

# Safeguards in Delegated Legislation

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At last the legal profession as a whole is realising that no longer can it go on acting on the basis that the sole functions of the State are to preserve internal order and to defend the country against external aggression, although, perhaps rightly, it is not prepared to accept Duguit's view that the State is simply a society divided into government and subjects. "Law, like every social phenomenon, is subject to perpetual change; indeed any scientific study of law must necessarily involve an analysis of the evolution of legal institutions. In a sense, therefore, the transformation of the State is also the transformation of its law. . . . Systems of law under which, until our own time, society has lived, are in a condition of dislocation. The new system that is to replace it is built on entirely different conceptions. Whether those conceptions mark a progress or a decline it is not our business to enquire. . . . A realistic and socialised legal system replaces an earlier system that was at once abstract and individualist in character."<sup>1</sup> The vast economic, political and social changes we are witnessing are making more and more indistinct the boundaries of the sphere of state activity, and the time may not be far distant when these boundaries will have completely disappeared. The tremendous possibilities of atomic energy, acute housing shortages, world shortages of food, the provision of State health services and legal aid, to mention only a few matters, inevitably increase the functions of the State at the expense, in every respect, of the individual. These functions are really public services, duties which the State must perform. "The idea of public service lies at the very base of the theory of the modern state"<sup>2</sup> and, accepting that view as accurate, it is obvious, in the light of world conditions, that adjustments must be made in the division of governmental powers if the needs of the community are to have a chance of being reason-

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<sup>1</sup> Author's introduction to *Law in the Modern State*, by Leon Duguit, translated by Frida and Harold Laski, pp. xxxv-xxxvi.

<sup>2</sup> *Op. cit.*, p. xlv.

ably satisfied. The movement is from public power, as envisaged in the traditional legal concept of sovereignty, to public services or functions which the State is from time to time, and at any time, under a duty to provide or perform. The more complicated life becomes the more the State must intervene, every new intervention carrying with it the obligation to provide proper and adequate safeguards for each individual member of society. But in attempting to devise such safeguards one must remember that every new intervention by the State means a further replacement of a domestic economy by at least a national economy, and that consequently safeguards which were appropriate when a person could be treated simply as one individual alone are no longer suitable when every person is dependent not only on a national economy but also on an international economy.

All these fundamental changes are bound to be reflected in the law, otherwise law would be static. Unfortunately lawyers, as a class, dislike changes, especially when their traditional ideas of the law are involved. To them, the principles of law are immutable, and changes in economic and social conditions are events merely on occasions to be noticed. Too many lawyers have been reluctant to discard the legal notions and prejudices of a bygone age and too inclined to scoff at the new system of administrative law. "The law has been at home in dealing with the rights of property, but it has been far less successful in dealing with the less material aspects of conduct and service, where rights must be attached, not to a substantial thing but to the functions which men fulfil in the life of the community."<sup>3</sup> As has been very recently pointed out, "The days of individualism have ended, for the time being at any rate. Everywhere, to a greater or a lesser degree, the collectivist state is triumphant."<sup>4</sup> As Professor Keeton further points out, "The whole conception of the orbit and enforceability of a private right differs fundamentally today from what it meant sixty or seventy years ago. A private right may, without exaggeration, be defined as an area of personal freedom which exists only so long as it does not impede the development of a social policy by a public organ."<sup>5</sup> That is the situation the lawyer now has to face, and the principle involved seems to be identical with that of the Russian Revolution, that "society has the right and the obligation to decide by a collective act what is good for the society as a whole and to

<sup>3</sup> MacIver, *The Modern State*, p. 270.

<sup>4</sup> Keeton, *The Twilight of the Common Law*, *Nineteenth Century*, April 1949, 230, at p. 238.

<sup>5</sup> *Ibid.*, at p. 237.

make that decision binding on the individual".<sup>6</sup> Further, it would seem that we now have to ask the same questions as the Soviets: "how can economic, political, and socio-cultural institutions be integrated through law? how can law change to meet changing conditions and yet provide stability in a society which badly needs stability? What is the relation of personal claims and interests, of litigation, to the broad purposes for which society exists?"<sup>7</sup>

It is useless, nay ludicrous, for lawyers to hold to the belief that the common law of England is "the perfection of reason"<sup>8</sup> or that "... the common law is a practical code adapted to deal with the manifold diversities of human life. . .".<sup>9</sup> The common law is not able to cope fully with modern problems, neither are judges who have had a predominantly common law training. Those who wish to maintain the unchallengeable supremacy of the common law and of its adjudicators are being unrealistic, and also unfair, not only to themselves but also to the community. Their assumption that Providence has ordained that they should be the sole dispensers of justice becomes more fantastic with the passing of every year. Common lawyers are as much subject to human limitations as are, for example, Ministers of the Crown, and judges have not been lifted "into the realm of pure reason, above and beyond the sweep of perturbing and deflecting forces. . . . The great tides and currents which engulf the rest of men, do not turn aside in their course, and pass the judges by."<sup>10</sup> "The decisions of the courts on economic and social questions depend upon their economic and social philosophy; and for the peaceful progress of our people during the twentieth century we shall owe most to those judges who hold to a twentieth century economic and social philosophy and not to a long outgrown philosophy, which was itself the product of primitive economic conditions."<sup>11</sup> How many lawyers hold to a twentieth century economic and social philosophy? Is it to be wondered at that the influence of lawyers is not as great as it was or should be? Administrative law has now become so far-

<sup>6</sup> Carr, *Soviet Impact on the Western World*, at p. 45.

<sup>7</sup> Berman, *The Challenge of Soviet Law* (1948), 62 Harv. L. Rev. 220, at p. 239, where he states that "These are the very questions which now confront American jurists".

<sup>8</sup> Coke, *Institutes*, Pt. 1, para. 138.

<sup>9</sup> *Per* Lord Macmillan, *Read v. J. Lyons & Co. Ltd.*, [1946] 2 All E.R. 471, at p. 478; [1947] A.C. 156, at p. 175.

<sup>10</sup> Cardozo, *The Nature of the Judicial Process*, p. 168.

<sup>11</sup> President Roosevelt in his message of Dec. 8th, 1908, to the Congress of the United States of America, 43 Congressional Record, part 1, p. 21, quoted by Cardozo, *op. cit.*, p. 171.

reaching in its effects that the legal profession, as a whole, have been forced to recognize it and to express apprehensions as to its shortcomings.<sup>12</sup>

It must be remembered, however, that it was the traditional outlook of the then Lord Chief Justice of England (Lord Hewart) which was really responsible for the setting up in 1929 of the Committee on Ministers' Powers, whose report<sup>13</sup> has become of the utmost constitutional importance in the United Kingdom and has been a valuable guide to authorities in other countries concerned with administrative law, for example the United States of America. Their Report, in fact, dealt with both delegated legislation and judicial or quasi-judicial decision.

