BINGHAM CENTRE FOR THE RULE OF LAW

Government Amendments to the Police, Crime, Sentencing and Courts Bill: A Rule of Law Analysis

Katie Lines, 14 January 2022

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British Institute of International and Comparative Law

Executive Summary

On 15 November 2021, the Government introduced 18 pages of new proposed amendments to the Police, Crime, Sentencing and Courts Bill. By this time the Bill had already completed its initial passage through the Commons and had reached committee stage in the Lords. The Lords have had no substantive time to scrutinise the new amendments, and the House of Commons has been almost entirely bypassed.

The Rule of Law protects the supremacy of the legislature over the executive. It also requires the process for enacting law to be transparent, accountable, inclusive and democratic. Parliament must have sufficient time to scrutinise and debate proposed changes to the law, and the executive must abide by constitutional norms governing the legislative process. One such constitutional norm is that amendments should not normally be tabled in the Lords after second reading, as this does not allow the Lords sufficient time for scrutiny and avoids any meaningful scrutiny by the democratically elected House.

The new amendments require proper scrutiny. They make substantial and controversial changes to the law governing the right to protest, including some which raise significant Rule of Law issues. All the amendments interfere with the rights of freedom of expression and freedom of assembly protected by Articles 10 and 11 of the European Convention on Human Rights ("ECHR"). Any restrictions on the rights protected by Articles 10 and 11 must be a lawful, necessary and proportionate response to a legitimate aim, and it is questionable whether these amendments satisfy that requirement. If the restrictions are challenged under the European Convention on Human Rights, the lack of proper democratic scrutiny by Parliament will be taken into account by the European Court of Human Rights and will weigh against any argument the Government wishes to make that the restrictions are within the UK's margin of appreciation.

The Government has disregarded basic Rule of Law standards and shown contempt for Parliament by introducing these amendments at such a late stage. The Government should withdraw the new amendments. If it still wishes to introduce these restrictions then it must do so in a manner that is constitutionally proper, by introducing a new Bill. If the Government fails to withdraw the amendments, then the Lords should vote against them during report stage on 17 January 2022. The amendments are numbered 148-159 in the sixth marshalled list of amendments to be moved on report.

Summary of amendments and examples of specific Rule of Law concerns

- Amendments 148 and 149 create the offences of "locking on" and "being equipped for locking on". The threshold for conviction is very low and raises Rule of Law concerns around the certainty and foreseeability of the law.
- Amendment 150 will significantly increase the penalty for wilful obstruction of the highway from a fine, to up to 51 weeks imprisonment. It is not clear that such an increase is justified.
- Amendments 151- 153 introduce a variety of new offences in relation to the obstruction of major transport works, and the interference with the use or operation of key national infrastructure. A number of these offences are incredibly broad and unacceptably vague, leading to Rule of Law concerns regarding legal certainty and the foreseeability of the law.
- Amendment 154 expands existing stop and search powers to cover protest-related offences, and amendments 155-158 create a new suspicion-less stop and search power. The police are given an extremely broad discretion to conduct stop and searches, raising Rule of Law concerns around the potential for the arbitrary and discriminatory exercise of police power.
- Amendment 159 creates a new type of civil order, a serious disruption prevention order ('SDPO'), which can be imposed with or without a conviction. The imposition of an SDPO on individuals who have not committed a criminal offence seems hard to justify. In addition, the threshold for the imposition of an SDPO lacks legal certainty and foreseeability. It is also concerning that the SDPO regime gives the police an extremely broad discretion to request the imposition of wide-ranging restrictions and requirements. Finally, the Secretary of State is given a power to "issue guidance" in relation to SDPOs, to which the police "must have regard". The Bill does not include sufficient safeguards to prevent the guidance being used to restrict protest rights in an arbitrary manner.

About the Bingham Centre for the Rule of Law

The Bingham Centre is an independent, non-partisan organisation that exists to advance the Rule of Law worldwide. Established in 2010 as part of the British Institute of International and Comparative Law (BIICL), the Centre was brought into being to pursue Tom Bingham's inspiring vision: a world in which every society is governed by the Rule of Law "in the interests of good government and peace at home and in the world at large." The Rt Hon Lord Bingham of Cornhill KG was the pre-eminent UK judge of his generation, who crowned his judicial career by leaving us arguably the best account of what the Rule of Law means in practice and why it is so important in any civilised society -too important to remain the exclusive preserve of courts and lawyers. One of our strategic aims is to increase discussion about the meaning and importance of the Rule of Law in the political process.

