an analytical tool.⁷

There is not a definition of “Henry VIII clause” that is authoritative. Clearly, we mostly think we know what we mean by the term but different people will give it quite different meanings.

The following definitions are each subtly different from each other:

1. The term “Henry VIII power” is commonly used to describe a delegated power under which subordinate legislation is enabled to amend primary legislation.⁸
2. **Henry VIII powers:** A delegated power that enables ministers to amend or repeal primary legislation by secondary legislation.⁹
3. A Henry VIII clause is a provision in an Act that allows primary legislation to be amended, suspended or overridden by delegated legislation.¹⁰

⁴ House of Lords Delegated Powers and Regulatory Reform Committee, 3rd report of Session 2012-13, *Special Report: Strengthened Statutory Procedures for the Scrutiny of Delegated Powers*. HL Paper 19, 5 July 2012, para.20, p.10.

⁵ Western Australia, Legislative Council, Standing Committee on Uniform Legislation and Statutes Review, Report 96, *Co-operatives Amendment Bill 2015*, February 2016, para 4.18.

⁶ Hon. Norman Moore MLC, Western Australia, Legislative Council, Hansard 23 November 2010 at.9249.

⁷ Ross Carter, Jason McHerron and Ryan Malone *Subordinate Legislation in New Zealand* (LexisNexis: Wellington, 2013) at 79 (4.09).

⁸ Daniel Greenberg (ed), *Craies on Legislation*, 10th ed. (Sweet and Maxwell: London, 2015), para. 1.3.9.

⁹ Ruth Fox and Joel Blackwell *The Devil is in the Detail: Parliament and Delegated Legislation* (Hansard Society: London, 2014) at 16.

¹⁰ Dean R Knight and Edward Clark *Regulations Review Committee Digest*, 6th ed. (New Zealand Centre for Public Law: Wellington, 2016) at 29.

4. ...a delegated power which enables a Minister, by delegated legislation, to amend, repeal or otherwise alter the effect of an Act of Parliament...¹¹
5. A Henry VIII clause is a clause of an Act of Parliament which enables the Act to be expressly or impliedly amended by subordinate legislation or Executive action.¹²
6. The essence of a Henry VIII clause is that it allows the executive, by way of subordinate legislation, to affect the scope and content of an act of Parliament.¹³

The first 3 definitions are traditional definitions and at least imply that the clause must empower a direct or textual amendment to an Act of Parliament. That is what many of us have always understood a Henry VIII clause to be. Powers enabling the repeal of an Act, or the suspension or overriding of its operation, by delegated legislation might also be characterised as falling within the ambit of a Henry VIII power.

But I don't think you could just quote one of the first 3 definitions and feel confident that you have given a restricted or precise meaning.

It is apparent that many commentators and legislators now take the view that a wide range of what seem to be unremarkable regulation making powers are Henry VIII clauses and are therefore objectionable. It is common for members of parliamentary committees to take the view that any provision that allows the alteration of the effect of an Act is by inference an amendment to the Act and hence a Henry VIII provision that is likely to be objectionable. The New Zealand Regulations Review Committee, for example, has taken a broad view of what constitutes a Henry VIII clause, including regulation-making powers that alter the scope or effect of legislation, even if the text of the legislation is not changed. The Committee has advised that these clauses should only be used in exceptional circumstances and that it will usually recommend that they be deleted.¹⁴

That view is indicated in the last 3 of the definitions. It leads to this sort of discussion in committee¹⁵:

Ms J.M. Freeman: ... My question to the important drafting people is: is that not a Henry VIII clause, by virtue of the fact that it changes the aspect of the operation of an act by regulation?

¹¹ House of Lords Delegated Powers and Regulatory Reform Committee, 3rd report of Session 2012-13, *Special Report: Strengthened Statutory Procedures for the Scrutiny of Delegated Powers*. HL Paper 19, 5 July 2012, para. 20.

¹² Queensland Scrutiny of Legislation Committee, "The use of 'Henry VIII Clauses' in Queensland Legislation" (1997) at 3.20.

¹³ Hon. Ken Baston MLC, Western Australia, Legislative Council, Hansard 24 March 2015 at 23, debate on *Gene Technology (Western Australia) Bill 2014*.

¹⁴ Above n.10 at 30.

¹⁵ Western Australia Hansard, Legislative Assembly Legislation Committee, 10 November 2015 at 13.

Dr K.D. Hames: I do not think that is what Henry VIII clauses are. Geoff Lawn can answer.

Mr G. Lawn: Paragraph (c) of the definition of a “material public health risk” is the opposite of paragraph (b), which states that things can be included, which gives scope to expand the definition of “material public health risk”. Paragraph (c) allows the scope to be narrowed; it just provides flexibility. I would not describe it as a Henry VIII provision, which is a provision that overrides an act. This is a provision that allows the detail of that definition to be changed.

Ms J.M. Freeman: It provides the ability to override a definition of a clause though, does it not?

The answer is probably that both the member and the Parliamentary Counsel (Mr. Lawn) were correct but were using the term “Henry VIII clause” with quite different meanings.

An approach that identifies almost any delegated legislation power as a Henry VIII power confers an extraordinarily broad responsibility on Parliamentary committees, parliamentary counsel and instructors and is really dealing with the wrong question.

We run the risk of dealing with principle untrammelled by common sense if all provisions that enable subsidiary legislation to affect the scope and content of an Act are unquestioningly classified as Henry VIII clauses and, on that basis, as objectionable. All delegated legislation alters the scope of an Act to some degree. Sometimes it may challenge parliamentary sovereignty, but mostly it does not. Concern about this broad approach is not particularly new, at least on the part of parliamentary counsel. In the early 1990s the Queensland Parliamentary Counsel expressed concern in an annual report to Parliament that adoption of this approach meant that fundamental legislative principles were at risk of being debased to “meaningless pious incantations” and that the result was “patently absurd”.¹⁶ Armed with this hammer, a parliamentary committee may well see everything as a nail.

In 1997 the Queensland Scrutiny of Legislation Committee carefully considered the scope of the term “Henry VIII clause” and decided that a broad “alteration of scope and effect” definition was misconceived because all subordinate legislation alters the effect of the principal Act.¹⁷ The Committee settled on an “express or implied amendment” definition. The basis of their proposal was that the details in subordinate legislation should not conflict with the provisions of the Act so that the Act would have to be read as if it contained different words. While the intention may have been to narrow the meaning of the term, in practice, a useful distinction may not have been made. Would the second case in the

¹⁶ Office of the Queensland Parliamentary Counsel, *Annual Report 1994-1995*, Government Printer, Brisbane, 1995 at 34. Cited in Queensland Scrutiny of Legislation Committee *The use of “Henry VIII Clauses” in Queensland Legislation* (1997) at 3.15.

¹⁷ Above n. 12 at 23.

“roaming cat” examples be objectionable because the definition of “roaming cat” would have to be read differently but the third case be acceptable? Where is the logic in that?

Daniel Greenberg (who is apparently of the view that the narrow “textual amendment” view applies) has argued that

[the use of Henry VIII clauses is] not particularly a matter for alarm. Parliamentarians and others who have become exercised over Henry VIII Clauses have always been barking up a slightly wrong tree, because of the assumption that textual amendment is a more serious form of interference with primary legislation than any other.... It makes no difference in principle whether the change is made by notional textual amendment of the list or by free-standing modification in another instrument. Either the power in question is one which it is appropriate to delegate to the Executive or it is not; and in either case the question is one of substance and not of form.”¹⁸.

The issue is also one of context - what is innocuous in one situation may be highly inappropriate in another.

If we return to the roaming cats example, there are a number of possibilities depending on context. It may be that the legislation requires the keeping of statistics on how many roaming cats are registered. There is no significant consequence and it is doubtful that anyone would be particularly exercised by the delegation. Or the legislation might require all cats defined as roaming cats, and no other cats, to be registered. Some might query whether it is appropriate to allow expansion of the definition by delegated legislation but many would not. It might depend on how onerous the registration requirements were. Or the legislation might provide that all roaming cats are to be exterminated. Now that is a moment when you can be very sure that the words “Henry VIII” will be heard loud and clear irrespective of what form of legislation was used and irrespective of the fact that nothing in the Act would be overridden. The more relevant question would be whether the power was a suitable power for delegation and the answer would likely be no.

Should we continue to refer to Henry VIII clauses?

Is there any point in continuing to use the term “Henry VIII clause”? My answer would be no because the term has lost any coherent meaning.

If the term must be used by parliamentary committees it should only be used with its narrowest meaning: clauses that allow textual amendment (“real” Henry VIII clauses). Other regulatory powers should be queried on the basis of whether or not they are suitable powers to be delegated but should not be labelled as part of some ancient autocratic heresy.

A reminder why “real” Henry VIII clauses are regarded as objectionable: the basis of the Donoughmore Committee’s recommendation that Henry VIII clauses not be used other than

¹⁸ Daniel Greenberg, “*Dangerous Trends in Modern Legislation*”, [2015] *Public Law* 96 at 105-106

in exceptional circumstances was that the clauses vest an enormous power in executive government and that power was capable of abuse. It is certainly a reason why any clauses conferring the power to make delegated legislation must be carefully considered.

Historically, the parliamentary branches of government have, for very good cause, carefully guarded their law-making powers. To delegate a power in such a way that it overrides a statute is a significant decision and one that carries potential dangers.

Commentators frequently state that the objection to allowing delegated legislation to override primary legislation is that there is no effective scrutiny by Parliament or accountability for policy decisions¹⁹. This is an exaggerated concern. In most jurisdictions delegated legislation committees have power to enquire into whether an instrument contains only matter that is suitable for subsidiary legislation and Parliament can disallow regulations.²⁰ However disallowance is generally a lengthy process and parliamentary committees dealing with delegated legislation commonly argue that the problem should be dealt with at the source, rather than by disallowance.²¹

While concerns about some “Henry VIII clauses” are legitimate, the broad definition of the term takes the meaning far beyond having sufficient regard for the institution of Parliament and into territory where (were opposition to these clauses consistently enforced) it would render both government and Parliament incapable of operating efficiently. The updating of a reference, the change of an office title and the addition of a term to a definition would all be included in the broad definition. Very often it is in everyone’s interests that the law be flexible and responsive to changing circumstances.

There are many regulation-making powers that do not vest any significant power in the Executive although they allow minor changes to the scope or effect of an Act. The same arguments that support any delegated legislation, support the use of delegated legislation in these circumstances. It would be a waste of parliamentary time and a needless delay to require an amendment to an Act of Parliament to deal with these matters. History tells us that Bills that deal with relatively unimportant matters fall to the bottom of the list and can take years to pass. Ministers tend not to want to use valuable Cabinet and parliamentary time to deal with minor matters and agencies quickly learn that it’s not worth the bother of pursuing parliamentary amendment. In the meantime, the law becomes more and more archaic and dysfunctional. These provisions will mostly just be standard regulation making powers of the sort that we never used to think of as Henry VIII clauses.

¹⁹ See, for example, Dennis Morris, “Henry VIII clauses: Their birth, a late 20th century renaissance and a possible 21st century metamorphosis”, *The Loophole* (March 2007) 14 at 20-21.

Stephen Argument, “*Henry VIII clauses Fact Sheet*”, Standing Committee on Justice and Community Safety; Australian Capital Territory Legislative Assembly, November 2011 at 2-3.

²⁰ See for example D. Pearce and S. Argument, *Delegated Legislation in Australia*, 4th ed. (Lexis Nexis: Chatswood, 2012) at 59ff.

²¹ Above n.12 at 2.35.

A legitimate role for “real” Henry VIII clauses

Even the most hardened of commentators find it difficult to completely rule out the occasional value of clauses that permit the textual amendment of Acts. More often than not the concession is overwhelmed by an overriding rejection of the concept. This is not helpful.

For example, consider these 3 comments are made in the space of 10 pages in a UK report:

... the use of ‘Henry VIII’ delegated powers to repeal or amend primary legislation without future recourse to Parliament is contrary to the principle of Parliamentary sovereignty.²²

a ‘pernicious habit’ that should be consigned to the ‘dustbin of history’²³

Critics of Henry VIII powers have a tendency to treat them as intrinsically bad. However, some of these powers can, in practical terms, be quite anodyne in their application- for example, the renaming of a public body. Treating them as a uniform problem misses the key point: what, exactly, do the powers give rise to in terms of ministerial authority and is this something that Parliament is comfortable Ministers should be able to do without scrutiny?²⁴

The third statement seems eminently sensible and embodies the gist of this paper. It is, however, somewhat undone by the 2 earlier statements. As is all too often the case with discussions on Henry VIII powers, a person can take from the discussion whatever the person wants to find because there are no firm grounds for the discussion.

