

Introduction:

The significance of post-legislative scrutiny

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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, Saalfeld and Strom 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, Saalfeld and Strom 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 have 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 (Procedure Committee 1990; Hansard Society 1993). 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 pre-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 scarce 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 (Karpen, 2009; Kelly and Everett 2013, De Vrieze and Hanson 2017, 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.

In terms of the *legislation* being scrutinised, the Constitution Committee and the Law Commission meant legislation enacted by the UK national legislature. It was the legislature examining whether the measures it had passed had delivered on what was expected of them. Legislatures may be engaging in scrutiny, but for it to be post-legislative, there has to be legislation in the first place. However, the term has since been expanded by some commentators to encompass goals set not by the legislature, but by other bodies. This has been notably the case with sustainable development goals (SDGs), established by the United Nations, as discussed by Fitsilis and De Vrieze in their contribution to the volume. Some SDGs may be delivered through legislatures enacting primary and secondary legislation, but others are met independently of any domestic legislation. As Fitsilis and De Vrieze note, the Inter-Parliamentary Union (IPU) has an especially important role in utilising field missions to engage with parliaments to assess their capacity to integrate SDGs via dedicated legislation. Where there is such legislation, then scrutinising it once enacted to see if it has achieved its purpose falls within post-legislative scrutiny. Their article raises the question of how and to what extent the concept can be applied to goals set externally. Should one draw on the concept as a guide to systematic scrutiny, but utilise a modified or different term?

Who does it?

Where it is undertaken, the task of engaging in post-legislative scrutiny, or oversight, varies from nation to nation, not unrelated to the different interpretations. The legal, or formalistic, approach is

something more easily undertaken by officials, whereas the evaluative, or political, approach is one more appropriately undertaken by legislators.

As Jonathan Murphy records in his study, there are different ways of carrying out post-legislative scrutiny. Practice varies considerably, as is clear from the contributions to this volume.

Parliaments may utilise committees, commissions, external working bodies, or independent state agencies. Parliamentary committees offer the most direct form of engagement. As Fitsilis and De Vrieze point out in their article, in some parliaments, it is the Legal or Legislative Committee that conducts the review of the enactment of legislation, while the thematic committees evaluate whether the laws have achieved their purpose. In some cases, the remit for PLS is explicitly assigned to a dedicated committee, as is the case in the Scottish and Lebanese parliaments. The more formalistic form of PLS may be undertaken by a range of bodies, be it official agencies independent of the legislature or by bodies appointed by and answerable to the legislature.

There is also the distinction to be drawn between conferring the task on someone and that task being undertaken. There are resource implications to undertaking PLS as well as an opportunity cost. Why should legislators engage in post-legislative scrutiny if there is more political advantage in focusing on scrutinising bills as they pass through the legislature? Partisan theory is most powerful for explaining most committee activity in legislatures (Cox and McCubbins 1993). There is not much partisan advantage to appointing committees to engage in post-legislative scrutiny. There may thus be limited incentives to engage in such activity.

The problem is illustrated well in the case of the UK Parliament. Both Houses engage in some degree of post-legislative scrutiny. However, the form varies between the chambers. As Norton has argued elsewhere, distributive and informational theories serve to explain the differences (Norton 2019: 347). In the House of Commons, the driver for undertaking post-legislative scrutiny

by committee is the committee members. In the House of Lords, it is the chamber. There are thus differences in form. There are also differences in application. In the House of Commons, scrutiny is sporadic. In the House of Lords, it is limited but consistent. However, in both, it is not extensive. There is, as Tom Caygill identifies in his article, a post-legislative gap in the UK. Though government departments review Acts three to five years after enactment, neither House utilises these as the basis for regular post-legislative scrutiny. The nature of incentive is one that is clearly crucial.

Why do it?

Why do legislatures engage in post-legislative scrutiny? Since the development of the term, PLS has become a notable feature in some legislatures. It is now receiving recognition, and scholarly attention, on a growing scale. Some scholarship has been substantial, not least Caygill's PhD thesis on the subject (Caygill 2019). More articles are now starting to appear. It was the subject of a special issue of the *European Journal of Law Reform* in 2019. The Westminster Foundation for Democracy (WFD) has been especially active in generating analyses and reports. But what is the rationale for the activity?

Post-legislative scrutiny may be seen as a public good. The principal justifications for undertaking it were advanced by the Constitution Committee in its 2004 report as improving the quality of law and of government.

