§ Law in Context

# Law and Administration

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# Making the law

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## 1. Legislation and constitutional change

Since at least the nineteenth century, a first objective for lawyers has been to arrange legal norms logically and in a hierarchical fashion. This is the essence of both Dicey's nineteenth-century doctrine of parliamentary sovereignty and Hart's celebrated theory of primary and secondary rules (see Chapter 1), each of which seeks to establish when and why rules are binding and to be obeyed. The fact that the constitution is unwritten sets statute law at the apex of the hierarchy of legal norms; the prerogative powers, historical rival of parliamentary legislation, are nowadays subordinate to statute and those

remnants of the prerogative legislative powers that remain in respect of colonial territories are controversial and subject to review by the courts.[1] At the other end of the spectrum, the borders between law and non-law are not always easily discernible. It may often be hard to differentiate the confusing 'ragbag of rules, regulations, orders, schemes, byelaws, licences, directives, warrants, instruments of approval or minutes' that bear the label delegated legislation,[2] from the confusing ragbag of directives, circulars, guidance, guidelines and codes of practice that clutter the desks – and computer screens – of bureaucrats. Discussion of this mass of 'soft law', generated by the use of rule-making as a standard technique of modern bureaucracy and e-governance, is reserved for Chapter 5.

A sharp line is commonly drawn between statute law, which falls into the field of constitutional law, and secondary legislation which, merely by virtue of being made by the executive or other authorised public bodies, falls within the purview of administrative law. We have never been entirely comfortable with this distinction and shall not attempt to maintain it here. In a separation-of-powers analysis, the role of the executive in lawmaking may pass virtually unnoticed, while the traditional vision of 'Parliament the lawmaker' disguises the fact that parliamentary input into legislation is in practice rather modest – sometimes little more than its input into the making of delegated legislation. The parliamentary stage of lawmaking occupies fractional space on a continuum from policy-making to implementation in which the action passes from one institution to another in an effort to get a law on to the statute book and in force. Ministers and civil servants, politicians and lawyers participate at both policy-making and legislative stages of the process. We shall see too that with greatly improved procedures for parliamentary scrutiny of delegated legislation and EU law these forms of lawmaking are no longer so clearly differentiated from statute.

The package of constitutional reform introduced after the 1997 election again makes the boundary difficult to maintain. The devolution legislation and the HRA were all designed expressly to be compatible with the doctrine of parliamentary sovereignty, as was the earlier European Communities Act 1972 (ECA), passed after the UK acceded to the European Communities. Yet each in its different ways disturbed and significantly modified the traditional hierarchy of rules. As noted in the last chapter, the HRA altered the balance of power between legislature and judiciary, provoking hot debate over the true nature of parliamentary sovereignty. In this chapter, we follow the theme of 'dialogue', assessing the contribution of the Westminster Parliament to 'mainstreaming' human rights. The HRA and ECA both contain swingeing executive powers to legislate by delegated legislation, commonly known as 'Henry VIII clauses'. In the case of the European Union (EU), where the

[1] *R (Bancoult) v Foreign Secretary (No. 2)* [2008] UKHL 61. And see Ch. 1, p. 13.
[2] J. Griffith and H. Street, *Principles of Administrative Law*, 3rd edn (Pitman, 1973), p. 32.

'primacy' doctrine of EC law developed by the ECJ poses a direct challenge to parliamentary sovereignty, the fiction of 'delegation' on which Anglo-American administrative law is premised seems to us unhelpful in resolving the delicate issue of whether EU legal instruments are or are not 'delegated' legislation.[3]

Although it may be technically correct to classify 'devolved legislative competence' as lawmaking under delegated powers, the output is not 'delegated legislation' in the same sense as statutory instruments subject to scrutiny by the Westminster Parliament. If anything more complex, lawmaking procedures in Northern Ireland are, as we write, only just being tested.[4] In addition, the three representative bodies have adopted their own procedures, which differ – and may in the future differ more – from those used at Westminster.[5]

The Scotland, Northern Ireland and Government of Wales (GWA) Acts 1998 created devolved institutions with substantial, though variant, lawmaking and rulemaking powers. The Scottish Parliament can pass primary legislation, known as 'Acts of the Scottish Parliament' (ASP). Bills are subject to possible legal challenge by the Law Officers for a four-week period if they are thought to be outside the lawmaking powers of the Scottish Parliament and any provision of an ASP outside its legislative competence is 'not law'. This covers provisions incompatible with the ECHR and EU law (both areas for which the UK retains responsibility).[6] At least for a limited period, ASPs can amend or repeal Westminster Acts in respect of Scotland; vice versa, Westminster Acts can modify the law of Scotland in both reserved and devolved areas, if necessary by amendment or repeal of ASPs. Under the so-called 'Sewel convention' the consent of the Scottish Parliament is normally required, an issue on which the Scottish Parliament is not unnaturally highly sensitive.[7] Powers are also available under the Scotland Act for UK ministers to amend Scottish law in devolved areas by subordinate legislation.

In Wales, where the Assembly does not possess plenary legislative powers, the Westminster Parliament makes statute law. The amending GWA 2006 allows the Welsh Assembly to make laws known as 'measures', which will have similar effect to an Act of Parliament in areas where the Assembly has legislative competence; these are listed in the Act and can be amended either by a new Westminster Act or a 'Legislative Competence Order', which will transfer

[3] See P. Lindseth, 'Democratic legitimacy and the administrative character of supranationalism: The example of the European community' (1999) 99 *Col. Law Rev.* 628.

[4] But see G. Anthony and J. Morison, 'Here, there, and (maybe) here again: The story of law making for post-1998 Northern Ireland' in Hazell and Rawlings (eds.), *Devolution, Law Making and the Constitution* (Imprint Academic, 2005).

[5] See N. Jamieson, 'The Scots statutory style and substance' (2007) 28 *Stat. Law Rev.* 182.

[6] Ss. 29 and 33 of the Scotland Act 1998; G. Gee, 'Devolution and the courts' in Hazell and Rawlings (eds.), *Devolution, Law Making and the Constitution*.

[7] CC, *Devolution: Its effect on the practice of legislation at Westminster*, HL 192 [6]; A. Page and A. Batey, '*Scotland's Other Parliament*' [2002] *PL* 501. The Sewel convention was originally developed in Northern Ireland to cover relations between Westminster and the Stormont Parliament between 1922–1972.

specific powers from Westminster to the Assembly and is subject to approval by both the Assembly and UK Parliament. A two-stage process, involving pre-legislative scrutiny of a proposed LCO by committee and approval by the Assembly and Parliament of a draft LCO, is necessary; a complex process demanding careful co-ordination. The GWA also provides that, if in the future authorised by popular referendum, the Assembly may make Welsh statutes.[8] Under s. 33, the Secretary of State for Wales must consult the Assembly after the beginning of each Westminster parliamentary session on the Government's legislative programme and thereafter on Bills agreed for introduction.[9]

These are only a few of the complexities noted by the House of Lords Constitution Committee (CC) as raising 'barriers for the ordinary reader' to 'full access to and understanding of the law of the land'.[10] For legislation on devolved subjects it is, for example, necessary to look to ASPs, Acts of the Westminster Parliament, and now to Welsh Assembly Measures. As for secondary legislation, the network of regulation has become so tangled that the Scottish Parliament wants a programme of consolidation, especially where rules originally made by UK ministers have been successively amended by the Scottish ministers.[11] Adding to concern that devolution has brought increased reliance on delegated legislation is the problem that some measures may be subject to scrutiny by two Parliaments, which may not always see eye to eye. The effect on lawmaking procedures at Westminster, not fully appreciated at the time of devolution, is also considerable – so complicated as to persuade the Lords Constitution Committee that it may defy attempts at resolution within the structures of 'asymmetrical devolution'. The complexities 'derive from the nature of the devolution settlement, and it would be difficult to mitigate them without seeking to re-model the structure of that settlement'.[12] In practice, conventions and inter-institutional agreements have had to be evolved to flesh out relationships between the partners, so far with success. [13]

## 2. Parliament and courts

We should be careful not to underrate the symbolism of a formal parliamentary contribution to lawmaking. Parliament provides the ultimate seal of democratic legitimacy, marking the giving of assent on behalf of citizens to measures that are to have binding force. In the 'small c' constitution (see p. 96)

[8] A. Trench, 'The Government of Wales Act 2006: The next steps to devolution in Wales' [2006] *PL* 687.

[9] S. 33 re-enacts s. 31 of the 1998 Act, on which see R. Rawlings, 'Quasi-legislative devolution: Powers and principles' (2001) 52 *NILQ* 54 and 'Law making in a virtual Parliament: The Welsh experience' in Hazell and Rawlings (eds.), *Devolution, Law Making and the Constitution*.

[10] CC, *Devolution: Inter-institutional relations in the United Kingdom*, HL 28 (2002/03).

[11] Scottish Parliament Subordinate Legislation Committee, (21 September 1999) col. 31.

[12] HL 192 (2003/04) [17].

[13] See, e.g., R. Rawlings, 'Concordats of the constitution' (2000) 116 *LQR* 257.

there is a sentiment strong enough to amount to a convention that constitutional matters and other matters of great import ought to be reserved for full debate in Parliament, even if there are differences over what these matters are and where the lines are to be drawn. This explains why in the *JCWI* case (p. 114 above) the Court of Appeal asked for *parliamentary* ratification of a regulatory power to strip asylum seekers of their right to welfare benefits leaving them destitute. And fear of what may be done to an unwritten constitution when parliamentary sovereignty is the highest constitutional norm lies behind the warning shots fired by Lord Steyn in *Jackson v Attorney-General* (p. 111 above). In *Jackson*, the appellants were contending that the Hunting Act 2004 was not a 'true' statute, despite the fact that the procedure adopted was in full accordance with that laid down in the Parliament Act 1949. This involved the second contention that the 1949 Act was not a 'true' statute; it was a form of secondary legislation made in terms of the 1911 Act. Lords Bingham and Nicholls made short work of the argument. Lord Bingham thought the meaning of the term 'Act of Parliament' was not 'doubtful, ambiguous or obscure. It is as clear and well understood as any expression in the lexicon of the law. It is used, and used only, to denote primary legislation.' Nor was an Act of Parliament required to 'state on its face' that it was made by the authority of the 1911 Act. Hence legislation made under the 1911 Act was not 'delegated or subordinate or derivative in the sense that its validity is open to investigation in the courts, which would not be permissible in the case of primary legislation'.[14] Lord Steyn did not dissent, though he addressed the issue somewhat differently:

> The word Parliament involves both static and dynamic concepts. The static concept refers to the constituent elements which make up Parliament: the House of Commons, the House of Lords, and the Monarch. The dynamic concept involves the constituent elements functioning together as a law making body. The inquiry is: has Parliament spoken? The law and custom of Parliament regulates what the constituent elements must do to legislate: all three must signify consent to the measure. But, apart from the traditional method of law making, Parliament acting as ordinarily constituted may functionally redistribute legislative power in different ways. For example, Parliament could for specific purposes provide for a two-thirds majority in the House of Commons and the House of Lords. This would involve a redefinition of Parliament for a specific purpose. Such redefinition could not be disregarded.[15]

What occurred when the Countryside Alliance came back to court seeking judicial review of the Hunting Act makes the distinction between primary and secondary legislation amply clear. In terms of classical English judicial review the case was obviously untenable; quite simply statute law is not reviewable. To ground their action, the Alliance had to turn to the European streams of the

[14] *Jackson v Attorney-General* [2005] UKHL 56 [24], noted in Plaxton, 'The concept of legislation: *Jackson v HM Attorney General*' (2006) 69 *MLR* 249.

[15] *Jackson* [81]. The argument is a variant on the so called 'new theory of sovereignty' addressed by R. V. F. Heuston, *Essays in Constitutional Law* (Stevens, 1961).

'multi-streamed jurisdiction', arguing (i) that the Hunting Act contravened their right of property under ECHR Art. 1, Protocol 1 and (ii) that the Act violated their freedom under the EC Treaty to offer services and trade. Both arguments were categorically rejected.[16]

Partly for historical reasons, the courts treat the democratic credentials of Parliament with great respect, as we saw in *ex p. Smith* (p. 114 above), where the court refrained from questioning policy that Parliament had recently considered. *Jackson* is, however, one of a number of recent cases that has seen judicial review creep ever closer to Parliament. A turning point was the *Fire Brigades* case,[17] in which both sides of the constitutional argument were represented. Section 171(1) of the Criminal Justice Act 1988 had been introduced by the House of Lords and passed by Parliament in the face of government opposition to place the *ex gratia* criminal injuries scheme on a statutory footing (see Chapter 17). The Act was stated to come into force 'on such day as the Secretary of State may appoint'. Instead, the Home Secretary introduced legislation to replace the statutory scheme, which failed to pass the Lords. Hoping to delay implementation indefinitely, he replaced the existing scheme with a new, less generous 'tariff-based' *ex gratia* scheme, effectively by-passing the 1988 Act. Trade unions representing workers likely to be affected by cuts in compensation challenged the legality of this action.

Two very different viewpoints inform the arguments in this case which triggered considerable disagreement in both Court of Appeal and House of Lords, though both finally agreed by narrow majorities that the procedure adopted had been improper. Lord Mustill represents the traditional view that legislation is ineffective until it comes into force, reasoning that gave the whip hand to government and legitimated the use of the prerogative in the teeth of Parliament's expressed wishes. For the majority, Lord Lloyd thought it was an abuse of power to stultify the express intention of the legislature by recourse to the prerogative:

> *Lord Mustill* (dissenting): Parliament has its own special means of ensuring that the executive, in the exercise of its delegated functions, performs in a way which Parliament finds appropriate. Ideally, it is these latter methods which should be used to check executive errors and excesses; for it is the task of Parliament and the executive in tandem, not of the courts, to govern the country. In recent years, however, the employment in practice of these specifically Parliamentary measures has fallen short, and sometimes well short, of what was needed to bring the executive into line with the law . . .
>
> To avoid a vacuum in which the citizen would be left without protection against a misuse of executive powers the courts have had no option but to occupy the dead ground in a manner, and in areas of public life, which could not have been foreseen 30 years ago. For myself, I am quite satisfied that this unprecedented judicial role has been greatly to the public benefit. Nevertheless, it has its risks, of which the courts are well aware . . . Some

[16] *R (Countryside Alliance) v Attorney-General* [2007] UKHL 52.
[17] *R v Home Secretary, ex p. Fire Brigades Union* [1995] 2 AC 513.

> of the arguments addressed [in the Court of Appeal] would have the court push to the very boundaries of the distinction between court and Parliament established in, and recognised ever since, the Bill of Rights 1688 . . . 300 years have passed since then, and the political and social landscape has changed beyond recognition. But the boundaries remain; they are of crucial significance to our private and public life; and the courts should, I believe, make sure that they are not overstepped.
>
> *Lord Lloyd:* If one assumes that the postponement for five years was a valid exercise of the power conferred by Parliament, then of course the Home Secretary would be free to continue the existing non-statutory scheme in the meantime, as he has in the past, or substitute another scheme, whether more or less favourable to the victims of violent crime. But the assumption begs the question. It is the decision of the Home Secretary to renounce the statutory scheme, and to surrender his power to implement it, which constitutes the abuse of power in the present case . . .
>
> Ministers must be taken at their word. If they say they will not implement the statutory scheme, they are repudiating the power conferred on them by Parliament in the clearest possible terms. It is one thing to delay bringing the relevant provisions into force. It is quite another to abdicate or relinquish the power altogether. Nor is that all. The Government's intentions may be judged by their deeds as well as their words. The introduction of the tariff scheme, which is to be put on a statutory basis as soon as it has had time to settle down, is plainly inconsistent with a continuing power under section 171 to bring the statutory scheme into force . . . In granting . . . relief, the court is not acting in opposition to the legislature, or treading on Parliamentary toes. On the contrary: it is ensuring that 'powers conferred by Parliament are exercised within the limits, and for the purposes, which Parliament intended'.

