

**THE SOUTH AFRICAN PARLIAMENT'S OVERSIGHT OF DELEGATED
LEGISLATION**

By

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ABSTRACT

This thesis presents an analysis of the South African Parliament's attempts to create a mechanism to enable oversight of delegated legislation.

The question sought to be addressed is, whether Parliament has done anything to create a mechanism to oversee the delegation of its law-making authority to the executive and if so, whether any of these efforts have been successful.

This paper illustrates how the making of delegated legislation is not foreign to South Africa's system of separation of powers as provided for in our Constitution and as interpreted by our courts.

It is shown how, despite what the Constitution allows, recent law-making efforts have not strengthened Parliament's ability to oversee delegated legislation. Instead legislators purposefully sought to curb attempts to improve rule-making and delegated legislation.

Similarly, efforts to make delegated legislation more accessible to the public have been missing from government's list of priorities.

The South African Parliament's efforts to scrutinise delegated legislation is contrasted with the efforts of the Gauteng Provincial Legislature and several foreign legislatures.

Finally, it is indicated how Parliament, after more than 20 years since the promulgation of the final Constitution, has failed to create a permanent mechanism to enhance and strengthen its oversight of delegated legislation.

1. Introduction

The rise of the modern administrative state has led to a blurring of the separation of powers as traditionally understood. However, arguably the separation was never that rigid to begin with.

Having to govern on the minutiae of all aspects of a modern society – from tax rules to road sign regulations – means that already overburdened legislatures have had to delegate their legislative powers to executive functionaries. However convenient, this delegation also has its perils and many legislatures across the world have implemented measures to ensure a level of oversight over the delegation of its law-making authority.

In South Africa there have been two serious attempts by Parliament – one pre-1994 and one post-1994 – to introduce a mechanism which would enable such oversight.

The final Constitution specifically allows for the creation of such mechanisms, but in the 20 years since the promulgation of the Constitution, progress has been very slow, if not insignificant.

The Gauteng Provincial Legislature is the only legislature in the country which has successfully enacted legislation to provide for scrutiny of delegated legislation.

This dissertation examines this aspect of the constitutional system in South Africa and discusses in detail the pre- and post-Constitution attempts by Parliament to implement a mechanism for the scrutiny of delegated legislation, as well as attempts to improve access to delegated legislation.

It examines briefly how other democracies have designed their scrutiny mechanisms and provides some proposals as to how South Africa can re-attempt this process in future.

2. Delegated Legislation and the Separation of Powers

Any discussion on the concept of the separation of powers invariably invokes the words of the French political philosopher and lawyer Charles-Louis de Sécondat de Montesquieu, commonly known as Montesquieu.

He wrote in the *L'Esprit des Lois* (The Spirit of the Laws), Volume 1:¹

When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner.

Again, there is no liberty, if the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would then be the legislator. Were it joined to the executive power, the judge might behave with violence and oppression.

Montesquieu's *L'Esprit des Lois* in turn 'deeply influenced' the framers of the United States Constitution.² The design of the US political system embraces the separation of the executive and legislative branches to a much greater degree than Westminster-style parliaments. For instance, in the US the president is directly elected and not elected by a majority in the legislature.

However, James Madison - the 4th President of the United States, and one of the authors of the Federalist Papers - understood that there could not be a complete separation of power between the different government branches.

Madison argued that Montesquieu had not meant that the branches 'ought to have no PARTIAL AGENCY in, or no CONTROL over, the acts of the other.'³ Rather, the danger lies 'where the WHOLE power of one department is exercised by the same hands which possess the WHOLE power of another department, the fundamental principles of a free constitution are subverted.'⁴

During the negotiations for a new constitution to transition South Africa from a country ruled by a minority to a constitutional democracy, the extent to which the branches of government

¹ Montesquieu, *Spirit of the Law*, Volume 1, Chapter VI.

² McClean, I and McMillian, A *Concise Dictionary of Politics* (2003) at 354.

³ Madison, J 1788 'The Particular Structure of the New Government and the Distribution of Power Among Its Different Parts' Federalist No. 47.

⁴ Ibid.

needed to be separate was one of the many issues with which the framers of the new constitutional order had to grapple.

In the early 1990s South Africa's road towards a new political order was characterised by several collapsed attempts at reaching consensus, but by 1993, after the signing of a Record of Understanding between the government of the day and the African National Congress, the Multi-Party Negotiating Process (MPNP) undertook to reach a settlement on the country's new constitutional order.⁵

In November 1993 the MPNP agreed on the text of the interim Constitution and 34 binding Constitutional Principles which would act as a framework for the final Constitution.⁶

Section 71(2) of the interim Constitution⁷ stated that the Constitutional Court needed to certify that all the provisions of the interim text complied with the 34 Constitutional Principles before it would have any force and effect.

Constitutional Principle VI required that there 'shall be a separation of powers between the legislature, executive and judiciary, with appropriate checks and balances to ensure accountability, responsiveness and openness.'⁸ The extent and nature of the separation was for the participants to the process to negotiate and decide.

During the first attempt at certifying the final constitution, the Constitutional Court pointed out that there exists 'no universal model of separation of powers'.⁹ The Court made this observation when it was addressing an objection to various provisions of the proposed new Constitution for its failure to 'effect full separation of powers'.¹⁰ The principal objection was to the provision which allowed members of executive government to remain members of legislatures in all three spheres of government.

In addressing this concern, the Court said:

The principle of separation of powers, on the one hand, recognises the functional independence of branches of government. On the other hand, the principle of checks and balances focuses on the desirability of ensuring that the constitutional order, as a totality, prevents the branches of government from usurping power from one another. In this sense it anticipates the necessary or unavoidable intrusion of one branch on the terrain of

⁵ Spitz, R and Chaskalson, M *The Politics of Transition* (2000) at 32.

⁶ Currie, I & De Waal, J *The Bill of Rights Handbook* (2016) at 5.

⁷ 200 of 1993

⁸ *Ibid* at Schedule 4.

⁹ *Ex parte Chairperson of the Constitutional Assembly of the Republic of South Africa* 1996 (4) SA 744 (CC) at para 108

¹⁰ *Ibid* at para 106.

another. No constitutional scheme can reflect a complete separation of powers: the scheme is always one of partial separation.¹¹

Although the final Constitution¹² does not expressly provide for the separation of powers, chapters four, five, and eight set out the powers of the national assembly, the president and the national executive, and the judiciary respectively.

