Hansard Society, Delegated Legislation Review Launch Event

Tuesday 2 November 2021

Steve Baker MP: Democratic control of political power matters

(Check against delivery)

On Tuesday 6 July 2010, I walked into my first ever Delegated Legislation Committee to scrutinise the first piece of such legislation in my parliamentary career.

It was the draft Conduct of Employment Agencies and Employment Businesses (Amendment) Regulations 2010.

As I walked into the Committee room my eye was drawn to a sole member of the public sitting at the back.

Engaging him in conversation I learnt that his daughter had been exploited by a modelling agency. He was now campaigning for a change in the law to protect other father's daughters from what his own had endured at the hands of unscrupulous agencies.

The regulations were supposed to protect potentially vulnerable people seeking work by tightening the restrictions on the charging of up-front fees in the entertainment and modelling sectors.

Registering a portfolio with an agency cost a fee but agencies would frequently say that the portfolio was not good enough and would have to be re-done, for which they would charge huge sums running to a £1,000 or more. The regulations were supposed to guard against this.

"*But it won't work*" the father explained, "*because it doesn't cover movies. All the agencies will do is say to girls that they've got to have a portfolio fit for movies. So, they'll just carry on ripping young women off.*"

The Committee began, the minister spoke for 12 minutes, his opposition counterpart for four minutes and then back to the minister to wrap up. It was all over in just 19 minutes.

Fifteen other MPs - many of them also newly elected and on their first legislative committee - sat in that debate just like me knowing little about the law we were being asked to scrutinise but knowing full well that the last thing the whips wanted was for one of us to stand up and speak.

I don't know whether the father's concern that the regulation was unworkable was well founded. But his concern seemed a reasonable one and it was not addressed in the debate.

I thought at the time - and blogged - that the whole experience was unedifying. Goodness knows what the father thought, and I tell this story to convey three important points.

Firstly, the one person in that room who mattered - the man whose daughter had been exploited by a modelling agency - had to sit silently at the back while a regulation he was campaigning on, and knew something about, was pushed through with scant scrutiny by Members of Parliament who knew next to nothing about the legislation in front of us.

And the manner in which we did it must have seemed nonsensical, perhaps even offensive to him. I doubt that MPs or Parliament went up in his estimation after what he witnessed.

It was a sad reflection on parliamentary democracy at work.

The second reason I tell the story is to emphasise that what I am going to say this evening is not partisan. MPs of all parties of course have experiences like mine in Delegated Legislation Committees.

MPs of all parties experience and are dissatisfied with the way the scrutiny system works - as you heard during the first panel discussion. And governments of all political stripes have a poor record where scrutiny of delegated legislation is concerned. As a rule: ministers like power but not scrutiny.

The third reason I tell the story is because seemingly mundane regulations like that go through Parliament week-in, week-out. They don't attract publicity like the Brexit or Covid-related Statutory Instruments. They go under the radar of media and public attention.

But they affect people's everyday lives.

Which is why this issue matters so much; and why this Review is so important.

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Democratic control of political power is why I came into politics. I'm not in Parliament because I want more power – but because I think we must exercise care and caution about who we give power to, and how they use it.

And this, I think, is the crux of the problem we face.

Enormous power is now wielded by Ministers. Successive Parliaments have, for decades, granted Ministers extraordinary powers in hundreds of Acts of Parliament that intrude into almost every area of our lives.

But the scrutiny procedures to hold Ministers to account for the wielding of these powers are utterly inadequate. Indeed, they are so poor they shame Parliament. They provide for little accountability in any meaningful sense of the word.

The volume of Statutory Instruments coupled with the inadequate scrutiny process leaves ministerial power subject to little parliamentary control.

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I do not say this lightly, but if we continue to allow the exercise of power by Ministers on this scale, with so little accountability and no serious scrutiny, then we are knowingly and willingly accepting a form of elective dictatorship by ministerial diktat.

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The pandemic has brought concerns about delegated legislation and parliamentary accountability into sharp relief. Never before have Statutory Instruments attracted so much attention.

