Strasbourg, 7 July 2010

CDL-UDT(2010)020
Engl. Only

T-06-2010

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

UNIDEM CAMPUS TRIESTE
SEMINAR

"THE QUALITY OF LAW"

Trieste, Italy

Palazzo del Ferdinandeo,
MIB School of Management
Largo Caduti di Nasirya n° 1
tel: +39 040 918 8111

14 – 17 June 2010

REPORT

"THE RELATION BETWEEN PRIMARY AND SECONDARY LEGISLATION"

by
Mr Anthony BRADLEY
(Professor, Substitute Member of the Venice Commission, United Kingdom)

A. Introduction – secondary (subordinate) legislation and the separation of powers

1. The theme of this session is an aspect of legislation that is found in every country. The needs of modern government are so diverse and complex that not all the enacted rules (norms) that a country requires can be made by relying on 'the legislature' to make the laws. The classical doctrine of 'separation of powers' is well-known. By this doctrine, *legislative power* is vested in the legislature (Parliament), *executive power* in the Government (whether President, Prime Minister, Cabinet or Council of Ministers), and *judicial power* is vested in the judiciary (the courts). The 'separation of powers' has been advocated (especially by the French jurist, Montesquieu) as the means of avoiding the tyranny that would arise if the same body made the laws and gave effect to the laws.

2. In a variety of forms, this doctrine is reflected in most national constitutions. It is often linked with another doctrine, 'the rule of law'. A basic principle underlying both doctrines is the need in a democracy to distinguish between (a) what the government (the executive) wants to happen and (b) legal rules (norms). Certainly, 'what the government wants to happen' is likely to result in the making of laws – but what the government wants to happen is not itself law. The government's policy decisions must first be subject to the process of legislation – and that is the task of the legislature (Parliament, consisting of elected representatives of the people), even if the initiative for new laws comes often or mainly from the executive.

3. In reality, it is impossible to keep strictly to the classical division of power – not all laws can be made by the legislature.

B. Reasons for existence of secondary (subordinate) legislation

4. Different national constitutions deal in different ways with the need for secondary (subordinate) legislation. By the process of legislation, public policies can be enacted in general terms by the legislature, but they then have to be capable of being applied to concrete situations. For this to be done objectively and fairly, more detailed legal rules are required.

5. Two obvious examples may be given – (a) To regulate road traffic, speed limits are required – and the road traffic law may provide for a variety of speed limits (for motorways, country roads, urban roads etc). These limits have to be applied to different parts of the country – and drivers must be informed of the limit on the road they are using. An effective way of doing this is by the making of rules, regulations, ordinances or decrees that give effect to (or implement) the road traffic law, but are subordinate to it.

(b) Suppose that the social security law provides a pension for a widow whose husband dies, or for a worker who retires after reaching a fixed age – how is this general law to be applied when a woman's 'husband' has died, but she cannot prove he was married to her? Or when a male worker was often ill during his working life and was sometimes in work and sometimes not, or often worked part-time? And what if the widow or the retired worker has spent many years abroad? If they are to be eligible for the pension, detailed rules are required that give effect to the main aims of the social security law – it might be possible to include them all in the same social security law, but this may not be the most effective way of providing these detailed rules.

6. If speed limits are to be applied lawfully, and pensions are to be administered lawfully, the decision in a particular case cannot be left to the discretion of an official, a politician or even a judge. This would open the way for arbitrary decision-making. The broad policy enacted by the legislature needs to be accompanied by more detailed rules stating how the law is to be applied (setting out the procedure for applying for a pension, indicating what evidence has to be provided, stating the effect of living abroad on a pension entitlement etc).

7. Many other examples could be given: the control of new buildings and urbanisation, health and safety in factories, the conduct of public education, management of prisons and hospitals, employment in the public sector, conduct of elections, immigration procedures …..

8. To summarise the reasons for the existence of subordinate legislation -

a. The legislature will almost certainly be unable to approve all detailed rules as well as the general law – and the customary process of legislation by debate and vote may not be suitable for this

b. Even if it could, there is an advantage in keeping the most important general rules separate from the issues of detail – to do this well will improve the quality of the legislation

c. Some subjects (e g speed limits, building control) are better applied at a regional or local level than at a national level – in a country with a federal structure, the regional legislature can meet this need; where there is a system of local self-government, the local authorities may be able to meet the need for local laws

d. The subject matter of some rules may be too technical to be dealt with in the legislature – for example, building regulations, regulations on the construction and use of motor vehicles

e. Often there is a need for flexibility and an ability to change the detailed rules in delivering a public service, especially when a new scheme is introduced

f. A reason of a different kind exists for regulations to deal with public emergencies - urgent action may be needed when the government cannot wait for the legislature to meet.