In this way the separation of powers in our Constitution is similar to that of the United States, ‘based on inferences drawn from the structure and provisions of the Constitution, rather than on an express entrenchment of the principle.’¹³

For the purposes of this study, the nature of the separation between the legislature and the executive is relevant.

The Constitution vests the legislative authority of the national sphere of government in the National Assembly (NA)¹⁴ and gives it the power to pass legislation on any matter, excluding – barring certain circumstances – those listed as areas of ‘exclusive provincial legislative competence’.¹⁵

Besides amending the Constitution, the National Assembly has the power to assign its legislative powers to any legislative body in another sphere of government.¹⁶ Amongst the powers given to the National Assembly is the power to ‘consider, pass, amend or reject any legislation before the Assembly’.¹⁷

The Constitution also gives the National Assembly the important role of overseeing the national executive authority, requiring it to provide for mechanisms:

- a) to ensure that all executive organs of state in the national sphere of government are accountable to it; and
- b) to maintain oversight of –
 - i. the exercise of national executive authority, including the implementation of legislation; and
 - ii. any organ of state.¹⁸

¹¹ Ibid at para 109.

¹² Constitution of the Republic of South Africa, 1996.

¹³ *South African Association of Personal Injury Lawyers v Heath and Others* 2001 1 SA 883 (CC) at para 21.

¹⁴ Section 43(a) of the Constitution (n12).

¹⁵ Ibid section 44(1)(a)(ii).

¹⁶ Ibid section 44(1)(a)(iii).

¹⁷ Ibid section 55(1).

¹⁸ Ibid section 55(2).

The constitutional obligation on the legislature to keep the executive accountable is re-emphasised when the Constitution deals with accountability and the responsibilities of cabinet members. Members of the cabinet ‘are accountable collectively and individually to Parliament for the exercise of their powers and the performance of their functions.’¹⁹ They are also mandated to ‘provide Parliament with full and regular reports concerning matters under their control.’²⁰

The Constitution’s first reference to delegated legislation is in section 101(3) under executive decisions, where it is required that ‘[p]roclamations, regulations and other instruments of subordinate legislation must be accessible to the public.’

In addition, section 101(4) states:

National legislation may specify the manner in which, and the extent to which, instruments mentioned in subsection (3) must be –

- (a) tabled in Parliament; and
- (b) approved by Parliament.²¹

The ‘instruments of subordinate legislation’ referred to here is legislation made by the executive government (or its functionaries) through a delegation of Parliament’s law-making authority in a permitting provision contained in an act of Parliament. These instruments, when made in terms of an act of Parliament, have the same status as national legislation.²²

This type of legislation goes by many names: delegated legislation, subordinate legislation, secondary legislation, legislative instruments, and so forth.

This study will refer to ‘delegated legislation’ or simply ‘instrument’, unless a particular institution under discussion uses a different term.

Examples of instruments of delegated legislation are: rules, orders, tariffs, ordinances, proclamations, directives, declarations, schemes, and perhaps the best known, regulations. The procedures through which these instruments are made are often referred to as ‘rule-making’.

¹⁹ Ibid section 92(2).

²⁰ Ibid section 92(3)(b).

²¹ For provincial legislatures these sections are mirrored in section 114(2) (powers of provincial legislatures), section 133(2) (accountability and responsibility of the executive council) and sections 140(3) and (4) (executive decisions) of the final Constitution.

²² Section 239 of the Constitution (n12).

Although it is done often, the Constitution does not actually have a provision which explicitly states whether it allows original legislatures the power to confer delegated legislative powers on other organs of state (and neither did the interim Constitution). According to Du Plessis the ‘oblique reference’ to delegated legislation in section 101(3) quoted above can ‘certainly not be construed as an authorisation to enact them, but it is at least constitutional recognition of the fact that they (can) somehow exist.’²³

However, Du Plessis then argues that the power of original legislatures to grant delegated legislative powers could be considered as ‘implicitly included in the legislative powers that the Constitution expressly grants them.’²⁴

In a political system that incorporates the separation of powers, the fact that the executive branch can make legislation should offend our notion that the legislature is the law-making authority of the Republic, yet different types of delegated legislation abound and are mentioned in the Constitution itself.

Prior to the arrival of South Africa’s constitutional democracy, the South African Parliament was supreme and the view was that Parliament could ‘delegate as much power as it liked’.²⁵ For instance, section 25(1) of the Black Administration Act²⁶ allowed the State President to amend or repeal ‘any law then in force’. These types of provisions are referred to as ‘Henry VIII clauses’ named for the Statute of Proclamations (1539) which gave King Henry VIII of England the power to legislate by proclamation.²⁷

Evidently this type of power delegation is offensive to South Africa’s new constitutional system with its defined powers for the different branches of government, yet in 1995 - before the promulgation of the final Constitution, but after the interim Constitution - Parliament amended the Local Government Transition Act²⁸ to include a section which allowed the President to amend the Act and any schedule thereto by proclamation in the Government Gazette.²⁹

Following the amendment of the Act, the President exercised this power by amending the Transition Act through a proclamation, transferring control over the local government

²³ Du Plessis *Re-interpretation of Statutes* (2002) at 48.

²⁴ *Ibid* at 48.

²⁵ Hoexter *Administrative Law in South Africa* 2ed (2012) at 263.

²⁶ 38 of 1927.

²⁷ UK Parliament Glossary.

²⁸ 209 of 1993.

²⁹ *Ibid* at section 16A.

delimitation process from the provincial governments to the national government. This action was challenged in *Executive Council, Western Cape Legislature v President of the Republic of South Africa*.³⁰

The Constitutional Court ruled that Parliament could not constitutionally delegate the power to amend acts of Parliament to the executive and that the delegation in section 16A(1) of the Local Government Transition Act was impermissible.³¹

The Court stated that the Constitution's provisions prescribing how laws are to be made and changed are not 'merely directory' and are 'part of scheme which guarantees the participation of both houses in the exercise of the legislative authority vested in Parliament under the Constitution'.³²

Although the case revolved around the constitutionality of a Henry VIII-type clause, the Court unsurprisingly touched on whether the executive's power to make delegated legislation would be permissible under the new constitutional order, according to Chaskalson:

In a modern state detailed provisions are often required for the purpose of implementing and regulating laws, and Parliament cannot be expected to deal with all such matters itself. There is nothing in the Constitution which prohibits Parliament from delegating subordinate regulatory authority to other bodies. The power to do so is necessary for effective law-making. It is implicit in the power to make laws for the country and I have no doubt that under our Constitution parliament can pass legislation delegating such legislative functions to other bodies.³³

Delegating authority to make subordinate legislation within the framework of an enabling act is therefore allowed, assigning plenary legislative power to another body is not.³⁴

Referring to Chaskalson's comment that the Constitution does not *prohibit* delegated legislation, Du Plessis said, '[h]e could have put it more boldly.'³⁵

In *Minister of Health v New Clicks South Africa (Pty) Ltd and Others*³⁶ Chaskalson did just that, stating that allowing members of the executive to make delegated legislation was an

³⁰ 1995 (4) SA 877 (CC).

