Can Parliament Control the Regulatory Process?

J.R. Mallory

One of the most basic parts of our constitutional system is what the great English constitutional lawyer A.V. Dicey called "the rule of law". By that Dicey meant that no man can be punished save for a specific breach of the law and that all men — from the highest to the lowest — are subject to the ordinary courts of the land. The growth of regulatory bodies and administrative tribunals has eroded some of the effect of his second proposition, but it is still true that the courts have great power and authority in keeping regulatory bodies within the law and beholden to the principles of natural justice. The trouble is that, while courts interpret the law, they do not make it, so that legislatures and the subordinate bodies to whom they give regulatory powers are able to make laws and regulations that offend against our notions of natural justice. It is hard for the courts to prevent this from happening, even when there are Charters of Rights enshrined in the constitution.

Under a system of parliamentary sovereignty (even if partially limited by a Charter of Rights as it is in Canada) there is only limited constitutional protection of the rule of law and of the principles of natural justice. The ultimate safeguard of these principles in the end is the conscience of the legislature. How far have the values of constitutionalism been internalized in the minds of ministers and parliamentarians? How far can parliament as an institution protect these values against governments who may be tempted to ignore them?

The Role of Parliament in Controlling the Executive

Nearly twenty years ago Professor Bernard Crick, in his influential and perceptive *Reform of Parliament,* wrote:

> Thus the phrase 'Parliamentary control', and talk about the 'decline of Parliamentary control', should not mislead anyone into asking for a situation in which governments can have their legislation changed or defeated, or their life terminated . . . Control means *influence,* not direct power; *advice* not command; *criticism,* not obstruction; *scrutiny,* not initiation; and *publicity,* not secrecy.[1]

We must, in short, be realistic about the role of Parliament in the Westminster system. The government has been chosen to govern; the opposition is a "government in waiting", using its resources — including what goes on in Parliament — as a part of what Professor Crick has called "a permanent election campaign" which begins with the summoning of a new Parliament and continues until it is dissolved and the real election campaign begins. Everything that goes on in Parliament is a contest between organized groups of politicians seeking a political end — the control of the government.

A legislative chamber is made up of a large number of persons ostensibly engaged in the public ventilation of great issues for the edification of the electorate. Much of the time they are in fact merely legitimating coherent legislative proposals which have already reached mature and final form within the machinery of the executive. Where there are disciplined political parties and majority governments there is little that can be done to modify legislative proposals. The debate in a parliamentary chamber takes place within a complex framework of rules which allow discussion to take place, but which are also designed to facilitate the progress of legislation. A determined opposition can cause so much delay that many measures perforce die on the order paper, but the ones that the government is determined to pass will survive. In the minds of both government and opposition the object of the whole exercise is to lay the groundwork for the next election. Parliamentary debate is not legislation in the ordinary sense of the term, but simply legitimation.

Since it is difficult for a large body of persons to conduct effective business, much of the activity in a parliamentary body takes place in committees. Part of this committee work is concerned with stages of the legislative process, and does not concern the present discussion. Other parts of it relate to the functions of scrutiny and control. All committees have some characteristics in common. They can be more businesslike because of their small size, and the specialized nature of their tasks makes their members more knowledgeable and capable of becoming more effective. They also have one characteristic which makes them somewhat different from their parent body, where ardent political partisans engage in daily combat over political advantage. As small groups committees are susceptible to what is known as small-group behaviour — a tendency towards a corporate identity of their own which softens the adversary character of life in a parliamentary chamber. For this reason they tend to be somewhat distrusted by party managers. A member who devotes the major part of his time to committee work may also risk his political career if he

J.R. Mallory is Emeritus Professor of Political Science at McGill University. He was the keynote speaker at the second Commonwealth Conference on Delegated Legislation held in Ottawa in April 1983.

seriously neglects more highly visible political work on the floor of the House and in his constituency. As a consequence there are never enough members available to become expert committee men.

Governments, which control the way in which a legislative chamber does its business, have been reluctant in our system to give too much power to committees on the ground that this will undermine the proper constitutional relationship between the cabinet and Parliament. This is one of the reasons why recent generosity in Canada in increasing the office and research facilities of members and party caucuses has not been extended to enhancing committee staffs. Nevertheless, there are some kinds of surveillance and scrutiny which can be done only if committees have adequate and expert staffs under their own control.[2]

The Scrutiny of Statutory Instruments

The growth of the reach of the modern state has made it unavoidable that legislatures — hard-pressed for time — should pass many laws in skeletal form, leaving ministers or regulatory agencies the task of framing regulations to achieve the specific purpose of the law. Such matters as safety in the air or in the marketing of drugs require frequent modification in the rules as a result of rapid technological change. It would be absurd to expect each new problem to lead to the full and solemn process of statutory amendment.