- We carry out independent, rigorous and high quality research and analysis of the most significant Rule of Law issues of the day, both in the UK and internationally, including highlighting threats to the Rule of Law.
- We make strategic, impartial contributions to policy-making, law making or decision-making in order to defend and advance the Rule of Law, making practical recommendations and proposals based on our research.
- We hold events such as lectures, conferences, roundtables, seminars and webinars, to stimulate, inform and shape debate about the Rule of Law as a practical concept amongst law makers, policy makers, decision-makers and the wider public.
- We build Rule of Law capacity in a variety of ways, including by providing training, guidance, expert technical assistance, and cultivating Rule of Law leadership.
- We contribute to the building and sustaining of a Rule of Law community, both in the UK and internationally.

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Rule of Law Monitoring of Legislation Project

This Report is part of the Rule of Law Monitoring of Legislation Project. The project aims to systematically scrutinise Government Bills from the perspective of the Rule of Law, and to report on Bills which have significant Rule of Law implications. The goal is to provide independent, high quality legal analysis to assist both Houses of Parliament with its Rule of Law scrutiny of legislation. Previous Reports have been on the EU (Withdrawal Agreement) Bill and the Terrorist Offenders (Restriction of Early Release) Bill as well as on various coronavirus laws. Dr Ronan Cormacain is leading this Project.

The Report has been prepared by Katie Lines.

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Introduction

1. On 15 November 2021, the Government published 18 pages of new proposed amendments to the Police, Crime, Sentencing and Courts Bill.[1] The Bill had been introduced over 8 months earlier, on 9 March 2021. By the time the new amendments were published the Bill had already completed its initial passage through the Commons and had reached the end of committee stage in the Lords. Peers were able to scrutinise the amendments for around an hour and a half in the early hours of the morning, between 11.50pm and 1.15am, on the very last day of committee stage. Peers complained that this was "outrageous", "absurd" and "totally unacceptable", and that the House was wholly unable properly to scrutinise the new provisions.[2]

The Rule of Law and proper law-making procedures

2. The Rule of Law protects the supremacy of the legislature over the executive. It also requires the process for enacting law to be transparent, accountable, inclusive and democratic.[3] Parliament must have sufficient time to scrutinise and debate proposed changes to the law, and the executive must abide by constitutional norms governing the legislative process. One such constitutional norm is that the tabling of any amendments in the Lords after second reading is "strongly deprecated since Lords Members have only a limited time to consider them and move amendments to them".[4] The late tabling of amendments also avoids any meaningful scrutiny by the democratically elected House.

3. The new amendments to the Police, Crime, Sentencing and Courts Bill require proper scrutiny. They make substantial and controversial changes to the law governing the right to protest, including some which raise significant Rule of Law issues (see some examples below). The amendments raise a number of Rule of Law concerns regarding legal certainty and foreseeability, the arbitrary exercise of power, the principle of non-discrimination, and the excessive delegation of power. More broadly, all the amendments interfere with the rights of freedom of expression and freedom of assembly protected by Articles 10 and 11 of the European Convention on Human Rights ("ECHR"). The Rule of Law requires the effective protection of human rights, including ensuring that public authorities comply with their positive obligations under human rights law. Any restrictions on the rights protected by Articles 10 and 11 must be a lawful, necessary and proportionate response to a legitimate aim, and it is questionable whether these amendments satisfy that requirement. If the restrictions are challenged under the European Convention on Human Rights, the lack of proper democratic scrutiny by Parliament will be taken into account by the European Court of Human Rights and will weigh against any argument the Government wishes to make that the restrictions are within the UK's margin of appreciation.

4. The Government has disregarded basic Rule of Law standards and has shown contempt for Parliament by introducing these amendments at such a late stage. It has shown no respect for the constitutional norms of the legislative process or parliamentary supremacy. The Lords have had no substantive time to scrutinise the new amendments; the House of Commons has been almost entirely bypassed; there has been no time for the libraries to produce briefings; no impact assessment has been published; and the Joint Committee on Human Rights has not been able to engage in legislative scrutiny as it did with the rest of the Bill.

5. The Government should withdraw the new amendments. If it still wishes to introduce these restrictions, then it must do so in a manner that is constitutionally proper and Rule of Law compliant, by introducing a new Bill. If the Government fails to withdraw the amendments, then the Lords should vote against them during report stage on 17 January 2022.

