DELEGATED LEGISLATION

A report of the address given to the Association
on Wednesday 26th November 1975

by

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There is a long history of delegated legislation in the United Kingdom, said Sir Michael Havers in his address on this subject to BILA. What makes it of special interest now is the quantity of orders and regulations required, arising out of over-legislation by Government. In 1973 there were published 2800 pages of ordinary legislation, compared with 8000 pages of statutory instruments (including HM Customs' statistics).

This sheer deluge of material makes it virtually impossible for anyone to know the law. Lawyers find it extremely difficult to advise clients, while MP's are unable to study everything sufficiently to enable them to control the activities of Government. In such circumstances and with the other pressures on members things could slip past Parliament, which would otherwise be the subject of rigorous scrutiny.

A recent Church measure which contained a grave defect nearly slipped through the net in this way. Only a 'by chance' reading of the measure by an MP (at 11.30 p.m.) had drawn attention to the flaw.

It is understandable that ministers have their pet programmes which they wish to convert into statutes, but the legislative programme has become so heavy - with much of it irrelevant to our real needs - that MP's are grossly overworked.

In these circumstances there is a natural desire to save the time of the House and one obvious way is to give ministers the power to make orders on matters not, therefore, required in the Statute Book. This posed obvious dangers which Parliament had attempted to obviate without complete success. In 1971, dissatisfaction with the supervision of delegated legislation reached such a point that a committee was set up under Lord Brooke to consider how the procedures might be improved. This was especially relevant to the control of so-called secondary legislation stemming from the European Community.

As a result both Houses of Parliament established committees to consider instruments from a technical viewpoint. These committees, however, have limited powers which do not include the amendment of an unsatisfactory instrument. There is, now, also a 'merits' committee to consider the merits and policy of a statutory instrument but it cannot vote on the merits and, in fact, can only hope to persuade the Government that time

should be provided for a debate, perhaps by the unlikely expedient of voting, that an instrument has 'not been considered' after a $1\frac{1}{2}$ hour discussion on it! The position is not improved by the fact that many instruments do not require the affirmative approval of Parliament (the affirmative procedure) but are effective unless annulled (the negative procedure). Under the negative procedure a member who wishes to have an instrument annulled has to move a 'prayer' to that effect for which the Government may or may not provide time after the normal close of business. With the existing pressures on time that is not always acceptable to the Government. The committees, in fact, can only really ask 'Were the correct procedures followed? Is the meaning clear? Does the instrument come within the powers delegated by the enabling Act?'.

Members of the public rarely see instruments before they are made, although in some cases there are consultative procedures at the drafting stage. The validity of an instrument may be challenged in the courts but such opportunity only rarely arises. If the consultative procedures are followed, however, the system does at least give Government departments more time to prepare individual instruments than would be the case with complicated sections of a Bill.

There is always pressure to increase the number of statutory instruments and this must be resisted, otherwise it will lead to rule by orders rather than by statute.

The system is basically sensible but it is capable of abuse. The House often has little knowledge of some of the complicated proposals contained in the instruments and can only exercise its will by a really determined effort. The time is coming when a Bill of Rights might be necessary as the only safeguard of basic rights which will otherwise disappear.