As regards delegated legislation, after an exhaustive inquiry the C.M.P. came to the firm conclusion that the development of the practice of delegating legislative powers is inevitable, it being, in the sphere of constitutional law, a natural reflection of changes in our ideas of government which have resulted from changes in political, social and economic ideas, and of changes in the circumstances of our lives which have resulted from scientific discoveries.<sup>14</sup> It is submitted that the soundness of this conclusion of the C.M.P. is now generally admitted, and it is further submitted that the events that have happened since 1932 have strengthened the reasons given<sup>15</sup> by the C.M.P. for coming to this conclusion. Thus, pressure upon parliamentary time is greater than ever, with the result that it is increasingly important to ask Parliament to consider only essential principles in legislation, and not subordinate matters. There are many people, of whom the present writer is one, who contend that the pressure upon parliamentary time is greater than it need, or should, be, but personal opinions do not alter facts. Again, the subject matter of modern legislation gets more and more technical. It would be impossible to include in Acts of Parliament the technical matters connected with, for example, the nationalisation of the transport, electricity, gas, and steel industries, or with town and country planning. These are large and complex schemes of reform,<sup>16</sup> and it is impossible to foresee all the contingencies and local conditions for which provision must

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<sup>12</sup> *E.g.*, the General Council of the English Bar have passed a resolution to the effect that the procedure of administrative tribunals should be inquired into.

<sup>13</sup> Cmd. 4060 (1932) (King's Printer, London). The Committee will be referred to hereinafter as the "C.M.P."

<sup>14</sup> *Ibid.*, p. 5.

<sup>15</sup> *Ibid.*, pp. 51-2.

<sup>16</sup> Not everyone will agree that "reform" is the right word.

eventually be made in these matters. The whole of the administrative machinery could not possibly be inserted in the Acts of Parliament themselves. Also, flexibility and opportunity for experiment are just as essential now as in 1932. As the C.M.P. pointed out,<sup>17</sup> the method of delegated legislation permits the rapid utilisation of experience and enables the results of consultation with interests affected by the operation of new Acts to be translated into practice. The General Development Order made by the Minister of Town and Country Planning pursuant to his powers under section 13 of the Town and Country Planning Act, 1947, illustrates the point. That Order attempts to strike a balance between a necessary degree of planning control and a reasonable freedom for developers to carry out minor day-to-day operations, but as the right balance may not have been achieved the Minister has expressed the wish that the attention of his officers should be drawn to any case in which the Order does not work well in practice, so that revision of the Order can be considered.<sup>18</sup> The Order has in fact been amended in the light of the experience gained since the Order came into operation.<sup>19</sup> And occasions of emergency which affect the whole country, such as war, or strikes which interfere on an extensive scale with the supply of food, fuel, light or other necessities of life, or with the means of locomotion, make it vital for Parliament to arm the Government in advance with almost plenary power to meet such occasions, and are the justification for such United Kingdom Acts as the Emergency Powers (Defence) Acts, 1939 and 1940, the Emergency Powers Act, 1920, and the Supplies and Services (Extended Purposes) Act, 1947. If Parliament is to be in a position to pass the kind and quantity of legislation which modern public opinion requires, then Parliament must delegate some of its legislative power.<sup>20</sup> The condition of the world is such that the the first function of government is so to respond to the public needs as to satisfy the economic situation of the country, and that, as Duguit points out, is a power which a Government cannot abdicate.<sup>21</sup> And since no Government can perform that function unless it is given adequate powers, which must include a legislative power, it is clear that delegated legislation must inevitably be part of the technique of modern government. But

<sup>17</sup> Cmd. 4060, p. 51.

<sup>18</sup> See the present writer's *Planning and Development under the Town & Country Planning Act, 1947* (1948), 11 Mod. L. Rev. 401, at p. 422.

<sup>19</sup> See *Town & Country Planning (General Development) Amendment Order, 1949*—SI 1949, No. 195.

<sup>20</sup> Cmd. 4060, p. 23.

<sup>21</sup> *Law in the Modern State*, p. 129.

as with judges so with Ministers of the Crown and other administrators, "Deep below consciousness are other forces, the likes and the dislikes, the predilections and the prejudices, the complex of instincts and emotions and habits and convictions, which make the man. . .".<sup>22</sup> The imperfections of human nature make risks of abuse incidental to delegated legislative power, and safeguards are necessary to ensure that these risks are minimised as much as possible. Consideration must now be given to the question of safeguards.

Since Ministers of the Crown and their departments obtain their delegated law-making powers from Parliament, it is Parliament who should take steps to ensure that it keeps an effective control over persons and bodies when the latter are exercising their delegated law-making powers. The most important safeguards include the following.

(1) When Parliament intends to confer a law-making power on a Minister it should take care to define in clear language in the statute conferring the power the precise limits of the power.<sup>23</sup> In other words, Parliament should properly apply its mind to the matter, and not confer a law-making power in such a way that the Minister can claim to have a free-hand when exercising the power. For example, the power should be framed so as not to permit an unlimited series of sub-delegations. The Scrutiny Committee (as to which, see No. (7) below) have drawn the attention of the House of Commons to the fact that sometimes they have had to take note of a pedigree of five generations:

- (a) the statute,
- (b) the Defence Regulations made under the statute,
- (c) the orders made under the Defence Regulations,
- (d) directions made under the orders, and
- (e) licences issued under the directions;

and they expressed the hope that departments would find themselves able so to frame any order that it will be self-contained, that is to be content with the grandchildren of the statute and not to bring its great-grandchildren or great-great-grandchildren upon the scene.<sup>24</sup> As the Committee said, it is "by no means clear that Parliament contemplated these cumulative delegations. They tend to postpone the formulation of an exact and definite law and they encourage the taking of powers meanwhile in wider terms than may ultimately be required."<sup>25</sup> The Com-

<sup>22</sup> Cardozo, *op. cit.*, p. 167.

<sup>23</sup> Cmd. 4060, p. 65.

<sup>24</sup> Para. 16, Third Special Report, H.C. 186 (1945-6).

<sup>25</sup> *Ibid.*

mittee have since been able to report that at least one department has been replacing "directions" with orders, thus reducing the length of the series of sub-delegations, but the Committee remain unconvinced that, when Parliament by statute delegates to a Minister a power to legislate by statutory instrument, the delegation can or should be interpreted (in the absence of specific provision to that effect in the statute) as authorising him to empower himself or other Ministers to make other ranges of instruments. They are not satisfied that a power to make consequential or incidental provisions by instrument can cover sub-delegation.<sup>26</sup> Whether the statute does or does not confer power to sub-delegate is never easy to say,<sup>27</sup> and Parliament should take especial care to make its wishes and intentions abundantly clear.