C. Constitutional provision for subordinate legislation

9. The need for different levels of legislation leads to what is called the 'hierarchy of norms'. At its simplest, the hierarchy consists of

(i) the constitution
(ii) laws made by the legislature (sometimes these are called 'primary legislation')
(iii) subordinate laws or regulations (sometimes these are called 'secondary legislation').

The principle of legality requires that the laws in (ii) must comply with the constitution; the laws in (iii) must comply with the laws in (ii) and also with the constitution. If the constitution includes protection for fundamental rights, this protection must be observed both by the legislature in making laws, and by the bodies responsible for making subordinate laws. And, if the constitution requires international norms to be observed, both (ii) and (iii) must comply with those international norms. Hence, on a prosecution for a driving offence, the prosecution must be able if required to show a chain of legal authority – from initial arrest of the driver by a police officer to conviction and punishment by a court. The same applies when a decision is made to grant or withhold a social security pension.

10. In a country with a federal constitution, the hierarchy of norms will be more complicated, and it will include the powers of the regional authority. If there is local self-government, local laws will need to be included in the hierarchy.

11. Many constitutions provide in one way or another for subordinate legislation, but they vary greatly. The Annex to this paper includes a few examples taken from volume 1 of the book Constitutions of Europe – texts collected by the Council of Europe Venice Commission (2004).

12. The variety in the constitutions can be illustrated in the following broad analysis.
a. Some constitutions give exclusive authority to the Parliament to make laws – so if subordinate laws are needed, for instance on education, they must be expressly authorised by an Education Law (if Parliament does not authorise this, such regulations cannot be made). The delegation of legislative powers in this way explains why the practice of subordinate legislation in the United Kingdom is often referred to as 'delegated legislation'.

b. Some constitutions give a general power to the President, Government, Prime Minister etc to issue decrees that give effect to laws made by Parliament (power to implement, or to supplement, the laws made by Parliament). Where this power exists, it should be clear that the executive decrees are subordinate to laws made by Parliament, and that the decrees may not contradict or vary laws made by Parliament.

c. Many constitutions provide for the President, Government etc to make laws in the event of a national emergency, but this power is often subject to conditions that involve getting the approval of Parliament as soon as possible, or give the laws a temporary effect

d. Some constitutions allow both the Parliament and the President, Government etc to make laws. In practice it may be very problematic to have two parallel powers! Does it necessarily follow that laws made by the President are subordinate to those made by Parliament?

13. Without attempting to draw out binding conclusions from a brief study of different constitutions, three principles emerge:

(i) all constitutions ought to make some provision for legislation in time of emergency
(ii) all constitutions need to make some clear provision that enables the executive to make laws that are subordinate to laws made by the parliament
(iii) constitutions should avoid conferring equal power to make laws on both the parliament and the executive.

D. Potential difficulties in the use of subordinate legislation

14. The most fundamental difficulty (for both political and legal reasons) is to have two rival legislatures – an elected Parliament and the President! At the other extreme, there is the difficulty caused by an obsolete law that only Parliament can change, but it never does so even when there is an acute need for amendment (for instance, stating the precise levels of fines for different criminal offences, in a time of rapid inflation)

15. But other difficulties often arise. Should the power to make subordinate legislation include power to legislate on particular issues of constitutional importance – such as

- power to impose taxation
- power to expropriate private property
- power to create new criminal offences
- power to create new forms of punishment
- power to make retrospective laws
- power to authorise further delegation of legislative power
- power to amend laws made by the legislature?

These difficulties will have both a legal significance – 'is this subordinate law valid in law?'; and also a political significance – what democratic control of laws made by the executive is possible?

16. Another kind of difficulty arises from procedural matters. These include the need to publish subordinate laws, ensuring that those affected by the laws have knowledge of them, knowing whether a regulation is still in force or a new one has been made, and providing access to the text of the laws.