One important area where Henry VIII clauses (of the out there and unashamed variety) are often found to be acceptable is in transitional provisions relating to new and complex legislation. The authors of *Subordinate Legislation in New Zealand* note that both the New Zealand Legislation Advisory Committee and the New Zealand Regulations Review Committee have sanctioned the inclusion of Henry VIII clauses in statutes that usher in substantial or complex legislative reform, provided satisfactory safeguards are built in.²⁵ They also note that complex legislative reforms result in “considerable legislative upheaval. Some flexibility is desirable to avoid unintended consequences that may disadvantage citizens.”²⁶

A judge of the High Court of Australia has also spoken up in defence of such provisions.

²² Joel Blackwell and Ruth Fox, *Westminster Lens: Parliament and Delegated Legislation in the 2015-2016 Session* (Hansard Society Insight, London, 2017) at 4.

²³ *Ibid.* at 6 (citing the Rt.Hon. the Lord Judge, Lord Mayor’s Dinner for the Judiciary, *The Mansion House Speech*, 13 July 2010).

²⁴ *Ibid.* at 10.

²⁵ Above n.7 at 21.

²⁶ *Ibid.* at 56

...parliamentary oversight, together with the scope for judicial review of the exercise of the regulation-making power, diminishes the utility of the pejorative labelling of the empowering provisions as "Henry VIII clauses". The empowering provisions reflect not a return to the executive autocracy of a Tudor monarch, but the striking of a legislated balance between flexibility and accountability in the working out of the detail of replacing one modern complex statutory scheme with another.²⁷

Parliamentarians are occasionally fond of saying that transitional clauses like this are "lazy drafting" or used to cover up drafting errors.²⁸ The High Court recognition does not seem to have stopped that criticism but parliamentary counsel and instructors know that at times the provisions have proved to be both necessary and for circumstances that could not have been foreseen. The powers are not often included in primary legislation and even more rarely actually used. The occasions on which I have seen them used are for outcomes that any reasonable person would think appropriate.²⁹ There should be considerable comfort in Parliament knowing that legislation in a complex environment will not result in an unpredictable injustice.

Clauses that allow the overriding or modification of laws have also been accepted in times of emergency such as the New Zealand earthquakes. Again, this is a rare and exceptional use of such powers.

The Court of Appeal for British Columbia recently noted that

courts will generally not interpret a statutory provision as allowing the repeal or amendment of a statute by regulation unless the provision is expressly and unequivocally to that effect.³⁰

If broad powers are conferred, Parliament needs to express very clearly the powers that it is delegating and the drafter of the delegated legislation needs to be particularly careful to stay within the scope of the empowering Act. The recent judgement of the UK Supreme Court in the *Public Law Project Case*³¹ made this point emphatically, particularly in relation to Henry VIII clauses, but also in general terms. The take home lesson was that, while courts will not cut down the scope of a clearly articulated power,

²⁷ *ADCO Constructions Pty Ltd v Goudappel* [2014] HCA 18 Gageler J 23 (footnotes omitted).

²⁸ See, for example, Hon. Adele Farina MLC and Hon. Ken Travers MLC, Western Australia, Legislative Council, Hansard, 3 December 2015 at 9454a-9510a, debate on *Perth Market Disposal Bill*.

²⁹ See, for example, *Associations Incorporation Regulations 2016* (WA), regulations 19 and 20 giving short term exemptions from certain requirements of the new Act that had not previously applied to incorporated associations.

³⁰ *West Fraser Mills Ltd. v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2016 BCCA 473 at para. 59. The Court held that a regulation expanding occupational safety and health duties set out in an Act was validly made under an ordinary regulation making power and did not require the authority of a Henry VIII power because the regulation did not purport to amend or repeal the Act.

³¹ *The Public Law Project, R (on the application of) v Lord Chancellor* [2016] UKSC 39, [2016] AC 1531.

the more general the words by Parliament to delegate a power, the more likely it is that an exercise within the literal meaning of the words will nevertheless be outside the legislature's contemplation.³²

Optimistic instructors point to words like "necessary and convenient" or "for the purposes of this Act" in a regulation making power as justifying the drafting of something that is simply outside the scope of what Parliament would or could have contemplated at the time the empowering Act was passed. The answer, as Daniel Greenberg would say, is "The broader the power, the narrower the power."³³ Or as he has even more robustly put it:

taking an absurdly broad power because you do not have the foggiest idea what you may want to do with it is actually a good way of ensuring that you will not be able to achieve your objectives because the wider the power, the more rigorously the courts will apply the presumption against the delegation of legislative power.³⁴

Many jurisdictions are far more conservative in their use of Henry VIII clauses than the British Parliament, which on occasion takes an approach that would be vigorously resisted in Australian parliaments, no matter what safeguards were included. Reaction to that sort of approach should be taken into account when studying some of the British commentary on Henry VIII clauses. The Brexit legislation, the "great repeal bill", may include some far-reaching Henry VIII clauses. That proposal is already creating debate and threats of legal action. Necessity, or at the very least, practicality, doesn't always stand in the way of an argument and the parliamentary, public and judicial response will be interesting.

Conclusion

In the same way that we should be fiercely on the alert for actions that undermine parliamentary sovereignty, we should also be on the alert for developments that undermine the effective operation of legislation without proper analysis of principles. The broadening of the meaning of "Henry VIII clause" and the adoption of an approach that all such clauses are inherently objectionable is one such development. It is important that the scrutiny of, and automatic objection to, Henry VIII clauses do not override a more principled and coherent approach to scrutiny of provisions that delegate legislative power.

³² Greenberg, above n. 8 at para 1.3.11. Cited in the *Public Law Project Case*, *ibid.* at para. 26.

³³ Daniel Greenberg "The Broader the Power, the Narrower the Power" (2016), 37 *Statute Law Review* v-vi.

³⁴ *Ibid.*

Despotism Revisited

Ian Brown¹



Abstract

Legislation that grants broad discretionary powers to governments, including Henry VIII powers, is becoming more common. These powers are needed to deal with emergent and changing circumstances and to provide flexibility to administer legislation. However, they also may be misused and can create challenges for those who use them. This article canvasses some of the reasons for the granting of discretionary powers and also provides some suggestions for legislative drafters when asked by their clients to include these powers in proposed legislation.

The Nature of the Issue

In 1929, Lord Hewart, Lord Chief Justice of England, warned of the rise of a “new despotism”². This new despotism displayed itself in legislation that delegated to the executive important decision-making powers without accountability to Parliament. Many of the rules and policies being established were difficult for the average citizen to find and understand and there were instances where the jurisdiction of the courts was excluded. He described the strategy as “to subordinate Parliament, to evade the Courts, and to render the will, or the caprice, of the Executive unfettered and supreme”³. For Lord Hewart, the motivation for this course of events was a genuine belief on the part of the executive that “[t]he business of the Executive is to govern” and that “[t]he only persons fit to govern are the experts”⁴. The end result, he warned, would be a state in which citizens’ rights would be trammelled and the scheme of self-government undermined.

¹ Chief Legislative Counsel, Saskatchewan, Canada.

² Lord Hewart of Bury, *The New Despotism* (London: Ernest Benn Limited, 1929).

³ *Ibid.* at 16.

⁴ *Ibid.* at 20.

In response to Lord Hewart's criticism, the British Parliament established the Committee on Ministers' Powers (the Donoughmore Committee), which reported on measures to oversee and limit the use of ministerial powers.⁵ The proposed measures included placing clearly defined limits in Acts on the use of delegated legislation, abandoning the use of Henry VIII clauses other than in exceptional circumstances and using legal experts to draft delegated legislation. While the report dealt with a wide variety of ministerial powers, the majority of the comments concerning delegated legislation focussed on what we now term regulations. The committee also reviewed the exercise of delegated judicial and quasi-judicial powers.

Parliaments in Canada and throughout the Commonwealth subsequently also undertook a number of steps to provide oversight of the executive's use of delegated legislation. These included enacting *Regulations Acts*^{5A} or *Statutory Instruments Acts*, establishing parliamentary committees to review regulations that have been enacted and creating rules to provide for tabling delegated legislation for review and either approval or disallowance.

An Ongoing Issue

Controversy over the use of broad ministerial powers continues. In 2010, Lord Judge, then Lord Chief Justice of England and Wales, expressed his concern over the increased use of Henry VIII clauses in United Kingdom legislation.⁶ In a speech to the Lord Mayor's annual dinner for the judiciary, he said:

You can be sure that when these Henry VIII clauses are introduced they will always be said to be necessary. But why are we allowing ourselves to get into the habit of Henry VIII clauses? Why should we? By allowing them to become a habit, we are already in great danger of becoming indifferent to them, and to the fact that they are being enacted on our behalf. I do not regard the need for affirmative or negative resolutions as a sufficient protection against the increasing apparent indifference with which this legislation comes into force. To the argument that a resolution is needed, my response is, wait until the need arises, and go to Parliament and get the legislation through, if you can. I continue to find the possibility, even the remote possibility, that the Treasury may by order disapply any rule of law, or a Minister may change our constitutional arrangements, to be rather alarming. Of course, I am not suggesting that any of the Ministers with whom we were dealing before June, or any of the Ministers we are dealing with now are intent on subverting the constitution. I know that. You know that.

⁵ Report, 1932, Cmd 4060 (1932, HMSO, London).

^{5A} The Uniform Law Conference of Canada adopted its first Uniform Regulations Act in 1943.

⁶ A Henry VIII clause is a clause inserted into an Act that allows the executive to repeal or amend the Act without further parliamentary scrutiny. The term is derived from the *Statute of Proclamations 1539*, which gave King Henry VIII the power to legislate by proclamation. <http://www.parliament.uk/site-information/glossary/henry-viii-clauses/>.

But, and it is, I suggest, a very important but: history is long as well as short, and what's to come is always unsure.⁷

Canadian Parliamentarians and judges have not expressed the same concern over delegated discretionary powers. An argument could be made that the introduction of the *Canadian Charter of Rights and Freedoms*⁸ and the active role of the courts in exercising judicial review has made the situation better in Canada.⁹ With respect to Henry VIII clauses, it may

⁷ The Mansion House Speech, 13 July 2010 by Lord Judge, Lord Chief Justice of England and Wales, available at <http://russellandcarol.co.uk/blogs/carol/bin-henry-viii-clauses-ken-clarke-told-lord-chief-justice-used-lord-mayors-annual-dinner>. Lord Judge reiterated his concerns in a 2016 speech to King's College London (*Ceding Power to the Executive; the Resurrection of Henry VIII*, April 12, 2016), available at <https://www.kcl.ac.uk/law/newsevents/newsrecords/2015-16/Ceding-Power-to-the-Executive---Lord-Judge---130416.pdf>. In his 2016 speech, Lord Judge argued that the "Henry VIII clause" contained in the *Statute of Proclamations* (1539) was actually more limited than contemporary "Henry VIII clauses", being "not more than a wish list", in that it did not alter any Act of Parliament and that it did not interfere with existing rights (at 6).

⁸ *Canada Act, 1982* (UK), 1982, c. 11, Schedule B, especially section 7, which deals with legal rights, and section 32, which makes all government actions subject to *Charter* scrutiny.

⁹ See B. McLachlin, *Rules and Discretion in the Governance of Canada* (1992), 56 *Sask L Review* 167. Canadian courts have upheld the right of legislatures to delegate their powers to the executive using Henry VIII clauses: see *Re Gray* [1918] SCR 180 and *Reference as to the Validity of the Regulations in Relation to Chemicals Enacted by Order in Council and of an Order of the Controller of Chemicals Made Pursuant Thereto* ("Chemicals Reference") [1943] SCR 1. Both of those cases were decided in the context of war-time emergency. These decisions have been upheld in later Canadian cases. See, for example, *Ontario Public School Boards' Assn v Ontario (Attorney General)* (1997), 151 DLR (4th) 346 (OSCJ); [1997] OJ No 3184 (QL); 45 CRR (2d) 341 where the court nevertheless termed the Henry VIII powers under consideration as a "massive delegation and subdelegation" (para 2], a "breathtaking power" (para 29), "extraordinary" (para 56), "arbitrary" (para 60) and "remarkable" (para 61). However, the court noted that the Henry VIII powers in the Act had not actually been used, leaving open the possibility of a challenge to a future use of those powers on the issue of "whether these arbitrary powers are actually necessary to achieve any valid legislative purpose" (para 60). Along those lines, there is the comment in *Greater Essex County District School Board v International Brotherhood of Electrical Workers, Local 773* (2007), 83 OR (3d) 601 (OSCJ) concerning "the narrow construction to be given to these powers" (para 85). See also John Mark Keyes, *Executive Legislation*, 2nd ed. (Markham, Ontario: LexisNexis, 2010) at 362 to 365.

Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed. (Markham, Ontario: LexisNexis, 2014) at 363, fn. 88. makes the following comments respecting Henry VIII powers:

It is arguable that the rhetoric relied on to condemn Henry VIII clauses is ill-suited to the realities of law-making in the modern administrative state. In practice, at least in the context of a majority government, the executive branch controls both the legislative and regulatory agendas. At the federal level, draft regulations are published in the *Canada Gazette* before being made, along with government contact information, so that those whose interests are affected can express their views. Given that legislative agendas are crowded and what gets on them is politically-driven, it may be reasonable to entrust at least minor adjustments of regulatory schemes or benefit programs to the executive branch that administers them.

Professor Sullivan makes a number of good points. However, delegating decision-making to the executive does lessen the role and power of elected members. Even in cases of majority governments, back bench members do exercise significant influence on the executive and it is valuable for that influence to be maintained. As well, requiring important matters to be debated in Parliament or a Legislative Assembly gives all elected members an opportunity to provide a direct voice on the decision to be made and also gives greater public awareness of issues. The media and the public tend to be less aware of regulations and other forms of delegated legislation and rarely follow administrative decisions. Of concern, also, is the trend in Canada to delegate important decisions, not just minor adjustments, to the executive. To borrow the words of *Re Gray*, Parliament may delegate its powers but cannot abdicate its functions, particularly the functions of scrutiny and control of the executive.

also be that, as the British Columbia Court of Appeal stated, such provisions in Canadian legislation are rare and that courts will construe them narrowly.¹⁰

While most of the commentaries on this subject have dealt with Henry VIII clauses, I suggest that the issue concerns all grants of broad discretionary powers.¹¹ The issue of delegating these types of powers should receive close attention from those responsible for preparing and reviewing legislation. Delegating decision-making takes away powers from our legislatures and undermines democracy.¹²

While Henry VIII clauses may be less of an issue in Canada, there are concerns over other forms of discretionary powers. The issue of delegated discretionary powers is an ongoing challenge for our office as, I am sure, it is for drafting offices in other jurisdictions. Who should exercise the power? The Lieutenant Governor in Council (or the Governor in Council)? A minister? A public officer? What powers should be delegated? What limits, if any, should be placed on the delegated powers? What rights or protections should be given to those affected by the exercise of the delegated powers? How does one respond to requests to include Henry VIII clauses or unfettered discretionary powers in legislation?

The discretionary powers our office is asked to draft could be used to issue permits or licences, grant exemptions, impose an administrative penalty, approve significant plans and agreements or the right to conduct business, modify the application of an Act, issue binding directions to local authorities or cancel the sale or disposition of public land. To assist in exercising these important powers, ministers or public officials often establish policy manuals, directives or guidelines that, while not imposing mandatory laws, have a quasi-legislative status and are relied on when exercising discretionary powers.¹³

¹⁰ *West Fraser Mills Ltd. v Workers' Compensation Appeal Tribunal, et al* 2016 BCCA 473 at para 59. See also *Greater Essex County District School Board v International Brotherhood of Electrical Workers, Local 773*, *ibid.* at paras 85 and 114 and John Mark Keyes, *ibid.* at 362 to 365.

¹¹ The New South Wales Ombudsman, "Discretionary Powers" (November 2010) defines a discretionary power as follows:

Discretionary powers are permissive, not mandatory. They are powers granted either under statute or delegation which do not impose a duty on the decision-maker to exercise them or to exercise them in a particular way. Within certain constraints, decision-makers are able to choose whether and/or how to exercise discretionary powers.

Available at

https://www.ombo.nsw.gov.au/_data/assets/pdf_file/0006/3687/FS_PSA_04_Discretionary_powers.pdf.

These powers are exercised according to policy considerations rather precise legal principles.

¹² Of course, a public official must have legal authority to exercise a discretion. Unless a legal power is delegated, a public official has no inherent authority to issue orders or affect rights or property: *Roncarelli v Duplessis* [1959] SCR 121.

¹³ John Mark Keyes has a comprehensive, informative and readable study of quasi-legislation in *Executive Legislation*, above n. 9 at 50ff.

We have also observed a trend of placing fewer details and rules in Acts and regulations and more in policy directives, guidelines, manuals and codes.¹⁴ To assess the use of policies, guidelines and manuals, our office undertook a study in 2016 of 4 government ministries and 2 Crown corporations that interact constantly with the public. We found that they administer:

- 137 Acts,
- 416 regulations and
- 127 policy manuals and guidelines (this figure may be an undercounting as it includes only those that are made available on websites).

References in Acts to the authority to issue policies, guidelines and manuals has grown steadily each year.

Are these trends a cause for worry? Yes. The concern may not be with the well-intentioned manner in which current ministers and public servants propose to use these powers. It also involves the potential misuse that could be made of them in the future. To repeat Lord Judge’s comment, “history is long as well as short, and what’s to come is always unsure.” Safeguards are required to see that current and future uses of discretionary powers are reasonable and made for the purposes for which they are granted.

As key actors in the development of legislation, drafting offices have a role to provide sound legal and policy advice to public servants and ministers and to protect the broader public interest.¹⁵ Our approach to this issue rests on the realization that our duty is not only to the client providing instructions, but also to the judicial system, to the legislature and to the public.¹⁶ While our role is not to make policy, we can at least highlight the implications of proposals and encourage discussion.

¹⁴ A good example in Saskatchewan is *The Environmental Management and Protection (Saskatchewan Environmental Code Adoption) Regulations*, [RRS c E-10.22 Reg 2](#), which adopted 28 codes and standards for regulating environmental issues such as reporting of and handling the discharge of materials into the environment, water quality and reclaiming forested lands.

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¹⁵ See the comment on “The Use of ‘Henry VIII Clauses’ in Queensland Legislation” by the Scrutiny of Legislation Committee, Legislative Assembly of Queensland (1995) at page 10:

The OPC [Office of Parliamentary Counsel] is therefore obliged to draft legislation that has sufficient regard to the institution of Parliament and to advise their clients in that respect.

See also the comments of the Donoughmore Committee, above n. 5 at 50 on the importance of good drafting in preparing regulations:

The importance of good drafting cannot be overemphasised, and the more resort to delegated legislation is practised by Parliament, the more necessary it is that its draftsmanship should be uniformly good.

The same comments apply to preparing codes, policy manuals, guidelines and other forms of delegated quasi-legislation.

¹⁶ See Ann Seidman, Robert B. Seidman and Nalin Abeyesekere, *Legislative Drafting for Democratic Social Change* (London: Kluwer Law, 2001) at 49.

The remainder of this paper canvasses some of the reasons for seeking broad discretionary powers and then discusses how our office responds to those requests. The focus is primarily on discretionary decision-making and law-making powers. It does not deal with issues involving delegated judicial and quasi-judicial powers.¹⁷

Reasons for Requests

There are some understandable reasons for requesting broad discretionary powers. They remain basically the same as those set out in the Donoughmore report.¹⁸ But, our office has noted that there are also requests that are not supportable.

Understandable reasons:

Complexity of subject matter—

As the scope of government activity has expanded, governments confront more complex issues. As well, society has become more diverse with different cultures, different languages and different beliefs.¹⁹ Governments have an obligation to respect human, constitutional and aboriginal rights, which can be very diverse.

In addition, some fields regulated by governments involve complicated and ever-evolving subjects. With securities markets, for example, new financial instruments appear regularly, new ways of raising capital are developed and new approaches to trading and marketing securities are proposed.

The era when government could set out a broad rule and require everyone to comply has passed. Any attempt to cover all possible variations would fail. Some subjects are just too complex and too variable over time. Any Act or regulation that tries to anticipate all possible circumstances would end up being overly long, impossible to follow and quickly dated. Some delegation to a minister or authoritative decision-maker is required and room must be left to grant exemptions or permit variations so long as an expected standard is met.

¹⁷ Also beyond the scope of this paper is the use of prospective Henry VIII clauses that delegate the power to change Acts of Parliament passed after the empowering Act is passed: see Barber, N.W. and Young, Alison, *The Rise of Prospective Henry VIII Clauses and Their Implications for Sovereignty* [2003] *Public Law* 112. While those clauses may be justified in the United Kingdom, I have been unable to uncover the use of this type of clause in Canada. Given the Canadian practice of preparing regular revisions and consolidations of statutes, of making direct, textual amendments to Acts, as opposed to implied amendment, and of using consequential amendments, such a power is unnecessary in Canada. As well, it is likely that a Canadian court will narrowly construe a prospective Henry VIII clause.

¹⁸ Donoughmore, above n. 5 at 51 and 52.

¹⁹ Cities have become more diverse. In Toronto, for example, almost 50% of the population is composed of persons who are members of a visible minority and 150 languages are spoken. Every Canadian city has experienced increased diversity in its population.

Pressure to respond quickly –

The rise of social media in addition to the influence of the traditional media places pressure on government to react quickly. A former Quebec premier, Pierre-Marc Johnson, speaking from personal experience, noted that:

... the political agenda, by choice of the media, has become unlimited. Not satisfied with dealing with the general set of priorities of government, the media literally shapes the government's daily agenda. Temporary, superficial and perishable issues form the daily menu: the politicians not only react to this, but frequently adjust their priorities to these short-lived calendars of activities.²⁰

If a flood occurs, an unexpectedly severe snowstorm arrives or a new transmittable disease appears, citizens demand that government act immediately. Time to reflect, investigate and plan is limited. Cabinets and instructing officers perceive the need to act and ask for flexibility to do so.²¹

New and transitional programs –

Governments propose new programs that have untested and uncertain elements. Scope is needed to experiment and learn from experience. For example, Saskatchewan recently became the first “sub-national” Canadian jurisdiction to adopt a patent box incentive to promote research and development and economic growth. There was no legislative precedent and no administrative experience from other jurisdictions to draw on. How many applicants would there be for the incentive? Are the requirements to be enrolled in the incentive program too tough or too generous? Will the scientific tests proposed to evaluate innovative projects work? Flexibility is required to deal with those issues and the various “unknown unknowns”.²²

In other cases, governments undertake new ways to carry out programs. The Saskatchewan government recently introduced a new way of collecting and administering property taxes.

²⁰ Johnson, Pierre- Marc, *New Paradigms of Political Power and Life*, (notes from an address to the Institute of Public Administration of Canada, August 28, 1995).

²¹ A good example of the need to act quickly resulting in the use of broad “Henry VIII” powers is the *Canterbury Earthquake Response and Recovery Act, 2010* (NZ 2010, No. 114) enacted by the New Zealand Parliament in the aftermath of the September 4, 2010 earthquake in the area surrounding Christchurch. The Act permitted the Government by Order in Council to grant an exemption from, to modify or to extend almost any New Zealand enactment.

²² The proposed use of discretionary powers and Henry VIII clauses in the United Kingdom to deal with unknowns has been raised as an important element of the European Union (Withdrawal) Bill [HC], Bill 5, 2017-19 (the “Great Repeal Bill” required following Brexit). Former First Parliamentary Counsel, Sir Stephen Laws, cautioned that those powers will be required to avoid legal chaos that could arise once EU laws cease to apply after Brexit (see *Article 50 and the political constitution*, UK Constitutional Law Association, 18 July 2016, available at <https://ukconstitutionallaw.org/2016/07/18/stephen-laws-article-50-and-the-political-constitution/>). See also *Legislating for Brexit: the Great Repeal Bill*, House of Commons Library Briefing Paper, 23 February 2017, available at <http://researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-7793>.

The initiative involved the education portion of local property taxes being paid directly to the government rather than school boards. How would the new regime work? How would unforeseen issues be dealt with? To address these concerns, the instructing officer proposed a provision that was to read:

The Lieutenant Governor in Council may make regulations, prescribing the manner in which the municipal Acts or any prescribed Act or regulations made pursuant to a prescribed Act apply to this Act or any municipality or its duties required under this Act.

The intent was to vary the way in which municipal Acts are to be applied and to set rules that could differ from the rules set out in those Acts. Our office pointed out that the proposed regulation-making power would be ineffective as a means of overriding an Act and that it proposed an unfettered discretionary power. The instructing officer readily agreed to drop the proposal. But this example highlights the pressures that ministers and public servants are under to deal with new and transitional matters.

Parliamentary and Cabinet time is limited –

Neither Parliament (nor a Legislative Assembly) nor Cabinet has the time to deal with every issue. Routine issues can be delegated to another person or body and matters requiring specialized expertise can best be decided by someone with suitable training, experience and credibility.