Courts are also reluctant to trespass on parliamentary territory or tempt retaliation by scrutinising the internal proceedings of Parliament.[18] Thus when Lord Bingham in *Jackson* examined the history of the Parliament Acts in very great detail, he expressed his feelings that this was a somewhat strange exercise. This has meant that the courts did not until recently turn to parliamentary debates etc. to aid interpretation. *Pepper v Hart*[19] was the first occasion when this was done. It was held that, when statute is obscure or ambiguous, reference can be made to *Hansard* debates and other parliamentary or official material as an aid to statutory construction. Following *Pepper v Hart*, however, doubts were expressed whether the practice would play into the hands of government, which was in a position to manipulate statements made to Parliament and so obtain an advantage inside the judicial process.[20] More recently, the new style

[18] *Pickin v British Railways Board* [1974] AC 765; and see H. W. R. Wade, 'The basis of legal sovereignty' [1955] *CLJ* 172.

[19] *Pepper (Inspector of Taxes) v Hart* [1993] AC 593.

[20] *Jackson* [65]. See for discussion S. Styles, 'The rule of Parliament: Statutory interpretation after *Pepper v Hart* (1994) 14 *OJLS* 151; Lord Steyn '*Pepper v Hart*: A Re-examination' (2001) 21 *OJLS* 59; S. Vogenauer, 'A Retreat from *Pepper v Hart*? A Reply to Lord Steyn' (2006) 26 *OJLS* 629; P. Sales, '*Pepper v Hart*: A footnote to Professor Vogenauer's reply to Lord Steyn' (2006) 26 *OJLS* 585

of explanatory notes to draft bills published on the internet has raised similar doubts; both have been described as likely to lead to a 'politicisation of judicial interpretation'.[21] This fear has led the Speaker to protest that courts were starting to delve too deeply into parliamentary affairs in an effort to seek out and identify the underlying reasons for legislation; there are no circumstances, he has argued, where it is appropriate for a court to refer to the record of parliamentary debates in order to decide whether an enactment is compatible with the European Convention. The House of Lords did not entirely accept this view. Especially in human rights cases, Lord Nicholls said in *Wilson*:

> the court may need additional background information tending to show, for instance, the likely practical impact of the statutory measure and why the course adopted by the legislature is or is not appropriate. Moreover, as when interpreting a statute, so when identifying the policy objective of a statutory provision or assessing the 'proportionality' of a statutory provision, the court may need enlightenment on the nature and extent of the social problem (the 'mischief') at which the legislation is aimed. This may throw light on the rationale underlying the legislation.[22]

In *Huang and Kashmiri*[23] Lord Bingham took a bolder line. Faced with the classic argument that Immigration Rules and supplementary instructions, made by the minister and laid before Parliament, should be assumed to have 'the imprimatur of democratic approval and should be taken to strike the right balance between the interests of the individual and those of the community', Lord Bingham distinguished the Immigration Rules from housing policy which, he said, had:

> been a continuing subject of discussion and debate in Parliament over very many years, with the competing interests of landlords and tenants fully represented, as also the public interest in securing accommodation for the indigent, averting homelessness and making the best use of finite public resources. The outcome, changed from time to time, may truly be said to represent a considered democratic compromise. This cannot be said in the same way of the Immigration Rules and supplementary instructions, which are not the product of active debate in Parliament, where non-nationals seeking leave to enter or remain are not in any event represented.

To proceed down this road would indeed amount to 'major shift in the British constitution' and one fraught with danger and difficulty, as the Speaker's decision to intervene in the *Wilson* case suggests.

[21] R. Munday, 'In the wake of "good governance": Impact assessment and the politicisation of judicial interpretation' (2008) 71 *MLR* 385.

[22] The Speaker was intervening in *Wilson v First County Trust* [2003] UKHL 40 [63]. See also *R v Environment Secretary, ex p. Spath Holme* [2001] 2 AC 349.

[23] *Huang and Kashmiri v Home Secretary* [2007] UKHL 11 [17]. In *Kay v Lambeth LBC* [2006] 2 AC 465 the House of Lords had adopted a more passive approach in respect of housing law.

Less intrusive and more legitimate would be recourse to a statement made under s. 19 of the HRA. This obliges a Minister to make and publish a written statement on introducing legislation either that the provisions of the bill are in his view compatible with the Convention or that, although he is unable to make a statement of compatibility, the Government nevertheless wishes the House to proceed with the bill. For a statement of compatibility to be made, 'the balance of arguments' must favour the view that a bill will survive judicial scrutiny. The section is an important 'firewatching' innovation, operating to concentrate the minds of ministers, all those who have to advise ministers, and Parliament itself on the risk of inadvertently violating human rights law. In *Animal Defenders International*,[24] the question was whether s. 321(2) of the Communications Act 2003, which regulates political advertising, was compatible with ECHR Art. 10. The Law Lords looked to the Commons proceedings, where the minister had stated her inability to make a s. 19 statement because of uncertainty over the meaning of an ECtHR case. The JCHR, which thought the prohibition on political advertising might well be incompatible, had advised the Government to examine ways in which 'more limited but workable and Convention-compliant restrictions could be included in the Bill'; this advice had been endorsed by the Joint Committee on the Draft Communications Bill.[25] The Government on legal advice 'judged that no fair and workable compromise solution could be found'. This was accepted by the JCHR after re-consideration[26] and then by Parliament as a whole.

This substantial consideration of the bill when before Parliament helped to guide the House of Lords to the conclusion that a total ban on broadcast political advertising could be justified in a democratic society, and hence has Convention-compatible. That a policy or law has been carefully considered and sealed with the authority of the representative legislature lends substance to the case that it is 'necessary in a democratic society.' As Baroness Hale said:

> Government and Parliament have recently examined with some care whether a more limited ban could be made to work and have concluded that it could not. The solution chosen has all-party support. Parliamentarians of all political persuasions take the view that the ban is necessary in this democratic society. Any court would be slow indeed to take a different view on a question such as this.[27]

Lord Bingham thought that:

[24] *R (Animal Defenders International) v Culture, Media and Sport Secretary*) [2008] UKHL 15. For the view of the ECtHR, see *VgT Verein gegen Tierfabriken v Switzerland* (2001) 34 EHRR 159.

[25] JCHR, HC 1102 (2001/2) [62–4]; Joint Committee on the Draft Communications Bill, HC 876-1 (2001/2).

[26] JCHR, HC 191 (2002/3), HC 397 (2002/3).

[27] *Animal Defenders International*, respectively [52] [33].

> The weight to be accorded to the judgment of Parliament depends on the circumstances and the subject matter. In the present context it should in my opinion be given great weight, for three main reasons. First, it is reasonable to expect that our democratically-elected politicians will be peculiarly sensitive to the measures necessary to safeguard the integrity of our democracy. It cannot be supposed that others, including judges, will be more so. Secondly, Parliament has resolved, uniquely since the 1998 Act came into force in October 2000, that the prohibition of political advertising on television and radio may possibly, although improbably, infringe article 10 but has nonetheless resolved to proceed under section 19(1)(b) of the Act. It has done so, while properly recognising the interpretative supremacy of the European Court, because of the importance which it attaches to maintenance of this prohibition. The judgment of Parliament on such an issue should not be lightly overridden.

## 3. Parliament the watchdog

### (a) The scrutiny function

Parliament's second and more practical scrutiny function is as important as its representative role. Parliament does not 'make' law in the functional sense of drafting bills; this is government's role, with Parliament's drafting role generally confined to amendment.[28] The two Houses do, however, debate, critique, assent to or dissent from, government proposals and do their best to scrutinise the text. For the Lords Constitution Committee, the scrutiny of legislative texts is fundamental to the work of Parliament and more especially the Lords:

> Parliament has to assent to bills if they are to become the law of the land. Acts of Parliament impinge upon citizens in all dimensions of their daily life. They prescribe what citizens are required to do and what they are prohibited from doing. They stipulate penalties, which may be severe, for failure to comply. They can have a significant impact not only on behaviour but also on popular attitudes. Subjecting those measures to rigorous scrutiny is an essential responsibility of both Houses of Parliament if bad law is to be avoided and the technical quality of all legislation improved. Parliament has a vital role in assuring itself that a bill is, in principle, desirable and that its provisions are fit for purpose. If Parliament gets it wrong, the impact on citizens can on occasion be disastrous; and history has shown examples of legislation that has proved clearly unfit for purpose . . .
>
> Our starting point is that the process by which Parliament considers bills should be structured, rigorous and informed, and sufficient to ensure that Members have adequate opportunity to weigh the merits of the bill and consider the detail. We believe that legislation is most likely to emerge fit for purpose if Parliament has the opportunity to be involved at all stages of the legislative process and has mechanisms to digest informed opinion and comment from concerned citizens and interested organisations. Parliament does not operate in a vacuum. It is important that those affected by, or with knowledge of or having

[28] M. Zander, *The Law-Making Process* (Cambridge University Press, 2004); D. Miers and A. Page, *Legislation*, 2nd edn (Butterworths, 1990).

> an interest in proposed legislation should have an opportunity to make their voices heard while the legislation is being considered rather than after it has taken effect . . .[29]

The Committee, suggesting – not for the first time – that the paradigm had not been achieved, endorsed a 1947 description of Parliament 'as an overworked legislation factory'.[30]

Statistics kept by the Commons confirm this description.[31] Overall, the number of pages of legislation is substantially higher than forty years ago, although the number of statutes 'has if anything been declining'. Starting in 1951 with sixty-four Acts, the statutory load peaked in 1964 with ninety-eight Acts, levelling out in 2006 with fifty-five. Statutes were getting longer: from just under 4,000 pages of statute law in 1951 to 6,000 in 1964, though the figure dropped to 2,712 in 2005, reflecting a sharp rise in delegated legislation (p. 163 below). Contemplating the statistics, the Modernisation Committee made the redundant point that, 'given a smaller volume of legislation each year, Parliament could devote more time to scrutinising it'. But the Committee saw no way out: 'the volume of legislation is largely a function of the programme of the Government of the day rather than a matter of procedural changes in the House'.[32] And governments, we suggested, are becoming steadily more intrusive while, in parallel, there has been a consistent trend to rule-based governance. We have become a highly regulated society.

Lord Renton, who chaired an important Commons report on the quality of legislation, disliked the tendency to push everything into primary legislation. Discussing the Water Act 1989 (418 pages long with 194 sections and 27 schedules) he observed that it contained 'a good deal of law which consists of mere instruction to government departments . . . This is not a suitable device for legislation . . . Internal matters of this kind are best dealt with by the ordinary machinery of government . . . and departmental circulars can play an important part.'[33] This preferred division of functions, in which Parliament 'outlines' policy, leaving it to the administration to finalise detail, dates back to the nineteenth century. In practice, the division is often disregarded. Secondary legislation may be hotly political; instead of simply implementing the 'nuts and bolts' of government policy', it may be used to change policy, 'sometimes in ways that were not envisaged when the primary enabling legislation was passed', and its relative obscurity, which seldom attracts the attention of the media or

[29] CC, *Parliament and the Legislative Process*, HL 173-I (2003/4). And see M. Russell, *Reforming the House of Lords: Lessons from overseas* (Constitution Unit, 2000).

[30] L. Amery, *Thoughts on the Constitution*, 2nd edn (Oxford University Press, 1964), p. 41.

[31] HC Library, *Acts & Statutory Instruments: Volume of United Kingdom Legislation 1950 to 2007*, SN/SG/2911 (Jan. 2008).

[32] Modernisation Committee, *The Legislative Process*, HC 1097 (2005/6) [7] [ 9].

[33] *Report of the Committee on the Preparation of Legislation*, Cmnd 6053 (1975). See also Lord Renton, 'Current drafting practices and problems in the United Kingdom' (1990) 11 *Stat. Law Rev*. 11, 14.

even of MPs, makes it an ideal way to hide 'bad news'.[34] This makes the style of much modern legislation highly specific and complex. The long Bills today presented to Parliament have codifying tendencies, though codification is usually incomplete. There is an unhappy common law practice of 'legislation by reference', which leaves the searcher to trawl through partially repealed statutes and regulations to discover the true state of the law (though there is now an online data base of revised legislation making it easier to find accurate texts of legislation in force). The Pensions Act 2007, which we meet again in Chapter 12, consists of seventy-eight pages of thirty-seven detailed and highly technical sections, containing a dense list of repeals and revocations with the dates they come into force; nine powers to make regulations or orders vested in the minister or agencies; and eight complex schedules, which take up more space than the sections. Since schedules are unlikely to be debated, they are a good place to hide controversial provisions – though efforts have been made to phase-out some of the 'dirty tricks' available to governments for this purpose[35] through 'programming', whereby a timetable is agreed for each stage of a bill with time allocated in advance to the more controversial clauses; and 'carry-over', which allows consideration of bills to be spread over a parliamentary year.[36]

The Constitution Committee emphasises that:

> for Parliament to examine bills effectively, it needs to understand them. That encompasses the purpose of the bill and the provisions designed to achieve that purpose. For many years, the way in which bills were brought before Parliament was not conducive to aiding understanding. Bills were often drafted in fairly obscure language with no accompanying material to explain the provisions and no clear explanation of the effect of provisions that substituted words for those in earlier Acts. Members were dependent on the Minister's speech on Second Reading and explanations offered in response to probing amendments.[37]

Draftsmen are currently instructed to use accessible language and the explanatory notes that since 1998–9 accompany bills are fuller, clearer and available online. General (previously Standing) Committees, used for detailed scrutiny of bills, can now if they wish operate more like a Select Committee, taking evidence, which widens public access and engages the attention of interested professional bodies and their advisers at a pre-legislative stage. The Constitution Committee thinks this procedure, so far little used, should become standard practice.

[34] E. Page, *Governing by Numbers: Delegated legislation and everyday policy-making* (Hart Publishing, 2001), p. 3, citing the Scrutiny Committee (p. 164 below).

[35] See Modernisation Committee, *Committee Stage of Public Bills: Consultation on alternative options*, HC 810 (2005/6), pp. 3–5.

[36] Modernisation Committee, *Programming of Bills*, HC 1222 (2002/3) contains statistics of use of programming and guillotine. See also Procedure Committee, *Programming of Legislation*, HC 235 (2004/5) and *Government Response*, HC 1169 (2004/5).

[37] *Parliament and the Legislative Process*, HL 173 (2003/4) [76].

### (b) Impact assessment

Amongst the mounting piles of documents available to today's legislator are Impact Assessments (IAs). Originating as the chief analytical device for 'better regulation', IAs were, by 2005, administratively required for all forms of UK regulation, from codes of practice to formal legislation, where policy changes could affect the public sector, charities, the voluntary sector or small businesses. The types of impact considered had moved from business matters to include health, gender, race, sustainability, rural issues, human rights and older people.[38]

A basic template made available by the National Audit Office (NAO)[39] tells officials what to cover in a full regulatory impact assessment:

- *Purpose and intended effect* – identifies the objectives of the regulatory proposal
- *Risks* – assesses the risks that the proposed regulations are addressing
- *Benefits* – identifies the benefits of each option including the 'do nothing' option
- *Costs* – looks at all costs including indirect costs
- *Securing compliance* – identifies options for action
- *Impact on small business* – using advice from the [DTI] Small Business Service
- *Public consultation* – takes the views of those affected, and is clear about assumptions and options for discussion
- *Monitoring and evaluation* – establishes criteria for monitoring and evaluation
- *Recommendation* – summarises and makes recommendations to ministers, having regard to the views expressed in public consultation.

According to Cabinet Office guidance,[40] the IA process is continuous. An *initial IA* should inform and ideally accompany a submission to ministers seeking agreement to a proposal and include best estimates of the possible risks, benefits and costs. A *partial RIA* accompanies the near-mandatory public consultation with relevant questions and enquiries. The *full/final RIA* updates and builds upon the analysis in the light of consultation, further information and analysis. 'You can then submit the full RIA to ministers with clear recommendations. It becomes a final RIA when it is signed by the responsible minister and placed in the libraries of the Houses of Parliament.' (You will see this progression illustrated in the *Greenpeace* case at p. 177 below).