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[1] The amendments are numbered 148-159 in the sixth marshalled list of amendments to be moved on report
[2] HL Deb 24 Nov 2021, vol 816
[3] Venice Commission 'The Rule of Law Checklist' (Council of Europe 2016), Benchmark A5 available at < https://www.venice.coe.int/images/SITE%20IMAGES/Publications/Rule_of_Law_Check_List.pdf>
[4] Erskine May: Parliamentary Practice (25th edition, 2019), paragraph 29.26 < https://erskinemay.parliament.uk/section/5459/tabling-of-amendments/>

Summary of proposed amendments and examples of Rule of Law concerns

Amendments 148 and 149: new offences of "locking on" and "being equipped for locking on"

6. Her Majesty's Inspectorate of Constabulary and Fire & Rescue Services ("HMICFRS") describes how protestors locking themselves to objects has "become an integral part of non-violent civil disobedience".[5] Amendments 148 and 149 would criminalise this act by creating the offences of "locking on" and "being equipped for locking on".

7. An individual can be convicted of "locking on" if: (1) they intentionally attach themselves or someone else to another person, an object, or land; or attach an object to another object or to land; (2) that act causes or is capable of causing serious disruption to two or more individuals or an organisation; and (3) the person intends the act to cause such disruption, or are reckless as to whether it will have this consequence. The offence carries a weighty potential penalty: those convicted of locking on can be sentenced to imprisonment for up to 51 weeks (i.e. virtually a whole year).

8. Entirely peaceful protestors will be caught by this offence. The threshold for conviction is astonishingly low and raises Rule of Law concerns around the certainty and foreseeability of the law.[6] An individual could commit the offence if they attach themselves or objects together in a way that causes no serious disruption, but is merely capable of doing so. How can protestors know whether an act of locking on is capable of causing serious disruption, if no disruption occurs? It is also unclear how firmly "attached" things have to be for the offence to be committed. Could an individual commit the offence merely by planting banners in the ground? Or by linking arms with other protestors?

9. An individual will commit the corresponding offence of "being equipped for locking on" if they have an object with them with the intention that it will be used in the course of, or in connection with, the commission by any person of the offence of "locking on". Again, the threshold for conviction is incredibly low. An individual can commit the offence merely by having the intention for an object to be used for locking on, even if no locking on offence is ever committed.

10. When Baroness Williams of Trafford tabled the Government's amendments, she described them as being "necessary" to "protect the public" from "unacceptable levels of disruption".[7] But the Government has not shown why it is necessary to create new "locking on" offences. An investigation into protest law undertaken by HMICFRS found that most interviewees – a group which included police officers - "did not wish to criminalise protest actions through the creation of a specific offence of locking on".[8]

Amendment 150: increase in penalty for wilful obstruction of the highway

11. Amendment 150 will significantly increase the penalty for wilful obstruction of the highway from a fine, to up to 51 weeks imprisonment. This is another proposal that does not appear to be in line with recommendations made by HMICFRS. HMICFRS considered whether sentences for protest offences should be increased in order to act as a deterrent, but concluded that "imposing harsher sentences for non-violent offences committed during protests is likely to be difficult to justify without reference to the individual facts of any particular case."[9]

[5] Her Majesty's Inspectorate of Constabulary and Fire and Rescue Services, 'Getting the balance right? An inspection of how effectively the police deal with protests' (March 2021), p. 46 < https://www.justiceinspectorates.gov.uk/hmicfrs/publications/getting-the-balance-right-an-inspection-of-how-effectively-the-police-deal-with-protests/>
[6] Venice Commission, 'Checklist', Benchmark B3
[7] HL Deb 24 Nov 2021, vol 816 col 979
[8] HMICFRS, 'Getting the balance right?', p. 125
[9] HMICFRS, 'Getting the balance right?', p. 140

Amendments 151-153: new offences of "obstruction of major transport works" and "interference with use or operation of key national infrastructure"

12. These amendments introduce a variety of new offences in relation to the obstruction of major transport works, and interference with the use or operation of key national infrastructure.