Less Supportable Requests

Convenience –

A broad discretionary power may be requested because it is more convenient for the minister or public servant. Rather than having to work within set rules, officials may prefer to handle each case as they see fit. Echoing the attitude criticized by Lord Hewart, they perceive themselves as experts, public spirited and experienced, believing that they are better able to make decisions than the average person. But, as Seidman, Seidman and Abeyesekere warn about unfettered discretion:

Unaccountable, secret and unnecessarily broad discretion ineluctably creates the basis for arbitrary decision-making. Corrupt behavior constitutes arbitrary decision-making's most striking and possibly its most subversive guise.²³

²³ Seidman et al. above n. 16 at 351. See also the comment by the New South Wales Ombudsman, above n. 11:

As a matter of principle, it is unacceptable for an agency to adopt and implement a policy that adversely affects, or could adversely affect, the rights or interests of any member of the public where the existence or content of the policy is kept secret or the policy document is not available for inspection and purchase on request.

Convenience or trust in the capacity of public servants should never be grounds for granting broad discretionary powers.

Lack of time to prepare, plan and consult –

At times, a proposed Act is brought forward without proper preparation. Key issues have not been identified, key stakeholders have not been consulted and key research has not been undertaken. There are several factors that may lead to this situation.

A government may feel great pressure to act quickly to address a problem. Or, an instructing officer may lack the time and resources to do the necessary work. For an instructing officer, preparing legislation may be a side-of-the-desk task and there may be lack of support from the officer's seniors in obtaining the resources that are needed. Finally, secrecy may be important when developing legislation and there is no opportunity to consult with those who are to be affected. A grant of broad discretionary powers may be proposed to solve these problems. However, our office has taken the position that lack of preparation and planning should never be the excuse for poorly thought-through legislation. Every proposed piece of legislation should be subject to a rigorous intellectual analysis and, as Geoffrey Bowman observed, "If the analysis means that ideas collapse, the client will be sent away to think again or might even conclude that the particular project should be abandoned".²⁴

Inexperience –

Many instructing officers are new to their positions. They lack experience with preparing legislation and have limited knowledge of statutes and regulations. This is a greater issue when the turnover of instructing officers is high. They may suggest a broad discretionary power without understanding the consequences of granting those powers.

Assuming the future decision makers will act similarly to those proposing discretionary powers –

Ministers and public servants take their responsibilities seriously and try to act in good faith and in the public interest. However, they mistakenly assume that future ministers and public servants will act as they do. There is a danger that giving broad, unfettered powers may leave the power open to abuse. It is important to keep in mind the way in which a proposed legislative power can be abused. As a former chair of our Cabinet committee noted, when addressing public servants:

²⁴ Sir Geoffrey Bowman, "Why is there is Parliamentary Counsel Office?" (2005), 26 *Statute Law Review* 69 at 70.

The only proper way to interpret legislation is not how a well-intentioned minister and a well-intentioned civil service will use the legislation, but how a future minister or future civil servant could misuse the legislation.²⁵

Steps for Handling Requests

Requests to have discretionary powers are not inherently wrong. Even Lord Hewart recognized that *The New Despotism* may have been mistaken and that a modern, wide-ranging welfare state requires giving public servants wide discretionary authority.²⁶ But, with the warning that “what’s to come is always unsure” it is important for a drafting office to subject requests to a thorough review, to advise as to the appropriateness of the request and to recommend any modifications, limits and procedural constraints.

Here are some of the steps that our office has undertaken to deal with requests for grants of broad discretionary powers.

Awareness –

The first and obvious step is to be aware of the issues surrounding Henry VIII clauses and grants of broad discretionary powers. As Lord Judge warned, we should never become complacent about the use of these powers. This a regular topic of discussion in our office when reviewing drafting instructions and draft Bills. We have made an effort to educate our client instructing officers about this issue. It is discussed in the materials we give to instructing officers, such as the document “Preparing Drafting Instructions: Guide and Tips”. As well, it is a subject that we cover in seminars for public servants. In January of 2017, our office held a seminar for instructing officers in conjunction with our Cabinet Secretariat and our Government’s Regulatory Modernization Unit. The use and potential misuse of discretionary powers was a key subject that was discussed.

This is also an issue of which our Cabinet is aware. Among the roles and responsibilities for our Cabinet committee established to review proposed legislation is the following:

- making recommendations to Cabinet respecting standard policies and provisions that should be incorporated into legislation and that should be adopted and followed by ministries and government agencies in developing proposed legislation – *including*

²⁵ Oral comments of Hon. E.B. Shillington (undated). Note also the opinion of Mr. Justice Stephen in *Re Castioni*, [1891] 1 QB. 149 at 167-168:

I have had on many occasions, [the opportunity] to draft Acts of Parliament, which, although they may be easy to understand, people continually try to misunderstand, and in which therefore it is not enough to attain to a degree of precision which a person reading in good faith can understand; but it is necessary to attain if possible to a degree of precision which a person reading in bad faith cannot misunderstand. It is all the better if he cannot pretend to misunderstand it. [added words are mine]

²⁶ Stevens, Robert (article on the Irish National Archives website), *Hewart, Gordon, First Viscount Hewart (1870-1943), judge*, available at <http://treaty.nationalarchives.ie/wp-content/uploads/2011/10/Hewart.pdf>.

policies to ensure accountability of ministries and government agencies and transparency in decision making. [emphasis added]

The fact that our elected members are vigilant in reviewing grants of discretionary powers gives our office credibility when we advise clients.

It is also important for governments to realize that, as Lord Judge notes,

the electoral wheel turns and power moves from one party to another, so that in due course the ministers of the opposition party, now in government, are themselves able to deploy the very same Henry VIII clauses to achieve their own contrary policies.²⁷

Because of the fairly constant turnover of elected parties in Saskatchewan, government members often have had experience in opposition and are aware of the wheel turning. This acts as a self-imposed limit in requesting broad delegated powers.

No unfettered decision-making powers –

Proposals to grant unfettered discretion are carefully reviewed and modified to set out the grounds on which discretion will be exercised, the circumstances in which it may be exercised and the requirements that the decision-maker must comply with when exercising the power. Clear and objective criteria to govern the exercise of powers should be included in the legislation granting the discretionary power. Our Cabinet committee is careful to ensure that this principle followed. A recent example came when our former *Provincial Lands Act*,⁶ which had been basically untouched for 70 years, was redrafted and replaced. The former Act had the following provision:

56(1) The minister may in his discretion consent, subject to such conditions as he deems necessary or desirable, to a sublease of provincial lands disposed of under lease.

The new provision was drafted to make the exercise of discretion subject to the regulations, which will set out the circumstances and the manner of exercising discretion. The regulations will provide clarity for those who may wish to apply for a sublease or other disposition and also make the minister accountable to the Lieutenant Governor in Council for any exercise of that discretion.

General phrases, such as “it is appropriate” or “in the public interest”, do not, in our opinion, give any meaningful guidance to those affected by ministerial action. Placing criteria for the use of discretionary powers in legislation will guide decision-makers and prevent any unusual or inappropriate use of those powers. Seidman, Seidman and Abeyesekere observe:

Unless a stakeholder knows the categories of considerations an official will take into account in coming to a decision, the stakeholder cannot participate meaningfully in

²⁷ Lord Judge, “Ceding Power to the Executive; the Resurrection of Henry VIII”, above n. 7 at 12.

⁶ SS 1978, c P-31.

decision-making. Without that knowledge, a stakeholder cannot determine what inputs to make to influence decision [*sic*]. That no specified criteria limit agency decision [*sic*] gives its officials more capacity not only to make arbitrary decisions in general, but, particularly, to behave corruptly.²⁸

They also advise that discretion be limited to the least scope that the nature of the case requires and that the decision-makers be limited to making only decisions that the law empowers, taking into account only factors that the law permits, by procedures that the law authorizes. Those are recommendations we try to follow.

When setting limits, it is important to remember that the person or body to whom a discretionary power is given may choose to delegate the exercise of that power to another. There is both common law²⁹ and statutory³⁰ authority to permit delegation. The individual to whom a power is delegated may not have the experience, training or independence from outside influences to understand how to properly exercise it. As well, that individual could be in a junior position, be a recent appointee or lack knowledge of the purpose for which the discretion was given. Attention should be paid to the possibility of delegation of decision-making and the persons to whom the exercise may be delegated. This highlights the importance of placing clear limits.³¹

Procedural protections –

In addition to setting out the criteria that decision-makers must take into account, we advise clients on a number of procedural protections for those affected by decisions that can be placed in legislation. These include, where appropriate:

- giving those affected an opportunity to make representations to the decision-maker before a decision is made;
- requiring decision-makers to provide reasons for their decisions and to communicate those reasons;
- giving those affected a right to appeal the decision to the courts or an independent, judicial-type body.

²⁸ Seidman et al. above n. 16 at 351.

²⁹ See, for example, *Carltona Ltd v Commissioners of Works*, [1943] 2 All ER 560 and *The Queen v Harrison*, [1977] 1 SCR 238.

³⁰ Canadian jurisdictions provide statutory authority for a Minister of the Crown or public officer to delegate the exercise of decision making, subject to noted limits. See, for example, section 24 of the *Interpretation Act*, RSC 1985, c. I-21, section 23, section 23.2 of *The Interpretation Act, 1995*, SS c-I-11.2 and sections 27 and 28 of the [Model Uniform Interpretation Act](#) adopted by the Uniform Law Conference of Canada.

³¹ [The Cabinet Directive on Law-Making](#) of the Government of Canada provides a good guide for those involved in law-making, setting out, among other things, the relationship between Acts and regulations, what should not be included in regulation-making powers and how the government's legislative program is prepared.

Require publication –

Decision-makers are increasingly making use of policy documents, guidelines, and manuals in decision-making. These should be made available to the public. Our *Freedom of Information and Protection of Privacy Act* was amended in 2017 to add the requirement that these instruments be made available electronically if requested and be made available on the decision-maker's website.³² Of course, disclosures must respect the privacy rights of individuals and their right to keep sensitive, personal information and health records private. The requirement to make these instruments as widely available as possible is important given the increasing frequency with which they are developed and used by decision-makers.

Policy manuals and guidelines are useful for decision-makers and of value to stakeholders. However, unlike regulations, they are not subject to review by Cabinet, are not drafted by professional drafters and may not be reviewed by legal counsel. Neither are they subject to formal reviews by the legislature.³³ It is important, therefore, for them to be available to those affected by decisions.³⁴

Placing limits on the use of powers –

Another step involves placing limits on the use of discretionary powers. A minister or other delegate is given the authority to make decisions or exercise discretion for a limited period or for a limited purpose. In the case of a time limited power, the delegate must return to the

³² Section 65 of *The Freedom of Information and Protection of Privacy Act*, SS 1990-91, c F-22.01.

³³ See also Keyes, above n. 9 at 54 to 56 for a discussion of the criticisms of quasi-legislation.

³⁴ While preparing this paper, our office worked with an agency that provides benefits to the public. We discovered that the benefits were being provided pursuant to the agency's policy, but the policy setting out the benefits and the rules respecting the benefits were not posted on the agency's website. No one in the agency could explain this lacuna. Apparently, someone in the agency decided years ago that it was not necessary to post the policy and that relying on policy would give more flexibility to the agency. We advised the agency that there was a lack of proper legal authority to issue the policy and that relying on policy created questions about the legal entitlement to the benefits. As a result, we recommended that the agency review its legal authority and amend its legislation, if required, to ensure its legal authority to issue the benefits. In addition, we encouraged the agency to at least post the benefits policy on its website. See also the comment by the New South Wales Ombudsman, above n. 11:

There is usually no legally enforceable obligation to comply with government circulars, memoranda and relevant industry or generally accepted codes of practice. However, in the interests of fairness, equity and consistency, decision-makers should have regard to them and comply with their terms unless there are justifiable, and preferably documented, reasons for taking another course of action.

Legislative Assembly to renew that authority.³⁵ This is an effective means of controlling delegations.³⁶

Are there other measures that could be taken? Many jurisdictions have scrutiny committees to review and either approve or disallow regulations. The mandate of those committees could be expanded to include the review of discretionary powers. This would ensure that these powers are being properly exercised and that there is no unusual or unexpected use of these powers.³⁷

Another measure would be to require impact statements to be presented to elected members and made public. An initial impact statement could be required to accompany a proposed grant of discretionary powers to indicate the purpose of the grant and how it will be used. Subsequent impact statements could also be required from time to time to show how the power has been used.

Policy manuals and guidelines are becoming important elements in the exercise of discretionary powers. In addition to requiring them to be publicly available, more attention could be given to their preparation, including regular reviews by legal counsel and, depending on the resources available, seeking the assistance of drafting offices in organizing and writing them to ensure better clarity and consistency.