³¹ Ibid at para 126.

³² Ibid at para 62.

³³ Ibid at para 51.

³⁴ Ibid at para 51.

³⁵ Du Plessis op cit (n23) 48.

³⁶ 2006 (2) SA 311 (CC).

‘essential part of public administration’ and provides the ‘detailed infrastructure’ according to which the policies of the legislature are given effect.³⁷

Therefore, although this law-making delegation is in a strict sense a contravention of the principle of the separation of powers, it is one that is ‘indispensable for the flexible and expeditious governmental response to unforeseen developments in the reality of daily life.’³⁸ The legislature ‘cannot directly exert its will in every detail’, but lays down the outline.³⁹

Administrators are therefore ‘an essential part of public administration’ and essentially end up making more law than the legislature itself.⁴⁰

Administrative law doctrine distinguishes between two types of administrative conduct, ‘adjudication’ and ‘rule-making’ the latter which results in delegated legislation.⁴¹ An executive functionary can therefore administer and legislate; what matters is ‘not so much the functionary as the function.’⁴²

One can distinguish these acts by calling a ‘legislative act’ the ‘issuing of instructions which have a general application’ and an ‘executive act’ the ‘issuing of a specific instruction to an individual.’⁴³

However, in *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others*⁴⁴ the Constitutional Court ruled that when a functionary acts in terms of a delegated provision, for instance when making regulations, the result is ‘legislation’, but the process of making the legislation, is in substance ‘administrative’.⁴⁵

Section 33 of the final Constitution provides for the right to ‘just administrative action’ and in 2000 the Promotion of Administrative Justice Act⁴⁶ (PAJA) was promulgated to give effect to the rights in this section.

³⁷ Ibid para 11.

³⁸ Parliament of South Africa ‘Interim Report of Joint Subcommittee on Delegated Legislation on Scrutiny of Delegated Legislation’ (2002) at 2.

³⁹ *Bezuidenhout v Road Accident Fund* 2003 (6) SA 61 (SCA) para 10.

⁴⁰ Hoexter op cit (n25) 25.

⁴¹ Hoexter, op cit (n25) 51.

⁴² *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* (CCT16/98) [1999] ZACC 11; 2000 (1) SA 1; 1999 (10) BCLR 1059 (10 September 1999) para 141.

⁴³ Griffith *Principles of Administrative Law* (1973).

⁴⁴ 1999 (1) SA 374 (CC) at para 27.

⁴⁵ Ibid at para 27.

⁴⁶ 3 of 2000.

There is no question that PAJA covers adjudication, but whether it applies to ‘rule-making’ has been matter of ‘considerable dispute’.⁴⁷

Chaskalson referred to the *Fedsure* judgment in the *New Clicks*⁴⁸ case when he ruled that legislative administrative action was included in the definition of ‘administrative action’ in section 33(1) of the Constitution⁴⁹ and that the making of regulations in the case before the court constituted administrative action within the meaning of the PAJA.⁵⁰

Chaskalson pronounced that:

The Constitution calls for open and transparent government, and requires public participation in the making of laws by Parliament and deliberative legislative assemblies. To hold that the making of delegated legislation is not part of the right to just administrative action would be contrary to the Constitution’s commitment to open and transparent government.⁵¹

However, as Hoextra points out, in *New Clicks* only five other justices found that PAJA was applicable to regulation-making and it was only Justice O’Regan who concurred fully with the Chief Justice.⁵²

Part of the reason for the confusion is that an early draft of the bill that eventually became PAJA, the Administrative Justice Bill (which will be more thoroughly discussed in the next chapter), included the word ‘rule’ amongst the definitions and defined it as:

...any measure with the force of law applying generally or to a group or class of persons, including subordinate legislation made in terms of an Act of Parliament or in terms of provincial legislation, but does not include a law made by Parliament, a provincial legislature or a municipal council.⁵³

Ultimately the term ‘rule’ was not included as a definition in the version of the Administrative Justice Bill that the executive introduced to Parliament and was also not reintroduced by the portfolio committee during the deliberations. The final version of PAJA also did not include ‘rule-making’ in its definition of ‘decision’ (the definition of ‘decision’ was not even in the Administrative Justice Bill when it was introduced in Parliament).

⁴⁷ Currie *The Promotion of Administrative Justice Act, A Commentary* (2007) at 87.

⁴⁸ 2006 (2) SA 311 (CC).

⁴⁹ *Ibid* at para 118.

⁵⁰ *New Clicks* op sit (n36) para 135.

⁵¹ *Ibid* para 113.

⁵² Hoexter op cit (n25) at 200.

⁵³ South African Law Commission ‘Project 115, Administrative Justice Report’ (August 1999) Draft Bill at section 1(n) at 20.

The change to the definitions in the Bill was in part an attempt to limit the Act's coverage of rule-making.⁵⁴ Arguably the notice and comment procedures contained in section four indicate that PAJA is meant to cover rule-making, because notice and comment procedures were developed specifically to allow public participation in rule-making.⁵⁵

Nonetheless, even before the promulgation of the Constitution and PAJA, O'Regan argued that administrative law should adopt mechanisms to ensure that delegated legislation 'is fair, efficient, rational, and seen to be rational.'⁵⁶

She proposed a whole raft of options, including:

...structuring of rule-making institutions to enable public or interest-group participation; the adoption of procedures requiring notification and consultation prior to the making of subordinate legislation; the giving of reasons for the legislation adopted; the establishment of a central drafting office to which all subordinate legislation should be referred prior to promulgation; effective legislative scrutiny of subordinate legislation; compulsory, periodic review of all subordinate legislation; the introduction of a national register of subordinate legislation; and, of course, the adoption of appropriate standards of judicial review for subordinate legislation.⁵⁷

This study will review specifically two of the options proposed by O'Regan, namely effective legislative scrutiny of subordinate legislation and the introduction of a national register of subordinate legislation.

