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Mr Blair's legacy: The Legislative and Regulatory Reform Bill and the emasculation of Parliament

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INTRODUCTION

As Tony Blair reaches the end of his premiership, it has become clear that his constitutional reforms are likely to be one of the more substantial legacies of his time in office. It may be that his last contribution to this constitutional legacy is a Bill that has been described by the House of Commons Regulatory Reform Select Committee as "the most constitutionally significant Bill that has been brought before Parliament for some time" – the Legislative and Regulatory Reform Bill.

Under this anodyne title, the Bill seeks to introduce a sweeping increase to ministerial powers. In its first clause, the Bill states that:

"A Minister of the Crown may by order make provision for either or both of the following purposes -
(a) reforming legislation;
(b) implementing recommendations of any one or more other United Kingdom Law Commissions, with or without changes."

In other words, the Bill gives Ministers a power to over-ride, alter or re-write legislation by ministerial order. Clause 2 of the Bill confirms this, explaining that the power can be used for "amending, repealing or replacing *any* legislation" [emphasis added]. It also provides that the power extends to making alterations to any aspect of the common law as well as statute. The only things the Bill does not empower Ministers to do by order are to raise taxes, to impose criminal penalties in excess of two years, to authorise forcible entry or search and seizure and to compel the giving of evidence. However, the Bill also applies to itself, so Ministers could, in theory, simply remove these limitations at a later date.

"The most constitutionally significant Bill that has been brought before Parliament for some time" – the Regulatory Reform Select Committee.

This is a startling extension of ministerial power at Parliament's expense, going well beyond the "regulatory reform" agenda used by the Government as the grounds for the Bill's introduction. It is either a well-intentioned but fatally misguided piece of legislation, or another example of the emasculation of Parliament by stealth.

The Government has claimed widespread backing for the Bill, not least from business. Many admire the Bill's stated objectives (to reduce the burden of regulation). And those who cavil at the Bill's scope have been painted as constitutional obsessives standing in the

way of the delivery of business-friendly reform.

The Bill will rightly be scrutinised and criticised by constitutionalists; but its failings go beyond concerns based on constitutional tradition. The Bill fails even on the Government's own terms. In the course of the debate on its second reading, the Minister told the House that:

"The Bill abides by the regulatory principles of transparency, accountability, proportionality and consistency. Regulatory activity must be targeted only at cases where action is needed".

These principles come from the Government's own Better Regulation Task Force (now the Better Regulation Commission) and seem ripe for application to a Bill that has such a huge effect in the regulatory arena.

The Bill falls foul of each one of the rules that Ministers insist others should comply with. It is not proportionate. It is not transparent. It dilutes accountability. And it is not consistent.

The Government's problem is that the Minister was entirely wrong when he said that the Bill was consistent with each of these principles. On the contrary, it falls foul of each one of the rules which Ministers insist others should comply with.

PROPORTIONALITY

Perhaps the Bill's greatest failing is its lack of proportionality. This stems not from the size of the task of reducing the burden of legislation; rather, it stems from the granting of powers that extend massively beyond those that – properly used – are required in order to implement deregulation.

The Regulatory Reform Act 2001 permitted Ministers to use Regulatory Reform Orders (RROs) to amend primary legislation in situations where the Order would remove a "burden". The extent of this power was itself contentious, but it was at least arguably proportionate to the goal of regulatory reform. In its consultation paper on reforming the 2001 Act, the Government indicated that it was minded to retain this concept, albeit with amendments to widen its scope.

But when the Bill emerged, there was no such limitation on Ministers' power. The Bill gives them power to legislate by order in any way, not just in relation to regulatory reform or deregulation. The Bill, in fact, makes no mention of deregulation or regulatory reform or the removal of burdens.

Ministers, moreover, are yet to provide any example of a regulation that they believe ought to be amended which could not have been amended under the old regime but could be amended under the proposed powers.