³⁵ As an example, in 2000 the Government of Saskatchewan introduced a new land titles regime, moving from a paper-based system to a paperless system. Because of the complications in introducing a major change over a wide geographic area and the necessity of preserving property rights as well as public confidence in the land titles operations, the new Act contained a provision permitting the minister to make regulations, among other things, modifying the application of the Act, exempting persons from the application of the provisions of the Act or prescribing new or additional procedures to be followed. The regulations were stated to be made solely for the purposes of facilitating the conversion to the new system (see *The Land Titles Act, 2000*, SS 2000 c.L-5.1, section 203). Now that the conversion is completed, the powers are effete and the regulation making provision could now be repealed as unnecessary.

Another example is the *Canterbury Earthquake Response and Recovery Act, 2010* (NZ 2010 No 114), which was replaced by the *Canterbury Earthquake Recovery Act 2011* (NZ 2011 No 12). Both of those Acts placed time limits on the use of “Henry VIII” powers. The current legislation governing the earthquake recovery, the *Greater Christchurch Regeneration Act 2016* (NZ 2016 No 14), while it provides for the continuance of orders made under the former Acts, contains more limited powers for government ministers.

See also The European Union (Withdrawal) Bill [HC], Bill 5, 2017-19, where the proposed use of several Henry VIII powers is limited as to both purposes (sections 7(6), 8(3) and 9(3)) and to either a 2-year period after exit day (sections 7(7), 8(4)) or to the day after exit day (section 9(4)). It has been pointed out that, under the Bill, there can be several “exit days” with the result that the period for exercising this power may be extended for a considerable length.

³⁶ Paul Salembier, *Legal and Legislative Drafting* (Markham: LexisNexis, 2009) at 252 suggests not using Henry VIII clauses in areas that have been identified as problematic, such as the imposition of taxes and the creation of offences. The European Union (Withdrawal) Bill adopts these restrictions on the use of its proposed Henry VIII powers.

³⁷ In Saskatchewan, *The Regulations Act, 1995*, SS 1995, c R-16.2 provides that all regulations stand referred to the appropriate policy field committee of the Legislative Assembly. Rule 147 of the *Rules and Procedures of the Legislative Assembly* set out the grounds on which the Policy Field Committee are to review regulations. Policy Field Committees could have their mandate expanded to undertake this role.

It is also important to note that, in Canada, courts retain the power of judicial review, even if the empowering Act contains a privative clause.³⁸ As a result, decisions by a delegate are always open to challenge before a court. This power serves as a restraint on the exercise of broad discretionary powers.

Conclusion

Drafting offices will continue to face requests from clients to include broad discretionary powers in legislation. Given the nature and complexity of matters that decision-makers must deal with and the pressures on governments to react quickly and expertly, the reasons for requesting those powers are understandable. While the use of Henry VIII clauses may be criticized, they are still being incorporated into Acts in many jurisdictions. In fact, Professor Dennis Pearce and Stephen Argument in *Delegated Legislation in Australia* stated about the Australian experience:

Regrettably, the use of Henry VIII clauses in the Australian jurisdictions has become more common.³⁹

Drafting offices should continue to make themselves aware of the issue and of the dangers of discretionary powers. They should advise their clients on the proper use of these powers and insist on the inclusion of proper limits and procedures to govern their use. No decision-maker should be above the law. In exercising discretionary powers, the delegate should be expected to do so “according to the strait line and rule of law, justice and good observing”.⁴⁰

APPENDIX – Selected Commentaries on Discretionary and Henry VIII Powers

United Kingdom

Barber, N.W. and Young, Alison, “The Rise of Prospective Henry VIII Clauses and Their Implications for Sovereignty” [2003] *Public Law* 112

³⁸ See *Dunsmuir v New Brunswick*, [2008] 1 SCR 1990 at para 31 where the majority of the court held (*per* Bastarache and LeBel, JJ):

[31] The legislative branch of government cannot remove the judiciary’s power to review actions and decisions of administrative bodies for compliance with the constitutional capacities of the government. Even a privative clause, which provides a strong indication of legislative intent, cannot be determinative in this respect (*Executors of the Woodward Estate v. Minister of Finance*, 1972 CanLII 139 (SCC), [1973] SCR 120, at p 127). The inherent power of superior courts to review administrative action and ensure that it does not exceed its jurisdiction stems from the judicature provisions in ss. 96 to 101 of the *Constitution Act, 1867*: Crevier. As noted by Beetz J in *U.E.S., Local 298 v Bibeault*, 1988 CanLII 30 (SCC), [1988] 2 SCR 1048, at p 1090, “[t]he role of the superior courts in maintaining the rule of law is so important that it is given constitutional protection”. In short, judicial review is constitutionally guaranteed in Canada, particularly with regard to the definition and enforcement of jurisdictional limits.

³⁹ *Delegated Legislation in Australia*, 4th ed. (Chatsworth: Lexis Nexis Australia, 2012) at 22. Rutherford.

⁴⁰ Dr. Samuel, *Rex Lex Question XXXIX*, (Portage Publications, 2009, Colorado Springs) at page 352, available at <http://www.portagepub.com/dl/caa/sr-lexrex17.pdf>.

Hon. Mr. Justice V.C.R.A.C. Crabbe, “Shorter Parliamentary Enactments and Longer Executive Regulations - Pros and Cons” (1986), 7 *Stat L Review* 4.

Lord Bingham of Cornhill, “The Old Despotism” (1999), 22 *Israeli Law Review* 169.

Lord Judge, “Ceding Power to the Executive; the Resurrection of Henry VIII”, speech to King’s College London (2016)

Dennis Morris, “Henry VIII clauses: Their birth, a later 20th century renaissance and a possible 21st century metamorphosis” *The Loophole*, March 2007 at 14 to 63.

Lord Rippon of Hexham, “Henry VIII Clauses” (1989), 10 *Stat L Rev* 205.

Legislating for Brexit: the Great Repeal Bill, House of Commons Library Briefing Paper, (2017).

Sir Stephen Laws, “Article 50 and the political constitution”, UK Constitutional Law Association (2016).

New Zealand

Kelly Buchanan, *Henry VIII is Alive and Well and Living in New Zealand*, Library of Congress (October 5, 2010) <https://blogs.loc.gov/law/2010/10/henry-viii-is-alive-and-well-and-living-in-new-zealand/>.

New Zealand Parliament, Parliamentary Practice in New Zealand, Chapter 29: Delegated Legislation (14 Oct. 2010).

Australia

Stephen Argument, *Henry VIII Clauses Fact Sheet*, prepared for the Australian Capital Territory Committee on Justice and Community Safety (2011).

Moens and Trone, “The Validity of Henry VIII Clauses in Australian Federal Legislation”, (2012), 24 *Giornale di Soria Costituzionale* 133.

The New South Wales Ombudsman, *Discretionary Powers*, https://www.ombo.nsw.gov.au/data/assets/pdf_file/0006/3687/FS_PSA_04_Discretionary_powers.pdf.

Queensland Law Reform Commission, *Henry VIII Clauses*, Working Paper 33, (1990) http://www qlrc.qld.gov.au/data/assets/pdf_file/0004/372901/wp33.pdf .

Rule of Law Institute of Australia, *Henry VIII clauses & the rule of law*, <http://www.ruleoflaw.org.au/wp-content/uploads/2012/08/Reports-and-Pres-4-11-Henry-VIII-Clauses-the-rule-of-law1.pdf> .

Scrutiny of Legislation Committee, Legislative Assembly of Queensland, *The Use of ‘Henry VIII Clauses’ in Queensland Legislation* (1995).

Canada

B McLachlin, Rules and Direction in the Governance of Canada (1992), 56 *Sask L Review* 167 (1992).

Introducing Constitutionally-based Judicial Review: Drafting Issues

Bilika Simamba¹



Abstract

The ability to access judicial review is limited by common law rules, though certain jurisdictions have reduced some of these to statute. In England, the rules, such as the exclusivity concept (redress for infringements of public law rights must be sought through public law and not private law remedies) exist in a context of review that is not protected by a written Constitution. Meanwhile, in some countries, such as the Cayman Islands, the right to lawful administrative action is now protected in the Constitution. This article discusses the extent to which the common law rules survive, if at all, in countries where judicial review has become constitutionally protected. It also discusses some of the issues legislative counsel might consider when introducing such provisions into a Constitution or any statute.

Restrictions on Judicial Review: Common Law and Statutory

At the centre of judicial review is the concept of separation of powers. While the legislature, executive and judiciary must retain primary responsibility for their respective branches of government, there is need for limited checks and balances. Thus, the courts must not unduly interfere with executive decisions of public authorities.² As much as possible, such decisions

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² However, it is recognized that in many Commonwealth jurisdictions higher courts can judicially review decisions of lower courts, quite apart from their jurisdiction to hear appeals. The Grand Court has exercised this jurisdiction at least twice. See *Miller v Summary Court, ex p Attorney General* (1994-95) CILR 417 (challenge of a decision by a magistrate not to allow an opposing party to see the notes from which the opposing party's witness had refreshed their memory, *certiorari* granted); *P Kruger v Northward Prison (Director)* (1996) CILR157. The UK Privy Council, which is the final court of appeal for Cayman, has reaffirmed this power in the Jamaican case of *Forbes v Attorney General* (2009) 75 WIR 406. In the UK, s 29(3) of the Supreme Court Act 1981 states that, "the High Court shall have jurisdiction to make mandatory,

must be left to those authorities. It is only when an authority exceeds its power that a court can properly intervene. For this purpose, an authority does not necessarily exceed its powers just because the court would have made a different decision. And supplementary to the ideal of limited interference some jurisdictions also have other restrictions, including (1) the exclusivity principle, (2) the other remedies rule, (3) the rule as to exhaustion of statutory remedies, (4) time limits and choice of procedures, and (5) the need for leave to apply for judicial review).³

First, judicial review is a public law remedy and must therefore be used if the issue is one of public law. Further, when one seeks judicial review, they must apply for leave. To obtain leave, they must establish a prima facie case. There is no need to obtain leave for an ordinary civil action. Thus, if one were to seek relief in a public law matter but do so through, for example, a writ of summons, they may be seen as trying to avoid the need to seek leave. For that reason, courts have generally insisted that, if the matter is one of public law, a party must not circumvent the leave procedure by using a private law procedure.

Second, if proceedings have a substantial element of private law and there are equally effective private law remedies, a court will often not grant leave, or refuse ultimately to make a ruling on the substantive case, if the issues arising can be sufficiently redressed in private law proceedings.

Third, where there are statutory rights of appeal, the litigant must first exhaust them before seeking leave. Where they have not done so, leave will be refused unless there are exceptional circumstances.

Fourth, it is important that any challenge be settled as soon as possible. Government decisions, many of which have far-reaching consequences, cannot be held up by court proceedings, hence the rule that judicial review must be sought within three months from the date of the decision, act or omission giving rise to the proceedings.

And fifth, section 26 of the Constitution of the Cayman Islands⁴ provides that where a person claims that the rights in the human rights chapter of the Constitution have been breached or are threatened, the person may within one year apply to the Grand Court for relief. Leave is not required. On the other hand, the rules of court provide that judicial

prohibiting or quashing orders as the High Court possesses in relation to the jurisdiction of an inferior court.” But this power does not extend to the cases of trial by indictment in the Crown Court.

³ These rules (and others) have been adopted in many Commonwealth jurisdictions and relate mainly to the grounds of review, which can be found in any standard book on administrative law, for example, H Barnett, *Constitutional and Administrative Law*, 11th ed. (Routledge-Cavendish: 2015). See also I Loveland, *Constitutional Law, Administrative Law, and Human Rights: A Critical Introduction*, 7th ed. (Oxford University Press: 2015).

⁴ *Cayman Islands Constitution Order*, UKSI 2009/1379, Schedule 2.

review requires leave does not. A decision of the Cayman Court of Appeal (“CCA”), which is discussed further below,⁵ has not, in my view, satisfactorily dealt with this conflict.

Issues

Under section 33 of the Constitution of South Africa,⁶ everyone has the right to “administrative action that is lawful, reasonable and procedurally fair.” That Constitution further provides that national legislation must be enacted to provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal. Sections 19(1) of the Constitutions of the Cayman Islands and the Turks and Caicos Islands (TCI),⁷ in identical terms, provide that decisions of public authorities must be “lawful, rational, proportionate and procedurally fair”. In all three cases the provisions are part of the respective Bills of Rights.