(2) If it is intended to confer a discretion on a Minister, the limits of the discretion should likewise be defined with equal clearness.<sup>28</sup> Clarity, however, will be of assistance only to Parliament, and will not be a safeguard to an individual who contends that the Minister has unlawfully exercised his discretion. For this state of affairs the courts are to some extent responsible. In *Liversidge v. Anderson and Another*<sup>29</sup> the appellant, who had been detained in prison under the Defence (General) Regulation 18B, claimed a declaration that his detention was unlawful and damages for false imprisonment. Regulation 18B gave power to the Secretary of State, if he had reasonable cause to believe a person to be of hostile origin or associations, and that by reason thereof it was necessary to exercise control over him, to make an order against that person directing that he be detained. Such an order was made against the appellant, and not unnaturally he wanted particulars of the grounds on which the respondents had reasonable cause to believe him to be a person of hostile associations, and of the grounds on which they had reasonable cause to believe that it was necessary to exercise control over him. The House of Lords decided that such particulars could be ordered only if the onus was upon the respondents to prove the various facts which justified the making of the order for detention. The onus, the court decided, was not on the respondents, and no order for particulars ought to be made. Where regulations are made for the safety of the realm and the administrative plenary discretion is vested in a Secretary of State, it is for him

<sup>26</sup> Para. 3, Special Report, H.C. 201 (1947-8).

<sup>27</sup> See Willis, *Delegatus non potest delegare* (1943), 21 Can. Bar Rev. 257; de Smith, *Sub-Delegation and Circulars* (1949), 12 Mod. L. Rev. 37.

<sup>28</sup> Cmd. 4060, p. 65.

<sup>29</sup> [1941] 3 All E.R. 338; [1942] A.C. 206.

to decide whether he has reasonable grounds, and to act accordingly. As Lord Atkin pointed out in his dissenting judgment, the effect of the majority judgment is that "the words 'If the Secretary of State has reasonable cause' merely mean 'If the Secretary of State thinks that he has reasonable cause'. The result is that the only implied condition is that the Secretary of State acts in good faith. If he does that — and who could dispute it, or, disputing it, prove the opposite? — the Minister has been given complete discretion as to whether or not he should detain a subject."<sup>30</sup> Of what use is it to advise that the limits of ministerial discretion should be defined in clear language, when, on a mere question of construction, judges "show themselves more executive-minded than the executive"?<sup>31</sup> Mr. Justice Henn Collins in *Phoenix Assurance Co. Ltd. v. Minister of Town & Country Planning*<sup>32</sup> stated that the considerations which operated in the decision given in *Liversidge v. Anderson* have no place in such a matter as town and country planning because in the latter no question arises of preventing a public danger when the safety of the State is involved, and accordingly he held that a court of law could inquire into the grounds on which the Minister satisfied himself, when making an order under the Town and Country Planning Act, 1944, for compulsory purchase, that such an order was requisite for the purposes to which section 1(1) of that Act referred. His Lordship followed his decision in the later case of *Robinson v. Minister of Town & Country Planning*, but his decision was reversed on appeal,<sup>33</sup> Lord Greene M.R. holding<sup>34</sup> that no objective test is possible and Lord Justice Somervell holding<sup>35</sup> that the principles laid down in (*inter alia*) *Liversidge v. Anderson* are not restricted to war purposes. The position in the United Kingdom, therefore, is that if an Act of Parliament confers power on a Minister to do certain things if he "is satisfied"; or "satisfied that it is necessary or expedient", or "has reasonable cause", or some such like expression, then unlimited discretion is given to the Minister, assuming he acts in good faith, and his discretion is uncontrollable by the courts. The Minister's conduct can, of course, be questioned in Parliament, but that will not be of much, if any, help to the harassed citizen. The C.M.P. pointed out that "it may be necessary to

<sup>30</sup> [1941] 3 All E.R. 338, at p. 349.

<sup>31</sup> *Ibid.*, at p. 361.

<sup>32</sup> [1947] 1 All E.R. 454, at p. 457.

<sup>33</sup> [1947] 1 All E.R. 851.

<sup>34</sup> *Ibid.*, at p. 857.

<sup>35</sup> *Ibid.*, at p. 862.



leave all such questions, legislative and judicial, to the executive discretion of the Minister, any other course may be inconsistent with good administration".<sup>36</sup> It is the old conflict between rights of the general public and those of the individual, and the former must now prevail over the latter.

(3) Parliament should be extremely reluctant to confer power on a Minister to modify the provisions of the Act so far as may appear to him to be necessary for the purpose of bringing the Act into operation,<sup>37</sup> or on the Government to amend other Acts of Parliament. The C.M.P. recommended that the use of the Henry VIII clause should be abandoned in all but the most exceptional cases, and should not be permitted by Parliament except upon special grounds stated in the Ministerial Memorandum attached to the Bill. Further, that even when permitted, the clause should only be used for the sole purpose of bringing an Act into operation, and should be subject to a time limit of one year from the passing of the Act.<sup>38</sup> This recommendation of the C.M.P. was observed in practice after the publication of the Report until three or four years ago, when the Henry VIII clause made a reappearance in connection with the resumption of elections of local councillors and aldermen, but this need not be regarded as a serious flouting of the recommendation of the C.M.P.

(4) Only in the most exceptional cases, and then only on the special grounds stated in the Ministerial Memorandum attached to the Bill, should Parliament permit the use of clauses designed to exclude the jurisdiction of the courts to inquire into the legality of a regulation or order.<sup>39</sup> If and when Parliament decides that a Minister should have such a power, the intention of Parliament should be plainly stated in the statute and a period of challenge, say six months, should be allowed.<sup>40</sup> Parliament should never prohibit challenge absolutely. For instance, if in purported exercise of statutory powers (a) a ministerial order is made fixing the maximum price of home-grown beans, and it is alleged that such an order is *ultra vires* in that the enabling statute gives no power to make any order controlling

<sup>36</sup> Cmd. 4060, p. 39, footnote 129. See also Treves, *Administrative Discretion and Judicial Control* (1947), 10 Mod. L. Rev. 276, and de Smith, *The Limits of Judicial Review: Statutory Discretions and the Doctrine of Ultra Vires* (1948), 11 Mod. L. Rev. 306.

<sup>37</sup> The form of clause conferring this kind of power acquired the nickname of "the Henry VIII clause" because that King is regarded popularly as the impersonation of executive autocracy—see Cmd. 4060, p. 36.

<sup>38</sup> Cmd. 4060, p. 65.

<sup>39</sup> Cmd. 4060, p. 65.

<sup>40</sup> *Ibid.*

maximum prices at which articles may be sold;<sup>41</sup> (b) a regulation is made extending to certain trade marks owned by British subjects the power of the Comptroller-General of Patents to suspend the trade mark rights of an enemy or an enemy subject and it is alleged that there is no statutory authority for so extending the power;<sup>42</sup> and (c) at the invitation of a Minister a voluntary compensation fund is set up within the egg-marketing industry to which egg packers continuing in business could make contributions, out of which compensation could be paid to egg packers who had been put out of business, and certain egg packers contend that the scheme is really a levying of money for or to the use of the Crown and not sanctioned by the parent statute;<sup>43</sup> it is right and proper that the courts should have jurisdiction to inquire into the legality of such delegated legislation. The courts, however, would not be unduly worried with applications of this kind if the first-mentioned safeguard, that the precise limits of the law-making power should be defined in clear language in the parent statute, were carefully observed.