The NAO has been keen to emphasise the contribution of IAs 'to the Government's aim of modernising policy making':

[38] See BRTF, *Regulatory Impact Assessment Guidance* (2005 version).
[39] NAO, *Better Regulation: Making good use of regulatory impact assessments*, HC 329 (2001/2), p. 16.
[40] Cabinet Office, *Regulatory Impact Assessment overview* (2005 version).

> Identifying the options for achieving the desired policy outcome and the costs and benefits associated with each option should help assess how policies are likely to work in practice and to develop policies that secure the desired results while avoiding unnecessary burdens. By making RIAs publicly available, members of the community should be able to understand what a proposed regulation is seeking to achieve and what it means for them, and to challenge assumptions with which they disagree. This should contribute to making policies inclusive and decision making transparent. By facilitating Ministerial and parliamentary scrutiny of regulation and subsequent evaluation of whether regulation has achieved what was intended, RIAs should help establish accountability for the regulatory process.[41]

But sampling the quality of the 150–200 final IAs produced each year, the NAO expressed disappointment. Often IAs were not used in the right way. There was a lack of clarity in analysis and persistent weaknesses in the assessments; they were too discursive; and there was a general lack of consistency in the analysis undertaken and presentation of results. Consequently, IAs were only occasionally used to challenge the need for regulation and influence policy decisions; they 'have not yet been a tool which has dramatically altered the regulatory landscape or the way Government thinks about regulation'.[42]

The methodology has today become an inherent part of new public management theory and discourse, intended to suggest that management, administration and now lawmaking are scientific disciplines: from 'rational' administration to 'evidence-based legislation'. 'Better' legislation is no longer merely well-drafted, clear and accessible – as the Hansard Society in a major report on the legislative process insisted that it should be.[43] Better legislation in this new regulatory context is part of a scientific – or pseudo-scientific – pursuit of rational policy development, aimed at 'smart' regulation: in other words, a regulatory strategy that 'offers the best mixtures of regulatory instruments and institutions'.[44] Echoing Power's criticisms of the flattening effects of audit (p. 61 above), Baldwin reminds us that not everything is capable of being measured:

> Smart regulation involves too many variables, estimates and judgments to lend itself to the RIA process. To evaluate it by using RIA processes involves something approaching a category mistake . . . It is difficult to see how ongoing regulatory co-ordination, with all its flexibilities, can be tested in advance by a RIA process as if it is a static single-shot system.[45]

[41] NAO, *Better Regulation*, pp. 3–4. The acronym RIA stands for regulatory impact assessment, later generalised as IA.

[42] NAO, *Evaluation of Regulatory Impact Assessments 2005-06*, HC 1305 (2005/6), pp. 3–4, 12; NAO, *Regulatory Impact Assessments and Sustainable Development* (2006), p. 2. And see T. Ambler *et al*., *Regulators: Box tickers or burdens busters?* (British Chambers of Commerce, 2006).

[43] Hansard Society, *Making the Law: Report of the Hansard Society Commission on the legislative process* (1992).

[44] R. Baldwin, *Rules and Government* (Clarendon Press, 1995), p. 485; J. Black, '"Which arrow?": Rule type and regulatory policy' [1995] *PL* 94. And see below, Ch. 6.

[45] Baldwin, *Rules and Government*, pp. 503, 506–7.

This warning should be borne in mind when we move to considering post-legislative scrutiny.

### (c) 'Mainstreaming': the Joint Committee on Human Rights

Feldman, former academic adviser to the JCHR, feels that a 'human rights culture' is beginning to emerge in Parliament. This has brought substantial improvements in every area of parliamentary scrutiny, including delegated legislation, where there exists 'the added incentive that, unlike primary legislation, subordinate legislation is normally invalid and ineffective to the extent of any incompatibility with a Convention right, which concentrates the mind wonderfully'.[46] This is an important point. Section 10 of the HRA authorises a minister, where either the domestic courts or ECtHR have found legislation to be incompatible with the Convention, to 'make such amendments to the legislation as he considers necessary to remove the incompatibility'. This 'fast track' procedure allows any minister who sees 'compelling reasons' to do so, to amend statute law by means of delegated legislation, a so-called 'Henry VIII clause' that Parliament normally resents. In this case, the assumption is that government's motives for using 'fast-track procedure' will always be the benign wish to bring the law into compliance with human rights standards. This assumption, we have begun to see, is not always correct. Evidence that the JCHR takes its scrutiny powers seriously is therefore welcome.

The JCHR, set up and charged with 'considering human rights issues in the UK' has emerged as central to the effectiveness of Parliament in maintaining human rights standards:

> In many other jurisdictions with constitutional bills of rights, or other legal protections of human rights, court judgments are the single most important source of interpretation of the rights protected. In the UK's institutional arrangements for protecting human rights, however, Parliament, as well as the judiciary, has a central role to play in deciding how best to protect the rights which are considered to be fundamental. This means that in our system, when courts give judgments in which they find that a law, policy or practice is in breach of human rights, there is still an important role for Parliament to play in scrutinising the adequacy of the Government's response to such judgments and, in some cases, deciding for itself whether a change in the law is necessary to protect human rights and, if so, what that change should be.[47]

Taking as its starting point the s. 19 statement, the JCHR effectively 'shadows the minister', scrutinising all government and private bills in accordance with a sifting system and reporting to the House on those with implications

[46] D. Feldman, 'The impact of human rights on the UK legislative process' (2004) 25 *Stat. Law Rev*. 91,102.

[47] JCHR, *Monitoring the Government's Response to Court Judgments Finding Breaches of Human Rights*, HC 728 (2006/7) [1].

for human rights. Its approach, set out in every scrutiny report, has been to interpret its brief widely; to these ends it is prepared to take account of conventions other than the ECHR to which the UK is a signatory, such as the UN Refugee Convention, Convention against Torture and Convention on the Rights of the Child.[48] Where the explanatory notes or human rights memoranda accompanying a bill are inadequate, the minister is likely to face questioning from the JCHR, which pays special attention to any 'clear pattern of incompatibility, i.e. if reports from us and our predecessors have repeatedly raised the same incompatibility issues and the Government does not appear to have addressed them'.[49] The Committee may then make repeated reports (p. 157 below).

After eight years' experience, the JCHR published a lengthy review of its working practices, explaining how such a small Committee could manage its demanding mandate:

> The Committee intends to maintain its predecessors' undertaking to scrutinise all Government and private bills introduced into Parliament for their human rights implications. It will seek however to focus its scrutiny on the most significant human rights issues raised by bills in order to enhance its ability to alert both Houses to them in a timely way. To this end it will implement a new sifting procedure, to be carried out by its Legal Adviser under the Chairman's delegated authority according to certain criteria to establish the significance of human rights issues raised by a bill . . . The Committee's Reports on bills will be shorter and more focused, and the Committee intends more regularly to reach a view on issues of proportionality which may arise . . . The Committee also re-emphasises the importance of a substantial improvement in the quality and consistency of the information which the Government provides to Parliament on the human rights implications of bills at the time of their introduction.[50]

The reduction in overall work brought about by the sifting process would be used to expand pre-legislative scrutiny, 'in order to draw the attention of Parliament and the Government to any potential pitfalls in relation to a proposed policy course'; post-legislative scrutiny would also be undertaken 'to assess whether the implementation of legislation has produced unwelcome human rights implications'. Thematic inquiries, such as that into deaths in custody,[51] would continue, and inquiry work would start into 'major unexpected developments and significant human rights issues of national concern' where the Committee felt it could make an 'important and useful contribution' to parliamentary and public debate. There are also 'regular evidence sessions' with the human rights

[48] JCHR, *The UN Convention Against Torture (UNCAT)*, HC 701 (2005/6); *The UN Convention on the Rights of the Child*, HC 81 (2002/3).

[49] JCHR, *Monitoring the Government's Response to Court Judgments*, HC 728 (2006/7)

[50] See JCHR, *The Committee's Future Working Practices*, HC 1575 (2005/6) [40-2]. The JCHR has 12 members and has had two Labour Chairs: Jean Corston MP and Andrew Dismore MP.

[51] See JCHR, *Deaths in Custody*, HC 137 (2004/5); *Government Response*, HC 416 (2004/5).

minister, and work with the newly established Commission for Equality and Human Rights is projected. The regular discussions with government, process of hearing and sifting evidence, issuing reports, and receiving and responding to government responses are all, of course, relatively formal but they certainly fall within the description of 'dialogue'.[52]

The JCHR takes into consideration the broad political or public impact of prospective legislation, including the extent to which it has attracted public and media attention and 'reputable NGOs or other interested parties have made representations'; it is becoming something of a focal point for human rights lobby groups. In publishing special reports, it tries to pick up missed opportunities to promote and protect human rights and significant topical issues, using a broad proportionality test to weigh the importance of an affected right, the number of people likely to be affected, their vulnerability, the strength of justification for the interference and the extent to which the UK's 'most significant positive obligations are engaged'. Amongst subjects chosen are the cases for a Human Rights Commission and Children's Commissioner for England and latterly the 'British Bill of Rights'.[53] Noting the popular preference for social and economic rights, the JCHR has included these in its analysis, asserting that they are more than merely political aspirations and merit the same degree of consideration as civil and political rights.

> The popular misconception which we noted in our Report on *The Case for a Human Rights Commission*, that human rights are a 'criminal's charter', cannot be as easily applied to economic, social and cultural rights. Rights to adequate healthcare and education, to equal treatment in the workplace, and to protection against the worst extremes of poverty, deal in the substance of people's everyday lives. In a society which is setting out to build a 'culture of rights' this public identification with core economic and social rights is not insignificant.[54]

We should not infer from this that the JCHR refrains from reporting on controversial civil-liberties issues; very much the reverse. Exchanges with government over terrorism are best described as a ping-pong match. A stream of reports on counter-terrorism and asylum bills has flowed from the Committee, giving it considerable expertise strengthened by contacts with experts (such as Lord Carlile, the Government's independent adviser on terrorism) from whom it takes evidence. This has allowed the JCHR to develop and fiercely promote its own policies. In its report on the 2008 Counter-Terrorism Bill, for example,

[52] E.g., JCHR, *Life Like Any Other? Human rights of adults with learning disabilities*, HC 73 (2007/8), *Government Response*, Cm. 7378 (2008); JCHR, *The Human Rights of Older People in Healthcare*, HC 378 (2006/7) *Government Response*, HC 72 (2007/8).

[53] *The Case for a Human Rights Commission*, HC 489-I (2002/3); *The Case for a Children's Commissioner for England*, HC 666 (2002/3); *A British Bill of Rights*, HC 150-iii (2007/8); and see n. 52 above.

[54] JCHR, *The International Convention on Economic, Social and Cultural Rights*, HC 1188 (2003/4) [29].

it set out its choice of the 'five most significant human rights issues which are in need of thoroughgoing parliamentary scrutiny and debate': pre-charge detention; post-charge questioning; control orders and special advocates; the threshold test for charging and the admissibility of intercept. It went on to consider these issues in considerable detail, with a view to 'framing the debate on the Bill'.[55]

The JCHR was not particularly impressed by the judgments in terrorism cases discussed in Chapter 3. In its own '28 days report', the JCHR 'reached the firm conclusion that the system of special advocates, as currently conducted, fails to afford individuals a fair hearing, or even a substantial measure of procedural justice'. It recommended that:

- the Secretary of State be placed under a statutory obligation always to provide a statement of the gist of the closed material
- the prohibition on any communication between the special advocate and the individual (or their legal representative) after the special advocate has seen the closed material be relaxed
- the low standard of proof in SIAC proceedings be raised.[56]

When the Government rejected all its recommendations, the JCHR urged it to re-visit the matter, expressing regret that the Government had not seen fit to discuss the House of Lords judgment in *MB* with the special advocates themselves. Widening the 'dialogue' and inviting the judges to join it, the JCHR accused the Law Lords of timidity and obscurity, remarking that the High Court had found considerable difficulty in deciding exactly what was required to give effect to the confusing judgments:

> We welcome the decision of the House of Lords in *MB* that it would be a breach of an individual's right to a fair hearing if a control order could be made where the essence of the case against him is entirely undisclosed to him. We have frequently made the same observation in our reports on the control order legislation. However, we are surprised at the Lords' interpretation of the scope of their power under section 3 of the Human Rights Act to read words into a statute to avoid an incompatibility with a Convention right. In 2005, in the Prevention of Terrorism Act, Parliament grappled with how to strike the right balance between the right to a fair hearing and keeping sensitive information secret. It decided (against our advice) to strike that balance by placing a duty on courts in control

[55] *Counter–Terrorism Policy and Human Rights (Eighth Report): Counter-Terrorism Bill*, HC 199 (2007/8); JCHR, *Counter-Terrorism Policy and Human Rights (Twelfth Report): Annual renewal of 28 Days 2008 Counter-Terrorism Policy and Human Rights (Twelfth Report): Annual renewal of 28 Days 2008,* HC 825 (2007/8); *Counter-Terrorism Policy and Human Rights: Government responses to the Committee's Twentieth and Twenty-first Reports and other correspondence*, HC 756 (2007/8); *Counter-Terrorism Policy and Human Rights (Fourteenth Report): Annual Renewal of Control Orders Legislation***,** HC 37 (2008/9).

[56] See *Government Reply to the Nineteenth Report from the Joint Committee on Human Rights Session 2006-07: Counter-Terrorism policy and human rights: 28 days, intercept and post-charge questioning*, Cm. 7215 (2007).

> order proceedings to receive and act on material even the gist of which is not disclosed to the controlled person. It used mandatory language to make that intention clear. To weaken Parliament's clear mandatory language by 'reading in' the words 'except where to do so would be incompatible with the right of the controlled person to a fair trial' does, as Lord Bingham observed, 'very clearly fly in the face of Parliament's intention'.
>
> The scheme of the Human Rights Act deliberately gives Parliament a central role in deciding how best to protect the rights protected in the ECHR. Striking the right balance between sections 3 and 4 of the Human Rights Act is crucial to that scheme of democratic human rights protection. In our view it would have been more consistent with the scheme of the Human Rights Act for the House of Lords to have given a declaration of incompatibility, requiring Parliament to think again about the balance it struck in the control order legislation between the various competing interests. In any event, we think it is now incumbent on Parliament to consider again, in detail, exactly what a 'fair hearing' requires in this particular context, in light of the House of Lords judgment, and to amend the control order legislation accordingly.[57]

The Committee went on to make detailed proposals as to steps the Government should take immediately in the forthcoming counter-terrorism legislation, arguing that 'counter-terrorism measures which breach human rights are ultimately counter-productive and therefore worse than ineffective in countering terrorism: they risk exacerbating the problem'.

In a later report on renewal of control orders,[58] the Government was sharply reminded that no response had been made to the many earlier reports on extension of pre-trial detention, which were therefore reiterated. The Committee complained also that it could not report on two measures raising significant human rights issues because these had been introduced too late in the proceedings. This was not the first complaint of failure to deal fairly with the Committee by laying reports etc. in time; indeed, consistent failures in this respect prompted the JCHR in its latest report on counter-terrorism to recommend that the independent adviser on terrorism should, like the PCA, report directly to Parliament, effectively transforming him into a parliamentary officer.

It is not the first time that the JCHR has taken issue with the courts. After *Leeds v Price*,[59] where the House of Lords had refused to set aside the domestic rules of precedent in order to allow a lower court to take into consideration a subsequent decision of the ECtHR that was clearly inconsistent, the JCHR tartly remarked:

[57] HC 199 [46–7] referring to *Home Secretary v MB and Others* [2007] UKHL 46 and *Home Secretary v E* [2007] EWHC 233 (Admin) (Beatson J).

