

Henry VIII is alive and kicking

King Henry VIII liked chopping off people's heads. Therefore, by some devious logic, his royal name has been attached to the constitutional device of giving Government Ministers power to repeal or amend Acts of Parliament by delegated legislation. Democrats dislike this. Judges, being all good democrats, share this dislike. Lord Scarman described one Henry VIII clause as "startling". Lord Bridge said that a power to modify the provisions of a statute 'should be narrowly and strictly construed'. But still they try it on.

The latest example is in the Representation of the People Bill. This changes electoral procedures in relation to electoral registration and absent voting, and allows for experiments involving innovative electoral procedures. It also makes changes in electoral law (1) to make it easier for the disabled to vote, and (2) to create an offence of supplying false particulars on a nomination form. In all this it gives effect to recommendations made by the Working Party on Electoral Procedures, a group chaired by the then Home Office Minister, George Howarth, and containing representatives from the main political parties, local government and electoral administrators.

The Working Party recommended, among other things, that pilot schemes for innovative electoral procedures, such as weekend voting, electronic voting, early voting, and mobile polling stations, should be run by a local authority so that their effectiveness could be evaluated, and that the successful ones should be used (or as the official memorandum puts it in the modern jargon "rolled out") more widely. This is where our old friend Henry VIII comes in.

Clause 10 of the Bill allows the Secretary of State to make orders enabling local authorities in England and Wales to run pilot schemes of innovative electoral procedures at particular local government elections. A local authority running a pilot is required to produce a report on the scheme, including an assessment of its success in facilitating voting and (if relevant) the counting process. The report must include a statement on whether, in the local authority's opinion:

- turnout was higher than it would otherwise have been,
- voters found the new arrangements easy to use,
- the new procedures led to any increase in personation or other electoral fraud, and
- the procedures led to an increase or saving in public expenditure.

Clause 11 (the Henry VIII clause) empowers the Secretary of State to make an order providing for an innovation which has been piloted successfully by a local authority to apply generally and permanently in the case of particular kinds of elections. *That includes parliamentary elections.* Up roar!

This particular Henry VIII clause has been sniped at all through the Bill's progress, first in the Commons and now in the Lords. It has also been condemned by the Select Committee on Delegated Powers and Deregulation. On February 29, at Report stage in the Lords, Lord Goodhart moved an amendment on behalf of the LibDems, supported by the Conservatives, to delete the reference to parliamentary elections. He said:

"It is true that the mechanism of elections is not as important in the scale of things as is the franchise, but it is still a matter of considerable importance. Until now all issues, such as the

question of the days on which elections are to be held and the time that polling stations are open on those days, have always been dealt with by primary legislation. What we will now have is power to roll out a pilot scheme across the country for all elections on the basis possibly of one trial in one local government area. We believe that to be quite inappropriate.”

The language was quiet, as befits the House of Lords, but their Lordships braced themselves for a tussle. Then the Minister, Lord Bassam of Brighton, rose. There was a hush. The Minister spoke.

“My Lords, it is not customary for a Minister to intervene at such an early stage in a debate, but it may help the House if I do so.” Expectation increased. The Minister continued.

“I can advise your Lordships that we shall be bringing forward Government amendments to Clause 11 at Third Reading. The effect of the amendments will be to limit the power to roll out successful innovations only to local government elections.”

Sensation! Democracy had triumphed. The try-on was called off. The constitutional need for a second chamber was yet again triumphantly vindicated.

But why did it happen in the first place? Lord Bassam gave a clue: “It was a power that was recommended by the Working Party on Electoral Procedures - and I can assure your Lordships, having made inquiries, that the working party meant the power to apply to all elections and not simply to local elections”.

Which just goes to show that you cannot trust mere working parties to get things right on major constitutional issues.

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