(5) The Act of Parliament conferring the law-making power should expressly provide that the delegated legislation made under it should be laid before Parliament. In the United Kingdom, when any *statutory instrument*<sup>44</sup> is required to be laid before Parliament after being made, a copy of the instrument has to be laid before each House of Parliament before it comes into operation.<sup>45</sup> The only exception to this rule is where it is essential that the statutory instrument should come into operation before copies of it can be so laid, when it will do so, but notification has forthwith to be sent to the Lord Chancellor<sup>46</sup> and to the Speaker of the House of Commons drawing attention to the fact that copies of the instrument have yet to be laid before Parliament and explaining why such copies were not so laid before the instrument came into operation.<sup>47</sup>

<sup>41</sup> *T. P. Gilbert & Son, Ltd. v. Birkin*, [1941] 2 All E.R. 489.

<sup>42</sup> *R. v. Comptroller-General of Patents, Ex parte Bayer Products Ltd.*, [1941] 2 All E.R. 677.

<sup>43</sup> *Yoxford and Darsham Farmers' Association Ltd. v. Llewellyn*, [1946] 2 All E.R. 38. Cf. *A-G v. Wilt's United Dairies* (1922), 91 L.J.K.B. 897.

<sup>44</sup> A "statutory instrument" is any document by which power to make, confirm or approve orders, rules, regulations or other sub legislation conferred on His Majesty in Council or on any Minister of the Crown is exercised, provided that the power is expressed (a) in the case of a power conferred on His Majesty, to be exercisable by Order in Council, (b) in the case of a power conferred on a Minister of the Crown, to be exercisable by statutory instrument. See s. 1, Statutory Instruments Act, 1946, which Act came into operation on the 1st January, 1948 — SI 1948, No. 3.

<sup>45</sup> Statutory Instruments Act, 1946, s. 4.

<sup>46</sup> Who is *ex officio* Lord Speaker of the House of Lords.

<sup>47</sup> Proviso to s. 4 of the Statutory Instruments Act, 1946.

Where an Act of Parliament provides that a *draft of any statutory instrument* shall be laid before Parliament, but the Act does not prohibit the making of the instrument without the approval of Parliament, then, in the case of an order in council, the draft must not be submitted to His Majesty in Council, and in any other case the statutory instrument must not be made, until after the expiration of forty days beginning with the day on which a copy of the draft is laid before each House of Parliament, or, if such copies are laid on different days, with the later of the two days.<sup>48</sup> No account is to be taken of any time during which Parliament is dissolved or prorogued or during which both Houses are adjourned for more than four days when one is reckoning this period of forty days.<sup>49</sup> If during the period of forty days either House resolves that the draft be not submitted to His Majesty or that the statutory instrument be not made, as the case may be, no further proceedings can be taken on it, but this is without prejudice to the laying before Parliament of a new draft.<sup>50</sup> The Scrutiny Committee (as to which, see No. (7) below) have made it their practice to require an explanation from the Government department concerned in all cases where the delegated legislation has not been published and laid before the House within seven days of signature,<sup>51</sup> and on May 15th, 1946,<sup>52</sup> Mr. Speaker ruled that, where the parent statute requires a copy of an instrument to be laid for a prescribed period before the House, the copy must be not only complete, but also correct. If the error is not self-evident, therefore, the corrected copy must be re-laid and the period for challenge in the House will begin to run afresh.

It should be noticed that these provisions apply where any statutory instrument or a draft of a statutory instrument is required to be laid before Parliament. Whether or not a statutory instrument or a draft is required to be so laid depends on the Act conferring the law-making power — each case has to be considered on its own merits. There is no general Act of Parliament which requires all delegated legislation to be laid before Parliament. It may be that the time has now come for the passing of such a general Act of Parliament.

It is obvious that the mere laying before Parliament of a statutory instrument or of a draft statutory instrument would

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<sup>48</sup> Statutory Instruments Act, 1946, s. 6(1).

<sup>49</sup> *Ibid.*, s. 7(1).

<sup>50</sup> *Ibid.*, s. 6(1).

<sup>51</sup> Para. 2, Third Special Report, H.C. 186 (1945-6).

<sup>52</sup> *Ibid.*, para. 3; also Hansard, Column 1885.

not be much of a safeguard, and very often, therefore, parliamentary control is strengthened:

(i) by the parent Act requiring its offspring of delegated legislation to be approved by positive resolution of each House<sup>53</sup> before it becomes operative. This can be a real check, since the Government must allot parliamentary time for consideration of the delegated legislation and notify the Houses accordingly, and Parliament itself must take positive action on the delegated legislation. But, clearly, this method could not be used for all delegated legislation, since it would take up practically the whole of Parliament's time. In practice this affirmative method is used for delegated legislation which imposes taxation, or modifies Acts of Parliament, or if the Minister concerned thinks it deals with a matter of major importance.

(ii) by the parent Act expressly providing that its offspring of delegated legislation shall be subject to annulment in pursuance of resolution of either House of Parliament. This is the "negative" method, and is much more widely used<sup>54</sup> than the "affirmative" procedure. Where an Act provides that any statutory instrument shall be subject to such annulment, the statutory instrument must be laid before Parliament after being made and the provisions of section 4 (*supra*) of the Statutory Instruments Act, 1946, apply to it. Either House is then entitled within forty days<sup>55</sup> beginning with the day on which a copy of the statutory instrument is laid before it, to resolve that an Address be presented to His Majesty praying that the instrument be annulled, and if either House so resolves then no further proceedings must be taken under the statutory instrument after the date of the resolution and His Majesty may by order in council revoke the instrument, but any such resolution and revocation will be without prejudice to the validity of anything previously done under the statutory instrument or to the making of a new instrument.<sup>56</sup> The "negative" method is not a safeguard unless members of the two Houses are vigilant and, in any event, it is not often that a "prayer" for annulment is successful. Obviously the Government, which must have delegated legislation to carry out its policy, is not likely to look with favour

<sup>53</sup> Only the House of Commons, so far as matters of finance are concerned.

<sup>54</sup> For every hundred statutory instruments subject to the "negative" method, only two or three are subject to the "affirmative" method.

<sup>55</sup> In reckoning this period of forty days, no account is taken of any time during which Parliament is dissolved or prorogued or during which both Houses are adjourned for more than four days—Statutory Instruments Act, 1946, s. 7(1).

<sup>56</sup> Statutory Instruments Act, 1946, s. 5(1).

on attempts to annul its delegated legislation, and will take steps to ensure that sufficient of its supporters are in the House and vote when the resolution for annulment is put to the vote. The orders in council made under the Emergency Powers (Defence) Acts, 1939 and 1940, were prayed against some fifteen or sixteen times and on only two occasions was the prayer successful. Since the General Election of 1945 and the consequent resumption of party politics "prayers" for annulment have become more frequent though no more successful, but the parliamentary debates which take place on a "prayer" are valuable in that they give publicity to matters arising out of delegated legislation and sometimes lead to the Minister concerned agreeing to re-draft his delegated legislation. On February 28th, 1949, a Member moved a motion to annul the Local Authorities (Charges for Dustbins) Order, 1949. This Order is designed to protect local authorities from financial loss in the matter of dustbins. A local authority may provide and maintain dustbins at an annual charge not exceeding 2/6 a dustbin, which is recoverable as part of the general rate of the premises upon which the dustbin is used. The maximum annual charge of 2/6 had been fixed by statute (Public Health Act, 1936), whereas the Order prescribed a maximum annual charge of 5/-. The Scrutiny Committee thought the Order appeared to make unusual and unexpected use of the powers conferred by the statute under which it was made, and reported in such terms to the House of Commons. After a debate, the motion was negatived.