[58] *Counter–Terrorism Policy and Human Rights (Ninth Report): Annual renewal of control orders legislation*, HC 356 (2007/8) [33], citing *Third Report of the Independent Reviewer pursuant to section 14(3) of the Prevention of Terrorism Act 2005* (18 Feb. 2008). See to the same effect the HL Merits of Statutory Instruments Committee, *Draft Prevention of Terrorism Act 2005 (Continuance in force of sections 1 to 9) Order 2008*, HL 51 (2007/08).

[59] *Leeds Corporation v Price* decided with *Kay v Lambeth Corporation* [2006] UKHL 10. The case concerned the right of local authorities to evict unauthorised occupiers from their land. The GJCHR was supporting the Government, which intervened to argue for a relaxation of the doctrine of precedent in the circumstances of the *Leeds* appeal.

> It is likely that the decision in *Leeds v Price* effectively excludes the judicial branch from having any significant role in the implementation of Strasbourg judgments against the UK. We are concerned that, without Parliament becoming involved, responsibility for the effective implementation of the judgments of the ECtHR will remain principally with the Government. If judgments are not given effect domestically and individuals are required to go to Strasbourg in order to gain just satisfaction, this will also contribute to the significant burden faced by the ECtHR as a result of repetitive cases. The effect of the House of Lords decision in *Leeds v Price* is to make it all the more important that there is effective parliamentary scrutiny of the Government's response to ECtHR judgments finding the UK in breach of the Convention and places an extra onus on Parliament to ensure that the law is changed as swiftly as possible following a finding of violation.[60]

The JCHR takes its monitoring of government responses to declarations of incompatibility and implementation of Strasbourg judgments seriously; its reports are, indeed, the best hope of finding out what is going on.[61] 'Dialogue' with ministers is detailed and specific. Following the ECtHR judgment in *Hirst v UK*[62] concerning the voting rights of convicted prisoners, for example, the JCHR commented unfavourably on Lord Falconer's timetable for implementation. In reply, the difficulty of this contentious matter was pleaded; it was under consultation. Six months later, when the timetable had slipped again, the chairman wrote asking for an updated timetable. The Committee had to register its disappointment in its 2008 report that no concrete timetable had as yet been set, raising serious questions regarding the government's sincerity.

Nicol has argued that the intention in the HRA was to give 'politicians a stake in the rights-game' and Parliament 'a voice of its own'.[63] One consequence of this pluralist model of rights-formation is that parliamentarians may develop conceptions of rights that diverge from those of government and judiciary. If the JCHR is the voice of Parliament for these purposes, then it is a surprisingly radical and independent voice. Its input into the human rights 'dialogue' is uncompromising and its influence in its continuous dialogue with ministers considerable. It is not afraid to voice views that differ starkly from those of the courts. It is a source of information not only for the two Houses but also for the general public. As indicated earlier, the JCHR has emerged as a focal point for human rights campaigners, who regularly give evidence for its reports. On occasion, it could indeed be seen to be acting more like a human rights commission or lobby group than a committee of MPs.

[60] *Monitoring the Government's Response to Court Judgments*, HC 728 (2006/7) [13].

[61] See JCHR, *Implementation of Strasbourg Judgments: First progress report*, HC 954 (2005/6); *Monitoring the Government's Response to Court Judgments Finding Breaches of Human Rights*, HC 728 (2006/7) and HC 1078 (2007/8) [47]–[63].

[62] *Hirst v UK*, App. No. 74025/01 (6 Oct. 2005).

[63] D. Nicol, 'The Human Rights Act and the politicians' (2004) 24 *Legal Studies* 451, 452 and 'Law and Politics after the Human Rights Act' [2006] *PL* 722.

### (d) Pre-legislative scrutiny

The practice of making bills available in draft for public consultation and pre-legislative scrutiny followed a recommendation from the Modernisation Committee in 1997.[64] By 2007, forty-five bills had been subject to this procedure – fewer than the Committee had hoped.[65] Pre-legislative scrutiny is concerned not so much with drafting style – though perhaps it ought to be – as with human rights issues, spending implications, regulatory impact assessment and delegation of powers. In some ways therefore the new scrutinising work duplicates that of other parliamentary committees, though it has the advantage that the 'fire-watching' comes at a stage when change is still possible. Time remains a serious problem; some complex bills are published in stages; essential draft regulations are often unavailable and a terse recommendation that all draft bills 'be accompanied by a comprehensive set of draft secondary legislation' has not always prevailed.[66]

There is near-universal agreement that pre-legislative scrutiny is 'a good thing': parliamentary officials indicate that it saves time at later stages; the Constitution Committee welcomes it, pointing specifically to the advantages for regional elected assemblies; the Law Society and other professional bodies see it as playing a significant part in improving the quality of bills. For the Hansard Society, it is 'an extremely positive development' because the public can be involved. The House of Lords Constitution Committee, hoping to see pre-legislative scrutiny extended, has recommended technical improvements, such as checklists, for a more consistent approach; greater access to information; evidence-taking facilities and so on.[67]A Scrutiny Unit has also been set up to deal with the problem that scrutinising committees are increasingly asked to survey a mass of documentary and statistical material, dealing with technical subjects such as resource budgeting, which are beyond their expertise. The Unit, set up in 2002, comprises seventeen staff, including lawyers, economists and an accountant; it advises on the reading of documentation and statistical material used in pre-legislative scrutiny, including regulatory impact assessments.

The Modernisation Committee sees pre-legislative scrutiny as aiding consensus and helping Parliament to 'connect with the public':

> Pre-legislative scrutiny of draft bills, one of the most successful Parliamentary innovations of the last ten years, should become more widespread, giving outside bodies and individuals a chance to have their say before a bill is introduced and improving the quality of the bills that are presented to Parliament. Members who have served on pre-legislative committees should

[64] Modernisation Committee, *The Legislative Process*, HC 190 (1997/8).
[65] House of Commons Library, *Pre-Legislative Scrutiny*, SN/PC/2822 (November 2007), p. 7.
[66] A. Kennon, 'Pre-legislative scrutiny of draft bills' [2004] PL 478, 488.
[67] HC 1097 (2005/6) [20]; Hansard Society, 'Pre-Legislative Scrutiny' (2004) 5 CC, *Issues in Law Making*; HL173-I (2003/4). And see CC, *Pre-legislative Scrutiny in the 2006-7 Session*, HL 129 (2007/8) and *Follow-up*, HL 43 (2007/8).

> be invited to return for the standing committee stage, drawing on their experience with the draft bill to contribute to the detailed consideration of the bill itself . . . there is evidence that, by informing Members more thoroughly about the issues surrounding a bill, pre-legislative scrutiny can make the Parliamentary stages of a bill more challenging for Ministers.
>
> As a matter of routine, Government bills should be referred to committees which have the power to take evidence as well as to debate and amend a bill, and these committees should be named public bill committees. This is not intended to be a substitute for pre-legislative scrutiny; it is to enable the Members who will be going through the bill in detail to inform themselves about its contents and to give the Minister a chance to respond to questions from the Committee, a process which is likely to be more fruitful than a series of debates on 'probing' amendments.
>
> The standing committee stage itself could be improved by increasing the notice period for amendments – giving Members more time to prepare for debates – and Members should have the opportunity to table brief explanations of their amendments. The House should take the first steps towards computerising standing committee papers and providing onscreen access to papers in committee rooms. In the longer term, this could have far-reaching implications for the way that Members use standing committee papers, for example, by providing hypertext links between different documents and showing how the bill would look if particular amendments were made . . .
>
> A more flexible approach to the timing of bills could bring some benefits. In particular, a move away from the 'standard' one-day debate on second reading could allow for longer second reading debates on some bills, and shorter debates on others.
>
> Parliament should improve the quality of the information it provides both for its own Members and for the public. A new series of 'legislation gateways' on the internet will provide a single source of information for each bill and the House of Commons Library will produce a Research Paper covering the committee stage of most bills, supplementing the Reports that are currently produced before second reading.[68]

The implications of these recommendations are considerable, bringing a very real risk of overload. The plethora of committees – general committees, departmental select committees, the JCHR, the constitutional committees of the two Houses, and so on – which all now take a hand in scrutinising legislation brings the further danger of overlapping and contradictory recommendations, reducing any impact they might have.

### (e) Post-legislative scrutiny

Parliament is also starting to take an interest in the output end of the legislative sequence, toying with the idea of post-legislative scrutiny. As Jean Corston, when Chair of the JCHR, explained in a letter to the Constitution Committee:

> As legislators, we need to pay as much attention to what happens after we have finished our specialised task of making the law as we do to the processes by which we achieve

[68] Modernisation Committee, *The Legislative Process*, HC 1097 (2005/6) [11].

> the law. The professional deformation against which we perhaps have to be most wary is supposing that legislating is the most effective way to achieve our ambitions, and that lawmaking is a precise science which can result in a perfect product. Our responsibility does not begin with a Bill's introduction to Parliament or end with the royal assent. Improving the efficiency with which we process legislation is only a small part of improving our effectiveness.[69]

The Constitution Committee favoured post-legislative scrutiny on the ground that it would allow implementation to be regularly monitored.[70] It did not, however, expand on how precisely this was to be done, limiting its advice to the recommendation that all legislation should be reviewed within three years either of commencement or passage of the legislation. The matter was then referred to the Law Commission which, after lengthy consultation, published essentially cautious recommendations,[71] fearing that post-legislative scrutiny would simply serve to reopen contentious political debates, while the huge resource implications would fall largely on already over-burdened departments. Warily, it concluded that the approach should be evolutionary and should build on what was already in place.

In its belated response, the Government chose to draw attention to its record of reforms,[72] including:

- more frequent publication of bills in draft, allowing pre-legislative scrutiny both inside and outside Parliament
- publication of a draft legislative programme[73]
- introduction of published Explanatory Notes on Bills and Acts
- measured use of 'carry-over' of bills from one session to the next so as to help make better use of parliamentary time
- renaming of Commons standing committees on bills as 'public bill committees' and fuller explanatory material, to promote greater public understanding
- oral evidence-taking as a standard part of public bill committee work on programmed government bills starting in the Commons
- written evidence taking procedures in public bill committees.

On post-legislative scrutiny, the Government agreed with the Law Commission's cautious approach. There were lessons to be earned from selective post-legislative scrutiny not only where problems were identified but also where things had gone well, but any more formal structure must be proportionate. It must:

[69] *Parliament and the Legislative Process*, HL 173-ii, pp. 164–7.
[70] *Parliament and the Legislative Process*, HL 173-i (2004/5), Ch. 5.
[71] Law Commission, *Post-Legislative Scrutiny*, CP No 178 (2006) and *Post-Legislative Scrutiny*, Cm. 6945 (2006).
[72] Office of the Leader of the House of Commons, *Post-Legislative Scrutiny: The government's approach*, Cm. 7320 (2008).
[73] Published in July, anticipating the traditional Queen's Speech in November; see House of Commons Library, *Draft Queen's Speech*, SN/PC/4398.

- concentrate on appropriate Acts and not waste resources attempting detailed reviews of *every* Act
- avoid re-running what are basically policy debates already conducted during passage of the Act
- reflect the specific circumstances of each Act (for example, associated secondary legislation or surrounding policy environment)
- be complementary to the scrutiny which can already take place, in particular through existing Commons select committee activity.

The initiative should therefore be left to Commons committees. All Acts would receive a measure of post-legislative scrutiny within government and a memorandum would be prepared as a basis for scrutiny by the appropriate departmental select committee; some Acts, on a considered and targeted basis, would go on to receive more in-depth scrutiny.

There are, in fact, strong arguments against post-legislative scrutiny, which have not been properly investigated. The first, mentioned by the Law Commission, concerns resources; post-legislative review as envisaged would add substantially to the burdensome paperwork generated by regular pre-legislative impact assessment. The second is that it is not clearly within the legislator's remit and its close links with impact assessment mean that, if it is to work properly, there must be co-operation with administration, alone capable of monitoring the administrative process. This raises questions as to how Parliament could react. The legislative process is not within Parliament's grasp: space for amending legislation needs to be found in the crowded government bill programme. So Parliament would need to authorise 'fast track' procedures, which it does not like, as it has done in the case of deregulation ( see p. 168 below). For government, the main concern is to avoid replaying policy arguments. The hope that this can be averted by a 'cooling-off period' of three to five years is simply naïve. Has the Countryside Alliance, for example, abandoned opposition to the Hunting Act four years (and two House of Lords challenges) after the Act came into force? Have anti-abortionists given up hope of seeing the Abortion Act repealed? The prospect of post-legislative scrutiny would breathe new life into buried political disputes.

## 4. Delegated legislation

Ideally, legislation and the regulations needed to implement it should form part of a single scheme and be drafted by the same team;[74] in practice this counsel of perfection is seldom met. The fact that the style of drafting secondary legislation 'is on the whole worse than that for primary legislation' can partly be explained by the fact that it is not drafted by specialist parliamentary draftsmen but by departmental lawyers who 'despite best efforts and training perhaps do

[74] Australian ARC, *Rule Making by Commonwealth Agencies* (Australian Government Publishing Service, Report No. 35, 1992), Ch. 4.

not have the opportunity to build up the necessary skill and expertise.'[75] The instructions on which the text is based often come from junior civil servants, who may themselves occasionally draft statutory instruments without the advice of parliamentary draftsmen or even the help of departmental lawyers.[76] These drafting problems, creating a greater need for scrutiny, should not be overlooked.

After World War II, when delegated powers had proliferated, the Statutory Instruments Act 1946 (SIA) was passed. It provided that statutory instruments as defined in the Act must be laid before Parliament for approval. In 'affirmative procedure', regulations need confirmation by the House, although this may in practice occur before the scrutiny committee has reported on them or the vote may be purely formal after a debate in a general committee. In 'negative procedure', a statutory instrument enters into force unless a motion to annul is successfully moved. The first scrutiny committee was the Committee on Statutory Instruments established in 1944. A survey of the markedly inadequate arrangements in 1971 led to a measure of rationalisation, when the Committee merged with the Special Orders Committee of the Lords to form the Joint Committee on Statutory Instruments (JCSI), which scrutinises all statutory instruments or drafts requiring affirmative resolution.[77]

The JCSI publishes around thirty scrutinising reports annually plus an annual report.[78] Its remit is to scrutinise the text of regulations for drafting faults and ensure that they conform to certain overriding principles: a statutory instrument should not impose a tax; its parent legislation must not oust the jurisdiction of the courts; it should not have retrospective effect without the express authority of the parent legislation. It can also be referred on the ground that there is doubt whether it is *intra vires*; that it makes an unusual or unexpected use of its powers; or on 'any other ground which does not impinge upon the merits of the instrument or the policy behind it'. The JCSI also monitors departmental progress in updating the regulatory stock but, in contrast to the Committee on the Merits of Statutory Instruments set up by the Lords in 2003, is not empowered to look at policy.

The Merits Committee can draw to the attention of the House of Lords any instrument considered to be 'politically or legally important or that gives rise to issues of public policy likely to be of interest to the House',

[75] Hansard Society, *Making the Law*, 285 (Law Society representations).

[76] Page, *Governing by Numbers*, Ch. 6. And see E. Page and B. Jenkins, *Policy Bureaucracy: Government with a cast of thousands* (Oxford University Press, 2005), pp. 48–9, 61–2.

[77] HC Standing Order 151, HL 74. Commons Members sit separately as the Select Committee on Delegated Legislation to deal with those instruments which need to be laid only before the House of Commons.