13. The maximum sentence for all offences under amendment 151 is significant: a term of imprisonment up to 51 weeks. But the offences created by amendment 151 are incredibly broad and, at times, unacceptably vague. For example, it will be an offence to interfere with, move or remove any apparatus which belongs to a construction worker and relates to the construction or maintenance of any major transport work. Key terms in this offence are left undefined. What does it mean to "interfere" with a piece of "apparatus"? Would this cover affixing a leaflet or poster to a piece of construction equipment, or a maintenance perimeter fence? It is hard to know how far these terms stretch, leading to Rule of Law concerns regarding legal certainty and the foreseeability of the law.[10]

14. Amendment 151 also makes it an offence to obstruct a construction worker from taking any steps that are reasonably necessary for the purpose of facilitating, or in connection with, the construction or maintenance of any major transport works. "Maintenance" is defined as including inspection, repair, adjustment, alteration, removal, reconstruction and replacement. Again, this is an incredibly vague and seemingly low threshold. Could the offence be committed if a protest prevents for a few hours the removal of waste from a relevant construction site? Or briefly delays a delivery to the site?

15. Amendments 152-153 create the offence of interfering with the use or operation of any key national infrastructure in England and Wales, where a person intends the act to interfere with the infrastructure or is reckless as to whether it will do so. The term "interfere" is defined as preventing the infrastructure from being used or operated to any extent for any of its intended purposes, which includes a significant delay in its operation. The maximum penalty is 12 months imprisonment.

16. "Key national infrastructure" is defined as being one of six types of infrastructure (road transport, rail, air transport, harbour, downstream oil, and newspaper printing), but the Secretary of State is granted a discretionary power to make regulations which add, remove or vary the kinds of infrastructure in this list. Liberty has noted the potential for this power to be used in an arbitrary manner to target particular protests to which the Secretary of State objects.[11] The regulations must be subject to the draft affirmative procedure, which provides some degree of protection against the arbitrary exercise of executive power. However, Parliament's ability to scrutinise regulations is inherently limited, and it is incredibly rare for Parliament to reject regulations made by the Secretary of State.

Amendments 154-158: new stop and search powers

17. Amendment 154 expands existing stop and search powers to create a new protest-specific stop and search power. The amendment allows a constable to stop and search a person or vehicle if the constable has reasonable grounds for suspecting that they will find an article made, adapted or intended for use in the course of or in connection with a specified list of protest-related offences.

18. Amendments 155-158 create an even broader and more extreme protest-related stop and search power: granting a constable the power to stop and search a person or vehicle without the officer needing prior suspicion. In other words, officers can stop and search any person or vehicle without needing reasonable grounds for suspecting that they will find a prohibited object. This power can only be exercised if a senior police officer authorises its use in a specified locality for a period of 24 hours or less (although this can be extended up to 48 hours). An authorisation can only be put in place if the senior police officer reasonably believes that (1) a specified protest-related offence may be committed within the officer's police area, or (2)

[10] Venice Commission "Checklist", Benchmark B3

[11] Liberty, 'Liberty's Briefing on the Police, Crime, Sentencing and Courts Bill for Report Stage in the House of Lords: Part 3 (Public Order)' (January 2022), paragraph 29 < https://www.libertyhumanrights.org.uk/wp-content/uploads/2019/03/Liberty-briefing-for-Peers-ahead-of-Part-3-Report-Stage-January-2022.pdf>

persons within the area are carrying certain prohibited objects, and (3) the authorisation is necessary to prevent the commission of protest-related offences or the carrying of prohibited objects. In addition, the authorisation must not last longer, or cover a greater locality, than is necessary.

19. Clause 158 makes it an offence to intentionally obstruct a constable who is carrying out a suspicion-less stop and search. The maximum penalty upon conviction is 51 weeks imprisonment.

20. Amendments 154-158 constitute an extreme expansion of stop and search powers, allowing the police to detain and confiscate objects from people who are intending to engage in entirely peaceful protests. The police are given a broad discretion to conduct stop and searches, especially in the context of the new suspicion-less stop and search power. Granting the police a broad discretionary power creates a risk of the over-policing of protests on an arbitrary or discriminatory basis. We query whether sufficient safeguards can be put in place to ensure that these stop and search powers will not be exercised in a manner that is arbitrary or discriminatory.