Annulment affects the whole of the disputed delegated legislation: it is not a case of amending such legislation. The House either completely accepts the delegated legislation or completely rejects it.

It is possible for both the "affirmative" and "negative" procedures to be applicable to the contents of a single statutory instrument, that is, the instrument may contain some paragraphs already affirmatively approved by Parliament and others which are exposed to annulment on motion.<sup>57</sup> This situation adds to the difficulties of Parliament, in that it is not easy in proceedings in, say, the House of Commons, for discussion to confine itself to the paragraphs in the instrument which are appropriate to the one process rather than the other, and steps

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<sup>57</sup> Examples are statutory instruments made pursuant to the powers conferred by the National Insurance (Industrial Injuries) Act, 1946, and the National Health Service Act, 1946. See para. 5, Special Report, H.C. 201 (1947-8).

should be taken, if practicable, to eliminate the concurrent operation of the two procedures.

The absence of any principle determining the choice between the procedure by "affirmative" resolution and that for annulment by "negative" resolution has been remarked upon by the Scrutiny Committee on two occasions.<sup>58</sup> They thought that the important Dock Workers (Regulation of Employment) Order, 1947,<sup>59</sup> might with advantage have been made subject to the affirmative procedure, since its terms, not having been exposed to detailed examination in Standing Committee by being embodied in the direct legislation of Parliament, deserved discussion by the House. This discussion could only have been obtained by putting down a "prayer" that the Order be annulled — a result which probably no Member would have desired. It is realised, of course, that the preference for the negative over the affirmative procedure involves considerations of political significance and parliamentary time, but "it would be helpful if the relative appropriateness of the two procedures, seemingly hitherto determined without conscious plan, could now be stated in some considered formula, so that instruments which, by the novelty or importance of their contents, appear to need or to justify discussion by the House should be the subject of the affirmative procedure".<sup>60</sup> No "considered formula" has yet been devised, and the choice of procedure still remains with the Minister.

(6) It is imperative that there should be the utmost publicity of all forms of delegated legislation. In these days of "streamlined" legislation, subordinate legislation is, from the point of view of the man in the street, more important than Acts of Parliament. It is to the "law" churned out by Ministers that he must turn in order to ascertain what he may or may not do. Until January 1st, 1948, there were in the United Kingdom two safeguards, which Sir Cecil Carr so aptly termed "ante-natal" and "post-natal" safeguards.<sup>61</sup> Section 1 of the Rules Publication Act, 1893, constituted the ante-natal safeguard by providing *inter alia* that at least forty days' notice of the proposal to make statutory rules, and of the place where copies of the draft rules could be obtained, had to be given in the London Gazette. What was also important was that any written representations or suggestions made by an interested public body to the Government

<sup>58</sup> In 1944 — see H.C. 113, 1944, para. 4; and 1947 — see paras. 5 and 6, Special Report, H.C. 140.

<sup>59</sup> S.R. & O. 1947, No. 1189.

<sup>60</sup> Para. 6, Special Report, H.C. 140 (1946-7).

<sup>61</sup> Carr, *Delegated Legislation*, p. 34.

department concerned had to be taken into consideration by that department before finally settling the rules. Certain important Government departments (*e.g.*, the Board of Trade and the Treasury) were exempted from these statutory provisions, which, too, only applied to those statutory rules that in pursuance of any Act of Parliament had to be laid before Parliament. The C.M.P. recommended that the exceptions to section 1 should be removed, so that the provisions as to antecedent publicity would apply to every exercise of a law-making power conferred by Parliament of so substantial a character that Parliament had required the delegated legislation to be laid before it.<sup>62</sup> The Rules Publication Act, 1893, has been repealed by the Statutory Instruments Act, 1946,<sup>63</sup> and the last-mentioned Act completely disregards the recommendation of the C.M.P. in that it contains no provisions as to antecedent publicity. So the "ante-natal" safeguard appears to have disappeared at the very time when it has become of greater importance. It is interesting to note that under the United States Federal Administrative Procedure Act, 1946, general notice of not less than thirty days of proposed rule-making has to be published in the Federal Register, and must include (1) a statement of the time, place and nature of public rule-making proceedings; (2) reference to the authority under which the rule is proposed; and (3) either the terms or substance of the proposed rules or a description of the subjects and issues involved. All interested persons must be given an opportunity to participate in the rule-making through submission of written data, views, etc., with or without opportunity to present them orally in any manner.<sup>64</sup> The section is applicable only to substantive rules as distinguished from interpretative rules, general statements of policy, rules of agency organization, procedure or practice. The authorities in the United States of America appear to attach more importance to the recommendation of the C.M.P. than we do ourselves!

The "post-natal" safeguard operates, as its name indicates, after the delegated legislation has been made. In the United Kingdom every statutory instrument has to be sent to the King's printer of Acts of Parliament immediately after it has been made, and copies of it must be printed as soon as possible and sold by the King's printer.<sup>65</sup> All statutory instruments received by the

<sup>62</sup> Cmd. 4060, p. 66.

<sup>63</sup> S. 12(1).

<sup>64</sup> S. 4. Certain matters, *e.g.*, all military, naval or foreign affairs functions of the United States, are outside the scope of the section.

<sup>65</sup> S. 2(1).

King's printer must be allocated to the series of the calendar year in which they are made and must, as a general rule, be numbered in that series consecutively as nearly as may be in the order in which they are received.<sup>66</sup> The Government department responsible for sending a statutory instrument to the King's printer has to certify it as local or general, according to its subject matter.<sup>67</sup> His Majesty's Stationery Office has from time to time to publish a list, known as the Statutory Instrument Issue List, showing the serial number and short title of each statutory instrument which has been issued for the first time by that Office during the period to which the list relates and the date on which each such instrument was so issued.<sup>68</sup> Further, at the end of each calendar year the Treasury is responsible for seeing that an annual edition of statutory instruments is prepared containing specified matter.<sup>69</sup> A Committee known as the Statutory Instruments Reference Committee has been set up, and it is to this Committee that notification must be given by the Government department concerned should the department consider that the printing and sale of copies of a statutory instrument, or of any schedule or document referred to in the statutory instrument, are unnecessary on the grounds that the statutory instrument will only be in force for a short time or that the schedule or document is, for example, bulky.<sup>70</sup> The Committee has power to override the wishes of the department and can direct that printing and sale shall be done in the ordinary way.<sup>71</sup> In any legal proceedings a copy of any list so published purporting to bear the imprint of the King's printer must be received in evidence as a true copy and an entry therein shall be conclusive evidence of the date on which any statutory instrument was first issued by His Majesty's Stationery Office.<sup>72</sup>

There have been occasions when persons have been convicted of offences under delegated legislation when it was quite clear that the delegated legislation itself had not been available to the general public and that consequently the accused had no opportunity of knowing they were committing offences. The inaccessibility of regulations is also a cause for common and justifiable complaint in Canada.<sup>73</sup> The United Kingdom Parliament has now taken

<sup>66</sup> Reg. 3, Statutory Instruments Regulations, 1947 — SI 1948, No. 1.