[78] The Annual Report not only contains statistics but list 'laggards' and 'leaders' in rectification: see, e.g., JCSI, *Scrutinising Statutory Instruments: Departmental Returns, 2006*, HC 917 (2006/7). And see J. Hayhurst and D. Wallington, 'The Parliamentary scrutiny of delegated legislation' [1988] *PL* 255.

which 'imperfectly achiev[es] its policy objectives', inappropriately delegates legislative power or incorrectly transposes EU law. Reviewing the area, the Merits Committee has stressed that, because statutory instruments cannot be amended during parliamentary scrutiny, it is essential that they be well formulated and well explained when presented. It has criticised lack of clarity in explanatory memoranda, inappropriate implementation of EU directives and insufficient progress in the consolidation of successive instruments, and censured 'failures to engage in "grass roots" consultation where regulations are being made which will affect the lives of ordinary citizens'.[79] The Committee blames in-house departmental procedures: the absence in some departments of a strategic approach to the making of statutory instruments, especially long-term planning and programme management measured against milestones. This suggests that departments do not take secondary legislation seriously. The Law Commission is in agreement, seeing the onus for improvement as lying on government: it should 'give more thought to consolidation of secondary legislation with the aim of improving accessibility'. More specifically, the related provisions of primary and secondary legislation 'should be capable of being accessed in a coherent fashion by a straightforward and freely available electronic search.'[80]

It could be retorted that Parliament does not take scrutiny sufficiently seriously. Indeed, the Clerk to the House of Lords Delegated Powers and Deregulation Committee notes 'widespread agreement that Parliament's consideration of secondary legislation is second rate'.[81] The main cause is the rise in number and length of statutory instruments (not all of which are laid before Parliament). In 1951, there were 2,144 but the numbers registered have doubled since the 1980s, from around 2,000 to over the 4,000 mark. The devolved administrations have naturally provided a major boost. Again, the volume rose from 2,970 pages in 1951 to 4,370 in 1964; by 2005, the figure had jumped dramatically, to almost 12,000 pages annually. The numbers of those subject to only negative procedure had also risen exponentially at Westminster. In fact, very few statutory instruments are discussed on the floor of the House of Commons: in the three sessions beginning 2004–05, for example, just 37:

> Does this matter? I think that most people involved in the parliamentary process would say that it does. The volume of secondary legislation has increased, is increasing and is unlikely to diminish. Statistics which the Government has recently provided show that this increase is particularly true for negative instruments which Parliament at present almost always nods through without comment. At the same time, the importance of much of the content of secondary legislation is increasing. It covers increasingly complex issues, perhaps especially

[79] Merits Committee, *The Management of Secondary Legislation*, HL 149 (2005/6) [122].

[80] Law Commission, *Post-Legislative Scrutiny* [4.14–15]. The Commission favoured an additional parliamentary joint committee.

[81] P. Tudor, 'Secondary legislation: Second class or crucial?' (2000) 21 *Stat. Law Rev.* 149, 150.

> in relation to information technology, where the goalposts are constantly changing and which is therefore a prime candidate for secondary legislation. And it covers issues which are increasingly sensitive, for example, relating to immigration and asylum issues.[82]

It is not that Westminster's Scrutiny Committees are not useful but their scope is limited and their procedures a little old-fashioned; they do not avail themselves, for example, of scrutiny techniques used elsewhere in government.[83] By no means all secondary legislation comes within the parameters of the SIA; not all statutory instruments are subject to affirmative procedure; very few of those subject to negative procedure are actually considered by Parliament. The Scrutiny Committees are unable to make amendments but are reliant on negotiation with departments. They can recommend debate either in committee or on the floor of the House but only a tiny handful of measures reported to the House is actually debated.[84]

The Procedure Committee blames Parliament for 'too great a readiness . . . to delegate wide legislative powers to Ministers, and no lack of enthusiasm on their part to take such powers. The result is an excessive volume of delegated legislation'.[85] Parliamentary procedure is 'palpably unsatisfactory, and offers the House scarcely any opportunity for constructive and purposeful discussion', while negative procedure allows instruments to slip through 'unregarded, undebated and often unnoticed by Members'. The Committee thinks the forty-day scrutiny period too short; it should be extended to the sixty days allowed to the Deregulation Committee (see p. 167 below) and a new Standing Order made forbidding a final decision in advance of the recommendations of the JCSI. A new and significant proposal to experiment with a new, 'super-affirmative' procedure, applicable to both affirmative and negative instruments, would require departments to signal particularly complex or significant affirmative orders to the House for channelling to the most appropriate committee of its choice.[86] Forcefully pointing out that almost all its proposed reforms had 'been pioneered . . . and shown to be eminently workable' elsewhere, including the scrutiny of primary legislation, the Procedure Committee concluded that this cast the failures of the system into even starker relief and rendered 'the task of modernising scrutiny of delegated legislation even more pressing'.[87] But in 2002, it had yet again to record stalemate; its two previous reports had received no government response nor had changes in Standing Orders or amendment been made to the SIA. Once again the Procedure

[82] *Ibid*.

[83] D. Oliver, 'Improving the scrutiny of bills: The case for standards and checklists' [2006] *PL* 219; HL 173-I (2003/4), from [88].

[84] On the need to manage the laying process, see HL 149 (2005/6) [71–4]. See also T. St. John Bates, 'The future of parliamentary scrutiny of delegated legislation: Some judicial perspectives' (1998) 19 *Stat. Law Rev.* 155.

[85] Procedure Committee, *Delegated Legislation*, HC 152 (1995/6).

[86] *Delegated Legislation*, HC 152 [57].

[87] Procedure Committee, *Delegated Legislation*, HC 48 (1999/2000) [51].

Committee stressed the need for a sifting process; this time the Government rejected the proposal out-of-hand.[88]

### (a) Deregulation and 'Henry VIII clauses': A case study

If delegated legislation is a necessary evil, executive powers to amend or repeal primary legislation retrospectively are regarded less complacently. Because it allows the executive to override the express wishes of Parliament and permits primary legislation to be overridden by secondary legislation, the so-called 'Henry VIII clause' is widely seen as an unconstitutional threat to parliamentary sovereignty and meets a hostile reception.[89] Yet we have already met several sweeping Henry VIII clauses, notably s. 10 of the HRA, which empowers a minister to act by order to 'make such amendments to the legislation as he considers necessary' to remove the incompatibility to one of the Convention Rights set out in Schedule 1 of the Act. Section 2 of the European Communities Act 1972 (ECA), discussed in greater detail below, not only contains powers to transpose EC law into the domestic legal order by Order in Council but also makes EC regulation directly applicable inside the UK. There is some sense that the use of Henry VIII clauses is increasing and that its legitimacy is less contested.

The Lords set up its committee on the Scrutiny of Delegated Powers in 1992 in response to the sweeping powers proposed in the Deregulation and Contracting Out Bill, described by Lord Rippon as 'a Henry VIII clause squared'.[90] The purpose of this bill was to allow the Conservative government to move quickly to lessen burdens falling on industry due to over-regulation. Expecting trouble, the Government had referred its bill to the Procedure Committee, which set out to ensure that 'no Act of Parliament is repealed or amended under this new power without examination at least as thorough as if the change had been made by a Bill passing through the House'.[91] But complaining that the outcome was inevitable because its deliberations were proceeding in parallel with debates on the bill, Opposition members ultimately boycotted the Committee. In the Lords, a government concession was secured to extend the normal scrutiny period of forty days for delegated legislation to sixty days, the start of 'super-affirmative' procedure (above). With these supposed precautions, the 'fast track procedure' went into operation. It was not much used: by the end of 1996, the Deregulation Unit of the Cabinet Office charged with deregulation had introduced only forty-four measures, of which

[88] Procedure Committee, *Delegated Legislation: Proposals for a Sifting Committee*, HC 501 (2002/3), *Government Response*, HC 684 (2002/3).

[89] See e.g., V. Korah, 'Counter-inflation legislation: Whither parliamentary sovereignty?' (1976) 92 *LQR* 42.

[90] Lord Rippon, 'Henry VIII clauses' (1989) *10 Stat. Law Rev*. 205, 206 and 'Constitutional anarchy' (1990) 11 S*tat. Law Rev*. 184. See also C. Himsworth, 'The Delegated Powers Scrutiny Committee' [1995] *PL* 34.

[91] *Delegated Legislation* , HC 152 [16].

three had attracted the notice of Parliament; by 2000, the total was only forty-eight. The Unit blamed the restrictive terms of the enabling legislation.

The New Labour Government now in power therefore proposed reinforcing the earlier legislation. It would extend the procedures to the public sector, allowing statutory instruments to be used to relieve *government agencies* of burdens, provided they were not the 'sole beneficiaries' of a deregulation measure. Even more controversially, the bill contained a 'mega-Henry VIII clause', allowing repeal by statutory instrument laid and approved by a resolution of each House of Parliament of any Act (whether or not in force) passed at least two years before the day on which an Order, including an Order made under the 1994 Act, was made.[92]

Government was moving on to dangerous ground. But it gave the usual undertakings not to use the legislation for 'highly controversial' measures and Parliament perhaps felt that it could rely on the vigilance of its Scrutiny Committees using 'super-affirmative' procedure: a two-stage consideration of Orders in each House obliging a minister wishing to make an Order to lay before Parliament after the first sixty-day scrutiny period a statement of any 'representations' received. As passed by Parliament, the Regulatory Reform Act 2001 had the acquiescence of its Select Committees.[93] Again it was not much used: only twenty-seven Orders had been made by the end of 2005. Reviewing the Act, the Cabinet Office concluded that it was not 'fit for purpose'; its ability to deliver regulatory measures was 'not as wide-ranging as hoped' so that the number of reforms delivered was 'significantly lower than expected'.[94]

In view of the fact that publication had been preceded by a review, by a consultation paper and by wide consultation, the uproar that greeted an amending bill in 2005 was perhaps unexpected. As introduced in January 2006, the bill would have allowed a minister to make provision by Order for reform or repeal of any public general or local Act plus a wide range of subordinate legislation and also to implement Law Commission recommendations with or without changes. There was power for ministers to act by negative procedure and, even though Parliament could request 'super-affirmative procedure', it would be for the minister to decide whether to apply it. The bill contained restrictive preconditions, based on fairness and proportionality.

Reports poured in from Select Committees criticising the bill 'in robust terms'. The Regulatory Reform Committee called it 'potentially the most constitutionally significant bill that has been brought before Parliament for some years'[95] and highlighted the perils of proposals that 'would change the way that

[92] House of Commons Library, *The Legislative and Regulatory Reform Bill: Bill 111 of 2005/6*, Research Paper 06/06 (2006), pp. 13–14.

[93] D. Miers, 'Regulatory reform orders: A new weapon in the armoury of law reform' (2001) 21 *Public Money and Management* 29.

[94] Cabinet Office, *Review of the Regulatory Reform Bill* (July, 2005); *A Bill for Better Regulation: Consultation document* (July, 2005).

[95] Select Committee on Regulatory Reform, *Legislative and Regulatory Reform Bill*, HC 878 (2005/6).

primary legislation was amended'. The minister faced aggressive questioning.[96] PASC, leaping with a slim excuse into the fray, pointed out that the bill itself provided a striking example of the advantages of legislative procedure as it currently existed. The bill gave government powers 'entirely disproportionate to its stated aims' and the Government, which had undertaken to amend it, must 'ensure that by the time it leaves this House it provides adequate safeguards against the misuse of the order making powers it contains'.[97] The media gleefully reported a government climb-down; amendments would be introduced so that the bill could 'no longer be misconstrued as an attempt by government to take a wider constitutional power' and a statutory veto on the 'fast track' procedure would be given to the two Regulatory Reform Committees.

As finally passed by Parliament, the Legislative and Regulatory Reform Act 2006 contains stringent limitations. The Act first provides that regulatory activities shall be targeted only at cases in which action is needed. It authorises ministers to make by Order in Council any provision 'aimed at removing or reducing any burden, or the overall burdens, resulting directly or indirectly for any person from any legislation' but strictly defines the term 'burden' and also limits the persons to whom the powers can be transferred or delegated. Relevant in the present context, it provides that Orders can be made only by statutory instrument that is subject to 'super-affirmative procedure' and have to be laid before and approved by a resolution of each House of Parliament.

What light does the affair shed on the effectiveness of the 'modernised' parliamentary legislative procedures? At first sight, they were not very effective; of nine suggestions from various select committees, only three were accepted. On the other hand, a proposal seen:

> by those interested in constitutional protection, as alarming, ended as an Act within the scope of accepted precedent. It also seems that the reports of the various select committees had some influence in persuading the government to table amendments that were able largely to satisfy those most concerned. On that basis it is misconceived to think that because all accepted amendments to the Bill were government amendments, the same result would have been achieved had those parliamentary stages not been required. All the amendments were preceded by pressure that might have resulted in amendments imposed against the wishes of government, or even House of Lords defeat and loss of the Bill, had the government continued to disregard issues perceived to be of constitutional importance.[98]

[96] Select Committee on Regulatory Reform, *Operation of the Regulatory Reform Act 2001*, HC 774 (2005/6).

[97] PASC, *Legislative and Regulatory Reform Bill*, HC 1033 (2005/6) [13]. See also CC, *Legislative and Regulatory Reform Bill*, HL 194 (2005/6).

[98] P. Davis, 'The significance of parliamentary procedures in control of the executive: A case study: The passage of Part 1 of the Legislative and Regulatory Reform Act 2006' [2007] *PL* 677, 693–4. And see A. Brazier, S. Kalitowski and G. Rosenblatt, *Law in the Making: Influence and change in the legislative process* (Hansard Society, 2008).

## 5. Access and participation

### (a) Pre-legislative consultation

When the first scrutiny committees were being set up in 1952, an MP remarked: 'It has been perhaps rather noticeable that all through this afternoon we have been discussing this merely from the point of view of Parliament and MPs. We have not let the public creep into the discussion at all.' Indeed, a proposal to allow members of the public to complain of, or ask for changes in, regulations was dismissed on the ground that 'aggrieved persons have their grievances brought to the attention of the House by Members.'[99] The general public has in fact never been totally excluded from the lawmaking process but consultation was – and still is – largely voluntary. Griffith and Street's foundational textbook[100] contains a lengthy account of informal government consultation procedures, emphasising their importance. Consultation, according to the authors, had a threefold purpose: (i) to put the administration 'in full possession of the facts and viewpoints which bear on the particular matter'; (ii) 'to enable those affected, from powerful groups to ordinary individuals, to state their case against the proposed action and to urge that it be modified or dropped'; (iii) for public explanation. Amongst appropriate techniques, the authors mention advisory committees, direct consultation and public inquiries, developing around that time as an important vehicle for consultation in the area of land use planning (see Chapter 13).

Wade and Forsyth call pre-legislative consultation with interests and organisations likely to be affected 'one of the firmest and most carefully observed conventions':

> It is not a matter of legal right, any more than it is with Parliament's own legislation. But it is so well settled a practice that it is most unusual to hear complaint. It may be that consultation which is not subject to statutory procedure is more effective than formal hearing which may produce legalism and artificiality. The duty to consult is recognised in every sense except the legal one.[101]

In some ways, this passage marks a transition, coinciding with a perceived decline in consultation and in publication of preliminary Green and White Papers under Margaret Thatcher, which provoked demands for a British equivalent of the American Administrative Procedure Act.

