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PARLIAMENTS AND POST-LEGISLATIVE SCRUTINY

Edited by
Franklin De Vrieze and Philip Norton

ROUTLEDGE

Parliaments and Post-Legislative Scrutiny

To what extent have parliaments a responsibility to monitor how laws are implemented as intended and have the expected impact? Is the practice of Post-Legislative Scrutiny emerging as a new dimension within the oversight role of parliament? What approach do parliaments apply in assessing the implementation and impact of legislation? These are the fascinating questions guiding this book.

Case studies offer an in-depth look at how particular countries and the European Union conduct Post-Legislative Scrutiny. The analysis puts Post-Legislative Scrutiny in the context of parliamentary oversight and parliaments' engagement in the legislative cycle.

The purpose of this book is to demonstrate the value of Post-Legislative Scrutiny as a public good, benefiting the executive, legislature and the people in ensuring that law delivers what is expected of it, as well as to respond to the need for greater clarity as to what is meant by the term. In this way, the publication can assist legislatures to think more clearly as to what precisely they understand, and seek to achieve, by Post-Legislative Scrutiny.

This book is the result of the co-operation between the Centre for Legislative Studies at the University of Hull and the Westminster Foundation for Democracy.

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This volume on post-legislative scrutiny is the result of the co-operation between the Centre for Legislative Studies at the University of Hull and the Westminster Foundation for Democracy (WFD). It draws primarily, though not exclusively, on papers delivered initially at three conferences. These were the University of Hull and WFD expert seminar on legislative impact assessments in April 2019, the ECPR Standing Group on Parliaments meeting in June 2019 and the 14th Workshop of Parliamentary Scholars and Parliamentarians held at Wroxton College, Oxfordshire in the UK, in July 2019. Those selected for inclusion have subsequently been revised in the light of feedback from the conferences as well as being peer-reviewed.

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Contents

Citation Information

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Chapter 1
The significance of post-legislative scrutiny
Franklin De Vrieze and Philip Norton
The Journal of Legislative Studies, volume 26, issue 3 (July 2020) pp. 349–361

Chapter 2
A deliberative approach to post legislative scrutiny? Lessons from Australia's ad hoc approach
Sarah Moulds
The Journal of Legislative Studies, volume 26, issue 3 (July 2020) pp. 362–386

Chapter 3
The UK post-legislative scrutiny gap
Tom Caygill
The Journal of Legislative Studies, volume 26, issue 3 (July 2020) pp. 387–404

Chapter 4
Ex-post evaluation in the European Parliament: an increasing influence on the policy cycle
Irmgard Anglmayer and Amandine Scherrer
The Journal of Legislative Studies, volume 26, issue 3 (July 2020) pp. 405–426

Chapter 5
Post-Legislative Scrutiny in Europe: how the oversight on implementation of legislation by parliaments in Europe is getting stronger
Franklin De Vrieze
The Journal of Legislative Studies, volume 26, issue 3 (July 2020) pp. 427–447

Chapter 6

How parliaments monitor sustainable development goals – a ground for application of post legislative scrutiny
Fotios Fitsilis and Franklin De Vrieze
The Journal of Legislative Studies, volume 26, issue 3 (July 2020) pp. 448–468

Chapter 7

Towards parliamentary full cycle engagement in the legislative process: innovations and challenges
Jonathan Murphy
The Journal of Legislative Studies, volume 26, issue 3 (July 2020) pp. 469–493

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The significance of post-legislative scrutiny

Franklin De Vrieze and Philip Norton

A legislature is a core institution of the state. Its core defining function is that of giving assent to measures of public policy that are to be binding (Norton, 1990, p. 1). The process by which a measure becomes a law has four principal stages: gestation, drafting, deliberation and adoption, and implementation (see Norton, 2013, pp. 70–7) The legislature is principally and necessarily core to the third stage. Prior to giving assent to a measure, it will normally debate its merits. In some legislatures, primarily in non-democratic nations, the debate may be perfunctory or formal. In others, it may be extensive and measures may be amended, sometimes rejected, as a result of the deliberations.

Legislatures have been studied since one can identify them as having come into being, but over the past century scholarly study has been both limited and narrow. It has been limited because of the perception that, as Lord Bryce notably argued, legislatures are in decline (Bryce, 1921, pp. 367–77). Power, he argued, had departed legislatures and gone elsewhere. Mass membership political parties, operating in an era of an expanding franchise, ensured executive dominance of the legislature and the approval of its measures. The focus of study thus shifted elsewhere, not least to executives and bureaucracies. When legislatures were studied, not least those legislatures that did exert some capacity to allocate values (most notably the US Congress), the focus was what happened in the legislature during the passage of a measure. When in post-war years there was a shift in study in the US to behavioural analysis, there was a focus on how members operated within the legislature in determining the outcome of legislation.