Regular scrutiny will determine if Acts have done what they were intended to achieve; if not, it may then be possible to identify alternative means of achieving those goals. Scrutiny may also have the effect of ensuring that those who are meant to be implementing the measures are, in fact, implementing them in the way intended.

Such scrutiny may also impose a much greater discipline on Government. We have already touched upon the fact that Ministers often see achievement in terms of getting their ‘big bill’ on the statute book. They may engage in greater circumspection if they knew that in future the measure of their success was not so much getting a measure on the statute book as the effect that it had.

As such, post-legislative scrutiny may improve the quality of Government. It may also contribute to improvement in the legislative process... We have stressed throughout this report the importance of ensuring that Parliament has mechanisms to ensure that bills are fit for purpose, but how does Parliament know that the bills, once enacted, have actually proved fit for purpose? (Constitution Committee 2004, pp. 42-3).

In addition, one can mention the need to act preventively regarding potential adverse effects of new legislation on fundamental rights, as well as, for instance, on the environment or on economic and social welfare (Fitsilis and De Vrieze, 2019).

The growing impetus for PLS coincides with the rationalisation of the law-making process, and a growing demand for the quality of legislation to be reviewed as well as procedures that can support parliaments to manage contemporary ‘legislative complexity’ (Heaton, 2013). PLS is an effort to support this by institutionalising and systematising a moment of analysis and assessment focusing specifically on improving the quality of legislation passed. As such it should improve a parliament’s understanding of the causal relations between a law and its effects as the accuracy of assumptions underlying legislation are tested after its enactment (Karpen, 2009). PLS as a form of legislative evaluation is therefore a learning process that both contributes to a parliament’s knowledge of the impacts of legislation but also its know-how in ensuring legislation meets the

needs of relevant stakeholders. By implication, PLS may reduce ambiguity and distrust and allows the legislator to learn by doing (De Vrieze, 2019b).

The act of carrying out PLS can therefore be justified as a stand-alone activity that enables a parliament to self-monitor and evaluate, as well as reflect on the merits of its own democratic output and internal technical ability. Various parliaments, a variety of which are discussed in this volume, are beginning to institutionalise PLS as a separate mechanism within parliament (Norton, 2019).

While PLS can take the form of a separate mechanism within parliament, the process of evaluation is also the by-product of a parliament carrying out effective executive oversight, assessing the extent to which a government is managing the effective implementation of its policies and abiding by statutory obligations. As indicated in the Constitution Committee's report, the existence of PLS may also serve to focus the minds of the drafters of legislation on the impact of legislation and not solely on ensuring that it is drafted in a way that will ensure that it is passed. In the UK, bills have been drafted to get through Parliament. 'That', as one leading judge observed, 'is the draftsman's principal task' (Lord Rodger of Earlsferry, quoted in Norton 2019, p. 342). Knowing that a measure may be subject to post-legislative review may encourage those responsible for drawing up bills to raise their sights beyond the assent stage and consider more those at whom the measure is directed.

However, the act of carrying out PLS on a primary basis is also one that extends beyond executive oversight, as an internal monitoring and evaluation system by which a parliament is also able to consider and reflect on the merits of its own democratic output and internal technical ability. Seen in this way, PLS also provides an approach that a parliament may take to its legislative role as one that is not only the maker of laws but also a country's legislative watchdog.

It is also possible to identify a third justification for post-legislative scrutiny. That is, encouraging citizens to engage more with the parliament. This is the consequence, or potential consequence, advanced by Moulds in her study of ad hoc experience in Australia. It is also a potential consequence touched upon by Fitsilis and De Vrieze in their study of evaluating delivery of sustainable development goals and by Murphy in looking at full-cycle engagement by parliaments in the legislative engagement.

Moulds identifies community-initiated PLS as one of four trigger points for scrutiny, contending that it has the potential to be highly deliberative in nature and provide the basis for experimenting with less conventional forms of parliamentary-community engagement. She illustrates the impact of community initiative and engagement through two case studies, the post-legislative review of the Sex Discrimination Act – encouraged by civic prompting and influenced in content by community engagement – and of the Marriage Act. As she recognises, the latter case study in particular illustrates the problem of determining what does and does not constitute post-legislative scrutiny. Post-legislative scrutiny is not necessarily a purely self-contained activity, but – as in the Australian review of the Marriage Act illustrates – constitute part of a wider process of initiating change.