The AAPA applies in the absence of alternative statutory provision to all federal administrative authorities and agencies, obliging them to give notice of proposed rule-making and (as understood in Britain) affords to 'interested persons the opportunity to participate in the rule-making through submission of written data, views or arguments with or without opportunity to

[99] HC 310 (1952/3), p. 141.
[100] J. Griffith and H. Street, *Principles of Administrative Law*, 5th edn (Pitman, 1973), pp. 118–36.
[101] Wade and Forsyth, *Administrative Law*, 9th edn (Oxford University Press, 2004), p. 896.

present the same orally in any manner'. In practice, the American experience has been very mixed; it has been said to impede agency action and lead to serious 'dilution of the regulatory process'[102] – one reason perhaps why a general right of consultation has not so far been conceded in Britain. In 1992, however, the Hansard Society noted 'deep dissatisfaction with the extent, nature, timing and conduct of consultation'. There was a lack of coherent policy; civil service guidelines did not appear to be followed; there were inconsistencies of approach between and even within government departments, agencies and other statutory bodies. The result was 'a mixture of good and bad consultation practice, and, more fundamentally . . . a distortion of the whole consultation process.' The Hansard Society called for a leisurely and prolonged two-stage consultation process at 'rough draft' and 'final draft' stage; this would give an opportunity for experts and those likely to be affected to make their views known. It also favoured published guidelines 'drawing on best practice' and influenced by the 'advice and experience of those most directly involved'.[103]

In his study of delegated legislation, Page identifies three separate types of consultation: *indirect consultation* of committees, advisory and other bodies known to be interested; a *staged consultation exercise*, based on an explanatory or exploratory paper, often published on the Internet; and *at large consultation* by politicians and civil servants testing their ideas informally at the development stage.[104] All may involve the general public, though in practice it is mainly interest groups or those who give evidence to parliamentary committees who make a meaningful response. Civil servants take consultation seriously; they 'generally make serious efforts to consult relevant groups' and will 'consult anyone interested in the consultations'.[105] But government retains discretion; representations can be ignored, though it is unwise to do so, as interest groups help to ensure that regulations will not prove so unpopular as to prove unenforceable. In this perspective, consultation is designed for 'stakeholders', rather than the public at large; it is, in other words, a 'Three Es' method of ensuring the interests of the main players. It also serves the purposes of 'joined-up government', acting as an 'NPM' technique for rectifying fragmented public administration, especially the impact of devolution; the Legislative and Regulatory Reform Act 2006, for example, lists the Welsh

[102] R. Hamilton, 'Procedures for the adoption of rules of general applicability: The need for procedural innovation in administrative rulemaking' (1972) 60 *Calif. LR* 1276, 1312–3, writing just as the UK and US models were compared by B. Schwarz and H. W. R. Wade, *Legal Control of Government: Administrative law in Britain and the United States* (Oxford University Press, 1972), p. 97. See J. Rossi, 'Participation run amok: The costs of mass participation for deliberative agency decisionmaking' (1997) 92 *Northwestern Univ. L. Rev.* 173.

[103] Hansard Society, *Making the Law*, pp. 17–18, 226 and Recommendations 150, 162.

[104] Page, *Governing by Numbers*, p. 129. Page examined 46 statutory instruments of which 11 involved no consultation, 6 indirect consultation, 12 at-large consultation, and 17 staged consultation.

[105] *Ibid.*, p. 142.

Assembly as potential consultee, requiring a second round of consultation if the whole or any part of the proposals undergoes change. This is like a staged consultation exercise confined to elite stakeholders.

The theme recurs in the context of statutory consultation rights, common in the fields of planning, social security and local governance. The Social Security Act 1992, for example, set up a Social Security Advisory Committee (SSAC), which must be consulted on new legislation and changes to regulation, and also advises on Green and White Papers; whether its advice will be followed is quite another matter. The SSAC has its own consultative network and also posts consultation exercises on the Internet[106] (Page's indirect consultation). Similarly, the Deregulation and Contracting Out Act 1994 allowed 'those with expert knowledge of the subject, and those who will be affected by the legislation, [to] have access to the process'.[107] Before making an Order under s. 1 of the Act, the minister has to consult (a) such organisations as appear to him to be representative of interests substantially affected by his proposals; and (b) such other persons as he considers appropriate (Page's 'at large' consultation). This is despite the fact that the Act was designed to introduce the possibility of 'dialogue between Parliament and people – largely absent from the consideration of much primary legislation'.

The UK Cabinet Office has issued a code of practice, available on the Cabinet Office website, on running a consultation and identifying and engaging with stakeholders. This sets out six consultation criteria which must be followed in all consultation documents:

- Consult widely throughout the process, allowing a minimum of twelve weeks for written consultation at least once during the development of the policy.
- Be clear about what your proposals are, who may be affected, what questions are being asked and the timescale for responses.
- Ensure that your consultation is clear, concise and widely accessible.
- Give feedback regarding the responses received and how the consultation process influenced the policy.
- Monitor your department's effectiveness at consultation, including through the use of a designated consultation co-ordinator.
- Ensure your consultation follows better regulation best practice, including carrying out a regulatory impact assessment if appropriate.

### (b) Citizen participation

Before considering contemporary policies for citizen participation, it is helpful to look at Arnstein's 'ladder of citizen participation', devised just as 'citizen

[106] A. Ogus, 'SSAC as an independent advisory body: Its role and influence on policymaking' (1998) 5 *J. of Social Security Law* 156.

[107] *Delegated Legislation,* HC 152-ii, p. 73 (Mr Barry Field).

| | |
|---|---|
| Citizen control | 8 |
| Delegated powers | 7 |
| Partnership | 6 |
| Placation | 5 |
| Consultation | 4 |
| Informing | 3 |
| Therapy | 2 |
| Manipulation | 1 |

Fig. 4.1 Arnstein's ladder of citizen participation

participation' became fashionable with planners at the end of the 1960s (see Fig. 4.1 above). Arnstein conceived the idea in the course of her work in US federal social programmes, where contacts with 'rubberstamp advisory committees' and 'manipulative neighbourhood councils' persuaded her that citizen participation was largely a sham; it 'juxtapose[d] powerless citizens with the powerful in order to highlight the fundamental divisions between them'.[108] Arnstein believed that there was 'a critical difference between going through the empty ritual of participation and having the real power needed to affect the outcome of the process'. It is useful to bear Arnstein's theory in mind when thinking about participation and consultation in British government and public administration.

Experiments with citizen participation started in the UK during the 1960s and '70s, when planners came to see it as the only way to stave off the vigorous protests and demonstrations that increasingly accompanied large-scale planning projects.[109] The Skeffington Committee, set up to advise on 'the best methods, including publicity, of securing the participation of the public at the formative stage in the making of development plans for their area',[110] talked ambitiously of a continuous dialogue between the people and the planners, allowing the people 'to take an active part throughout the plan-making process', and even of 'citizen control'. Never realised, the ideology of Skeffington still remains a potent influence in environmental matters, where public participation is today the subject of international conventions ratified by the UK. The governing Aarhus Convention, which requires public participation,[111] has

[108] S. Arnstein, 'A ladder of citizen participation' (1969) 35 *J. of the American Institute of Planners* 216.

[109] See R. Damer and C. Hague, 'Public participation in planning: A review' (1971) 42 *Town Planning Review* 217.

[110] Report of the Skeffington Committee, *People and Planning* (1969). See now J. Cullingworth (ed.), *Fifty Years of Urban and Regional Policy* (Continuum Publishers, 2001); Y. Rydin and M Pennington, 'Public participation and local environmental planning: The collective action problem and the potential of social capital' (2000) 5 *Local Environment* 153.

[111] The Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters. And see M. Lee and C. Abbot, 'The usual suspects? Public participation under the Aarhus Convention' (2003) 66 *MLR* 80; R. Macrory and S. Turner, 'Participatory rights, transboundary environmental governance and EC law' (2002) 39 *CML Rev.* 489.

been implemented by the European Commission and applies generally across the EU. In its *White Paper on European Governance* (strongly influenced by academic theories of deliberative democracy), the European Commission has recognised participation as a 'good governance' standard and committed itself generally to greater access for citizens to the policy-making process,[112] an ambition attainable, in view of the geographical area and cultural differences, largely through ICT. Whether this diluted form of participatory democracy or 'e-governance' adds up to anything more than therapy or placation (rungs 2 and 5) is a very moot point.

As we noticed in Chapter 2, however, consultation is currently an obsession in British government. Committed to being 'responsive', New Labour has seized the opportunity of technical advance, which has opened the way to consultation with the public and 'e-governance' (p. 75 above). Consultation is said both to inform the public about government policies and let them have their say (rungs 3 and 5). Page, however, has doubts about motives for consultation in the civil service, suggesting it is largely a way of 'making sure that interested parties know that there is likely to be a change in the law and checking that there are no mistakes or ill-conceived portions of the proposed legislation' (rung 3).[113] The decision is often finalised *before* consultation, though the consultees may not be aware of this, in which case it is purely placatory, buying time for the public to adapt to unpopular change (rungs 5 or 1).

The fashion has also penetrated the Commons, which has authorised tentative experiments in taking evidence by standing committees (rungs 4 and 3). The idea was endorsed in 2003 by the Constitution Committee:

> The legislative process is not an insulated one. It is important that Parliament is aware of the views of others. Parliamentarians may not themselves be expert or especially well informed about the subject matter of a bill. It is essential that Parliament has the means to hear from experts and informed opinion in order to test whether a bill is fit for purpose. However, input should not be confined to such opinion. Citizens may have strong views on the subject. Parliamentarians should be in a position to know whether a measure is objectionable to citizens on ethical or other grounds. A measure may be technically feasible – and enjoy the assent of those affected by it – but it may not necessarily be desirable in the view of citizens. Parliamentarians do not have to go along with the views expressed to them by individuals, but it is important that citizens have an opportunity to express their views on measures before Parliament. It is then up to MPs and peers to assess the strength of feeling and the extent to which it is persuasive or informed.

[112] European Commission, *White Paper on European Governance* COM (2001) 428 (Brussels, 25.7.2001). And see A. Follesdal, 'The political theory of the White Paper on Governance: Hidden and fascinating' (2003) 9 *EPL* 73; O. Gerstenberg and C. Sabel, 'Directly-deliberative polyarchy: An institutional ideal for Europe?' in Joerges and Dehousse (eds.), *Good Governance in Europe's Integrated Market* (Oxford University Press, 2002).

[113] Page, *Governing by Numbers*, p. 148.

> The opportunity to be heard should apply to citizens operating individually and collectively. Groups have a right to make their opinions heard, but so too do citizens who are not organised in groups. Our intuitive view is that groups often have the knowledge and the means to make their voices heard: individual citizens often do not. We are concerned therefore to explore to what extent the means do and should exist in order to ensure that citizens have the opportunity to express their opinions on legislation being considered by Parliament.[114]

Ironically, a strong alternative motivation for consultation comes from concern over public disillusion with representative democracy and its institutions, setting in train a search for 'more innovative methods' to encourage citizen participation and encourage 'civic voluntarism' (rung 8).[115] The unofficial 'Power Inquiry', which hoped to counter widespread indifference to politics by 'rebalancing the system towards the people', set out to stimulate a culture of political engagement in which it would be normal for 'policy and decision-making to occur with direct input from citizens' (rung 6).[116] Amongst its concrete recommendations we read:

- All public bodies should be required to meet a duty of public involvement in their decision and policy-making processes.
- Citizens should be given the right to initiate legislative processes, public inquiries and hearings into public bodies and their senior management.

A White Paper, *Communities in Control*, aims overtly at rung 8 (though rungs 5 and 1 are also possibilities). The document purports to examine 'who has power, on whose behalf is it exercised, how is it held to account, and how it can be accessed by everyone in local communities', the stated objective being:

> to pass power into the hands of local communities. We want to generate vibrant local democracy in every part of the country, and to give real control over local decisions and services to a wider pool of active citizens.
>
> We want to shift power, influence and responsibility away from existing centres of power into the hands of communities and individual citizens. This is because we believe that they can take difficult decisions and solve complex problems for themselves.[117]

### (c) Consultation and judicial review

The emergence of participation as a 'good governance value' plus the routine concession of consultation rights by public bodies suggests that courts might

[114] *Parliament and the Legislative Process*, HL 173-I (2003/4) [13] [14].
[115] PASC, *Public Participation: Issues and innovations*, HC 373 (2000/1).
[116] Rowntree Trust, *Power to the People: The report of Power: An independent inquiry into Britain's democracy* (March 2006), Recommendations 23, 24; and see House of Commons Library, *Power to the People: The report of Power: An independent inquiry into Britain's democracy*, Standard Note: SN/PC/3948 (2006).
[117] DCLG, *Communities in Control: Real people, real power*, Cm. 7427 (2008), p. 11.

be called on to protect them.[118] But although statutory consultation rights provide an opening for judicial review, English courts have been slow to accept it.[119] They have occasionally intervened to insist that consultation must permit 'a real and not an illusory opportunity to make representations', as when an Education Secretary, acting under legislation which made consultation mandatory, left four days for parental consultation on a new system of comprehensive schools.[120] In less flagrant cases, judges have tended to interpret statutory consultation requirements as 'directory' rather than 'mandatory', a leniency that contrasts oddly with the firm position taken by the House of Lords in *Padfield* (p. 101 above). And if protection of statutory consultation rights has been weak then protection of non-statutory consultation has been weaker still. Without a statutory basis, protection was virtually limited to situations where assurances had been given until the *GCHQ* case (p. 107 above), in which a trade union was held to have a 'legitimate expectation' of being consulted before policy change, laid a stronger foundation.[121]

An appeal brought by Bapio Action on behalf of newly qualified doctors, who had trained in the UK in the expectation of being permitted to work here but later found their limited leave to remain suddenly withdrawn, not only contains a classic statement of the position in English law but also tells us much about the hazards of informal rule-making. The Immigration Rules, which contained the policy change, have to be laid before Parliament but are technically not statutory instruments; they have been allocated a hybrid status between a statutory code and non-statutory guidance by the courts. Responsibility for the rules rests with the Home Office, which refused on this occasion to amend them. Undeterred, the Department of Health pressed on with guidance, of which Lord Bingham said in the House of Lords:

> To speak of the guidance being 'issued' is to suggest a degree of official formality which was notably lacking. It appears that the guidance was published on the NHS Employers' website in terms approved by the Department, but no official draft, record or statement of the guidance has been placed before the House, which has instead been referred to an e-mail beginning 'Dear All' sent by an official of the Immigration and Nationality Directorate of the Home Office in response to confusion caused by some earlier communication. It is for others to judge whether this is a satisfactory way of publishing important governmental decisions with a direct effect on people's lives.[122]

[118] See R. Stewart, 'The Reformation of American administrative law' (1975) 88 *Harv. LR* 1667; F. Bignami, *Three Generations of Participation Rights in European Administrative Proceedings* (JMWP 11/03, 2003).

[119] S. A. de Smith, Lord Woolf and J. Jowell, *Judicial Review of Administrative Action*, 6th edn (Sweet & Maxwell, 2007) [7-052–6].

[120] *Lee v Education Secretary* (1967) 66 LGR 211; *Bradbury v Enfield London Borough Counci*l [1967] 1 WLR 1311.

[121] *Re Liverpool Taxis Association* [1972] 2 All ER 589. For legitimate expectation see Ch. 5.

[122] *R (Bapio Action) v Home Secretary* [2008] UKHL 27 [10] (Lord Bingham); [2007] EWCA Civ 1139 [50] [43–5] (Sedley LJ).

Both appellate courts found these procedures wholly inadequate: the guidance directly and intentionally affected immigration law and practice by imposing on the possibility of employment in the public sector a restriction beyond those contained in the rules. Faced with the argument in the Court of Appeal that government has a duty 'at least as a prima facie rule', to consult prior to rule-change, Sedley LJ thought that implying a duty to consult from a 'practice of consultation' in a case where there were no statutory consultation provisions was a step too far:

> Many people might consider it very desirable – but thinking about it makes it rapidly plain that if it is to be introduced it should be by Parliament and not by the courts. Parliament has the option, which the courts do not have, of extending and configuring an obligation to consult function by function. It can also abandon or modify obligations to consult which experience show to be unnecessary or unworkable and extend those which seem to work well. The courts, which act on larger principles, can do none of these things.