Recent years, especially since the 1980s, have seen a shift in scholarly attention to legislatures (Martin et al., 2014; Norton, 2020) with some groundbreaking research, not least in the USA. As Martin, Saalfeld and Strom observed, there was a shift from the macro-level analyses of 'old' institutionalism to a micro level of analysis, inspired by a general rise of behaviouralism in the social sciences. 'In this conception of a political system the formal institutions of government were reduced to the "black box", where the conversion

of inputs into outputs occurred' (Martin et al., 2014, p. 9). There were analyses of how members saw their roles and how they were shaped by the political environment in which they operated. Members of the legislature did not exist in a vacuum, but the focus was the influences on members during the deliberative stage of the policy process. Other than in the USA, an outlier in terms of its capacity to shape measures independently of the executive, there has been little attention given to the input side of legislation – the gestation and drafting stages of bills – and to the output side in terms of the implementation of measures.

That this should be so is not surprising. Executive bills are laid before the legislature – they have been prepared by the executive – and once approved the measures are then implemented by the executive and other public agencies. Any dispute as to meaning is a matter for the courts. The initiation stage of the policy process is dominated typically by political parties, executive bodies and by organised interests. The drafting stage is dominated by the executive, which may utilise lawyers specialised in drawing up bills, as in the Office of Parliamentary Counsel in the UK and the Office of Management and Budget in the USA. The output side of the process is dominated by bodies at whom the legislation is directed or by bodies, such as the police, responsible for law enforcement. Any dispute as to the meaning of the law is, as mentioned, a matter usually for resolution in the courts.

There has thus been a significant growth in the study of legislatures, both quantitatively and qualitatively, but the focus has been the stage of deliberation and assent by the legislature. It reflects how legislatures how generally acted, devoting their resources to deliberations on bills once introduced. For legislatures, the beginning of the legislative process is when a bill is introduced and it ends when it is approved and becomes law.

The UK serves as an exemplar of this perception. The executive introduces a bill fully drafted, drawn up by the Office of Parliamentary Counsel acting on instructions from the relevant Government department. The minister in charge may negotiate with others, including organised interests and ministerial colleagues, to gain approval prior to the introduction of the bill. The legislature is not among the bodies that are involved (Norton, 2013, pp. 74–5), although anticipation of parliamentary reaction may shape how the bill is drawn up in order to smooth its passage through both Houses (Norton, 2019, p. 342). For ministers, and for backbench Members of Parliament, legislative success is seen as the bill receiving Royal Assent and becoming an Act of Parliament. In short, for a minister, the measure of success is essentially getting their bills enacted rather than whether the measures achieve their desired goals.

Recent years have seen a change in how some legislatures view the legislative process. This has led to a change in structures and processes, one that as we shall see has been rather disparate in both form and effect. As a result of this development, there is a growing body of scholarly analysis of these

changes. This volume is a contribution to that analysis. It focuses on one particular dimension: post-legislative scrutiny.

Taking A holistic view

In 2004, the Constitution Committee of the House of Lords (chaired by Philip Norton) published a report entitled *Parliament and the Legislative Process* (Constitution Committee, 2004). The committee was not the first to examine the case for some review of legislation once it was on the statute book (Hansard Society, 1993; Procedure Committee, 1990). It was distinctive, though, for two reasons: first, for taking a holistic view of the process by which law was made and enacted and, second, for its consequences. It triggered a significant series of events.

The committee considered both the input as well as output side of legislation, examining whether Parliament could play a role in both the drafting and the implementation stages, as well as considering how both Houses could be strengthened in scrutinising and influencing bills once they had been introduced. It was keen to see an extension of a practice that had begun in 1997 of some bills being sent for consideration by a parliamentary committee before being formally introduced to Parliament. This practice enabled parliamentarians to comment and potentially influence the drafting a bill before the Government had committed itself to the contents. However, only a minority of bills was sent for pre-legislative scrutiny. The committee favoured pr-legislative scrutiny being the norm rather than the exception (Constitution Committee, 2004, pp. 43–4). However, it was its recommendations on post-legislative scrutiny that were to have the most notable effect.

The committee was conscious that little attention was given by Parliament to measures once enacted. There were reviews of Acts by parliamentary committees when the measures had demonstrably had notably visible and unintended consequences, but such reviews were rare. There was no systematic scrutiny and parliamentary committees accorded no priority to it. The committee advanced a case for post-legislative scrutiny – we shall return to the justifications for such scrutiny – and recommended that post-legislative scrutiny be routine, with Acts being reviewed within three years of their commencement or six years after enactment, whichever was the sooner (Constitution Committee, 2004, p. 44).