Indeed, this was inadvertently admitted by the then Minister for Regulatory Reform in the Cabinet Office, Ruth Kelly, in a letter to the Select Committee in the preparation of their 2005 Report on the working of the previous Act. The Minister discussed a number of features of the Act which might be acting as a brake on the effectiveness of the legislation. In some cases, her letter provides evidence that features of the Act do need to be changed. But when it comes to the requirement that any Regulatory Reform Order must remove or reduce a burden, the Minister stated:

"This has rarely been an obstacle to RRO proposals."

It is difficult to argue that it is proportionate to give ministers an unfettered power to override almost any legislation by order simply in order to deal with something that has "rarely" been a problem.

CONSISTENCY

The Bill lacks the virtue of consistency in a number of important respects. First, the way in which the Government has introduced it has been inconsistent with other measures which have been recognised as having significant constitutional importance. For example, the Government introduced the welcome concept of pre-legislative scrutiny for particularly important measures: indeed, the Bill's predecessor was subject to pre-legislative scrutiny. This time, however, the Government refused a request by the Select Committee that the same procedure should be made available for the new Bill. Indeed, the Committee expressed its "surprise that the parliamentary timetable for the scrutiny of this major Bill has been so compressed".

The Committee's concerns highlight another inconsistency: the Bill itself relies heavily on the Government accepting recommendations from the Select Committee, but a theme of the legislative passage of the Bill so far has been the manner in which the Government has ignored concerns expressed by the Committee.

However, it is not just with respect to procedure that the Bill lacks consistency. For example, it is difficult to argue that the arrogation of ministerial power at Parliament's expense is consistent with its 2005 manifesto statement that:

"Labour will continue to support reforms that improve parliamentary accountability and scrutiny."

The Bill as it stands appears likely to achieve exactly the opposite result.

Most importantly, of course, the introduction of a Bill that gives ministers a general power to reform law is inconsistent with their repeated statements that the sole target of the Bill is deregulation. Ministers are yet to explain this inconsistency satisfactorily.

ACCOUNTABILITY

That the Bill dilutes accountability is hard to deny. The primary form of parliamentary accountability comes through the requirement that Ministers defend their proposals on the floor of the House.

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Ministers have stressed in debate that the Bill has "safeguards" which will prevent any abuse of power. These "safeguards" are, in the case of the Ministerial power to reform the law (rather than merely restate it or implement a Law Commission recommendation), a statement as to why the Minister considers that:

"(i) the policy objective could not be more satisfactorily secured by non-legislative means;

(ii) the effect of the provision is proportionate to its policy objective;

(iii) the provision, taken as a whole, strikes a fair balance between the public interest and the interests of any person adversely affected;

(iv) the provision does not remove any necessary protection;

(v) the provision does not unreasonably prevent any person from continuing to exercise any right or freedom; and

*(vi) the provision simplifies legislation, modernises it, makes its overall effect less onerous, removes inconsistencies and/or removes anomalies (**if and insofar as the Minister thinks it does so**)" [emphasis added].*

These "safeguards" amount to nothing more than the statement of a Minister's opinion. It is difficult to argue that Ministers are in any way accountable where a statement of their own subjective opinion is sufficient to satisfy the Bill's requirements.

Moreover, it would be extremely difficult try to make the minister accountable to the courts by means of judicial review. The Minister's view could only be challenged on the basis that it was irrational – that is, the view is so absurd as to be one to which no minister could ever reasonably have come. This is a very onerous standard, and most unlikely to be met. As the Select Committee points out, it is quite different from the normal parliamentary decision on whether or not MPs think the minister came to the right view or not.

The "safeguards" in the Bill are merely the statement of a Minister's opinion. How are Ministers accountable if a statement of their own opinion is all that is needed?

TRANSPARENCY

The Bill also fails on the transparency test, and does so on a number of counts. First, there is the question of legislative certainty – the question of what is on the face of the Bill and, consequently, what will be on the statute book for generations to come. According to the strict terms of the Bill, the ministerial powers it contains could be used for any measure at all, no matter how contentious or controversial.