With a stroke of his pen, the Health Secretary was able to lock us down at home for weeks on end in the most sweeping infringement of our liberties in the history of this country.

And he could do it because of a delegated power contained in a law passed in 1984.

Today I am not addressing the merits of the actions taken to protect public health. What concerns me is that Parliament was and is reduced to a bystander - a retrospective rubber stamp.

Hansard Society data shows that over 500 Coronavirus-related regulations have now been laid before Parliament. Some SIs made relatively innocuous changes; others were draconian: shutting down businesses, imposing hotel quarantine, or mandatory testing.

People rightly had concerns about the nature of the powers in the Coronavirus Act some of which stripped away our civil liberties. But it is with the Public Health (Control of Disease) Act 1984 that the biggest problems lie.

According to the Hansard Society's data, powers in the Coronavirus Act have been used just 26 times. In contrast, the 'urgent' power in the 1984 Public Health Act which enables regulations to come into force before parliamentary approval, has been used on an astonishing 91 occasions.

So, 91 times, using the power in just this one Act, a Minister brought into force regulations with serious implications for all our lives, and by simply declaring that he thought the situation was 'urgent' he could legally wait for up to 28 days before coming to Parliament to seek the consent of the people's democratically elected representatives for those measures.

Scrutiny was a farce. Even the most experienced MPs could not work out what they were debating and what was in force during the period when instruments were being rapidly revised.

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But then the scrutiny process <u>is</u> a farce - dressed up occasionally by a bit of parliamentary theatre - even in normal times.

It's just that prior to the pandemic barely anyone noticed other than parliamentary anoraks - like me and the Hansard Society.

The media, after all, are never going to be interested in scrutiny of the latest set of local audit regulations, VAT provisions, or tribunal procedure rules.

But who can blame them? The fourth estate can't really be taken to task for not engaging with an aspect of Parliament's work that MPs themselves find difficult to understand and routinely fail to take seriously. Who wants to be the journalist who must explain delegated legislation in 90 seconds on the evening news for the layman in the street?

But if they did cover it on the evening news the man and woman in the street might find it hard to understand why it is that MPs who know something about a policy area have almost no chance of being appointed to a Delegated Legislation Committee scrutinising a related Statutory Instrument.

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I am sorry to say that knowledge and enthusiasm are usually treated as dangerous things by parliamentary whips. So too is asking questions.

Since my baptism into these matters in July 2010, my approach to these Committees is to read the documents, question the Minister and express my views.

Inevitably, I am now rarely appointed to a DLC.

Why, because the Whips - God bless them - don't want MPs to act as legislators and scrutineers - to carry out our constitutional function. They want us to sit at the back, keep quiet, get on with our constituency correspondence and nod the Instrument through so ministers can govern most easily.

It pains me to say it but too many of my parliamentary colleagues are content to do so.

I have seen MPs having a grand time chuckling about just how fast they can get something passed into law. If you've read the Hansard Society's report, The Devil is in the Detail, you'll know that one Committee in the 2013-14 session lasted just 22 seconds - that may take some beating.

On the other hand, we all know these debates are dead ends, so perhaps the joke is on me and others for taking them more seriously. We vote on a motion that we have considered the Instrument. There's practically no prospect of securing a change to the Instrument if you have concerns about how it will work. They are not amendable. It's a very rare Minister who withdraws the SI because it becomes clear during the debate that there's a problem.

But at least SIs subject to the affirmative scrutiny procedure get a debate.

If an MP wants a debate on a negative SI, they must 'pray' against it in the form of a motion for an Early Day. Now Early Day Motions - EDMs - are known as 'parliamentary graffiti', which tells you all you need to know about how serious a process this is. I have

long refused to engage with EDMs, no matter how important or laudable they may be: the very idea of a motion for debate on an "early day" – that is, never – is an insult to the governed.

In the last session over 800 negative SIs were laid before Parliament, but according to the Hansard Society's data just 8 were debated by MPs. And of these 8, time for debate for 5 of them was found only after the expiry of the 40-day statutory scrutiny period prescribed in the Statutory Instruments Act 1946.