The shift from statutory to executive regulation was first perceived during the First World War. It did not decline with the coming of peace. In Great Britain the phenomenon was denounced by Lord Hewart in *The New Despotism,* examined by the Committee on Ministers' Powers in 1932, and more fully discussed by Sir Carleton Allen in 1945.[3] Concern in Canada was expressed by Brooke Claxton in a Commons debate in 1943. Subsequently Parliament in 1950 passed the *Regulations Act*, followed some twenty years later by the *Statutory Instruments Act* in 1971, and the setting up of a scrutiny committee of both Houses in the following year.[4]

It is obviously impossible to return to the halcyon days of the night watchman state when Parliament had plenty of time to discuss every change in the law, no matter how minute. But how, without paralyzing the whole legislative process, is parliamentary control to be asserted? In the first place it should be possible to distinguish — as the Committee on Ministers' Powers did — between a reasonable use of the regulatory power by the executive and a use which creates dangers to the basic constitutional values of the state. When ministers possess the power to raise taxes or to amend acts of Parliament by executive order the "decline of Parliament" is dramatically illustrated. Orders which make novel and unusual use of statutory power or trespass unduly on the liberty of the subject are the sort of grave issues which should be restricted to the normal legislative process in Parliament. And yet such orders may be legal, and therefore not subject to control by the courts.

A second issue is whether scrutiny of questionable orders should deal essentially with form, or should it extend to substance and policy. In this case a legislative committee can be accused of reviving policy issues which Parliament has already settled in the parent legislation. Nevertheless, regulations do sometimes seem to go beyond what Parliament appears to have intended and there should be some parliamentary means of reopening the issue. A normal parliamentary scrutiny committee, which has built up knowledge and experience in dealing with form rather than the substance of delegated legislation, may not be the best forum to deal with such issues. It might be desirable to divide the business of scrutiny between two different parliamentary bodies — those that are experts in clarity and those that deal with the subject matter of policy. How these two operations can be made to function in tandem has been the subject of several recommendations recently in Canada.

Recent Canadian Proposals

One of the most important aspects of a general procedural reform in the Commons tabled in 1979 was an improved method of dealing with statutory instruments.[5] At about the same time the Standing Joint Committee of the Senate and House of Commons on Regulations and Other Statutory Instruments was preparing a report aimed at improving its capacity to carry out its mandate,[6] and a Senate Committee in 1980 also made useful suggestions for improving the scrutiny of delegated legislation.[7] I shall consider each of them in turn.

Shortly before the end of its brief life, the Progressive Conservative government tabled in the House of Commons, on November 23, 1979, a number of proposals which had been foreshadowed in the Speech from the Throne "to extend the power of Parliament . . . to strengthen the powers and resources of parliamentary committees . . ." to provide more opportunity for initiatives by private members, and generally to make ministers more accountable. These included greater opportunities to discuss committee reports (it should be noted that several of the reports of the Statutory Instruments Committee have been discussed in the Senate but hardly ever in the Commons, presumably because of the reluctance of the government to afford time). There was also a proposal that standing orders be revised to increase opportunities for affirmative or negative resolutions on delegated legislation, a requirement which is comparatively rare in Canada. Another useful proposal was that the enabling clauses of bills be simultaneously referred to the Statutory Instruments Committee and to the relevant standing committee after second reading.

A large number of dubious regulations are a consequence of the tendency of past parliaments to pass broad and ambiguous delegation clauses. If more attention were paid to delegation clauses before laws are passed, the work of the Statutory Instruments Committee would be progressively eased. For while it is sometimes possible to persuade an agency to modify or withdraw an offending regulation, it is impossible to expect that parliamentary time will be found to make amendments to existing laws in order to strengthen parliamentary control of the executive.

The general thrust of the Conservative proposals was to increase the power of the ordinary members and to loosen the government's control over committees. It is not without significance that these proposals were made by a new government whose party had been out of office for fifteen years. As Gerald Baldwin once remarked about freedom of information legislation,

the only time to get it is before a government has been in power long enough to be afraid of it. It is therefore not surprising that none of the proposed reforms were taken up by the Liberals when they returned to power. Their own priorities for parliamentary reform were concerned with improving the efficiency of the legislative process, and not with making life easier for critics of the government.