⁵⁴ Currie & Klaaren *The Promotion of Administrative Justice Act Benchbook* (2001) at 83.

⁵⁵ *Ibid* at 84.

⁵⁶ O'Regan, 'Rules for Rule-making: Administrative Law and Subordinate Legislation' in *Administrative Law Reform* (1993) at 168.

⁵⁷ *Ibid* at 168.

3. Existing and Proposed Statutory Measures

3.1 Tabling of Delegated Legislation

As demonstrated in the previous chapter, since the enactment of the interim Constitution our courts have ruled that the making of delegated legislation by the executive is entirely consistent with South Africa's unique constitutional design.

While delegated legislation is now viewed as an 'essential part of public administration',⁵⁸ there is still a danger that the delegation of law-making power can lead to, amongst other things, abuses of power, the encroachment or violation of rights, and the substandard or substantively inaccurate drafting of law instruments.⁵⁹ Uncontrolled delegated legislation 'offers a fertile field for government despotism and bossy interference by bureaucrats.'⁶⁰

Besides the power to make delegated legislation and exercise discretionary powers, administrators are regularly given the power to 'flesh out statutes by making additional policy'.⁶¹

Governments might prefer to make policy through, for instance, regulations, because it is easier to avoid what comes with the parliamentary process: visibility, public participation, media attention, debate, and opposition.⁶²

One of the ways in which the Constitution seeks to protect against the unfettered use of delegated legislation by government is by allowing for national legislation which may specify the manner in which, and the extent to which, proclamations, regulations and other instruments of delegated legislation must be tabled in Parliament⁶³ and approved by Parliament.⁶⁴ However, since the promulgation of the final Constitution, no such legislation has been forthcoming.

⁵⁸ *New Clicks* op cit (n36) para 113.

⁵⁹ Klaaren & Sibanda 'Introducing the Gauteng Scrutiny of Subordinate Legislation Act: notes and comments' (2009) at 164.

⁶⁰ Hamer, B 'Chapter 9: Parliamentary control of delegated legislation' (2004).

⁶¹ Hoexter (n25) at 27.

⁶² Neudorf 'Rule by Regulation: Revitalizing Parliament's Supervisory Role in the Making of Subordinate Legislation' (2016) at 29.

⁶³ Section 101(4)(a) of Constitution (n12).

⁶⁴ *Ibid* at section 101(4)(b).

The primary purpose of tabling a written instrument in Parliament is to account to Parliament and is an important part of the process of ‘ensuring accountability and openness of government.’⁶⁵

Once a paper has been tabled in Parliament, it becomes a public document⁶⁶ and promotes a number of constitutional requirements:

- it makes Parliament a national forum for the public consideration of issues;⁶⁷
- it gives effect to the requirement that members of the cabinet must provide Parliament with full and regular reports concerning matters under their control;⁶⁸
- it enables the National Assembly to ensure that all executive organs of state in the national sphere of government are accountable to it;⁶⁹ and
- it enables the National Assembly to maintain oversight of the exercise of national executive authority, including the implementation of legislation, and any organ of state.⁷⁰

There are many statutes that require the tabling of certain documents in Parliament, including, but not limited to: international agreements, white and green papers, strategic plans, annual performance plans, annual reports, and instruments of delegated legislation.

Requiring the tabling of delegated legislation in Parliament is ‘[t]he classic device developed for the purpose of counterbalancing the delegation of legislative power.’⁷¹

In the absence of any specific post-Constitution legislation on the tabling of instruments of delegated legislation, the Interpretation Act of 1957⁷² applies.

This Act requires that when rules and regulations are made pursuant to a provision in a law, notwithstanding the provisions of any law to the contrary, a list of the proclamations, government notices, and provincial notices under which such rules or regulations were published in the Gazette shall be submitted to Parliament or the provincial legislature, within fourteen days after the publication of the rules or regulations in the Gazette.⁷³

⁶⁵ Parliament of South Africa ‘Guide to tabling of papers in Parliament’ (2011) at 7.

⁶⁶ *Ibid* at 7.

⁶⁷ Section 42(3) and (4) of Constitution (n12).

⁶⁸ Section 92(3)(b) *ibid*.

⁶⁹ Section 55(2)(a) *ibid*.

⁷⁰ Section 55(2)(b) *ibid*.

⁷¹ Baxter *Administrative Law* (1984) at 255.

⁷² 33 of 1957

⁷³ *Ibid* section 17.

In each case the number, date, and title of the proclamation, government notice or provincial notice, and the number and date of the Gazette in which it was published, needs to be stated.⁷⁴

The Act does not require the tabling of the actual text of the instrument.

Therefore, when individual acts do not indicate whether it is necessary for delegated legislation to be tabled in Parliament, the provisions of the Interpretation Act applies.

However, in *Bloem v State President of the Republic of South Africa*⁷⁵ it was ruled that the provisions referred to above concerning the time within which regulations have to be tabled:

...are not peremptory but merely directory, aimed at expediting their laying before Parliament but not intended to annul or invalidate them for non-compliance, and that the regulations have consequently not ceased to be of force or effect by reason of the failure to table them as aforesaid. To my mind they therefore continue to apply and are still of full force and effect despite such failure.⁷⁶

The current Interpretation Act's tabling requirements are more lenient than the Act's forebears. The Cape Colony's⁷⁷ Interpretation Act⁷⁸ stated that when the Governor is authorised by an act to make delegated legislation 'copies of such rules, orders or regulations shall be laid before both House of Parliament within thirty days after the making thereof'.⁷⁹

After the creation of the Union of South Africa, the Union Parliament's Interpretation Act⁸⁰ required the about the same: 'copies of such rules and regulations shall be laid upon the tables of both Houses of Parliament, within fourteen days after the publication of the rules or regulations in the Gazette'.⁸¹

Although the current Interpretation Act only requires that functionaries table a notification containing the details of the delegated legislation it made, Parliament does request that departments attach a copy of the Government Gazette wherein the instruments was published when the notification is tabled.⁸²

⁷⁴ Ibid section 17.

⁷⁵ 1986 (4) SA 1064 (O).

⁷⁶ Ibid at 1089G – 1091A.