Now demand for debates is not high. MPs know the chance of getting a debate is so slim few bother to request one. The government controls the allocation of time in the House, and it decides if, and when, a prayer motion to annul an Instrument will be debated. Unless HM Opposition is engaged, hope is forlorn.

Again, this matters because it is about the accountability of executive power to Parliament and the people. The 40-day scrutiny period is set out in an Act of Parliament as the way that MPs should hold ministers to account for the exercise of those powers delegated to them that are subject to the negative scrutiny procedure. That's about three-quarters of all SIs laid in a session. But successive governments have frustrated the intention of the 1946 Act by failing to schedule debates in a timely way, if at all.

The government that is subject to scrutiny gets to decide if and when that scrutiny will be undertaken. It is an indefensible process.

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I have seen the delegated legislation system from both sides of the fence - as a backbencher and as a Minister.

I had the honour of serving as a minister in the Department for Exiting the EU. To those who voted to remain in the EU, I'm sorry, to those who were with me, you're welcome…

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I shepherded the EU (Withdrawal) Act through Parliament and signed the first ever Brexit Statutory Instrument under that Act into law.

I know there may be some government lawyers and legislative drafters in the room so I'd like to acknowledge once again the fantastic work that the Government Legal Service and the Office of Parliamentary Counsel have done over the last few years, first with Brexit and then during the pandemic. What I am saying is no criticism of you.

You will all recall the drama and defining controversy of the EU (Withdrawal) Act - how should we handle Statutory Instruments to rectify deficiencies in retained EU law?

Part of the answer was a sifting committee whose remit was to consider all proposed SIs subject to the negative scrutiny procedure and decide whether they should be upgraded to the affirmative procedure, thereby guaranteeing at least up to 90 minutes of debate.

The government has since accepted every single one of the upgrade recommendations. Angela (Eagle) was one of the first members of that sifting committee so can perhaps give us some insight into its work.

I don't pretend that it was a perfect solution. But working with backbenchers concerned about these issues, it was a deliverable solution within the confines of current scrutiny procedures.

Looking ahead, Lord Frost has announced a review of retained EU law and has floated the possibility of "developing a tailored mechanism for accelerating the repeal or amendment of this retained EU law". We will have to see what is proposed but for me accountability to Parliament must lie at the heart of what we do. Democratic control of power by elected representatives of the public must mean exactly that, not Ministers exercising power by fiat with little or no parliamentary oversight.

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Let me be clear: I think delegated legislation is often necessary - there's no way Parliament could scrutinise everything done by our highly interventionist contemporary state through the primary legislation system - there just isn't the time. But if we are to have delegated legislation, it must be carefully prepared, the case for it properly evidenced, and it must be subject to meaningful parliamentary scrutiny and decision, including through amendments.

But the system we have is far from that.

So what needs to change?

The Hansard Society's Review is looking at the full range of problems and will develop a set of practical, workable solutions.

But here are a few thoughts for discussion.

Firstly, we need to think about what goes into primary and what goes into secondary or delegated legislation.

Can it be right that a criminal offence to which a prison sentence of up to 10 years is attached can be introduced via a Statutory Instrument and therefore subject to little parliamentary oversight? Should that be a matter for primary legislation only?

The cost of Net Zero is my latest campaign. In 2019 the House of Commons approved The Climate Change Act 2008 (2050 Target Amendment) Order 2019 after a debate lasting just the permitted 90 minutes for an affirmative Instrument. This Order authorised the decision to increase the climate change target from an 80% reduction in greenhouse gas emissions to 100% (net zero) by 2050.

That change in the target was a huge policy decision with considerable implications for our economy and society. The costs are estimated to run to trillions of pounds.

It was not appropriate for this to be dealt with by regulation rather than a Bill. But even if you disagree with me and think it was, you surely cannot defend just 90-minutes of scrutiny

when the Chief Scientist recently wrote in the Guardian, "transformation is required at every level of society"? Net Zero implies a revolution but it was nodded through after 90 minutes.