Limitations

Although an activity may be desirable in principle, there may be problems in its execution. The UK Law Commission made three cautionary comments about PLS, which highlight its limitations:

1. *Risk of replay of arguments.* As the Commission recognised, PLS should concentrate on the outcomes of legislation. Unless self-discipline is exercised by the reviewing body, and those giving evidence to it, there is a danger of it degenerating into a replay of arguments advanced during the

passage of the Bill. The criteria for determining whether a measure has achieved its purpose needs to be clear in advance in order to avoid a repeat of the debate on principle. The important consideration is that it is a review and not a replay.

2. *Dependence on political will.* As we have noted, PLS may be desirable, but it may not be achievable if the political will to deliver it is missing. It is possible to come up with an ideal scheme for reforming a political system, but it requires action on the part of those who are necessary to implement it (see Norton 1983: 54-69). Identifying the end point is necessary (there needs to be a clear goal), but it is not sufficient. The evolution of a more systematic approach to PLS will depend on a combination of political will and political judgment. Ensuring law does what it is designed to do is a public good and drafters giving greater thought to the effect, and not simply the passage, of legislation may enhance government and legislative efficiency in terms of avoiding the need for time and resource consuming amending legislation. However, both the legislature and the executive need to have the confidence to recognise that and commit to implementing regular post-legislative scrutiny.

3. *Resource constraints.* PLS, as we have noted, places demands on resources and time available. It carries a cost not only in time and expenditure on the part of the legislature, but also on the part of those called on to provide evidence. Consultation with key stakeholders is generally necessary if relevant data are to be obtained and an accurate evaluation of effectiveness is to be made. In these circumstances, it is usually beyond the capacity of parliaments to conduct a systematic evaluation of *entire* legislative schemes. Nonetheless, the results of evaluations by government departments (as in the UK) or official bodies (as in Australia) can provide the basis upon which parliamentarians can question and hold to account those responsible for the policy and its implementation. This is based on the evaluations being made public, in itself essential to ensuring accountability (De Vrieze, 2019b).

We would add a fourth limitation. Just as Royal Assent to an Act should not be seen as the end of a process, neither should completion of post-legislative scrutiny of an Act. PLS is a means to an end rather than an end in itself. It needs to be locked into the wider parliamentary process, amenable to debate and, as appropriate, further action considered to address any problems identified with the legislation. It needs also to be widely disseminated in order to engage community interest and ensure wide accountability. However, ensuring it is not an end in itself brings us back to political will. Both parliaments and executives have to recognise it is in their interests to ensure that law does what they intended it to do.

THIS VOLUME

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.

Each article is included as a free-standing contribution in order to ensure its intellectual integrity. This approach also has particular utility in terms of what we seek to achieve. That is, it emphasises the extent to which the concept of post-legislative scrutiny remains fluid. Authors discuss their understanding of the concept. There is some notable overlap, but also differences of conceptualisation and emphasis. We treat these as demonstrating the case for seeking to resolve

what is meant by post-legislative scrutiny. We have sought here to identify the problem, rather than solving it. This volume is offered as a starting point in the exercise, not an end point.

The contributions are essentially grouped thematically, starting with a series of case studies addressing post-legislative scrutiny, looking in depth at particular countries and the European Union, and then studies that take us beyond scrutiny to oversight and concluding with two that put the debate in a broader context. The grouping provides a basic framework, while the range demonstrates that the term post-legislative scrutiny is neither uniformly employed, nor its meaning interpreted in the same way. They help demonstrate the current elasticity of the term and the extent to which it may extend beyond scrutiny as well as beyond legislation enacted by the legislature.

The final paper, by Jonathan Murphy, puts the value of post-legislative scrutiny in a wider systemic context, ensuring we do not see it as a discrete development in seeking to improve parliaments' engagement in the legislative process. In many respects, Murphy's article brings the analysis full circle. The House of Lords Constitution Committee looked at the legislative process holistically, seeing delivery of post-legislative scrutiny as an integral part of a wider process of change to enhance the UK Parliament's role in enhancing the quality of law in the United Kingdom. Murphy locates post-legislative scrutiny similarly in a wider full-cycle process of parliamentary engagement in the legislative process.

The purpose of this collection therefore is to demonstrate the value of post-legislative scrutiny – a public good, benefiting the executive, legislature and the people in ensuring law delivers what is expected of it – as well as the need for greater clarity as to what is meant by the term. Achieving that is not only necessary for the purposes of intellectual rigour, but also has practical application in getting legislatures to think more clearly as to what precisely they understand, and seek to achieve, by post-legislative scrutiny.

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