Further, in all these Constitutions, there is also a provision allowing persons to bring proceedings before a court where any of the fundamental rights and freedoms have been infringed or are threatened.⁸ In Cayman, this is section 26, which provides that a person who alleges that government has breached or threatened his or her rights and freedoms under the Bill of Rights may bring proceedings before the Grand Court.⁹ This is often called the *enforcement provision*. Proceedings are to be commenced within one year of the decision or act, or from the date on which such decision or act could reasonably have been known to the complainant. However, the court may extend that time in the interests of justice. Also, in Cayman, with respect to *judicial review*, as in many other jurisdictions, a court rule requires that proceedings be commenced within three months though, here also, the court has a discretion to extend the time in the interests of justice.¹⁰ Section 28 of the South African Constitution and section 21 of the Constitution of the Turks and Caicos Islands (TCI) do not provide for a period during which any action must be brought, effectively leaving that to be determined by other legislation.¹¹

Among countries that have an enforcement provision, there are two models: the classical one retains common law judicial review and has an enforcement provision; the second, call

⁵ See below n. 13 and the accompanying text.

⁶ Act 108 of 1996.

⁷ *Cayman Islands Constitution Order*, above n. 4 and *Turks and Caicos Islands Constitution Order*, UKSI 2011/1681.

⁸ Section 38 (South Africa); section 21 (Turks and Caicos).

⁹ This is found in many Commonwealth Constitutions including section 32 (India), section 19 (Jamaica), section 46 (Nigeria), section 28 (Zambia).

¹⁰ Grand Court Rules (1995 Rev), O 53 r 4(1).

¹¹ Section 38 (South Africa) does not mention procedure, while section 21 (6) of TCI expressly leaves this to be determined by a separate law. More generally on the effect of placing this in a Bill of Rights, see Bilika H. Simamba, “Proportionality as a constitutional ground of judicial review with special reference to human rights” (2016) 16 (1) *Oxford University Commonwealth Law Journal* 125-159.

it the Cayman model, protects judicial review in a Constitution but also has an enforcement provision. Under either model, there are always issues as to how the two regimes, that is, judicial review (by common law or Constitutionally protected) and the enforcement provision can co-exist. However, these issues are heightened when the grounds of judicial review are also given constitutional existence. This article examines to what extent, if at all, the five rules remain valid in light of constitutionally protected judicial review. And because the duality exists in either model, the issues discussed here in relation to constitutionally guaranteed judicial review can apply also, or be extrapolated, to cases where judicial review is the subject of regular statute law as in, for example, Canada, Australia and New Zealand. In that respect, the article will make suggestions as to how to approach the issues relating to the drafting of legislation providing for judicial review so as to ensure a smooth transition. However, since the emphasis is to address the substantive and procedural issues, no suggestions will be made on the technical matter of drafting the provisions suggested as this can easily be undertaken once the substantive issues are identified.

In Cayman, the effect, on some common law rules, of section 19 of the Constitution (which is essentially declaratory of the common law grounds of judicial review)¹² and section 26 (providing for an enforcement right) was first considered judicially in *Coe v Governor*.¹³ There, the appellants brought an action by writ in the Grand Court claiming that the government's decision to close a section of a road, to facilitate some developments, was unconstitutional. The agreement between government and the developer was executed on 15 December 2011. The appellants commenced proceedings on 25 February 2013, more than a year later. A notice of the closure of the road was published in the *Gazette* on 13 March 2013. But even before gazettal, the matter had received considerable media attention.

On the one hand, the appellants argued that section 14 of the *Roads Law* (which allowed the closure of roads) was contrary to certain provisions in the *Bill of Rights* which required that: government protect the environment; reasons for government decisions be given if requested; and public officials comply with the *Bill of Rights*.¹⁴ That being the case, the appellants argued, they were entitled to bring an action by writ under section 26(4) of the Constitution (which had a one-year time limit) rather than seeking judicial review (which had to be sought within three months). There were also arguments that, legally, the effective date of the decision, for purposes of the limitation period, was not the date of the original

¹² See *GCHQ Case*, in full *Council of Civil Service Unions v Minister for the Civil Service* (1985) AC 374 (HL). As summarized by Lord Diplock, the common law grounds are 'illegality', 'irrationality' and 'procedural impropriety'. Proportionality was not mentioned as it is not a traditional ground of review. In the UK it is applied to judicial review concerning rights protected by the European Convention on Human Rights. See in this regard J Jowell, 'Beyond the Rule of Law: Towards Constitutional Judicial Review' Public Law 2000 Win 617.

¹³ (2014) 2 CILR 465 (CCA); Grand Ct case is in (2014) 2 CILR 251 (Henderson J).

¹⁴ Sections 18, 19, 24 of the Constitution of the Cayman Islands, above n. 4.

decision but the date of gazettal. This, it was asserted, was because the decision-making process was a continuing one, culminating in gazetting.

On the other hand, the respondents argued that, to the extent that the plaintiffs proceeded by way of writ, a private law procedure, the action was an abuse of the process of court as the plaintiffs were primarily seeking to challenge an administrative decision. That being the case, the respondents contended, the claim should have been brought by way of judicial review. The appellants, it was further argued, were bringing the action by writ in order to avoid the three-month time limit for making an application for review. Accordingly, the respondents urged the court to find that the time limit started to run from the date of the original decision, rather than from the date of gazetting the closure, an argument which, if upheld, meant that the claim was out of time.

The CCA, agreeing with the Grand Court, held that the material time for purposes of computing the limitation period was the date of making the original decision rather than the date on which the road closure was gazetted. The appeal court emphasized that this was so because the appellant's pleadings focussed on the agreement itself and not the later working out of the commitments it contained.

The Grand Court had considered but did not decide whether the appellant's challenge was an abuse of process in that it should have been brought by way of an ordinary application for judicial review under Order 53 of the *Grand Court Rules*, rather than under section 26 of the Constitution using the procedure prescribed under Order 77A of the Rules; this latter Order allows the bringing of an action using a petition or a writ. The CCA stated that it was reluctant to make a conclusive decision on the issue since it had not been fully argued before it and that to decide it was unnecessary for purposes of determining the appeal. However, in *Coe* the CCA considered it proper to consider 'in outline' the place of the exclusivity principle in the law of the Cayman Islands.¹⁵

The CCA was satisfied that the exclusivity principle was part of Cayman law, that is, that challenges to governmental acts and decisions should primarily be advanced by way of applications for judicial review and, to pursue them by writ, was tantamount to an abuse of process. It observed that the principle had, however, been eroded by the adoption of the section 26 challenge in the 2009 Constitution, enlarging the jurisdiction of the courts by allowing the Grand Court to hear writ actions if there were alleged breaches of protected personal rights or freedoms. The two different procedures, it observed, could properly co-exist but that it was important to differentiate between the spheres in which each should properly be used.

In that regard, the CCA stated that it was clear that cases *not* involving alleged breaches of the Bill of Rights (and this would include cases not involving the alleged breach of "personal rights and freedoms" but rather concerning the breach of "governmental

¹⁵ Above n. 12 at paras 74-84.

responsibilities”) should still be brought as ordinary cases of judicial review. It also stated that, although *some* constitutional claims could now be brought by writ actions, section 26 procedure should not be permitted to become a general substitute for the established procedure of seeking relief by way of judicial review of administrative action. Further, the court said that it would certainly amount to an abuse of process for a litigant to adopt the constitutional claim procedure *solely* for the purpose of avoiding the need to apply for leave to seek judicial review, with its shorter limitation period.

Finally, the CCA said that this approach would emphasize in general terms the distinction between: (a) the protection of the fundamental human rights and principles set out in the Cayman Bill of Rights and elsewhere (for example, in the European Convention on Human Rights); and (b) the observance of the responsibilities of government which are concerned with the lawful administration and furtherance of constitutionally important objectives, such as the protection of the environment and the advancement of education. The distinction, it said, might canalize the parallel remedies available to litigants and also reflect the need to support and enhance by constitutional protection the normal procedures of judicial review. In other words, although the principle of exclusivity normally requires that challenges against alleged unlawful governmental acts or decision be pursued by way of judicial review, where the act or decision amounts to a breach of a personal right or freedom, section 26 may be resorted to. Effectively, therefore, actions for breach of “governmental responsibilities” must be brought by way of judicial review and not section 26 procedure.

In order to examine the effect of these statutory provisions on the five rules, it is important to note the approach of the courts to reading statutes enacted against the background of common law.

How Statutes Affect the Common Law

Historical Factors

The effect of statutes on the common law has had a tortured history, partly steeped in the constitutional development of England. There was a time when some Judges refused to give effect to statutes that were in contravention of the common law.¹⁶ Later, when Judges universally accepted statutes as a legitimate form of law, the mischief rule emerged. The rule received its most famous expression in *Heydon’s Case* decided in 1584. There it was said:

That for the sure and true interpretation of all statutes in general (be they penal or beneficial, restrictive or enlarging of the common law) four things are to be discerned and considered: (1) what was the common law before the passing of the Act; (2) what

¹⁶ For example, Coke CJ, who once asserted a long time ago that an Act of Parliament cannot overrule the principles of the common law. See references in Daniel Greenberg, *Craies on Legislation*, 8th ed. (Sweet and Maxwell: London, 2004) 498.

was the mischief and defect for which the common law did not provide; (3) what remedy the Parliament hath resolved and appointed to cure the disease of the commonwealth; (4) the true reason of the remedy. And then the office of all judges is always to make such construction as shall suppress the mischief and advance the remedy, and to suppress subtle inventions and evasions for the continuance of the mischief and *pro privato commodo*, and to add force and life to the cure and remedy according to the true intent of the makers of the Act *pro bono publico*.¹⁷

Miers and Page have observed that arguments based on the mischief later gave way to those based on the actual words used in an Act.¹⁸ The authors note that this shift began following the emergence of the doctrine of the legislative supremacy of Parliament and was considerably hastened by the development of more exact drafting styles in the 19th century. They also note, significantly, that the judiciary's insistence on interpreting Acts of Parliament according to the precise words used had two historically important aspects, namely: the judiciary's preference for the common law and consequent hostility to legislation as a source of law; and the entrenchment of literal interpretation reflected the judiciary's conception of their role as interpreters after the supremacy of Parliament had become established.¹⁹

The Modern Approach

Today the approach to construing legislation that touches upon the common law is largely free from the dynamics of constitutional development. Courts now examine a statute and determine on a fair reading of it what the intention of Parliament was. The rule is that the common law continues to be valid unless Parliament expressly or by necessary implication extinguishes it.²⁰ It is also worth noting that a statute may be declaratory of the common law or, in some cases, a statutory rule may co-exist with a common law rule.²¹ Indeed, when legislative counsel are aware that they are dealing with an area that is wholly or partly governed by the common law, they will generally use words that make this clear, such as, “despite any other rule of law to the contrary”, or words to that effect.

Daniel Greenberg, referring to the presumption, has observed that:

Although the notion is of less and less importance as there are fewer and fewer areas of law where displacement of case law by legislation is sufficiently recent for common law rules to be both well-remembered and capable of application in modern

¹⁷ 3 Co. Rep. 7a; 76 ER 637, 638.

¹⁸ *Legislation* (Sweet and Maxwell: London, 1982) at 185.

¹⁹ *Ibid.* Before all this, there were judges such as Coke C.J. who had asserted that an Act of Parliament cannot overrule the principles of the common law.

²⁰ See Ruth Sullivan, *Sullivan and Driedger on the Construction of Statutes*, 6th ed. (Lexis Nexis Canada: Markham, 2014) at 538 citing 36 *Halsbury*, 3d ed. at para. 625.

²¹ *B. v Attorney General of New Zealand* [2003] 4 All ER 833 (PC).

circumstances, it retains importance in connection with long-standing concepts of law which pervade a number of different areas of substance.²²

Thus whereas the presumption against alteration in the common law exists, it is to be applied fairly, free of the antagonistic context in which it existed previously.

Elmer A Driedger, the famous Canadian legislative counsel and author, best captures this approach by stating that:

Perhaps in the end the presumption means no more than that where two reasonable constructions are open and one of these would result in a fundamental change in the principles or philosophy underlying our system of law, the courts will prefer the other.²³

Issues Discussed

Exclusivity Principle

As we saw above, according to this principle, if the matter is one of public law, the dissatisfied party *must* seek redress by way of judicial review. The rule can have some interesting results. In *O'Reilly v Mackman*²⁴ the applicants took part in a prison riot. As a result, the Board of Visitors (the disciplinary authority) reduced their remission of sentence. The applicants brought proceedings alleging breach of natural justice. They respectively brought actions, some by writ and others by originating summons, which are means by which private law proceedings are initiated. It was common ground that the issue was one of public law. Accordingly, the action could have been commenced by way of judicial review so long as they sought leave within three months as the law required. The court had to decide whether it was an abuse of the process of court to use the alternative avenue (private law proceedings by originating summons or writ).