⁷⁷ This was before the unification of South Africa in 1910.

⁷⁸ 5 of 1883 (C).

⁷⁹ Ibid at section VIII.

⁸⁰ 1910.

⁸¹ Ibid section 17.

⁸² Guide to tabling of papers in Parliament (n65) at 15.

Besides the requirements of the Interpretation Act, many individual statutes prescribe specific rules for the tabling, discussion, or approval by Parliament of delegated legislation made under the authority of the specific statute.

For instance, the Promotion of Access to Information Act⁸³ requires that any regulation made in terms of section 92(1) of the Act, must, before publication in the Government Gazette, be submitted to Parliament.⁸⁴

The PAJA⁸⁵ requires that certain regulations made in terms of the Act must be submitted to Parliament before publication in the Gazette, others are even subject to approval by Parliament before publication in the Gazette.⁸⁶

Similarly, section 10(3) of the Protected Disclosures Act⁸⁷ requires that any regulations made in terms of the Act must be submitted to Parliament before publication in the Government Gazette.

In terms of section 75(6)(a) of the National Road Traffic Act⁸⁸ draft regulations must be referred to Parliament for comment, in addition to being published in the Government Gazette with a call for comments.

Section 38(2) of the Criminal Law Sexual Offences and Related Matters Act⁸⁹ states that any regulation made in terms of section 39(2) of the Act, must be submitted to Parliament at least 30 days before its publication in the Gazette.

Other statutes contain similar provisions; the list goes on.

In 2006 the South African Law Reform Commission published a Discussion Paper⁹⁰ on the review of the Interpretation Act. The Department of Justice and Constitutional Development had requested that the parliamentary scrutiny of delegated legislation be considered as part of the investigation and the discussion paper treated it as a ‘collateral issue’.⁹¹

⁸³ Promotion of Access to Information Act, 2 of 2000.

⁸⁴ Ibid at section 92(2).

⁸⁵ 3 of 2000 (n46).

⁸⁶ Ibid at section 4(a) and (b).

⁸⁷ Protected Disclosures Act, 26 of 2000.

⁸⁸ 93 of 1996.

⁸⁹ 32 of 2007.

⁹⁰ South African Law Commission ‘Discussion Paper 112, Statutory Revision: Review of the Interpretation Act, 33 of 1957’ (2006).

⁹¹ Ibid at (x).

The Commission proposed the Interpretation of Legislation Bill⁹² for discussion. The Bill would require that, after its publication in the Gazette, or in a permissible alternative manner, delegated legislation had to be submitted to both houses of Parliament for delegated national legislation or the relevant provincial legislature for delegated provincial legislation.⁹³

Ultimately, the Bill was toothless. Non-compliance with the tabling provision would ‘not affect (sic) the validity, commencement, or enforcement of such subordinate legislation.’⁹⁴

The Discussion Paper only reflected the Commission’s preliminary views and was aimed at eliciting more responses.

At the end of 2017 the Commission was in the process of considering the draft report on the review of the Interpretation Act. After the Commission’s amendments to the draft report, the final report will be submitted to the Minister and the Department of Justice and Constitutional Development for comment. Thereafter the draft will again be updated and will serve before the Commission for final approval.⁹⁵

The more than ten year delay between the publication of the Discussion Paper and the finalisation of a draft report can be attributed to the Commission’s decision to prioritise a project on the review of all national legislation for compliance with the equality provisions of the Constitution.⁹⁶

As the report has not yet been finalised, it is unclear whether the Commission will recommend, as its 2006 discussion paper suggested, amending the Interpretation Act to make tabling mandatory.

3.2 Lost Opportunity of the Promotion of Administrative Justice Act

In 1993, during the same time that the Multi-Party Negotiating Process was ongoing, a three-day conference on administrative justice took place in Cape Town and resulted in the ‘Breakwater Declaration: Administrative Law for a Future South Africa’.

One of the areas of agreement of the conference was that:

Legal regulation of public power should include judicial review of administrative action as well as a range of procedures and institutions to ensure good governance, including:

⁹² Discussion Paper 112 op cit (n90) 467.

⁹³ Ibid Addendum A, section 13(1) at 475.

⁹⁴ Ibid Addendum A, section 13(2) at 475

⁹⁵ Correspondence with Pierre van Wyk, Principal State Law Adviser, South African Law Commission on 2 February 2018.

⁹⁶ Ibid.

- i. Effective parliamentary control and supervision of the nature and scope of delegated power and the way in which it is exercised.⁹⁷

In the same year the interim Constitution was drafted and the right to administrative justice was phrased as follows:

Every person shall have the right to-

- a) lawful administrative action where any of his or her rights or interests is affected or threatened;
- b) procedurally fair administrative action where any of his or her rights or legitimate expectations is affected or threatened;
- c) be furnished with reasons in writing for administrative action which affects any of his or her rights or interests unless the reasons for such action have been made public; and
- d) administrative action which is justifiable in relation to the reasons given for it where any of his or her rights is affected or threatened.⁹⁸

This wording of this section was significantly amended and eventually became section 33 of the final Constitution, the right to Just Administrative Action:

1. Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.
2. Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.
3. National legislation must be enacted to give effect to these rights, and must -
 - a) provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;
 - b) impose a duty on the state to give effect to the rights in subsections (1) and (2); and
 - c) promote an efficient administration.⁹⁹

The legislation contemplated in section 33(3) had to be enacted by 3 February 2000.¹⁰⁰ The final Constitution required that, before the promulgation of the envisaged legislation, section 33(1) and (2) of the final Constitution would be read as section 24 of the interim Constitution.¹⁰¹

In November 1998 the South African Law Commission (SALC) was asked to draft the legislation as required by section 33(3). In August 1999 the Commission presented its final

⁹⁷ Bennett (1993) *Administrative Law Reform* at 19.

⁹⁸ Section 24 of Interim Constitution (n7).

⁹⁹ Section 33 of the Final Constitution (n12).

¹⁰⁰ Schedule 6, section 23(1) of Interim Constitution (n7).

¹⁰¹ Schedule 6, section 23(2) of Final Constitution (n12).

report and a final revised bill, the ‘Administrative Justice Bill’ (hereafter referred to as the ‘Draft Bill’).