<sup>67</sup> Reg. 4, Statutory Instruments Regulations, 1947.

<sup>68</sup> *Ibid.*, Reg. 9.

<sup>69</sup> *Ibid.*, Reg. 10.

<sup>70</sup> *Ibid.*, Regs. 6, 7 and 12(3).

<sup>71</sup> *Ibid.*, Reg. 12(3).

<sup>72</sup> Statutory Instruments Act, 1946, sec. 3(1).

<sup>73</sup> Administrative Law and the Canadian Bar Association (1948), 26 Can. Bar Rev. 1333.



steps to remove the possibility of such grave injustice being done in the future, by enacting that in any proceedings against any person for an offence under a statutory instrument it shall be a defence to prove that the statutory instrument had not been issued by His Majesty's Stationery Office at the date of the alleged offence unless it is proved that at that date reasonable steps had been taken for the purpose of bringing the purport of the statutory instrument to the notice of the public, or of persons likely to be affected by it, or of the person charged.<sup>74</sup> The definition of "statutory instrument" (*supra*) is not wide enough to include all forms of delegated legislation and, as Lord Justice Scott pointed out in *Blackpool Corporation v. Locker*,<sup>75</sup> there is no duty on a Minister, either by statute or at common law, to publish any sub-delegated legislation made by him, and the individual may remain in complete ignorance of his legal rights. ". . . such cases as the present do appear to me *ex debito iustitiae* to demonstrate the crying need of immediate publication of all matter that is truly legislative." It is to be hoped that Parliament will find time in the near future to remove the serious deficiencies of the Statutory Instruments Act, 1946. The United States have obviously carefully considered the recommendations of the C.M.P., and we would do ourselves a good turn by returning the compliment and paying careful consideration to the Federal Administrative Procedure Act, 1946. A Government department in America is, generally speaking, compelled to publish in the Federal Register (1) organizational rules containing a description of the department's central and field organization, its delegations of final authority and the manner in which the public may secure information; (2) procedural rules relative to the general course and method by which its functions, such as rule making

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<sup>74</sup> Statutory Instruments Act, 1946, s. 3(2). Mr. Carl McFarland, Chairman, American Bar Association Committee on Administrative Law, 1941-1946, has stated that in the *Hot Oil* case a lawyer stood before the American Supreme Court and described how neither his client nor himself had ever seen the regulation under which he was prosecuted until it was pulled out of the hip pocket of a field representative of a certain agency, and that he did not believe the court would require him to be bound by such "hip-pocket jurisprudence". The court agreed with him. The Government's brief admitted that even the agency was unaware that it had repealed its own regulation. See Federal Administrative Procedure Act and the Administrative Agencies, edited by George Warren, 1947, at p. 61. The attention of the Canadian Committee on Constitutional and Administrative Law has been drawn to a decision in British Columbia (*Rex v. Ross*, [1945] 3 D.L.R. 574) holding that an order was not binding until published—see Administrative Law and the Canadian Bar Association (1948), 26 Can. Bar Rev. 1333, at p. 1340.

<sup>75</sup> [1948] C.A. 349; [1948] 1 All E. R. 85, at p. 87. See the present writer's note on this case in (1948), 26 Can. Bar Rev. 1471.

and adjudication, are determined; and (3) substantive rules, as well as departmental statements of general policy which have been formulated and adopted by the department for the guidance of the public.<sup>76</sup> There is no real reason why Government departments in the United Kingdom should not be forced to come out into the open to the extent that departments are in America. True, the criticism has been made that publication in the Federal Register is no real distribution of information, since few persons take the Federal Register, and it is like putting a needle in a haystack to place agency (*i.e.* departmental) procedures along with the multitudinous other materials there.<sup>77</sup> This criticism would hold for the United Kingdom if publication were provided for in the London Gazette, and, as Mr. Blachly says, the information should be gathered into a handbook published once a year.<sup>78</sup> The argument is frequently put forward that a general Act of Parliament governing administrative procedure would interfere with the flexibility of the administrative process. But as Dean A. T. Vanderbilt, of the New York University School of Law, has stated, "In this connection it may be well to recall similar misgivings of a century or more ago when courts were consolidated, law and equity merged and the forms of action abolished, but they proved groundless. . . . Executive justice, we need always to remember, tends to be heady."<sup>79</sup> One of the reasons given for the existence of delegated legislation is that it finds new and more efficient ways of doing things. "A corollary of new methods is to let the people know what the new methods are."<sup>80</sup>

(7) Standing Orders of both Houses of Parliament should require that a Standing Committee be set up in each House at the beginning of each parliamentary session for the purpose of considering and reporting on every parliamentary Bill containing a proposal to confer a law-making power on a Minister, and on every regulation and rule made in the exercise of delegated legislative power and laid before the House in pursuance of statutory requirement.<sup>81</sup> In the United Kingdom, the House of Lords, so far as this suggested safeguard is concerned, was twenty years ahead of the House of Commons. It was in 1924 that the Upper House set up a Special Orders Committee for the purpose

<sup>76</sup> Federal Administrative Procedure Act, 1946, s. 3(a).

<sup>77</sup> Blachly, Critique of the Federal Administrative Procedure Act, Federal Administrative Procedure Act and the Administrative Agencies, at p. 49.

<sup>78</sup> *Ibid.*

<sup>79</sup> Federal Administrative Procedure Act and the Administrative Agencies, at pp. 14-15.

<sup>80</sup> McFarland, *op. cit.*, at p. 25.

<sup>81</sup> Cmd. 4060, p. 67.

of examining the rules and orders which require an "affirmative" resolution. This Committee reports to the Upper House the extent to which the proposed delegated legislation (a) follows precedent, and (b) its provisions give rise to important questions of policy or principle; also whether it can be approved by the House without special attention or whether further inquiry ought first to be made. In 1944 the House of Commons appointed for the first time, and twelve years after the C.M.P. had made a recommendation to that effect,<sup>82</sup> a Select Committee,<sup>83</sup> the present duty of which is to consider all delegated legislation laid or laid in draft before the House, being delegated legislation upon which proceedings<sup>84</sup> may be or might have been taken in either House in pursuance of any Act of Parliament, with a view to determining whether the special attention of the House should be drawn to it on any of the following grounds:

- (i) that it imposes a charge on the public revenues or contains provisions requiring payments to be made to the Exchequer or any Government department or to any local or public authority in consideration of any licence or consent, or of any services to be rendered, or prescribes the amount of any such charge or payments:
- (ii) that it is made in pursuance of an enactment containing specific provisions excluding it from challenge in the courts, either at all times or after the expiration of a specified period:
- (iii) that it appears to make some unusual or unexpected use of the powers conferred by the statute under which it is made:
- (iv) that it purports to have retrospective effect where the parent statute confers no express authority so to provide:
- (v) that there appears to have been unjustifiable delay in the publication or in the laying of it before Parliament:
- (vi) that for any special reason, its form or purport calls for elucidation.