E. Controls over the practice of subordinate legislation and safeguards against misuse of subordinate legislation.

17. Subordinate laws ought to be as accessible to the public (including the legal profession) as laws that are made by the Parliament. This is a fundamental requirement of the rule of law. Under the European Convention on Human Rights, certain Convention rights (e g article 8, the right to respect for private and family life; article 10, freedom of expression) are subject to restrictions or qualifications that serve various public purposes, but these restrictions must be 'in accordance with the law' or 'prescribed by law'. This means that 'as a minimum the state must point to some specific legal rule or regime which authorises the interfering act it seeks to justify' (*Silver v United Kingdom* A 61 (1983), para 86). This may include rules made by a delegated rule-making authority (*Barthold v Germany* A 90 (1985) paras 45-6). The rules must be published before they come into operation (there must be no secret laws).

18. So far as procedural matters are concerned, it is desirable that the subordinate law should state the authority under which it is made, that any amendments to earlier regulations should be textual (to avoid uncertainty), and that the regulations should be published in a regular numbered series (and available on the internet). And who should draft the laws – the same government lawyers who draft laws made by Parliament, or by different government lawyers with less experience of legislative drafting? The reasons why care needs to be taken in drafting of subordinate law include the need to avoid uncertainty; and subordinate laws need to be applied by the courts and public authorities in the same way as primary legislation by the legislature.

19. The laws should not be imposed by unilateral edict – often there is a need for professional, financial, trade, business and consumer interests to be consulted before new regulations are made. Openness in the process of consultation can make for better laws, and often more acceptable laws.

20. In the interests of democratic oversight over the making of all laws, there should be some scope for oversight or supervision by the legislature – for instance, a requirement for reporting proposed regulations to Parliament, so that they can be considered by a legislative committee. On some very important matters, Parliament (or a legislative committee) should be asked to approve new regulations - by either requiring a positive vote of approval or enabling there to be a negative vote of disapproval. It is a valuable discipline for the executive to be required to report regulations to Parliament within a stated time-limit.

21. In the interests of maintaining the 'rule of law', there should be some procedure for enabling the legality of a regulation to be challenged and decided by a court. The legality of a regulation will be doubtful –

- if it is inconsistent with the constitution (including protection for fundamental rights and the observance of international norms)
- if it is inconsistent with a law made by the parliament
- if it goes outside the competence of the body that has made the regulation
- if important rules of procedure (like prior publication or consultation of interests) have been breached.

In Europe there are many different ways in which there can be judicial review of legislation – these include review by the Constitutional Court, by the Council of State (as in France) or an administrative court, or by the ordinary civil and criminal courts. In outline, there are two main sorts of review – direct review (when a regulation is challenged by someone who is prosecuted for breach of a regulation, and he claims that the regulation is invalid) and indirect review (when separate proceedings can be brought in, for example, the Constitutional Court).

F. Emergency legislation and executive decrees

22. a. Every national constitution should enable emergency legislation to be made in the event of a public emergency. The declaration of such an emergency is generally the necessary condition that enables the executive to issue ordinances or decrees to deal with the emergency. The provision in the constitution must deal with such matters as: what constitutes a public emergency for this purpose (and at a national, regional or local level?)? Who decides whether there is such an emergency? What body has power to make emergency decrees? How long may the declaration of an emergency last (since no emergency should become permanent)?

b. The constitution should state the essential rights and constitutional rules that are not to be affected by emergency regulations (possibly on the lines of Article 15, European Convention on Human Rights, which authorises derogation from many but not all Convention rights in times of emergency).

c. The constitution should provide for Parliament to meet as soon as possible for such purposes as to approve the declaration of emergency, to approve the emergency regulations that have been made, and to approve any prolongation of the emergency.

d. The emergency regulations must cease to have effect at the end of the emergency. Although the emergency regulations should not have permanent effect, there is a need within the central government for some permanent administrative machinery (e g a committee of ministers) that can take action when necessary. This machinery also needs to arrange for there to be a set of draft regulations that are available to use in a sudden emergency but have no effect until the emergency is declared.

e. There is also a need to include within permanent legislation power to take action in specific emergencies; thus the laws on public health, animal health, water and energy could each include powers to deal with (respectively) an epidemic affecting humans, an epidemic affecting animals, a period of prolonged drought, and a failure of power supplies.