The Draft Bill was in its sixth version,¹⁰² but it was still to undergo many more changes before it became the Administrative Justice Bill¹⁰³ as introduced in Parliament by the executive (hereafter referred to as the ‘Executive’s Bill’) in 1999 and then subsequently passed by Parliament as the Promotion of Administrative Justice Act in 2000.¹⁰⁴

The first chapters of the Draft Bill and the Executive’s Bill correspond for the most part, but the Draft Bill’s chapters providing for ‘Rules and Standards’¹⁰⁵ and the ‘Administrative Review Council’¹⁰⁶ was cut or watered down in the Executive’s Bill.

The ‘Rules and Standards’ chapter of the Draft Bill mandated the Chief State Law Advisor to ‘compile and publish protocols for the drafting of rules and standards’.¹⁰⁷ The Chief State Law Advisor would also be tasked with, in conjunction with an Administrative Review Council, providing training to those drafting the rules and standards.¹⁰⁸

A proposal by SALC for a Central Drafting Office - with its main task to ‘consider and approve the text of rules (but not standards) which organs of state intend making’¹⁰⁹ - did not even make it into the final version of the Draft Bill because the Department of Justice thought that several specially appointed State Law Advisors could perform this function ‘better and more cheaply’.¹¹⁰

The Draft Bill also required that when a decision was made to make a rule, an administrator had to ‘take appropriate steps to communicate the rule to those likely to be affected by it’.¹¹¹ It required compliance with any rules regulating the procedure for the publication of rules and allowed for variation of the rules in certain circumstances.¹¹²

Section 13 of the Draft Bill required the creation of up-to-date registers and indexes of rules and standards.¹¹³ This proposal will be discussed in more extensively in chapter seven.

¹⁰² Administrative Justice Report op cit (n53) note 1 at 15.

¹⁰³ Administrative Justice Bill, 56 of 1999 (Government Gazette No. 20572 of 25 October 1999)

¹⁰⁴ 3 of 2000 (n46).

¹⁰⁵ Administrative Justice Report ‘Draft Administrative Justice Bill’ op sit (n53) at Chapter 5.

¹⁰⁶ Ibid ‘Draft Administrative Justice Bill’ at Chapter 6.

¹⁰⁷ Ibid at section 11(a).

¹⁰⁸ Ibid at section 11(b).

¹⁰⁹ Ibid at 10.

¹¹⁰ Ibid footnote 31 at 33.

¹¹¹ Ibid ‘Draft Administrative Justice Bill’ section 12(1)(a).

¹¹² Ibid section 12(1)(b) & (2).

¹¹³ Ibid ‘Draft Administrative Justice Bill’ at section 13(1)(a)(i), (ii) and (iii).

The chapter dealing with the duties of the Chief State Law Advisor, publication of rules, and the registers and indexes of rules and standards, was substantially revised before it was published in the Draft Bill in an attempt to ‘balance the disadvantages of complying with its requirements and procedures (e.g. costs, delays, unnecessary work, unintended consequences) and the advantages (transparency, responsiveness, contemporaneity) of doing so.’¹¹⁴

The chapter on the Administrative Review Council in the Draft Bill envisaged the establishment of an Administrative Review Council which would inquire into and make recommendations for reform on various administrative law issues. This included, but was not nearly limited to, the appropriateness of establishing tribunals to review administrative actions¹¹⁵ and prescribing measures for the automatic lapsing of rules and standards.¹¹⁶

In the Executive’s Bill the chapters on Rules and Standards and the Advisory Council was removed and it instead gave the Minister the discretion to establish (through regulations) an Advisory Council to advise him or her on the publication of uniform rules and standards, the compilation and maintenance of registers, measures for automatic lapsing of rules and standards and so forth.¹¹⁷

The definition of ‘rule’, which included ‘subordinate legislation’, was also left out.¹¹⁸

The Executive’s Bill underwent several more changes during the parliamentary deliberation process of which the most significant was the revision of the definition of ‘administrative action’ and the addition of ‘decision’ and ‘empowering provision’. The Committee also made changes to the provisions dealing with procedural fairness.

It was eventually passed by Parliament as PAJA¹¹⁹ on the 3rd of February 2000.

During the development of the Draft Bill there was some ‘understandable aversion’, especially from the Department of Justice, to the creation of another government structure – the initially proposed Administrative Review Council. According the Department’s calculations at the time, the Council would have cost R980 000 per year to run, out of a

¹¹⁴ Ibid footnote 30 at 33.

¹¹⁵ Ibid ‘Draft Administrative Justice Bill’ section 15(c)(i).

¹¹⁶ Ibid section 15(d)(ii).

¹¹⁷ Ibid section 11(g).

¹¹⁸ Ibid section 1(n).

¹¹⁹ 3 of 2000 (n46).

budget of R300 million.¹²⁰ Adjusted for inflation, R900 0000 on the 1st of August 1999, amounted to roughly R2 444 562 in July 2017.¹²¹

Besides the narrowing of the definition of administrative action and the attempts exclude the act of rule-making from the scope of the Act, the changes made to the Draft Bill show that even the most benign suggestions to improve rule-making were not allowed to pass into law. It is almost as if the drafters of the final version of PAJA ‘were reluctant to admit the existence of “legislative” administrative action at all.’¹²²

For its ‘cautious and indirect approach’ which ‘reduces the prospects for a fully integrated system of administrative law - and will do concomitantly less than the version proposed by the Law Commission to topple judicial review from its pedestal’,¹²³ Hoexter viewed PAJA as an ‘opportunity lost’.¹²⁴

After the passing of PAJA, the Minister in September 2000 circulated draft regulations on Fair Administrative Procedures and draft regulations on the Administrative Justice Advisory Council to selected stakeholders for comment.¹²⁵

Since then the Minister promulgated regulations on Fair Administrative Procedures,¹²⁶ rules on the Procedure for Judicial Review of Administrative Action¹²⁷ and in January 2017 the Minister invited the public to comment on the draft code of Good Administrative Conduct.¹²⁸

However, the draft regulations on the Administrative Justice Advisory Council have not been taken any further.

¹²⁰ Administrative Justice Project op cit (n53) at 13.

¹²¹ inflationcalc.co.za

¹²² Hoexter 'The Future of Judicial Review in South African Administrative Law' (2000) at 497.

¹²³ Ibid at 497.

¹²⁴ Ibid at 499.

¹²⁵ Currie & Klaaren op cit (n54) at 12.

¹²⁶ Government Gazette No. 27719 (27 June 2005).