Ministers have asked MPs to rely on undertakings they have given to Parliament that they will not use their new powers to push through measures that are (in their own words) "highly controversial". Leaving aside the question of whether the use of the word "highly" is intended as a get-out clause, there is no doubt that this diminishes the transparency of the legislation, as well as diminishing the certainty of the safeguards Ministers claim to have given. Ministers have refused to include a provision within the Bill formally ruling out its use for controversial or politically contentious matters.

Furthermore, the Bill is also designed to limit discussion on the floor of the House of reforms taken up under its provisions. Just as important as regulatory reform is regulatory certainty, and one of the most important ways of achieving this is through Ministerial clarifications on the floor of the House. The fast-tracking procedures will remove this possibility.

Moreover, the Bill introduces a multiplicity of parliamentary procedures for the passage of Regulatory Reform Orders. Instead of the one relatively simple procedure provided for by the Regulatory Reform Act 2001, the new Bill proposes three – the negative procedure, the affirmative procedure and the super-affirmative procedure.

The Government claims that there is a good reason for this – that not all regulatory reform proposals are the same, with some demanding more scrutiny than others. It may be correct, although even the most demanding of the three, the super-affirmative procedure, remains a remarkably uncomplicated route through Parliament. Also, as the Select Committee pointed out, it is not the legislative stage that either takes the most time or causes the most problems for regulatory reform measures.

But even if the Government is correct, it misses the wider point about the loss of transparency. The European Parliament provides an instructive comparison. It too has a wide range of different legislative procedures – co-decision, consultation, assent and cooperation – each intended to reflect in an apparently logical way the scope of the

legislative scrutiny that is needed for a given measure. The result, though, is a fatal loss of transparency. Even seasoned observers of the European process are baffled – never mind the public. The same fate for the House of Commons would be highly regrettable.

TARGETING

This Bill must rank as one of the least targeted measures introduced by any government. Its provisions both go far beyond the claimed goal of the legislation while at the same time failing to recognised the real pressure points in the regulatory reform process.

The Government is correct in identifying a problem with the regulatory reform process has been a disappointment. By 2005, only 27 RROs had been made under the 2001 Act – rather fewer than the 75 promised by the Public Service Agreement target. At a time when the direct and indirect costs of regulation and compliance have been rising fast, the Government's objective of quickening the deregulation process is most welcome.

However, the Government has taken the easy way out with the Bill. In doing so, it has failed to target the real source of the problem. It is an easy option to tinker with parliamentary processes – alterations to Parliament's role have the benefit of being a visible sign of action and being relatively easy to accomplish for a government with a decent majority. It is much more difficult, as the Government has found, to influence the culture of government departments to make them into the engines of regulatory reform.

But the figures show that government action should be targeted at the latter rather than the former. The legislative process is not the reason why the regulatory reform has been a disappointment. On average, the parliamentary scrutiny stage has taken only 16% of the time from initial consultation to approval – to say nothing of the time taken within government departments before a consultation is even launched. (The obligation to have a consultation period rightly remains in place.)

As the Select Committee commented:

"The reduction in time for Parliamentary scrutiny appears to arise at least in part from the unfounded belief that existing Parliamentary procedures – rather than the failures of Government in identifying and bringing forward proposals – have been the cause of the relatively small number of RROs so far."

The Government is right in identifying a problem with the regulatory reform process: only 27 RROs have been made under the 2001 Act. But this Bill is the wrong solution.

CONCLUSION

Ministers, the business community and the public at large are right to demand more action on regulatory reform. But this Bill is not the way to do it. It is poorly targeted at the real bottlenecks in the regulatory reform process, and introduces powers that go far beyond those required to implement an effective programme of deregulation.

The fact that the Government has felt the need to introduce it at all illustrates the extent to which the management and control of regulation within government has got out of control. No one doubts that much more needs to be done to get it back under control: but this measure misses the real problem, and threatens to emasculate Parliament even as it fails in its purported purpose.

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