In *R (Greenpeace) v Trade and Industry Secretary*, an application to quash a government decision to reverse a longstanding policy on nuclear energy by supporting 'nuclear new build', Sullivan J took a bolder line, ruling that a consultation exercise was 'very seriously flawed'. This time, however, the judge was working from a statutory basis:

> The purpose of the 2006 Consultation Document as part of the process of 'the fullest public consultation' was unclear. It gave every appearance of being an issues paper, which was to be followed by a consultation paper containing proposals on which the public would be able to make informed comment. As an issues paper it was perfectly adequate. As *the* consultation paper on an issue of such importance and complexity it was manifestly inadequate. It contained no proposals as such, and even if it had, the information given to consultees was wholly insufficient to enable them to make 'an intelligent response'. The 2006 Consultation Document contained no information of any substance on the two issues which had been identified in the 2003 White Paper as being of critical importance: the economics of new nuclear build and the disposal of nuclear waste. When dealing with the issue of waste, the information given in the 2006 Consultation Document was not merely wholly inadequate, it was also seriously misleading . . . There could be no proper consultation, let alone 'the fullest public consultation' as promised in the 2003 White Paper, if the substance of these two issues was not consulted upon before a decision was made. There was therefore procedural unfairness, and a breach of the claimant's legitimate expectation that there would be 'the fullest public consultation' before a decision was taken to support new nuclear build.[123]

This judgment takes consultation seriously, seeing it as making a real contribution to rational risk assessment and decision-making (Arnstein, rung 4 or 3). The case was a strong one because it was based on an assurance in a White Paper. *Our Energy Future: Creating a low carbon economy* had promised in

[123] *R(Greenpeace) v Industry Secretary* [2007] EWHC 311 [116–20] (Sullivan J).

bold type that 'before any decision to proceed with the building of new nuclear power stations, there would need to be the fullest public consultation and the publication of a White Paper setting out the Government's proposals'. Consultation duly followed, with a programme of seminars and round table meetings, based on a full technical questionnaire for experts and a 'summary document' for the general public. Because the decision was ruled unlawful, all these procedures would have to be replayed. This clearly provides an incentive for public authorities to draw back, for fear of litigation, from the more generous consultation practices recently introduced to all but mandatory statutory consultation.

What followed the judgment illustrates the limited possibilities of consultation and, indeed, of judicial review (see Chapter 16). The minister (Alistair Darling) immediately issued a statement confirming the Government's faith in both the consultation process and the case for new nuclear power stations from which they clearly were not going to resile. Two White Papers followed from the Department for Business, Enterprise and Regulatory Reform. The first promised further consultations; the second endorsed the consultation exercise:

> In May 2007 we launched a consultation to examine whether nuclear power could also play a role in meeting these long-term challenges, alongside other low-carbon forms of electricity generation. We set out our preliminary view that it is in the public interest to give energy companies the option of investing in new nuclear power stations. The purpose of the consultation was to subject this preliminary view, and the evidence and arguments for it set out in our consultation document, to a thorough and searching public scrutiny . . .
>
> Following the consultation we have concluded that, in summary, nuclear power is:
>
> - Low-carbon – helping to minimise damaging climate change
> - Affordable – nuclear is currently one of the cheapest low-carbon electricity generation technologies, so could help us deliver our goals cost effectively
> - Dependable – a proven technology with modern reactors capable of producing electricity reliably
> - Safe – backed up by a highly effective regulatory framework
> - Capable of increasing diversity and reducing our dependence on any one technology or country for our energy or fuel supplies.
>
> Having reviewed the evidence, and taking account of these points, the Government believes nuclear power should be able to play a part in the UK's future low-carbon economy. We have also carefully re-examined the impact of excluding nuclear power from our future energy mix. Our conclusion remains that not having nuclear as an option would increase the costs of delivering these goals and increase the risks of failing to meet our targets for reducing carbon dioxide emissions and enhancing energy security.[124]

[124] *Meeting the Energy Challenge: A White Paper on energy*, Cm. 7124 (2007); *Meeting the Energy Challenge: A White Paper on nuclear power*, Cm. 7296 (2008).

This summary from John Hutton's introduction formed the basis for an Energy Bill, now the Energy Act 2008. A parallel Planning Bill (now the Planning Act 2008) was introduced, ostensibly to co-ordinate and replace the disparate systems governing planning approval for major infrastructure proposals, with the objective of streamlining decisions and avoiding long public inquiries.[125] The Act sets in place a new and 'independent' Infrastructure Planning Commission, which will make its decisions in the light of 'national policy statements' issued by the Government. Before any such statement can be issued, the minister must either 'carry out such consultation, and arrange for such publicity, as [he] thinks appropriate in relation to the proposal' or 'consult such persons, and such descriptions of persons, as may be prescribed'; he must also 'have regard to the responses to the consultation and publicity in deciding whether to proceed with the proposal'.

## 6. Climbing the ladder: EC law

### (a) EC law and sovereignty

Nothing in the EC Treaties, ratified by the UK in 1972 and 'brought home' by the European Communities Act 1972 (ECA), suggested change in the constitutional doctrine of parliamentary sovereignty; indeed, not even the contentious Treaty of Lisbon, signed by the Government in 2007, dares openly to mention the 'primacy' of EU law.[126] Primacy, like parliamentary sovereignty, is a doctrine articulated by judges, read into the EC Treaties by the ECJ in the seminal case of *Van Gend en Loos*.[127] At the time of UK accession, it is probable that neither MPs nor a largely apathetic public were aware of the Court's radical case law[128] or appreciated the effect of the arcane formula in s. 3(1) ECA, which provides:

> For the purposes of all legal proceedings any question as to the meaning or effect of any of the Treaties, or as to the validity, meaning or effect of any Community instrument, shall be treated as a question of law (and, if not referred to the European Court, be for

[125] The bill derived from the *The Eddington Transport Study* and *Review of Land Use Planning* (HMSO, December 2006) and *Planning for a Sustainable Future*, Cm. 7120 (2007) on which 12 weeks was allowed for consultation. And see below.

[126] 'EC law', which we use throughout for continuity, refers to law made under the EC Treaties (TEC); 'EU law' covers all forms of law made by the EU under the Maastricht Treaty of European Union (TEU) and TEC.

[127] Case 26/62 *Van Gend en Loos v Nederlandse Administratie Belastingen* [1963] ECR 1. For discussion see M. Shapiro, 'The European Court of Justice' in Craig and de Burca (eds.), *The Evolution of EU Law* (Oxford University Press, 1999).

[128] The White Paper, *The United Kingdom and the European Communities*, Cmnd 4715 (1971) [29] had said: 'There is no question of any erosion of essential national sovereignty; what is proposed is a sharing and an enlargement of individual sovereignties in the general interest.' For the full story, see D. Nicol, *EC Membership and the Judicialization of British Politics,* (Oxford University Press, 2001).

> determination as such in accordance with the principles laid down by and any relevant decision of the European Court).

To paraphrase, the ECA – in sharp contrast to the HRA – incorporates the jurisprudence of the ECJ into the domestic legal hierarchy and renders it *binding* on the national courts. The two judicial hierarchies are linked through TEC Art. 234, which sets in place a 'preliminary reference procedure' whereby national courts ask for advisory opinions from the ECJ on questions of EC law that arise in the course of domestic judicial proceedings. Subordinate courts or tribunals 'may' take the decision to refer; final appellate courts 'must' do so. Since 2003, a Member State whose courts wrongly fail to refer or otherwise make a 'manifest error' of EC law may be liable to compensate injured parties.[129]

The EC Treaty made provision for two different types of EC legislative act: a *regulation*, 'binding in its entirety and directly applicable in all Member States' and a *directive*, binding only 'as to the result to be achieved', which left to the Member States 'the choice of form and method' to be employed in implementation (TEC Art. ex 189).[130] ECA s. 2(1) provides:

> All such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaties, and all such remedies and procedures from time to time provided for by or under the Treaties, as in accordance with the Treaties are without further enactment to be given legal effect or used in the United Kingdom shall be recognised and available in law, and be enforced, allowed and followed accordingly . . .

Section 2(2) empowers ministers to carry out UK obligations where EU law is not directly applicable or effective by ministerial regulation or Order in Council.[131] These are 'prospective Henry VIII clauses' that, in the first case, allow an external lawmaker to make laws directly applicable within the United Kingdom.[132]

The message of *van Gend en Loos* reached the British public with the momentous *Factortame* case, where the House of Lords for the first time in history set aside (in technical parlance, 'disapplied') an Act of the UK Parliament in response to an ECJ ruling.[133] Perhaps curiously, since EC law

[129] Case C-224/01 *Köbler v Republic of Austria* [2003] ELR I-10239.

[130] The ECJ later blurred the distinction with its doctrine of 'direct effect', making directives enforceable in litigation by individual litigants in national courts, provided their provisions are sufficiently clear, precise and unconditional: Case 41/74 *Van Duyn v Home Office* [1974] ECR 1337; Case 43/75 *Defrenne v Sabena* [1976] ECR 455; and see T. Hartley, *The Foundations of European Community Law*, 6th edn (Oxford University Press, 2007), Ch. 7.

[131] See s. 2(2) and (4) of the ECA. The procedure is subject to reservations requiring statutes listed in Sch. 4. Around 50% of implementation of EU directives is effected under s. 2(2).

[132] N. Barber and A. Young, 'The rise of prospective Henry VIII clauses and their implications for sovereignty' [2003] *PL* 112.

[133] Case C-213/89 *R v Transport Secretary, ex p. Factortame (No. 2)* [1990] ECR I-2433.

was not obviously relevant to domestic legal procedure, s. 21 of the Crown Proceedings Act 1947 was in issue. Factortame had applied for an interim injunction pending a hearing in the ECJ of a question concerning compatibility of the Merchant Shipping Act 1988 with EC law. The House of Lords ruled that English law did not permit injunctions against the Crown but made a reference under TEC Art. 234 to ask whether an injunction should be ordered under EC law. The enigmatic reply was received that 'a national court which, in a case before it concerning Community law, considers that the sole obstacle which precludes it from granting interim relief is a rule of national law must set aside that rule'. Interpreting this to mean that interim relief should be available, the House of Lords awarded an interim injunction.

Mindful that the step taken by the House of Lords might be misunderstood, Lord Bridge took care to stress *Parliament's* responsibility for this momentous step:

> Some public comments on the decision of the Court of Justice . . . have suggested that this was a novel and dangerous invasion by a Community institution of the sovereignty of the UK Parliament. But such comments are based on a misconception. If the supremacy within the European Community of Community law over the national law of member states was not always inherent in the EEC Treaty it was certainly well established in the jurisprudence of the Court of Justice long before the United Kingdom joined the Community. Thus whatever limitation of its sovereignty Parliament accepted when it enacted the European Communities Act 1972 was entirely voluntary. Under the terms of the Act of 1972 it has always been clear that it was the duty of a United Kingdom court, when delivering final judgment, to override any rule of law found to be in conflict with any directly enforceable rule of Community law. Similarly, when decisions of the European Court of Justice have exposed areas of United Kingdom statute law which failed to implement Council directives, Parliament has always loyally accepted the obligation to make amends. Thus there is nothing in any way novel in according supremacy to rules of Community law in those areas to which they apply and to insist that, in the protection of rights under Community law, national courts must not be inhibited by rules of national law from granting interim relief in appropriate cases is no more than a logical recognition of that supremacy.[134]

The precise legal effects and constitutional implications of the *Factortame* case fall outside the scope of this book.[135] What is important here is that the case exposed the reality of EU membership: the national legal order was no longer wholly autonomous; it was subject not only to the influence of external legal orders but, in respect of EU law, to their directions.

Whether the courts would go further and 'disapply' a statute that *explicitly*

[134] *R v Transport Secretary, ex p. Factortame (No. 1)* [1989] 2 WLR 997, 1011.

[135] See H. W. R. Wade, 'Sovereignty: Revolution or evolution?' (1996) 112 *LQR* 568; P. Craig, 'Sovereignty of the United Kingdom Parliament after *Factortame*' (1999) *Yearbook of European Law* 221.

overrides EC law is still not decided. The issue was indirectly addressed in 'The Metric Martyrs' case'. The 'martyrs' were convicted of trading with imperial instead of metric weights and measures contrary to regulations made in terms of s. 2(2) of the ECA (above). The tortuous argument was advanced that these regulations were invalid, because the power to make them had been removed by s. 1(1) of the Weights and Measures Act 1985, which had impliedly repealed s. 2(2) of the ECA. (Under the doctrine of implied repeal, an earlier Act of Parliament is taken to be repealed by a subsequent Act with which it is inconsistent). Faced with a more extreme argument from counsel that Parliament could not *explicitly* repeal the ECA, Laws LJ gave an extreme response:

> Whatever may be the position elsewhere, the law of England disallows any such assumption. Parliament cannot bind its successors by stipulating against repeal, wholly or partly, of the ECA. It cannot stipulate as to the manner and form of any subsequent legislation. It cannot stipulate against implied repeal any more than it can stipulate against express repeal. Thus there is nothing in the ECA which allows the Court of Justice, or any other institutions of the EU, to touch or qualify the conditions of Parliament's legislative supremacy in the United Kingdom.[136]

What followed has been widely cited, but is decidedly controversial:

> In my opinion a constitutional statute is one which (a) conditions the legal relationship between citizen and State in some general, overarching manner, or (b) enlarges or diminishes the scope of what we would now regard as fundamental constitutional rights. (a) and (b) are of necessity closely related: it is difficult to think of an instance of (a) that is not also an instance of (b). The special status of constitutional statutes follows the special status of constitutional rights. Examples are the Magna Carta, the Bill of Rights 1689, the Act of Union, the Reform Acts which distributed and enlarged the franchise, the HRA, the Scotland Act 1998 and the Government of Wales Act 1998. The ECA clearly belongs in this family. It incorporated the whole corpus of substantive Community rights and obligations, and gave overriding domestic effect to the judicial and administrative machinery of Community law. It may be there has never been a statute having such profound effects on so many dimensions of our daily lives. The ECA is, by force of the common law, a constitutional statute. Ordinary statutes may be impliedly repealed. Constitutional statutes may not . . . A constitutional statute can only be repealed, or amended in a way which significantly affects its provisions touching fundamental rights or otherwise the relation between citizen and State, by unambiguous words on the face of the later statute.

This proposition – never tested in the House of Lords – throws doubt on the classical hierarchy of legal norms. Like Lord Steyn's dissent in *Jackson*, it

[136] *Thoburn v Sunderland City Council* [2002] 3 WLR 247 [59] and [62–4] (emphasis ours). And see T. Allan, 'Parliamentary Sovereignty, Law, Politics and Revolution' (1997) 113 *LQR* 443.

forms part of the debate over common law constitutionalism in which Sir John Laws played a conspicuous part (p. 110 above). It remains to add as a footnote that the European Commission announced in September 2007 that it was withdrawing its 2009 time limit for metrication, that 'supplementary indications' (namely, imperial measures) had always been permissible and would be allowed indefinitely. The regulations are, however, still in force, a typical example of 'gold-plating'.

### (b) Textual quality

Since 1999, it has been possible, with Council agreement, for EU legislation to be adopted immediately after first reading in the European Parliament (EP). This so-called 'fast track' route now accounts for over half of legislation made by 'co-decision procedure' (the standard EU lawmaking method in which Council and Parliament supposedly have equal rights). Up to 10,000 EU regulations and directives are currently in force. There is constant complaint (especially from business) about over-regulation and about the poor textual quality of EU legislation, which is published in over twenty languages and passes through many stages of negotiated policy-making and drafting. The EP has called the output 'opaque and confused' and simplification is a Commission priority; its Transparency Initiative and Better Regulation Agenda aim to simplify and codify the existing stock of legislation under a rolling programme.[137]

Policy and regulatory proposals are now assessed to ensure quality, and systemic impact assessments are overseen by an independent Impact Assessment Board and published. Difficulties of transposition are supposedly being tackled: 'in partnership with Member States, a more effective approach is being developed to handle difficulties in implementing and ensuring conformity with Community law.'[138] But much of the subject matter is highly technical, dealing, for example, with permitted levels of chemicals in animal feed, foodstuffs or pesticides, general health and safety issues or mesh dimensions of drift nets, and legislation may take the form of 'implementing regulations', resembling, though not identical to, delegated legislation in national law, where the European Parliament has limited scrutiny powers.[139] Typically, the UK has a single representative, civil servant or scientific expert on the EU scientific

[137] See *Final Report of the Mandelken Group on Better Regulation* (Brussels, 2005); European Commission, *Implementing the Community Lisbon Programme: A strategy for the simplification of the regulatory environment*, COM(2005) 535 final; European Commission, *A Strategic Review of Better Regulation in the EU*, COM(2005) 689 final, p. 9. And see Ch. 6.