G. Subordinate legislation and its near relations

23. Subordinate legislation must not be confused with some other features of modern government (sometimes called ‘soft law’), which do not necessarily have any legal consequences. These include -

a. The announcement of government policies – statements of what the Government or a Minister is intending to do. They have no direct effect on the law, and they are not within the formal hierarchy of legal norms. They do not in themselves alter the legal position of individuals or add to the powers of public authorities. But they may explain how existing legal powers are to be used.

b. The issuing of internal administrative rules to guide and direct officials in how they use their powers – this can help to promote good administration and consistent decision-making, especially in large government departments. Some of these internal rules must be kept secret

in the interests of security (for instance, rules of the police or of tax officials on measures against fraud) but many internal rules can be published if it is desired to create a more open system of government. For example, it is often useful both to officials and to the general public to know the basis on which official decisions are to be made (for instance, how immigration decisions are to be made or how regulatory decisions are to be taken).

c Statements of good practice – for instance, concerning the management of schools or hospitals. These can help to show the best forms of decision-making. They do not have binding effect but the managers of schools or hospitals should be required to take them into account in exercising their powers, and in practice they should be able to give reasons if they do not wish to follow the statement of good practice. .

ANNEX – Some European constitutions

AUSTRIA (constitution of 1920 as amended)
The constitution makes detailed provision for the allocation of powers. On many subjects, legislative power is vested in the Federation and executive power in the Laender. On some subjects, the Laender have power to make legislation implementing federal laws as well as executive powers.

By article 18: (1) the entire public administration shall be based on law
(2) every administrative authority can on the basis of law issue ordinances within its sphere of competence
(3) in emergency, when the National Council is not in session or cannot meet, law-amending ordinances may be issued by the Federal President on recommendation of the Federal Government (but publicity is required for such ordinances and certain matters are excluded from such ordinances)

By article 118: within the area of its defined competence, a municipality may issue local police ordinances to deal with nuisances interfering with local community life – but these ordinances may not violate the laws and ordinances of the Federation and Laender.

By article 139 – The constitutional court decides on the legality of regulations on the request of anyone whose rights are harmed by an alleged illegality

BELARUS (constitution of 1996)
Art 101 - The two chambers on the proposal of the President may adopt a law delegating to the President legislative power to issue decrees which have force of law – but this delegation may not include power to issue decrees which alter the Constitution or its interpretation, alter policy laws, approve the national budget, alter electoral law or limit the rights and liberties of citizens. The decrees may not amend the law on delegating legislative power, and may not be retroactive. In situations of necessity, temporary decrees may be issued but these must be promptly submitted to the two legislative chambers, and those chambers may legislate to override those decrees.

Art 108 – the Government shall issue acts within binding force in the entire territory – and the Prime Minister shall issue orders within his jurisdiction

CROATIA (constitution of 1990 as amended)
Art 100 **–** the President in a time of war may issue decrees having the force of law, with the authority of Parliament if that is in session – and also in other situations of emergency when the normal operation of governmental bodies is not possible. Such decrees must be submitted to Parliament as soon as Parliament is able to convene

Art 112 – The Government must execute the laws and other decisions of Parliament and shall enact decrees to implement the laws.

CYPRUS (1960 constitution as amended)
Art 54 – the competence of the Council of Ministers includes the 'making of any order or regulation for the carrying into effect of any law as provided by such law'

CZECH REPUBLIC (1992 constitution)
Art 15 – legislative power is vested in Parliament

Art 78 – "The Government may issue decrees for the implementation and within the scope of laws. Decrees shall be signed by the Prime Minister and the relevant Member of Government".

Art 79 (3) – " Ministries, other administrative agencies and territorial self-government bodies may issue on the basis and within the scope of a law legal regulations, if they are authorised to do so by law".

DENMARK (constitution of 1953)
Art 23 – in an emergency, when Parliament cannot assemble, the King may issue provisional laws, provided they do not conflict with the Constitution and that they shall always be submitted to Parliament for approval or rejection immediately when Parliament assembles

FINLAND (constitution of 1999)
Art 3 (Parliamentarism and the separation of powers) – legislative powers are exercised by Parliament; governmental powers are exercised by the President and the Government (which shall have the confidence of Parliament) and judicial powers are exercised by independent courts of law.

Art 80 – the President, the Government and a Ministry may issue decrees on the basis of authority given to them by the Constitution or another Act. But rights and obligations of private individuals and 'other matters under this Constitution that are of a legislative nature' shall be governed by Acts. If there is no specific provision on who shall issue a decree, it is issued by the Government. Other authorities may be authorised by an Act to lay down legal rules on given matters, if there is a special reason for this relating to the subject matter and if the significance of the rules does not require that they be governed by Act or Decree. The scope of such authority shall be precisely circumscribed. An Act shall lay down general rules for publication and entry into force of Decrees and other legal norms.

Art 107 – "If a provision in a Decree or another statute of lower level than an Act is in conflict with the Constitution or another Act, it shall not be applied by a court or other public authority"