It will be observed that the terms of reference exclude discussion of policy, and this may account for the fact that the Committee works entirely on non-party lines.

This Committee, which have the assistance of the Counsel to Mr. Speaker, and the quorum of which is three, have power to sit notwithstanding any adjournment of the House and to report from time to time; power to require any Government department concerned to submit a memorandum explaining any delegated legislation which may be under the Committee's consideration or to depute a representative to

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<sup>82</sup> Cmd. 4060, pp. 67-70.

<sup>83</sup> A similar Select Committee has been appointed in every parliamentary session since 1944. The Committee usually meets once a fortnight.

<sup>84</sup> *I.e.*, all delegated legislation which either requires an "affirmative" resolution or is subject to annulment in pursuance of a "negative" resolution.

appear before them as a witness for the purpose of explaining any such delegated legislation; power to report to the House, from time to time, any memoranda submitted or other evidence given to the Committee by any Government department in explanation of any such delegated legislation; and power to take evidence, written or oral, from His Majesty's Stationery Office, relating to the printing and publication of any delegated legislation. The Committee are instructed that before reporting that the special attention of the House should be drawn to any delegated legislation they must give to any Government department concerned an opportunity of furnishing orally or in writing such explanations as the department think fit. The Committee, for example, asked<sup>85</sup> the Ministry of Labour to furnish a memorandum explaining the Control of Employment (Directed Persons) (Amendment) Order, 1948,<sup>86</sup> and the Ministry of Food to furnish a memorandum explaining the Seizure of Food Order, 1948.<sup>87</sup> After considering these memoranda the Committee were of the opinion that the special attention of the House should be drawn to these two Orders on the ground that they appeared to make an unusual and unexpected use of the powers conferred by the parent statutes.<sup>88</sup>

During the parliamentary session 1947-8 the Committee, which is popularly known as the "Scrutiny Committee", examined 1189 statutory instruments and drew the special attention of the House to ten of them, of which seven were reported under the third head (unusual or unexpected use of a statutory power), one under both the third and the sixth (need of elucidation), one under the fourth (purported retrospective effect), and one under the fifth (unjustifiable delay).<sup>89</sup> The Reports of the Committee "wave a red light to which the House may or may not pay attention"<sup>90</sup> and there can be no possible doubt that the Committee are performing a valuable function. The activities of the Committee, it is submitted, are also a "red light" to Ministers and their departments, and there has been an improvement, in certain respects, in the behaviour of the latter. Thus, during the parliamentary session 1945-6 the Committee

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<sup>85</sup> Minutes of Further Proceedings of the Select Committee, H.C. No. 126 (1947-8).

<sup>86</sup> SI. 1948, No. 708.

<sup>87</sup> SI. 1948, No. 724.

<sup>88</sup> Seventh Report, H.C. 129 (1947-8), the appendices to which Report consist of the said memoranda.

<sup>89</sup> Para. 1, Special Report, H.C. 201 (1947-8).

<sup>90</sup> Campion, *An Introduction to the Procedure of The House of Commons* (1947 edition), p. 327.

brought twenty-seven Statutory Rules and Orders (as statutory instruments were then known) to the notice of the House on the ground of technical delay in presentation to Parliament or in publication, but they had occasion only once in the session 1947-8 to report an instrument on this ground.<sup>91</sup>

(8) Delegated legislation should always be drafted so as to be intelligible to the persons whom it affects. This, it is conceded, is more easily said than done, but it can be done. The C.M.P. pointed out that drafting of delegated legislation is "an art requiring specialised knowledge, experience and skill of the kind possessed by the office of Parliamentary Counsel".<sup>92</sup> The Scrutiny Committee have made valuable suggestions from time to time and, since the Treasury have instructed Government departments to take note of Special Reports of the Committee and of any recommendations therein contained,<sup>93</sup> it is hoped that these suggestions will bear fruit. Among such suggestions may be noted the following:

(a) *Back-to-Back Orders*. Where more than one statutory instrument is printed on the same sheet of paper, and one document occupies the whole of one side of the paper, there should be some warning on each side of the paper that another document is printed on the other side.<sup>94</sup>

(b) *Explanatory Notes*. Since delegated legislation is not subjected to the parliamentary processes to which a parliamentary Bill is exposed, a more generous range of expository-expression can be used in delegated legislation than one expects to find in a modern statute. Although welcoming the explanatory footnotes which are now appended to all delegated legislation upon which proceedings may be taken in the House, the Committee deprecated any tendency to frame the delegated legislation itself in technical language that has little meaning to the ordinary citizen, and to rely exclusively upon the footnote for giving him the guidance he needs. The most successfully framed document is one which is self-explanatory.<sup>95</sup> Two years later the Committee were able to report that they observed with satisfaction that instruments are sometimes so clearly drafted as to need no explanation.<sup>96</sup> But there is still room for improvement. For instance, no explanatory note is wanted if it would be otiose. S. R. & O. 1946, No. 243, stated that

<sup>91</sup> Para. 2, Special Report, H.C. 201 (1947-8).

<sup>92</sup> Cmd. 4060, p. 70.

<sup>93</sup> Treasury Circular No. 21/46.

<sup>94</sup> Para. 5, Third Special Report, H.C. 186 (1945-6).

<sup>95</sup> *Ibid.*, paras. 7 and 8.

<sup>96</sup> Para. 8, Special Report, H.C. 201 (1947-8).

For the purpose of Article II of the Utility Furniture (Supply and Acquisition) (No. 4) Order, 1944, the 1st day of March, 1946, shall be the prescribed date for the commencement of validity of any units coloured green

and not much fresh information was afforded by the explanatory note, which merely said "This Order makes green units valid on 1st March, 1946". Sometimes, too, an explanatory note alludes to other statutory instruments without mentioning their purport. Justifiable criticism has been made of legislation by reference, and Government departments should remember that explanation by reference is equally unsatisfactory.

As the Committee so wisely observed, a severely concise style of drafting, however correct technically, may sometimes create obscurity, and the instance they gave of where intelligibility had possibly been sacrificed to conciseness was the Control of Sulphuric Acid (No. 4) Order,<sup>97</sup> reading as follows:

The Control of Sulphuric Acid (No. 2) Order, 1940, as amended, shall have effect as if for the Schedule to that Order there were substituted the Schedule to this Order.

Now, on referring to the 1940 Order one finds that it has no Schedule. "The use of a few more words would have saved research and made clear that the Schedule was inserted in the 1940 Order by the amending Order of 1946."<sup>98</sup>

(c) *Short Titles.* Statutory instruments, that is delegated legislation, should have short titles, and a title need not attempt to give a catalogue of contents. Thus, instead of "The Control of Bolts, Nuts, Screws, Screw Studs, Washers and Rivets Order" something like "The Bolts, Nuts, etc. (Control) Order" would suffice. Neither need the title normally set out the full name of the parent statute, nor the name of the department making the delegated legislation, and although not every statutory instrument can have so compendious a name as "The Spoilt Beer Regulations", nevertheless ingenuity might usefully be employed to cut down such cumbrous titles as "The Artificial Insemination (Importation and Exportation of Semen and Artificial Semen) Regulations". Further, titles should be descriptive rather than technical. In "The Acquisition of Land (Owner Occupier) Regulations" the key words within the brackets are most helpful, whereas in the "Teachers Superannuation (Section 21(1)(a)) Varying Scheme" there is an element which must carry more meaning inside than outside the department.<sup>99</sup>

<sup>97</sup> SI. 1948, No. 294.