[138] *European Transparency Initiative* SEC(2005) 1300; *Green Paper*, COM(2006) 194 final; Commission Communication, *Second Strategic Review of Better Regulation in the European Union*, COM(2008) 32, 33, 35 final. 164 measures are covered for 2005–2009; 91 had been proposed or adopted, 44 in 2008.

[139] See for explanation of Comitology, M. Andenas and A. Turk, *Delegated Legislation and the Role of Committees in the EC* (Kluwer Law International, 2000) and for a critique, F. Bignami, 'The democratic deficit in European Community rulemaking: A call for notice and comment in comitology' (1999) 40 *Harv. Int'l LJ* 451.

'Comitology' that advises and supervises the Council and Commission in lawmaking.

National pride in British drafting at first led British draftsmen to 'translate' EU texts, using common law concepts and drafting style, rather than using the practice of 'copy out' whereby the EU text passes unaltered into domestic law. Not only does this leave room for error but provides government with opportunities to incorporate new policy, raising fears of 'unnecessary over-implementation'. The output has been castigated by the Commons as 'stuffed with jargon, badly translated, or victims of the sort of muddled thinking that even the most limpid translation cannot cure'.[140] The House of Lords Merits Committee, in a report warning that scrutiny is generally weak and needs strengthening', has also criticised the habit of 'legislation by reference', especially where criminal penalties are introduced:

> We consider that those affected by regulations (particularly those required to obey or enforce them) should be able to understand their obligations from the face of the instrument itself . . . look for evidence in the EM of what guidance the department or others is providing to stakeholders to explain the new obligation to ensure that it is fulfilled. The Committee's test of clarity and guidance is higher for an instrument which creates penalties and sanctions for non-compliance by individuals.[141]

Concerned over incoherence, the Cabinet Office commissioned the Davidson Review, which advised departments to review existing UK legislation before transposition with a view to creating a single coherent regulatory scheme. Drafters should avoid 'copy out'; 'gold-plating' (extending the scope of European legislation); 'double-banking' (failing to eliminate overlap); and 'regulatory creep' (over-zealous enforcement).[142] This counsel of perfection is likely to meet deaf ears.

### (c) Parliamentary scrutiny

We have been careful to emphasise elsewhere in this book not only the growing influence of EC law but also the growing dominance of the EU in policy-making. In many areas, policy, especially regulatory policy, is more often than not 'made in Europe' and framed in EC regulations, which form part of UK law, and directives, which have to be implemented (see Chapter 6). All that the UK Parliament can do in this situation is see that the EU

[140] ESC, *The Role of National Parliaments in the European Union*, HC 51, HC 51-xxviii, Cm 3446 (1996) [112]. A. Cygan, 'Democracy and accountability in the European Union: The view from the House of Commons' (2003) 66 *MLR* 384; and see L. Ramsay, 'The copy out technique: More of a "cop out" than a solution?' (1996) 17 *Stat. L. Rev.* 218.

[141] ESC, *Special Report: The work of the Committee in Session 2005-06*, HC 275 (2005/6) [15].

[142] Cabinet Office, *Review of the Implementation of EU Legislation* (Dec. 2006); and see NAO and PAC, *Lost in Translation: Responding to the challenge of European Law*, HC 26 and 590 (2005/6).

instructions are carried out faithfully: Parliament is, in other words, an agent or delegate of the EU institutions.[143] It follows that the UK Parliament, if it is to maintain (and even improve) its place in lawmaking, must endeavour to scrutinise and control the flood of EU legislation. Yet for many years the Commons slumbered, slow to appreciate the effects of EU membership and unwilling to co-operate with the European Parliament. It was left to the Lords, encouraged by its judicial members, to make the running. In 1972, the Lords set up what is now its European Union Committee (EUC), with a broad and simple remit 'to consider EU documents and other matters relating to the EU'. It soon established a Europe-wide reputation through the strength of its reports. The EUC, divided into specialist areas, focuses on policy, though it does sometimes undertake scrutiny: in 2007, for example, its specialist subcommittees conducted parallel inquiries into the impact of the Lisbon Treaty on the UK with a view to informing Parliament's debates on ratification.[144] As similar reports were issued by the Lords Constitution Committee and Commons European Scrutiny Committee (ESC), MPs on this occasion had little excuse for being ill-informed when they came to debate ratification.

The EUC emphasises the importance of getting in early:

> Once European regulations, directives and decisions have been through the law-making processes enshrined in the Treaties (which to varying degrees involve the Commission, the European Parliament and national government ministers operating in the Council), it is in practice too late for national parliaments to seek to reverse them, even if the EU instrument in question has to be given effect in the United Kingdom by means of domestic primary or secondary legislation.[145]

Both Houses regularly report on the Commission's Annual Work Programme, now discussed directly with the Commission and its officials in Brussels and Westminster.

The basis for Commons scrutiny was the Foster Committee, appointed in 1972 'to consider procedures for scrutiny of proposals for European Community Secondary Legislation'.[146] A Select Committee set up in 1973 was strengthened in 1980, when the Commons managed to win from government

[143] As argued by J. Steiner, 'From direct effects to *Francovich*: shifting means of enforcement of Community law' (1993) 18 *EL Rev* 3.

[144] EUC, *The Treaty of Lisbon: An impact assessment*, HL 62 (2007/8) and *Government Response*, Cm. 7389 (2008); HLCC, *European Union (Amendment) Bill and the Lisbon Treaty: Implications for the UK constitution*, HL 84 (2007/8); ESC, *EU Intergovernmental Conference*, HC 1014 (2006/7); *The Conclusions of the European Council and Council of Ministers*, HC 86 (2007/8), HC 16-iii (2006/7).

[145] EUC, *Review of Scrutiny of European Legislation* HL 15 (2002/3) [12]. See also EUC, *Enhanced Scrutiny of EU Legislation with a United Kingdom Opt-in*, HL 25 (2008/9).

[146] For an account of scrutiny, see Department of the Clerk to the House, *European Scrutiny in the House of Commons* (2005); HC Research Paper 05/85, *The United Kingdom Parliament and European Business* (2005).

the power of 'scrutiny reserve'.[147] This prohibits ministers from giving agreement in the Council or in European Council to any proposal on which the European Scrutiny Committee (ESC) has not completed its scrutiny or which awaits consideration by the House. This resolution gives the House essential purchase over the Government's activities in EU affairs. Its exceptions for urgency are, however, used very frequently; in up to seventy cases annually, the reserve is bypassed, often in respect of highly controversial pieces of legislation, such as that providing for the European arrest warrant and the setting up of a new European defence procurement agency.

Early Commons attempts at scrutiny were unsystematic and there were problems not only with bulk but also access and timing. An important report from the Procedure Committee, largely accepted by the Conservative government in 1988, moved to revise procedures in the hope that MPs would take more interest, the debates would be better attended and the House better informed.[148] There are now three European Standing Committees, which handle texts referred to them by the ESC and provide liaison with departmental Select Committees, in particular the Foreign Affairs Committee, which also handle European affairs. The ESC handles around 1,200 documents annually and has had to be strengthened with seven subcommittees. Under Standing Order No. 143, the ESC considers:

(i) any proposal under the Community Treaties for legislation by the Council or the Council acting jointly with the European Parliament
(ii) any document which is published for submission to the European Council, the Council or the European Central Bank
(iii) any proposal for a common strategy, a joint action or a common position under Title V of the Treaty on European Union which is prepared for submission to the Council or to the European Council (second pillar)
(iv) any proposal for a common position, framework decision, decision or a convention under Title VI of the Treaty on European Union which is prepared for submission to the Council (third pillar)
(v) any other document relating to European Union matters deposited in the House by a Minister of the Crown.

Its coverage is wide, taking in not just draft Regulations, Directives and Decisions but other documents such as EU Green and White Papers and

[147] Resolution of the House of 3 Oct. 1980, HC Deb., vol. 991, col. 843, now Resolution of the House of 17 Nov. 1998.

[148] Procedure Committee, *European Community Legislation*, HC 622 (1989/90) and *Government Response*, Cm. 1081 (1990). See also Modernisation Committee, *The Scrutiny of European Business*, HC 791 (1997/8); *Scrutiny of European Business*, HC 465 (2004/5); A. Cygan, 'European Union Legislation Before the House of Commons: The work of the European Scrutiny Committee' in Andenas and Türk (eds.), *Delegated Legislation and the Role of Committees in the EC*; T. Raunio and S. Hix, 'Backbenchers learn to fight back: European integration and parliamentary government' (2000) 23 *W. European Politics* 142.

Commission reports. 'We frequently question the likely effectiveness, cost, consistency or result of a measure, or ask the Government to justify its policy towards it, and we certainly regard it as an important part of our work to ensure that the Government has considered any potential problems and has done what it can to remedy them.'[149] The Committee has the power (rarely used) to refer documents formally to departmental Select Committees and (very rarely) to recommend a debate on the floor of the Commons. It also keeps under review the Commission's programme for regulatory simplification and scrutinises important EU texts with a view:

> to ensur[ing] that members are informed of EU proposals likely to affect the United Kingdom, to provide a source of information and analysis for the public, and to ensure that the House and the European Scrutiny Committee, and through them other organisations and individuals, have opportunities to make Ministers aware of their views on EU proposals, seek to influence Ministers and hold Ministers to account.[150]

The EUC and ESC co-operate, with some procedural differences: the EUC operates a 'sift' based on an explanatory memorandum from the Government, to select the most significant documents; the ESC considers *all* documents and there is no formal sift, since the purpose is not to examine the merits of documents but to report to the House whether they are legally or politically important and so worthy of a debate. In practice, however, the ESC calls its whole procedure a sift, since it is faced weekly with a pile of thirty to forty documents and relies heavily on briefing from its advisers.[151] A complaint running through every review is difficulty of access: the Commission regularly fails to make essential documents available; they are incomplete, badly translated, late (sometimes 'long after the legal deadline') or 'in bits and pieces and without a clear explanation of their status, and sometimes under misleading headings'. Council agendas are unpredictable and obscurely drafted; legislative proposals come forward 'shortly before the Council decided on them, and long before an official text reached national Parliaments, let alone the citizens who would be directly affected' and the Council was even prepared to discuss legislation on the basis of unofficial texts that were not available to the public at all.[152] All of this puts pressure on the parliamentary process.

The House of Lords EUC now sees scrutiny as comparing favourably with other national parliaments and the ESC has concluded that the new provisions of the Lisbon Treaty, designed to increase participation from national parliaments, will not make much difference to its work.[153] Open Europe, an

[149] ESC, 30th Report HC 63 (2002/3) [11].
[150] ESC, 30th Report HC 63 (2002/3) [25].
[151] HC 465-i (evidence of ESC Chairman, Jimmy Hood MP).
[152] ESC, *European Scrutiny in the Commons*, HC 361 (2007/8). See also European Parliament, Committee on Constitutional Affairs, Frassoni Report, PE400 629v02-00.
[153] ESC, *Subsidiarity, National Parliaments and the Lisbon Treaty*, HC 563 (2007/8); and see *Government Response*, HC 1967 (2008/9).

independent business think-tank devoted to reform of European institutions, has, however, compared the UK Parliament unfavourably with those of Denmark and other member states. Open Europe wants to see the Commons Standing Committees, which it calls a 'black hole', abolished. It would like the ESC, in consultation with specialist committees, to take its own decisions and it wants a mandate from the ESC to be necessary before government signs up to any EU legislation or political agreements. Alternatively, the ESC should have a 'kind of "red card" role' to mandate rejection of proposals that seem to breach the subsidiarity principle. Open Europe's five-point minimalist programme[154] asks for:

1. a *statutory* scrutiny reserve
2. substitute ESC members to ensure full participation (having substitutes for each member to ensure full attendance – rather than an average 40 per cent non-attendance – would improve the quality of debate)
3. a weekly 'question time' with the UK's Permanent Representative in Brussels on the issues which are expected to come up at CoReper that week
4. meetings of the Scrutiny Committee whenever the EU institutions are in session
5. joint rights of attendance and participation for MEPs, Peers, MEPs, MSPs etc., to attend and speak in committee.

In principle, Open Europe's programme is right, though whether scrutiny reserve would be a practical proposition for twenty-seven national parliaments is doubtful, as is the question whether scrutiny by national parliaments could ever be meaningful in a polity with twenty-plus languages and legal orders.[155]

## 7. Restoring the balance

In Chapter 3, we expressed our support for a modified 'dialogue' model of human rights protection in which the responsibility was shared between the institutions of government, demanding a measure of co-operation between executive, legislator, administration and courts. We focused there on the work of courts. In this chapter, we have tried to redress the balance, turning our attention to the work of legislators, in particular committees of the Lords and Commons. Looking at the role of the JCHR in 'mainstreaming' human rights, for example, we found it impressively vocal, with some success in getting its voice heard.

We followed this theme further, looking at efforts of the two Houses, with co-operation from New Labour Governments, to enhance their role in the law-making process. We looked at Parliament's efforts to stand up for its legislative

[154] Open Europe, *Getting A Grip: Reforming EU scrutiny at Westminster* (2006). Contrast HL 15 (2002/3) [60–70].

[155] T. Raunio, 'Always one step behind? National legislatures and the European Union' (1999) 34 *Government and Opposition* 180.

prerogatives, fighting a battle of attrition against the 'Henry VIII clause' and the Regulatory Reform Act. Slowly, Parliament has been bringing itself into the modern age through techniques like pre- and post-legislative scrutiny and impact assessment, giving itself a measure of control over the textual quality of law and secondary legislation. We have tried to evaluate the contribution of the two Houses of Parliament and their various Scrutiny Committees to making law accessible and comprehensible. Recognising the cardinal importance of our membership of the EU, we have asked whether Parliament gives sufficient recognition to the fact that so much UK legislation is for practical purposes 'made in Europe', according it sufficient scrutiny**.** Policy legitimacy and textual coherence of lawmaking in the EU are matters of consequence and concern, to which only the House of Lords European Union Committee gives enough time. All this adds up to a considerable burden on Parliament.

Lawmaking, as we have observed it in this chapter, remains largely the prerogative of an elite. We rely on Cabinet ministers, civil servants, departmental lawyers, parliamentary counsel and the law officers together with parliamentarians not only to reinforce awareness of constitutional principles inside and outside government but more importantly to carry out scrutinising functions forcefully and with integrity. Often downplayed, the impact of MPs and peers, whether individual or collective, may be greater than is commonly recognised.[156] The role of the general public is more diffuse. The official line is that 'the people' can and do participate in government. The reality is, we have suggested, that participation is largely notional, seldom moving above rungs 4 and 5 of Arnstein's ladder.[157] The public acts, and has to act, through civil society organisations, through political parties[158] and through the media. This in turn acts on government and Parliament as well as on the public. Together these various interests form what Davis has called a network of 'individual small binders' that act as watchdogs and 'protectors of the constitution'.[159] Their contribution is as important as, though not more important than, that of the courts.

[156] Brazier, Kalitowski and Rosenblatt, *Law in the Making: Influence and change in the legislative process*.

[157] A. King, *Does the United Kingdom Still Have a Constitution*? (Sweet and Maxwell, 2001), Ch. 2.

[158] D. Nicol, 'Professor Tomkins' house of mavericks' [2006] *PL* 467.

[159] P. Davis, 'The significance of parliamentary procedures in control of the executive' [2007] *PL* 677, 700.