The Joint Standing Committee on Regulations and other Statutory Instruments in its 1980 Report made an eloquent plea for confining government to "the stern restraint of the rule of law, and the control of arbitrary if well-meaning acts" through more effective parliamentary control. At the time that the report came out, the occasion seemed unusually propitious with the "deregulation debate" then at its height, in both Canada and the United States. The question has also become a fashionable one with economists, and has engaged the attention of the Economic Council of Canada, as well as of a parliamentary task force in the Commons, and has led to the designation of a senior minister of the Crown to take the matter in hand. While much, if not all of the deregulation debate has been concerned with policy issues — how much regulation and of what kind, and its effect on costs and services to the public — it seemed a good time to return to the question of "how" as well as "why".

In its report the Committee thought it had found a solution to the problem of how to reform old laws which had been too generous and vague in their grant of delegated legislative power through the use of "amending Bills introduced in the Senate upon the recommendation of the Regulatory Review Committee and subject to all-party agreement." They also proposed to strengthen the process of parliamentary control by providing that all subordinate legislation not already subject to a statutory affirmative procedure should be subject to disallowance by resolution of either House and that the executive be barred from re-making any statutory instrument so disallowed for a period of six months from its disallowance. This proposal was also endorsed by the Senate Committee on Justice and Legal Affairs. Such a power might have some deterrent effect, but, unless there is a remarkable change in the relationships between government and Parliament, it is difficult to see a disallowance resolution being carried. If this happened in the Commons it would show that the government whips had lost effective control over their own members. If it happened in the Senate it might be the incident that finally gave momentum to radical changes in that body. Accordingly even an opposition majority in the Senate might think twice about it.

A more promising proposal was one that would enlarge the scope of prior notification and consultative procedures. This recommendation may in part have stemmed from a fear of giving too much power to committees reviewing the merit of proposed regulations. They said "committees conducting such reviews would need to guard against the danger of their scrutiny of policy being too much influenced by their expert staff who might be simply endeavoring to have their own personal judgments substituted for those of servants of the Crown to whom Parliament had originally delegated subordinate law making authority." This is no doubt an argument which governments will be happy to deploy again and again against the granting of power to any committee that they cannot control. The Joint Committee may have yielded to considerations of political prudence in their self-conscious role as guardians of constitutional propriety. However, notification and consultation pose no such dangers to the pure values of the constitution: "More effective than any scheme of parliamentary scrutiny of the policy of a proposed subordinate law that can now be devised is an obligation to make the proposed law public, to state the reasons for its making and to consider representations from the public, whether individuals or groups." To a considerable extent recent regulations by the Treasury Board are now requiring greater use of notification and comment procedures. How far these procedures will inoculate us against the abuses of the regulatory state remain to be seen.

Regulatory Control: How Much Progress?

Parliaments in various countries which operate under the Westminster system have been trying in various ways to act as watchdogs on the executive while ministers have more and more displaced Parliament as the source of legislation. This counter-offensive to curb the growing legislative power of the executive has been going on for more than sixty years. How much has it accomplished? How much can it accomplish?

Among the obstacles I would place first an unrealistic appreciation of the situation. No matter how much we may yearn for it I doubt that we will get very far in getting the government off our backs and returning to the golden age of laissez-faire. The urge for deregulation may rid us of a few rules that are no longer in accord with contemporary standards — after all we have gotten rid of prohibition and censorship is declining. But other kinds of regulation will be difficult to resist. A higher level of environmental standards is more than a matter of aesthetics — it is becoming a matter of the air we need to breathe and the water we need to drink. Canadian history is full of examples of partnerships between the state and the private sector which have created a strong built-in tolerance for state regulation in our political culture. A consequence of this is that it is difficult to persuade people that the regulatory process, which experience has taught us is good, is in need of watching. The notion that we have to regulate the regulators is just that extra bit of political sophistication that is not easy to inculcate.

The current wave of enthusiasm for deregulation is based on a very different perception of issues than that of parliamentary control of the regulatory process. Much of the sentiment for deregulation is based on nineteenth century liberal economics. It is not easy for its proponents to see the issue of constitutional values. There is not a large attentive public for a discussion of the techniques for controlling arbitrary power in a constitutional order. In addition to the difficulty of being heard, the advocates of more refined parliamentary control over the executive have to contend with other obstacles which are inherent in the Westminster system.