As the committee recognised, there was widespread agreement as to the principle of post-legislative scrutiny. The problem was getting agreement to its implementation. Nothing had happened when previous bodies had recommended it. In its response to the committee's report, the government acknowledged the value of post-legislative scrutiny (Constitution Committee, 2005, p. 9), but demurred from acting to implement the recommendations. Instead, contending that the term was ill-defined, it referred the matter to

the Law Commission (an official body headed by a judge, set up to consider law reform) to examine options and to consider what body may be most suitable for the role.

In its report the following year, the Commission endorsed the Constitution Committee recommendation for systematic post-legislative scrutiny – for which it had found 'overwhelming support' – and for the appointment of a joint committee of both Houses on post-legislative scrutiny (Law Commission, 2006, p. 5). The government took two years to respond, but when it did it concurred in the commission's overall approach, but adopted a different scheme of scrutiny. It agreed that most Acts, three to five years after enactment, would be reviewed by the relevant government department, with the reviews published as command papers and sent to the appropriate departmental select committee in the House of Commons (Leader of the House of Commons, 2008, pp. 20–22). It was then up to the relevant committee if it wished to further examine the Act.

Our concern here is not with the extent to which post-legislative scrutiny has been undertaken, and with what effect, in the UK Parliament. That has been the subject of examination elsewhere (Caygill, 2019a, 2019b; Norton, 2019) as well as in this volume by Caygill. The picture has clearly been patchy. Our concern here is with the formal recognition of the importance of post-legislative scrutiny and how it has since expanded and been taken up by legislatures around the globe. As Sarah Moulds notes in her analysis of the Australian experience of post-legislative scrutiny, what happened in the UK influenced other nations, not least with a Westminster heritage or receiving development assistance from UK donors or aid agencies.

Assessing post-Legislative scrutiny

There are three key questions to be asked about post-legislative scrutiny. *First*, what is it? What exactly does it encompass? *Second,* who does it? Is it essentially a formal exercise to be undertaken by specialists, or a process to be undertaken by those who enacted the measure and who are able to hold government to account for how it has been implemented? Addressing the who also touches upon the how, be it by committee or some other agency. And, *third, why* do it? Given the demands made of legislatures and other public bodies, why should potentially scare resources be devoted to it? Here, we provide a brief summary in preparation for what follows in this volume. Mould in her analysis goes into greater detail.

What is it?

Post-legislative scrutiny has been defined in different ways in different jurisdictions. Furthermore, in some cases it is carried out, but without being styled

as post-legislative scrutiny. The term itself is only now beginning to gain some currency, but the recognition, as we shall see illustrated in this issue, is not universal. It has also been extended beyond what both the House of Lords Constitution Committee and UK Law Commission meant by the term. Indeed, it has become something of an elastic term, the elasticity extending to both components of the term – scrutiny and legislation.

In terms of the *scrutiny*, we can identify two purposes. One is an evaluative role, that is, seeking to that ensure the normative aims of policies are reflected in the effects of legislation, in other words to assess whether a piece of legislation has been implemented effectively and achieved its intended aims. This was how the Constitution Committee interpreted the term. It favoured government, when bringing forward a bill, to identify the criteria by which one would know whether it had achieved its purpose as a means of aiding objective, rather than partisan, scrutiny of the effect of the Act. It was also the interpretation adopted by the Law Commission. This is primarily what we understand by the term scrutiny. Though it may encompass seeking to be objective, or at least non-partisan, it is essentially a political role.

However, some legislatures have interpreted the term in more a legal, or formalistic, manner, treating PLS as a monitoring function, examining the application of legislation and the adoption of the necessary secondary legislation to give effect to it. In several countries, there is the risk that laws are voted for but not applied, that associated secondary legislation is not adopted, or that there is insufficient information on the actual state of a law's implementation and its effects (De Vrieze, 2019a). Implementation does not happen automatically and several incidents can affect its course including changes in facts on the ground, diversion of resources, deflection of goals, resistance from stakeholders and changes in the legal framework of related policy fields (De Vrieze, 2018). In such systems, there is a case for ensuring that the law has been given effect.

We thus have a distinction between the interpretative and the formalistic (De Vrieze & Hasson, 2017; Karpen, 2009; Kelly & Everett, 2013; Norton, 2019). The two are not mutually exclusive, but the extension of the term to encompass a formalistic role of oversight means that we need to be clear as to which interpretation is being adopted. Given now common usage of the term post-legislative scrutiny to encompass both, we retain PLS as the generic term. However, we consider that there may be a case, as we go forward, for adopting greater rigour and using PLS solely for scrutiny – that is the evaluative function – and post-legislative oversight (PLO) for the more legal, or formalistic, function. The distinction may have practical as well as intellectual value. It may encourage some legislatures to move beyond a formalistic, or tick-box, exercise to engage more directly with evaluating the consequences of measures that they have enacted.