Lord Diplock observed that:

If what would emerge is that his complaint is not of an infringement of any of his rights that are entitled to protection in public law, but may be an infringement of his rights in private law and that this is not a subject for judicial review, the court has power under rule 9(5), instead of refusing the application, to order proceedings to continue as if they had begun by writ ...²⁵

²² *Legislation* (Sweet and Maxwell 2004) at 499, 500.

²³ *Construction of Statutes* 2nd ed. (Butterworths 1983) 213. See also on the evolution of statutory interpretation, Sullivan, above n. 20 at 10-15.

²⁴ [1983] 2 AC 237.

²⁵ *Ibid.* at 283, 284.

Finally, Lord Diplock noted that before the reforms introduced in 1977 by Order 53 (later replaced by the *Civil Procedure Rules of 1998*) in the United Kingdom, which now allows damages to be sought in judicial review proceedings, applicants for review faced procedural problems relating to the ability to choose between private and public law proceedings. He then went on to say:

. . . now that those disadvantages to applicants have been removed and all remedies for infringement of rights protected by public law can be obtained upon an application for judicial review, as also can remedies for infringement of rights under private law if such infringements of rights should also be involved, it would in my view as a general rule be contrary to public policy, and as such an abuse of the process of the court to permit a person seeking to establish that a decision of a public authority infringed rights to which he was entitled to protection under public law to proceed by way of an ordinary action and by this means evade the provisions of Order 53 for the protection of such authorities.²⁶

Turning to the Cayman Islands, the CCA accepted in *Coe* that the principle of exclusivity was part of the law of Cayman. But in the case of Cayman the issue is more complicated. In England, when one speaks of a public law remedy, they would usually be referring to judicial review. And the significant part of that, for this purpose, is the need for leave. In Cayman section 19 of the Constitution gives judicial review a constitutional basis while leaving intact the relevant rules of procedure, including the three-month limit. Also, the section 26 remedy is also in a sense a public law remedy in that, first, it is intended to safeguard fundamental rights and freedoms in a manner similar to judicial review and, second, can be enforced also by a petition, which in this context can also be viewed as a kind of public remedy (in addition to a writ). It is therefore simplistic to suggest in general terms that the exclusivity principle exists in Cayman. Perhaps it is more accurate to say that it exists except to the extent that it has been varied by the Constitutional provisions in section 26. This is because that section does not fit neatly into the public-private dichotomy. It is rather a remedy *sui generis*, since it has a dual character.

On the assumption that human rights are a matter of public law and that section 26 is a public law remedy, then all human rights matters can be brought under section 26 unless the matter is one relating to government responsibilities, in which case, according to the CCA, it must be brought under section 19.²⁷ That would seem to exclude bringing an ordinary civil action to address a human rights matter. It is doubtful that the intention of the legislature would have been to exclude general civil remedies.

This doubt does not exist in the Turks and Caicos Islands Constitution. That is because section 21(1) states that the right exists, “without prejudice to any other action with respect

²⁶ Ibid. at 285.

²⁷ Above n. 13 at para 85.

to the same matter which is lawfully available”. This seems to suggest that even if the matter is one which has both public and private law implications, the litigant is not compelled to seek a public law remedy, that is, judicial review or an enforcement action, if, for the sake of argument, one takes enforcement action to also be a public law remedy. In other words, a matter that can be pursued by way of judicial review or enforcement action can also be pursued using general civil remedies.

Availability of Other Remedies

In deciding whether to grant leave for judicial review, the existence or otherwise of other remedies is relevant but not decisive. Under common law, judicial review is not open to an applicant if there are other equally effective remedies.²⁸ However, in Cayman, as elsewhere, the line between private and public law remedies has not been always easy to draw. The Privy Council case of *McLaughlin v Governor*,²⁹ originating in Cayman, exemplifies one approach to the matter. In that case there were statutory regulations by which government could abolish a post but only after giving the holder an opportunity to make representations. The applicant for judicial review was not given that opportunity. The Privy Council affirmed a decision of the CCA declaring the termination of employment to be unlawful, and ordered that all arrears of salary and benefits be paid, less any earnings the appellant may have earned since then. The Crown did not raise the issue of whether this particular employment matter was appropriate for judicial review.

However, in *Darkoh-Agyemang v Director of Studies*,³⁰ the applicant challenged a termination of employment for alleged sexual harassment. He was employed on contract but his contract was also governed by statutory regulations. The Grand Court refused to make a ruling on the application, holding that since he disputed the allegations, which were the purported grounds of termination, this was a triable issue best resolved by a regular civil trial.

The issue of other remedies was also considered in *Simamba v Chief Officer*.³¹ There the applicant, a government employee, was not allowed to teach some courses part time, outside working hours. Anticipating the argument as to other remedies, he argued that, in his particular case, the remedy of a regular civil trial would not be effective because of the nature of his proposed arrangement for teaching. It was explained that he would not earn a specified fee but that the courses would be advertised and that, if persons signed up, then he would derive a nominal income. The court denied the application stating that:

²⁸ *R v Chief Constable of Merseyside Police ex parte Calveley* [1986] 2 WLR 144; *R v (Sivasubramaniam) v Wandsworth Country Court* [2003] 1 WLR 475; *BX v Secretary of State for the Home Department* [2010] 1 WLR 2463.

²⁹ (2007) CILR 321 (PC).

³⁰ (1998) CILR 266 (Grand Ct).

³¹ Cause no G60/2014 (Grand Ct, 21 Nov). The writer was the applicant and argued the case himself.

I have no hesitation in finding that that Applicant’s contract of employment provides him with an adequate and comprehensive private law remedy. He may issue proceedings claiming damages to reflect his potential lost income which is capable of being assessed either as special damages or, failing sufficient particularity, as general damages based on lost opportunity. He may claim a declaration that there is in fact no conflict between his teaching course and his employment duties. The civil court would hear evidence and see documentation (including no doubt the Applicant’s course materials) and determine those issues far better equipped and informed than a Judge in the Administrative Court.³²

It is difficult to follow why a person who has already brought an application for judicial review should be required to bring another action, a similar one, seeking a declaration. In this case, the central issue was whether there was a conflict of interest where a person who works in a particular profession is to teach part-time in that same area. There was abundant affidavit evidence from which this issue could have been determined. Surely, the fact that there might have been insufficient evidence from which an assessment of damages could be made or that there was an element of private rights could not have justified the court in refusing to at least decide on the conflict of interest issue. Also, if the court needed a few more facts to make a reasonable decision, it could have ordered further affidavits to be filed.

Further, this approach is somewhat different from that taken in the case of *Coe*³³ where, as we saw above, a challenge to the exercise of a statutory power was commenced by writ. As already noted above, the issue arose whether this was an abuse of process. Henderson J in the Grand Court cited a long line of authorities, beginning with *O’Reilly v Mackman*,³⁴ which held that the mere fact that there was an element of a private right did not disqualify a matter from being brought by way of judicial review. Indeed, the court went so far as to say that “the force of the exclusivity principle has been somewhat eroded by the adoption of the new Constitution and the catalogue of rights found in it.”³⁵

In this connection, Justice Henderson referred to section 26(1) of the Cayman Constitution which, as noted above, enlarged the jurisdiction of the Grand Court to the effect that where it is claimed that a governmental act or decision has breached a personal right or freedom, a person may seek relief from the court. He also cited with approval the words of the Privy Council in *AG of Trinidad and Tobago v Ramanoop*³⁶ where it was said that, “As a general rule there must be some feature which, at least arguably, indicates that the means of legal redress otherwise available would not be adequate.”

³² Ibid. at para 25.

³³ [2014] 1 CILR 251. The appeal case is also referred to in this article.

³⁴ Above n. 24.

³⁵ Ibid. at para 25.

³⁶ [2005] 2 WLR 1324 (PC).

The issue of other remedies is not dealt with either in section 19 or 26 of the Cayman Constitution. However, it is safe to assume that, to the extent that the former is merely declaratory of the ground of judicial review, it is implied that the common law rules as to the existence of other equally effective remedies continue to be good law. That said, it is not clear if this can be implied also in relation to section 26, which has no similar common law background.

This particular matter is somewhat dealt with under the Turk and Caicos Islands Constitution. As observed above, there, section 21(1) provides for a litigant to seek enforcement action from the Supreme Court but without prejudice to other available remedies. However, subsection (2) goes on to say that the court must not order enforcement “if it is satisfied that adequate means of redress are or have been available to the person concerned under any other law.” The effect seems to be that all other remedies remain available but they have to be used if they are adequate. Effectively, this equates section 21 to the traditional limits of judicial review. It is submitted that in the Cayman Islands, this cannot be implied safely in relation to section 26 of its Constitution.

Exhaustion of Statutory Remedies

Where Parliament has instituted a comprehensive appeal structure under a statute, judicial review should not be used to circumvent those procedures.³⁷ Statutory rights of appeal must be exhausted.³⁸ Where, however, there are exceptional circumstances (such as inordinate delays in the proceedings) a court may grant leave to apply for judicial review even if those remedies have not been exhausted. In *R v Chief Constable of Merseyside Police ex parte Calveley*,³⁹ complaints were made against five police officers concerning an incident. Under the relevant rules⁴⁰ the police officers should have been informed of the complaints “as soon as is practicable”. They were informed two years and five months from the date of the complaints. The Chief Constable set a disciplinary hearing that was three years and three months from the date of the complaints. On a preliminary objection, the police officers contended that the delay in serving the notices was so prejudicial that it was unfair to continue the hearing. The Chief Constable rejected the contention and found the police officers guilty of the charges, dismissing two of them and requiring the others to resign.

The police officers appealed that decision under applicable rules. However, before the hearing, they applied for an order of *certiorari* to quash the Chief Constable’s decision. The Divisional Court refused the application on the ground that it was premature, in that the police officers had not exhausted the internal appeal procedure. On appeal, the UK Court of

³⁷ *R v Secretary of State for Social Services ex parte Connolly* [1986] 1 WLR 421.

³⁸ *R v Secretary of State for Home Department ex parte Swati* [1986] 1 WLR 477.

³⁹ [1986] 2 WLR 144.

⁴⁰ Section 7 of the *Police (Discipline) Regulations*, 1977.

Appeal held that the failure to notify the police officers as soon as was practicable amounted to such a serious departure from the police disciplinary procedure that, even though the internal rights of appeal had not been exhausted, the court would exercise its discretion to grant judicial review. Further, on the facts, an order of certiorari was granted to quash the Chief Constable's decision.

The Cayman Constitution does not state in either section 19 or 26 if all statutory remedies should be exhausted. However, at least in relation to section 19, this can be safely assumed and is so applied by the courts but it is less clear in relation to section 26.

Time Limit and Choice of Procedure

It will be recalled that the CCA made the distinction that the ordinary process of judicial review (not the special procedure under section 26) must be used where the allegation does *not* involve a breach of a personal right or freedom under the Bill of Rights or, in other words, where it has to do with “governmental responsibilities”.

This distinction is not clear from the Bill of Rights itself. Section 26 speaks in generic terms of a breach or threatened breach of the Bill of Rights. It does not make a distinction between rights and freedoms enjoyed in a personal capacity and those enjoyed by individuals as part of the community to which the government has a duty.

The distinction is also likely to be difficult to apply consistently in practice. For example, it is clear that a person who claims denial of *freedom of expression* protected by section 11 of the Cayman Constitution may bring an action under section 26. The distinction suggests that a person who claims that matters relating to the *environment* have been decided unreasonably in a particular matter cannot bring an action under section 26 but rather section 19. But where the association was denied a right to publish a statement in a newspaper owned by the government, what would be the right section under which an environmental association or a member of the association can bring an action?

Traditionally, this has been dealt with purely as a matter of *locus standi*. To try and make a distinction that translates into determining what kind of standing a person has (personal or group) seems to be an unjustified departure from current approaches in the law. Lord Denning gave an account of how restrictive forms of standing were over the years made more liberal.⁴¹ He referred to the *Sidebotham* case⁴² in the 19th century where it was decided that a person is not “aggrieved” unless they suffer particular loss in money or property rights. Later cases such as *R v Paddington Valuation Officer ex parte Peachey Property Corporation Ltd*⁴³ held that if a ratepayer or other person finds their name included in a valuation list which is invalid, they are entitled to come to the court and apply to have it

⁴¹ *The Discipline of Law* (Butterworths: London, 1979) at 115-7.

⁴² (1880) 14 Ch D 458 at 465.