The system of cabinet government which we have is based on the notion that it is the business of governments to govern, and that Parliament must not seek to usurp the role of government. The American separation of powers which enables congressional committees to be something like parallel governments is utterly different from our own system, and Canadian politicians in office will continue to resist the granting of powers or facilities which would

make parliamentary committees in any sense independent arms of government. Hence the suggestion that a scrutiny committee might have the power to annul an order has been resisted on grounds of outraged constitutionalism, and even the employment of annulment orders by either house is not an idea which governments are likely to encourage. It implies a loosening of caucus discipline in the House which is anathema to party managers. Accordingly any modest success which a scrutiny committee achieves — essentially through the ability to persuade rather than the power to veto — is achieved in a climate of chill hostility.

A second factor, which is not peculiar to the Westminster system, is that of excess of bureaucratic zeal. Civil servants are the prime initiators of program proposals, and even when the program originates with ministers (as is sometimes the case) it is the civil servants who work out the details of program implementation. Naturally they prefer regulations which will simplify administration and achieve program objectives in the most direct way. In drafting such regulations they and their legal advisers will push whatever statutory powers they have to the limit and occasionally hope to go beyond what is either lawful or acceptable. The checks on bureaucratic excess within the cabinet system in Canada seems to be perfunctory at best, so that a legislative scrutiny committee is the only check.

If Canadian experience tells us anything, it is that one of the most difficult questions is whether a proposed regulation is legal or not. The department — often backed by the Department of Justice — says that it is: the scrutiny committee is convinced that it is not. The committee is not a court and has no legal power, so that the department has a good chance of getting its way. Only when some aggrieved party challenges the regulation in court can its legality be authoritatively determined — and the challenge may go all the way to the Supreme Court of Canada at great expense of time and treasure to the aggrieved appellant.

One of the objects of the scrutiny process is to provide an alternative to expensive litigation in those cases, which are fairly numerous, where there is legitimate doubt whether a regulation is *intra vires*. In the end this can be determined authoritatively only by judges, whose duty is to uphold the law and the constitution. Politicians are not judges, they are political men. Their motives cannot be dissociated from considerations of political advantage, for that is what the political system is all about. However, whether they are scrutinizing the public accounts or the regulatory process, they cannot divorce themselves from their political role. Decent and honest men will tend to be even-handed but they cannot be blamed if the prospect of political advantage adds to their zeal. Elected politicians need to be partisans and they need to be involved in activities which are politically rewarding and politically visible. Much scrutiny activity does not have these qualities, so that it will be hard to recruit and retain the kind of members a strong scrutiny committee needs. To a degree this difficulty is mitigated when scrutiny committees involve members of a second chamber which is either appointed or elected for a comparatively long term. Nevertheless, the difficulty remains in combining a quasi-judicial role (and a role as moral censor of constitutional values) with the requirements of the political process. In the unending antagonistic relations between governments aiming to realize their own goals and scrutiny committees seeking a more open and responsive regulatory process, the balance will remain tilted towards governments.

Notes

[1]Bernard Crick, *The Reform of Parliament.* Second Edition, London, 1968, p. 80.

[2]There are of course difficulties, which should not be overlooked, in inflating the size and role of committee staffs. See J.R. Mallory, "Parliament in the Eighties." in R. Kenneth Carty and W. Peter Ward (eds.) *Entering the Eighties: Canada in Crisis,* Toronto, 1980.

[3]Lord Hewart, *The New Despotism*, London, 1929; *Report of the Committee on Ministers' Powers,* Cmd. 4060; C.K. Allen, *Law and Orders,* London, 1945; John E. Kersell, *Parliamentary Supervision of Delegated Legislation,* London, 1960.

[4]For a summary of these developments see J.R. Mallory, "Curtailing 'Divine Right': the Control of Delegated Legislation in Canada." in O.P. Dwivedi (ed.) *The Administrative State in Canada,* Toronto, 1982, pp. 131-49.

[5]For a general review of the proposals see *Parliamentary Government,* I:2. pp. 12-15.

[6]Joint Standing Committee on Regulations and Other Statutory Instruments. *First Report to the Thirty-Second Parliament,* Tabled June 3, 1980.

[7]Standing Senate Committee on Justice and Legal Affairs. *Report on Certain Aspects of the Canadian Constitution,* November, 1980.