21. When the new amendments were tabled, Baroness Williams of Trafford stated that HMICFRS had argued that new stop and search powers could help police to prevent disruption and keep the public safe.[12] It is true that HMICFRS was of the view that a suspicion-less stop and search power aimed at preventing "serious disruption" would have the potential to improve police efficiency and effectiveness.[13] However, the proposed amendments go much further than this. They create a suspicion-less stop and search power aimed at preventing a variety of protest-related offences, not just "serious disruption". In addition, HMICFRS recognised that creating a new stop and search power would be controversial, would need to be subject to strong and effective safeguards, could have a disproportionate impact on people from minority ethnic groups, and was opposed by many people within and outside the police service.[14]

Amendment 159: serious disruption prevention orders

22. Amendment 159 creates a new type of civil order, a serious disruption prevention order ('SDPO'). The prosecution can ask a court to impose an SDPO when a person is convicted of their second "protest-related" offence within a period of 5 years. A "protest related offence" is defined as being "an offence which is directly related to a protest". This is a vague definition which lacks legal certainty. Instead, the Bill should set out an exhaustive list of offences which are deemed to be "protest-related".

23. An SDPO can only be imposed when a court considers this to be necessary to prevent a person carrying out a specified list of protest-related activities. The list includes the carrying out, or contributing to the carrying out by another person, of activities "likely to result" in "serious disruption". This is another vague and low threshold, which lacks legal certainty and foreseeability.

24. In addition, a chief officer of police can apply to a magistrates' court for an SDPO to be imposed on a person who has never been convicted of an offence. In these circumstances, an SDPO can be made where a court considers that someone has, on a balance of probabilities, engaged in at least two specified protest-related activities in the last 5 years. The list of relevant protest-related activities includes a person having carried out, or contributed to the carrying out, of an activity that was likely to cause serious disruption. We note that no disruption needs to have actually been caused. The imposition of an SDPO in these circumstances seems draconian and hard to justify.

25. Once the conditions have been met for an SDPO to be granted, a court has a wide discretion to impose extremely severe restrictions and requirements on a person, including prohibiting them from being at a particular place, being with particular persons, or participating in particular activities. In addition, anyone subject to an SDPO must keep the police informed of their home address and the address of any other premises where they regularly stay. A person commits

[12] HL Deb 24 Nov 2021, vol 816 col 978
[13] HMICFRS, 'Getting the balance right?', p. 125
[14] Ibid., p.124-5

an offence punishable by up to 51 weeks imprisonment if they breach the SDPO without a reasonable excuse, and the SDPO can be in place for up to 2 years.

26. It is difficult to see how the breadth of these restriction and requirements could be a justified interference with the rights protected by Articles 10 and 11 ECHR, especially when an SDPO can be imposed on individuals who have committed no offence and caused no disruption. HMICFRS advised against the introduction of protest banning orders, because they concluded that there was a significant risk that such an order would be intrinsically incompatible with Article 11 ECHR.[15] We agree with this conclusion, and note that the restrictions that can be imposed by an SDPO could include, and go even further than, banning people from attending a protest.

27. It is also concerning from a Rule of Law perspective that the SDPO regime gives the police an extremely broad discretion to request the imposition of wide-ranging restrictions and requirements, backed by criminal sanction. The wider the breadth of a discretionary power granted to the police, the greater the risk of it being used in an arbitrary or discriminatory manner.[16] The Delegated Powers and Regulatory Reform Committee has echoed this criticism, noting that a court is likely to be heavily influenced by what the police say about whether an SDPO should be imposed, and what restrictions it should contain.[17]

28. Finally, the Secretary of State is given a broad discretion to issue guidance "in relation" to SDPOs, to which the police "must have regard". In theory, the Secretary of State's guidance could reduce the potential for the arbitrary exercise of police power, by setting out restrictions and safeguards to which the police must have regard when considering whether to request the imposition of an SDPO. However, in practice, the Bill does not include sufficient safeguards to prevent the guidance itself being used to restrict protest rights in an arbitrary manner. There are no restrictions on the topics that the Secretary of State's guidance can cover, and the Secretary of State is explicitly empowered to provide guidance "about identifying persons in respect of whom it may be appropriate for applications for serious disruption prevention orders to be made". This creates a risk of the guidance being used to target particular protestors with whom the Government of the day disagrees. In addition, the guidance will not receive sufficient parliamentary oversight. There is no consultation requirement, and the guidance will be subject to the negative scrutiny procedure, which is an extremely weak form of parliamentary control.[18]

[15] Ibid., p. 139
[16] Venice Commission, Benchmark C
[17] Delegated Powers and Regulatory Reform Committee, 'Police, Crime, Sentencing and Courts Bill: Government Amendments' (23 November 2021, HL Paper 107), paragraph 10
[18] The Delegated Powers and Regulatory Reform Committee has also expressed its concerns on this point in 'Police, Crime, Sentencing and Courts Bill', paragraph 21

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