⁴³ [1966] 1 QB 380, especially Lord Denning at 400-1.

quashed. This less restrictive approach to standing made it unnecessary to delve into whether or not the particular person had suffered direct damage and therefore whether they had standing. Today standing based on group rights is an accepted principle,⁴⁴ even if courts sometimes differ in its application. Thus, an approach that assigns a procedure depending on the kind of standing under which the process may be commenced is at variance with current attitudes in the law.

It is also important to note that Order 53 Rule 9(5) of the *Grand Court Rules* provides that:

Where the relief sought is a declaration, an injunction or damages and the Court considers that it should not be granted on an application for judicial review but might have been granted if it had been sought in an action begun by writ by the applicant at the time of making his application, the Court may, instead of refusing the application, order the proceedings to continue as if they had been begun by writ.⁴⁵

The reason for mentioning this rule in this context is that the CCA's position takes court procedure back to the days when standing was decided on the basis of direct harm done to a person; when originating process had to be issued *de novo* if the wrong procedure had been used; or even to the time when a case brought in a common law court would fail merely because it should have been brought in a court of common law rather than a court of equity.⁴⁶

Third, since the distinction adopted by the CCA would limit the number of cases brought under section 26 (which has a longer limitation period) it would effectively reduce the number of cases that can be litigated. This reduces the efficacy of the provision for the citizen and increases the scope for government decisions to remain unchallenged.

Fourth, this distinction is intended to retain, as much as possible, the limitations existing in the court rules as to time limits. To that extent it hearkens back to the time when judges were sceptical of statute law. In an era when rules of procedure have been simplified to avoid overly technical rules, the better view seems to be that the two sections must be viewed as being alternative ways for a litigant to proceed until the legislature clarifies the position.

Fifth, the attempted distinction between personal rights and freedoms, on the one hand, and governmental responsibilities, on the other, also means that, if it were to be applied as a strict rule, then it would raise an interesting procedural dimension. It would mean that when a person brings an action under section 26, a preliminary objection can be raised as to whether a particular section of the *Bill of Rights* protects a personal right or freedom, or

⁴⁴ See also many other recent cases relating to pressure groups such as *R v Secretary of State for the Environment ex parte Greenpeace (No 2)* [1994] 4 All ER 352; *R v Secretary of State for Foreign and Commonwealth Affairs ex part World Development Movement Ltd.* [1995] 1 All ER 611.

⁴⁵ (1995 Rev).

⁴⁶ The *Judicature Acts* of the 1870s combined the courts of law and equity. In the event of conflict, equity was to prevail.

merely imposes governmental responsibilities. Whereas the *Grand Court Rules* provide for the flexible procedure whereby a court may order that a matter brought by way of judicial review proceed as if begun by writ, there is no equivalent provision in Order 77A, which governs the procedure for section 26 applications. Thus, if a matter were brought under section 26 and the court were to rule that it should have been brought under section 19, the court, it seems, would have no power to allow it to proceed as if begun under section 19. A litigant would have to bring a fresh action under section 19 with the likelihood that, by that time the three-month time limit would almost certainly have expired except in the most exotic of circumstances. This militates against the reforms referred to above which were intended to avoid the choice of procedure being fatal.

The Constitution of TCI potentially avoids these problems by omitting to prescribe a period during which enforcement action may be sought and instead empowering the Legislature to make procedural rules with respect to the time within which an application, reference or appeal is to be brought.⁴⁷

In section II above we noted the decisions of the CCA in relation to the fixing of the material date of a decision or act and the bringing of an action under section 26 of the Cayman Constitution just to avoid having to seek leave. In relation to the date of the original decision, the court refused to accept that the material date of the decision was the date of gazettal of the decision. Instead, it held that the material date was the actual date of the original decision, a decision made in a non-public setting by the government but later announced. This part of the court decision seemed to depend entirely on the fact that the matter had received much media attention even before gazettal and that the arguments advanced in court were on the basis of the government decision. Ironically, it is the distinction between the contravention of a personal right or freedom, and of governmental responsibilities, that may have guided the court in making a better decision in relation to the material date. In a matter where the issue is one of governmental responsibility and the relevant law (the *Roads Law* in this case) provided for gazettal of a road closure, the better view would have been to hold the date of gazettal to be the material date of the decision for this had to do with governmental responsibilities whose performance was supposed to be gazetted.

Need or Otherwise for Leave

As alluded to above,⁴⁸ in regular civil proceedings of a private nature in many parts of the Commonwealth, including Cayman and the United Kingdom, there is no general requirement for leave. For example, a person suing for breach of contract against another person may commence proceedings without first seeking the permission of the court.

⁴⁷ Section 21(5) and (6).

⁴⁸ See “Restrictions on Judicial Review: Common Law and Statutory”, above at p. 5.

However, many jurisdictions stipulate grounds upon which regular civil suits may be struck off without a full hearing. These include that the suit is frivolous or vexatious or that it is doomed to failure. Thus, even if a case appears on the face of it to be weak, a court has to allow it to proceed unless it is “plain and obvious”⁴⁹ that it cannot in any circumstances succeed. Further, a special application has to be made by the defendant and courts rarely grant such applications. On the other hand, in judicial review proceedings, where as a matter of course an applicant has to first apply for leave before making the actual application, the applicant has to advance enough basic substantive arguments to show that they have an arguable case. In effect, therefore, there is a greater burden on an applicant in a judicial review case early in the proceedings to, so to speak, start making a case. By necessary implication, in opposing an application for leave, the respondent’s burden is not as heavy as that of a defendant seeking a matter to be struck out in regular civil proceedings. These different approaches translate into the position that the applicant in a judicial review matter has to meet a higher threshold at the beginning of the proceedings. This comparatively higher threshold for the granting of leave in judicial review matters, coupled with the fact that the respondent does not need to make a special application that leave be refused, is often justified on the basis that it is undesirable that decisions taken by public authorities on public matters be easily open to challenge. If, the argument goes, such proceedings could be struck off only upon achieving the same high threshold as in regular civil proceedings or were to be accorded a long limitation period, the efficiency of government may be impeded.

This argument assumes incorrectly that decisions by government institutions are more likely to be correct than a citizens’ opposition to them. Besides, not all decisions by government institutions affect major aspects of government as was the case in *Coe*, where the government was proposing to re-route a major road that had been in existence for a long time. For example, many judicial review proceedings have to do with matters as minor (from a government perspective) as the denial of a single-taxi licence for an individual.

What is more, as noted above, some jurisdictions, such as Cayman and a number of other Commonwealth jurisdictions, have enacted enforcement provisions regarding human rights matters.⁵⁰ Proceedings under these provisions do not require leave. Clearly, the possible inefficiency that may result if such decisions could be challenged without leave was not a concern and has not seriously impeded government operations. Indeed, in countries like Canada, leave is not generally required for judicial review and yet governments have not been unduly hampered in the performance of their functions. It seems therefore that the requirement for leave unduly fetters the citizen who may wish to challenge a government decision and is therefore not good law.

⁴⁹ For example, among many, see *Attorney General v Denbo* (1990-91) CILR 245 (Grand Ct).

⁵⁰ Above n. 9.

Approaches to Addressing Certain Imperfections of Judicial Review Procedure

Below is a summary of the approaches governments have used to deal with some of the issues raised. I point out how some of these have not themselves sufficiently addressed some matters of concern.

Exclusivity Principle

It was observed that the Turks and Caicos Islands Constitution confers the right to enforcement action “without prejudice” to other remedies that are lawfully available. This can be read to mean that a litigant does not have to carefully choose under which section to make an application, or between a public and private law remedy. In other words, they need not address the distinction made by the CCA regarding personal rights and freedoms, on the one hand, and government responsibilities, on the other. And yet the TCI Constitution still goes on to obfuscate the issue by stating that no action may be taken by the court “if it is satisfied that adequate means of redress are or have been available to the person concerned under any other law.” Thus, in one breath the Constitution says that a litigant who has a public law dispute can also pursue private remedies, but then goes on to say that if those other remedies are adequate, they must pursue them. There is clearly a need to choose between one of the two provisions: the one preserving the other remedies as being equal and concurrent; and the other restricting public law remedies if a private one would have been adequate.

The *Judicial Review Act* of Trinidad and Tobago, section 13, provides that if an action commenced by writ should have been commenced as a judicial review matter, the court can allow it to proceed as a JR subject to amendments to the proceedings.⁵¹ The *Judicial Review Act* of Guyana has a similar provision in section 12.⁵² Effectively, therefore, the exclusivity principle does not necessarily result in the particular proceeding failing. In the past, the application had to be denied and the aggrieved person needed to bring fresh, private law proceedings.

Availability of Other Remedies

Section 21(1) of the Turks and Caicos Islands Constitution makes it clear that no order can be made if the court is “satisfied that adequate means of redress are or have been available to the person concerned under any other law.” This seems to impose the same rule as would be implied under section 19 of the Cayman Constitution. From a drafting perspective, it would have been neater to address that issue by inserting similar wording in section 19. That would have created harmony between the two provisions.

⁵¹Laws of Trinidad and Tobago, Cap. 7:08, Act 60 of 2000.

⁵² Act 23 of 2010.

The Trinidad and Tobago *Judicial Review Act* provides in section 12 that if body sued is not subject to judicial review, the court may allow the case to proceed subject to amendments to proceedings. Section 11 of the *Judicial Review Act* of Guyana makes a similar provision.⁵³

Exhaustion of Statutory Remedies

The Cayman Constitution does not, under either section 19 or 26, deal with the exhaustion of remedies, but the rule can at least be safely implied under the former. Section 21(1) of the Turks and Caicos Islands Constitution does somewhat touch on the issue. The stipulation in subsection (1) that no action should be taken if “adequate means of redress are or have been available . . . under any other law” can be read as implying also that if there are any statutory remedies they should have been exhausted. This matter also needed express treatment in section 26 of the Cayman Constitution.

Section 9 of the Trinidad and Tobago *Judicial Review Act* provides that, except in exceptional circumstances, “alternative procedure” under a written law is to be pursued before leave can be granted. In contrast, under section 9 of the Guyanese *Judicial Review Act* review is not to be refused because any other written law provides other remedies.

Time Limits and Choice of Procedures

In dealing with the issue of synchronicity, the most obvious matter has to do with the time limit. In the Cayman Constitution, the clash between the one-year time limit in section 26 and the three-month limit in section 19 could have been avoided by simply omitting the time limit in section 26 and leaving it, as in the Turks and Caicos Islands Constitution, to be determined in legislation made by the legislature. Better still, it could have been left to be determined by rules of court, as in relation to judicial review.

Section 11(1) of the Trinidad and Tobago *Judicial Review Act* provides that an application must be made “promptly and in any event within 3 months . . . unless the Court considers that there is good reason for extending the period”. However, subsection (2) states that this a Court “may refuse leave to apply for judicial review if it considers that there has been undue delay in making the application, and that the grant of any relief would cause substantial hardship to, or substantially prejudice the rights of any person, or would be detrimental to good administration”. It is unclear whether an application made within 3 months, but which in the circumstances of its own was taken *with* undue delay, is admissible. In other words, it is not clear which of the two subsections provides the true time limit. The Guyana *Judicial Review Act*, section 11, leaves this to be determined by the rules of court.

The British Columbia *Judicial Review Procedure Act*, section 11, provides that an application for judicial review is not barred by passage of time unless: (a) an enactment otherwise provides; and (b) the court considers that substantial prejudice or hardship will

⁵³ Ibid.

result to any other person affected by reason of delay.⁵⁴ In Ontario, the *Judicial Review Procedure Act* provides that despite any limitation of time for bringing a judicial review application imposed under any law, the court may extend the time if there are apparent grounds of relief and no substantial prejudice or hardship will result.⁵⁵

Need or Otherwise for Leave

In addition to the conflict relating to time limit, there is the related issue that leave can be implied under section 19 of the Cayman Constitution since it deals with judicial review, but leave cannot be easily implied in relation to section 26. Regardless of the true interpretation, it does not stand to reason as to why there must be leave with respect to one and not the other. The time discrepancy and the need or otherwise for leave is inconsistent with the fact that both sections deal with public law. In that regard, the attempt by the CCA to make a general distinction as to what kinds of actions may be brought under which provision is not functional and does not give due regard to the fact that the two actions are essentially the same in nature and there was no good reason for treating them differently.

⁵⁴ RSBC 1996, c. 241.

⁵⁵ RSO 1990, c. J.1, s. 5. On some procedural issues that could restrict judicial review including time, see Joe McIntyre and Lorne Neudorf, “Judicial review reform: avoiding effective review through procedural means” (2016), 16 *Oxford University Commonwealth Law Journal* 85-99.