<sup>98</sup> Para. 7, Special Report, H.C. 201 (1947-8).

<sup>99</sup> Para. 11, Third Special Report, H.C. 186 (1945-6).

(d) *Citation of Exact Statutory Authority.* A Government department, when exercising a law-making power, should specify not only the Act but also the section or schedule thereof which confers the power. The department will have been careful to study its precise powers before framing its delegated legislation, so there should be no difficulty in declaring their sources in detail. It is obvious that this information "is helpful to anyone who may wish to verify his rights or perhaps to challenge in the courts the validity of the departmental instrument".<sup>100</sup>

(e) *Consolidation.* When delegated legislation has been heavily amended, it should be consolidated. For instance, the Air Navigation Order, 1923, has been amended more than thirty times and is itself out of print, and it was amended again in 1948. As the Scrutiny Committee pointed out, a periodical reprint of an old Order with amendments cannot be regarded as an adequate substitute for true consolidation.<sup>101</sup>

(9) Full use should be made of Advisory Bodies. The first principle of democracy, it has been stated, is that "all government is a trust delegated and controlled by the governed".<sup>102</sup> It is also contended that the basis of public law is no longer command but organization, and that most laws are in reality passed to organize and operate public utilities.<sup>103</sup> Duguit further contends that the Government and its officials are simply the managers of the nation's business, and that the growth and extension of State activity does not necessarily increase the Government's power. ". . . their [i.e. the Government and its officials] right of control is extinct because no one any longer believes in it."<sup>104</sup> No doubt there are many who subscribe to these views, but there are also many who believe that "The concentration of the instruments of power, whether political or economic, hardens the mind to power. The ignorance, prejudice, superstition, and helplessness of the mass permit government to grow despotic and the state to assume the pretensions of absolutism."<sup>105</sup> But all no doubt would agree that the State is an agency through which a people gives expression and order to its collective life, and it is on this basis that the suggestion is made that the fullest use should be made of advisory bodies, since it would enable the Government to keep more closely in touch with everyday

<sup>100</sup> Paras. 2 and 3, Special Report, H.C. 140 (1946-7). Cf. U.S.A. Federal Administrative Procedure Act, 1946, s. 4(a).

<sup>101</sup> Para. 10, Special Report, H.C. 201 (1947-8).

<sup>102</sup> MacIver, *The Modern State*, p. 373.

<sup>103</sup> Duguit, *Law in the Modern State*, pp. 49-50.

<sup>104</sup> *Ibid.*, p. 51.

<sup>105</sup> MacIver, *op. cit.*, p. 428.

life and would enable the governed to play a direct part in formulating the content of delegated legislation. Thus, before the appropriate Minister makes regulations under the National Insurance Act, 1946, he must send a preliminary draft to an Advisory Committee, which notifies persons affected, hears objections and reports on the draft to the Minister. When the Minister finally lays his regulations before Parliament he must also lay the Advisory Committee's report and a statement showing how far he has or has not given effect to that committee's recommendations. This is an important development of the principle of prior consultation, and has great possibilities. For example, the universities, professional bodies, trade unions, and the like, could be directly represented on Advisory Bodies, and who would contend that the views and advice of such representatives would not be invaluable both to the Minister and his department? If every Government department had an advisory body attached to it, and the Minister and the department had to consult the body when exercising their delegated law-making powers, and the Minister were compelled to report to Parliament on the body's recommendations, then the gap which at present exists between the "governors" and the "governed" would be appreciably reduced. It should be borne in mind that even important matters of principle are delegated by Parliament. Under the Town and Country Planning Act, 1947, the Central Land Board is given power to make regulations, with the consent of the Treasury, prescribing general principles to be followed by that Board in determining whether any and, if so, what development charge is to be paid in respect of development of land.<sup>106</sup> This is a matter affecting the whole community, a matter of principle not of mere detail, and the responsibilities of the Central Land Board and the Treasury should be shared with a suitably constituted Advisory Body. As the Committee on the Machinery of Government, presided over by the late Viscount Haldane, said, "We think that the more they [*i.e.* advisory bodies or committees] are regarded as an integral part of the normal organisation of a department, the more will Ministers be enabled to command the confidence of Parliament and the public in their administration of the services which seem likely in an increasing degree to affect the lives of large sections of the community".<sup>107</sup>

<sup>106</sup> Town and Country Planning Act, 1947, s. 70(3).

<sup>107</sup> Report of the Committee on the Machinery of Government, Cmd. 9230 (1918), p. 10 (King's Printer, London).



(10) Standing Orders of both Houses should require that every parliamentary Bill presented by a Minister, which proposes to confer law-making power on that or any other Minister, should be accompanied by a memorandum drawing attention to the power, explaining why it is needed and how it would be exercised if it were conferred; and stating what safeguards there would be against its abuse.<sup>108</sup> This safeguard, although reasonable, is one which is not likely to become a reality. Ministers are not very willing to give full explanations or to allow themselves to be subjected to cross-examination.

It is realised that not all the safeguards suggested in this article are as appropriate to Canada as they are to the United Kingdom and, further, that the Canadian federal system may call for additional safeguards. But if the problem is approached in the right spirit, then it will be successfully solved, and the outlook shown in the article on the Report of the Canadian Committee on Constitutional and Administrative Law<sup>109</sup> raises high hopes of sound and solid foundations being laid for administrative law in Canada. Every lawyer who has a proper perspective of the problem will agree that "All of us love to be told that we are trodden down by hungry generations of bureaucrats, that we are martyrs to their appetite for power and to their zeal for tying us up in unnecessary controls and restrictions. The judges, who so majestically protect us from the Executive, manage to confirm our worst fears. The newspaper will publish anything to the discredit of officials; we will believe it all. *The New Despotism* must have had colossal sales here as well as across the Atlantic",<sup>110</sup> and that "The time has come to consider in more careful terms the real relationship between government and the legal profession. It is the profession's duty to serve its clients, and they are best served by working with the democratic institutions of government, not by fighting against them."<sup>111</sup> It should also be said that it is the duty of Ministers to serve the community faithfully as a whole, which they cannot do unless they, too, are imbued with the right spirit. Cannot Ministers and lawyers work together in a spirit of co-operation, and so preclude any possibility of public administration strangling law?

<sup>108</sup> Cmd. 4060, p. 67.

<sup>109</sup> (1948), 26 Can. Bar Rev. 1333.

<sup>110</sup> Carr, *This Freedom* (1946), 62 L.Q.R. 58, at p. 61.

<sup>111</sup> (1948), 26 Can. Bar Rev. 1333, at p. 1345.