¹²⁷ Government Gazette No. 32622 (9 October 2009).

¹²⁸ Government Gazette No. 40540 (9 January 2017).

4. Attempts to Oversee Delegated Legislation in the South African Parliament

4.1 The 1940s

In the late 1940s, long before the advent of our current constitutional democracy, concerned members of Parliament of the Union of South Africa advocated for the creation of a Select Committee on Delegated Legislation to investigate mechanisms to oversee delegated legislation.

The prelude to the creation of the Committee in 1947 was characterised by the alarming growth of the delegated legislation during the Second World War, the attention attracted by the Donoughmore Report¹²⁹ and concerns raised by the Association of Law Societies, organised commerce and industry, and the National Council of Women.¹³⁰

At the time General Jan Smuts of the United Party served as Prime Minister and DF Malan was the leader of the second largest party in Parliament, the Herenigde Nasionale Party (Reunited National Party).

On 3 April 1947, after an investigation by two Select Committees, the House of Assembly appointed a final Select Committee to:

...enquire into the delegation by Parliament of legislative powers to the executive government to be exercised by means of government regulations, and to report upon what safeguards may be necessary to secure the constitutional principles of the sovereignty of Parliament and the supremacy of law in respect of the above-mentioned matter as well as generally¹³¹

The member of Parliament responsible for creating the necessary support for the committee was JH Russell.

One of the more interesting proposals submitted to the Committee on how to deal with delegated legislation came from the Association of Law Societies. The Association initially advocated for the creation of a permanent committee of Parliament to review all delegated legislation and to make recommendations on the recall or amendment thereof. However, following further research and consultation, the Association came to the conclusion that the

¹²⁹ The Report of the Committee on Ministers' Powers of 1932 was concerned mostly with the issues of subordinate legislation and formal administrative adjudication.

¹³⁰ Baxter *op cit* (n71) at 212.

¹³¹ Parliament of South Africa 'Report of the Select Committee on Delegated Legislation [S.C. 6 – '47]'

committee as proposed would not be practical, in part, because of the amount of time it would require of members of Parliament serving on the committee.¹³²

The Association then proposed a bill which would create a special court for the review of regulations. The Court would consist of a president and two assessors.¹³³

The bill proposed that all regulations would be required to be published in the Government Gazette with a notice stating that any objections to a regulation would have to be submitted within fourteen days of its publication.¹³⁴

If no objections were received the regulations were deemed to be law from the date of publication or a date specified therein. If more than one person objected to the published regulation, the objectors would be put in contact with each other and then within 28 days from the publication of the regulation, an assessor would be appointed.¹³⁵

A court date would then be determined to hear arguments for and against the regulations. The burden of proof would be on the promoter of the regulation to show that it is necessary and in the public interest. After the court ratified, amended, or changed a regulation brought before it, the court had to report to Parliament, with specific attention to certain factors.¹³⁶

The Committee did not accept the Association's special court, but instead made a final recommendation that was 'remarkably sophisticated'.¹³⁷

The Committee recommended the appointment of an officer in Parliament:

...charged with the duty of scrutinizing all statutory instruments framed under powers conferred by statute and to report whether, in his opinion, any of the scrutinised instruments merit the attention of the House on any of the following grounds:

- (a) that they appear to make any unusual or unexpected use of the powers conferred by the Statute under which they are framed;
- (b) that they tend to usurp the control of the House over expenditure and taxation;
- (c) that they tend to exclude the jurisdiction of the Courts of Law without explicit enactment;
- (d) that for any reason their form or purport calls for elucidation or special attention.¹³⁸

¹³² Parliament of South Africa *Verslag van die Gekose Komitee oor die Gedelegeerde Wetgewing* [S.C. 8 – '48] at xxx para 6(a).

¹³³ *Ibid* at xxxii para 10(2).

¹³⁴ *Ibid* at xxxiii para 10(4).

¹³⁵ *Ibid* at xxxiii para 10(4) and (5).

¹³⁶ *Ibid* at xxxiii para 10(6), (7) and (8).

¹³⁷ Baxter *op cit* (n71) at 213.

¹³⁸ Parliament of South Africa *Report of the Select Committee on Delegated Legislation* S.C. 8 – '49 at vi.

To make this safeguard effective, the Report also recommended that a select committee be appointed to which the officer's reports would be referred for consideration.¹³⁹

The fact that statutory instruments were to be scrutinised and reported upon to Parliament would have, the Committee thought, 'a salutary effect upon officials entrusted with the duty of framing such instruments.'¹⁴⁰

The proposal were accepted by the government at the time and in 1952 the report was referred to the Committee on Standing Rules and Orders in order for more specific proposals to be formulated.¹⁴¹

However, the United Party had been defeated by the Herenigde Nasionale Party in the 1948 South African general election and when the issue was debated again in Parliament in 1955 and 1957, the rebranded National Party was fully in control of Parliament and the executive.¹⁴²

After the 1948 election, Russell continued to champion the cause as a member of the opposition, waging 'a determined though ultimately unsuccessful campaign for stricter control over the delegation of legislative and executive administrative powers.'¹⁴³

Russell continued to press both Prime Ministers DF Malan and JG Strijdom for answers regarding the progress made towards the establishment of a scrutinising committee on delegated legislation.

In 1955 Strijdom said in the House that, in conformity with the reply of Malan in 1952, the matter had been referred to the Committee on Standing Rules and Orders, but after discussion a decision was made to 'drop the matter' and therefore government had 'accordingly decided to take no further steps in this connection.'¹⁴⁴

In 1957 – after several years of Nationalist rule - Mr Russell again pleaded for the implementation of the 1949 report:

The very gentlemen who were so ardent and keen to see that unchecked delegation of power should be controlled by a scrutinising committee during their period in Opposition, when they ascended unexpectedly to the seats of the mighty, when they

¹³⁹ Ibid at vi.

¹⁴⁰ Parliament of South Africa *Report of the Select Committee on Delegated Legislation* S.C. 8 - '49 (1949)

¹⁴¹ Parliament of South Africa *House of Assembly Debates* (Hansard) (1952) at col 2175 q III.

¹⁴² The Herenigde Nasionale Party had won the 1953 general election and changed its name to just the National Party after merging with the Afrikaner Party.

¹⁴³ Baxter op cit (n71) footnote 149 at 212.