Today, we must think about where the balance lies between primary and delegated legislation, and what scrutiny procedures can be deployed to match the scale of decision being taken by regulation. A one size fits all approach does not work.

At present, MPs cannot improve Statutory Instruments. We cannot amend them. We cannot limit them or sunset them. We can only accept or reject them - a 'take it or leave it', all or nothing choice. And bear in mind the nuclear option of rejecting a Statutory Instrument hasn't been triggered since 1979 in the Commons.

Whether the action is big or small, affects the entire nation or a particular community, will cost little or cost trillions, the scrutiny procedures are broadly the same, and utterly inadequate to the scale of the task.

But when it comes to solutions what I don't want is for any scrutiny mechanisms to rest solely in the hands of the opposition. There is such a thing as the conspiracy of the frontbenches when it comes to what gets debated and what doesn't. The "usual channels" rule.

I think we also need to look at the case for amendment of regulations, or at least amendment in some cases.

Last year I and a number of colleagues wanted to change the 10pm curfew on restaurant openings to 11pm. We weren't being difficult for the sake of it. We had a genuine concern that restaurants were being required to open only on an unprofitable basis; a 10pm curfew meant they could have only one cover. This mattered to those constituents of mine working in minimum wage jobs in bars and restaurants. They bore the brunt of the

decision. But all MPs could do was accept or reject the whole package. Some of us protested in division but we could have made a real difference by amendment.

This take it or leave it approach which tramples the legitimate concerns of MPs on behalf of affected electors is not acceptable.

We also need to think about tertiary legislation, directions, notices and guidance. Ministers can exercise enormous power through these either directly or through third parties. Should these not be subject to parliamentary scrutiny and if so how? Well, I'd argue that a suitable test is if it's justiciable before the courts it must be subject to parliamentary scrutiny and decision.

Before I came into Parliament, I was an engineer by trade: I want good quality ideas practically applied. But in the House of Commons questioning the evidence base behind policy proposals and subjecting the operational application of regulations to test and challenge, is incredibly difficult.

Too often MPs do not have access to the detailed technical information - particularly in good quality Impact Assessments - that are needed to understand how an Instrument will work in practice. The House of Lords has at least the benefit of the work of the Secondary Legislation Scrutiny Committee; MPs don't even have that kind of support on which to call.

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Now some people will say - including many of my MP colleagues - does any of this really matter? What difference will it make? The system has worked like this for decades. The parliamentary procedures for scrutiny of delegated legislation - particularly in the Commons - have barely changed in years, most people don't know about them, and fewer care.

I don't agree. I think constituents do care. They may not express it in exactly the ways we are doing this afternoon. But every day my constituents in Wycombe fill up my email inbox

with concerns and complaints about benefits, immigration, housing, the environment or transport. They often want a change in the law. And, more often than not, the most likely way such a change is going to be delivered is through regulations - through Statutory Instruments.

I think our constituents expect their elected representatives to take that legislative process seriously and to play their part in helping to improve the legal changes that will affect their lives.

I think the public also care about the accountability of power. They care about the rules - and in recent times particularly the restrictions - that affect their families and friends, their businesses and livelihoods, and they care about who makes those rules, why they make them, and whether they are going to be effective.

And if they have concerns about the rules, they want to know what I, as their democratically elected representative, am going to do about it. They want to know how I am going to stand up and question those in power and hold them to account for their decisions.

That's why this issue matters, and it's why I'm pleased to commit to supporting the Hansard Society's Review. The Society has a long and distinguished record of work on delegated legislation - raising concerns well before it became fashionable during Brexit and Covid.

I won't perhaps agree with every recommendation you make at the end of this process but I'm pleased to work with you - and with other parliamentarians from across the political spectrum - to galvanise political and media attention and focus, in the hope that together we might make some progress in the direction of reform and so strengthen our system of parliamentary democracy.

Ultimately what is at stake is nothing less than democratic control of political power on a mass scale. This matters.

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