¹⁴⁴ Parliament of South Africa *House of Assembly Debates* (Hansard) (1955) at 7995 - 7996.

became Cabinet Ministers, decided that they needed these powers to enforce their policies, determined to make use of these powers to fulfil their arbitrary intentions.¹⁴⁵

Unfortunately, Prime Minister Strijdom remained defiant that the matter had been dropped.

In 1983 Baxter wrote about this failed attempt at creating a mechanism for parliamentary oversight of delegated legislation:

In South Africa, where the balance between political parties is much more one-sided, and where scrutiny procedures are virtually non-existent, the executive has little if anything to fear from Parliament – hence even the duty to lay copies of delegated legislation has proved too great an effort.¹⁴⁶

4.2 After 1994

The second attempt at creating a mechanism in Parliament to oversee delegated legislation came in the 1990s, after arrival of South Africa's constitutional democracy.

The process happened in two phases. In the first phase the Joint Rules Committee created a subcommittee – with a NA component and a National Council of Provinces (NCOP) component – to investigate the matter of Parliament's oversight of delegated legislation. In the second phase, Parliament passed a motion to create the Interim Joint Committee on Scrutiny of Delegated Legislation while the matter was being finalised.

4.2.1 Joint Subcommittee on Delegated Legislation

The process of creating a parliamentary mechanism to oversee delegated legislation commenced in 1997 following the promulgation of the final Constitution and the inclusion of sections 101 and 140 (as discussed in Chapter 2).¹⁴⁷

In February 1997 a delegation from the South African Parliament attended the Fourth Commonwealth Conference on Delegated Legislation, which took place in Wellington, New Zealand.¹⁴⁸

In its report the delegation recommended that Parliament had to decide whether it would scrutinise delegated legislation and if so, what the scope of Parliament's scrutiny would be.¹⁴⁹

¹⁴⁵ Parliament of South Africa *House of Assembly Debates* (Hansard) (1957) at column 8840.

¹⁴⁶ Baxter op cit (n71) 215.

¹⁴⁷ Joint Committee on Delegated Legislation 'Best practices and legal requirements' (15 May 2012).

¹⁴⁸ Fourth Commonwealth Conference on Delegated Legislation was held in Wellington, New Zealand from 10 to 13 February 1997.

¹⁴⁹ NCOP Subcommittee on Delegated Legislation 'Report on Scrutiny of Delegated Legislation' (27 October 1999).

On the 19th of February 1998 the National Assembly Rules Committee discussed the ‘complexities involved in delegated legislation’ and concluded that there was a need for a Subcommittee on Delegated Legislation to investigate the matter further.¹⁵⁰

In October 1998 the Speaker of the National Assembly asked Professor Hugh Corder of the University of Cape Town’s Department of Public Law to compile a report on the methods for scrutiny of legislation by Parliament.¹⁵¹

After Corder submitted progress reports on the 2nd of November 1998 and on the 21st of January 1999, he was asked to expand and supplement certain areas.¹⁵²

Corder submitted his ‘Final Report on Methods for Scrutiny of Legislation by Parliament’ to Parliament on the 2nd of March 1999.¹⁵³

The 1999 Joint Rules of Parliament made provision for the Joint Subcommittee on Delegated Legislation which would be composed of members of the Assembly Subcommittee on Delegated Legislation and members of the Council Subcommittee on Delegated Legislation.¹⁵⁴

The Rules required that the Subcommittee:

- a) must investigate and make recommendations to the Joint Rules Committee on possible mechanisms that could be used by legislators to maintain oversight of the exercise of legislative powers delegated to the executive; and
- b) must perform any other function and may exercise any other power assigned to it by the Joint Rules Committee.¹⁵⁵

This section of the Rules included a note specifically referring to section 101(4) of the Constitution providing for national legislation to determine procedures for subordinate legislation to be tabled in and approved by Parliament.¹⁵⁶

In October 1999 the NCOP Subcommittee on Delegated Legislation held an informal meeting – at that stage the NCOP had not yet adopted rules to allow the subcommittee to be formally constituted – to establish the role of the NCOP, if any, in scrutinising delegated legislation.¹⁵⁷

¹⁵⁰ Rules Committee of the National Assembly ‘Draft Rules: Chapter on Committee System’ (19 February 1998).

¹⁵¹ Corder ‘Final Report on Methods for Scrutiny of Legislation by Parliament’ (1999).

¹⁵² Ibid.

¹⁵³ Ibid.

¹⁵⁴ Joint Rules of Parliament (1999) at section 84.

¹⁵⁵ Ibid at section 86.

¹⁵⁶ Ibid at section 86, note 1.

¹⁵⁷ NCOP Subcommittee on Delegated Legislation ‘Report on Scrutiny of Delegated Legislation’ (27 October 1999).

One of the members, Ms Pandor, observed that there was some parliamentary scrutiny of delegated legislation – for instance portfolio committees which scrutinise regulations – but that the discussion was about a formal scrutiny mechanism. She also observed that although Corder’s report on this very important issue had been tabled months before, comments from political parties had not been forthcoming.¹⁵⁸

On 11 April 2000 Corder presented his final report to the Joint Subcommittee on Delegated Legislation.¹⁵⁹

The report set out some of the most common ways in which legislatures oversee delegated legislation, these included:

- Laying down detailed and restricted guidelines which the enabling provisions which give the executive law-making authority, must adhere to;
- Requiring that all delegated legislation be tabled in Parliament;
- Subjecting all delegated legislation to a procedure for either approval or disapproval by Parliament after examination by a committee against certain standards; and
- Requiring the executive authority proposing the delegated to undertake some cost-benefit analysis or impact study.¹⁶⁰

When the chairs asked whether Parliament had the power to disallow regulations versus just making recommendations, Corder responded that the international norm does allow disallowance, but in the context of South Africa it was a grey area. He warned that disallowance could ‘sometimes lead to a confrontational relationship between the executive and the legislature.’¹⁶¹

Another concern raised was that there would be duplication of institutions performing oversight, but Corder argued that the ‘growing number of institutions that are dealing with oversight actually assist in boosting the accountability of the executive to the civic society at large.’¹⁶²

At the Subcommittees Committee’s meeting in September 2000 there was no quorum as members of the NCOP could not attend due to other commitments. At the time most of the

¹⁵⁸ Ibid.

¹⁵⁹ Joint Subcommittee on Delegated Legislation 'Report on the methods for scrutiny of legislation by Parliament' (11 April 2000).

¹⁶⁰ Corder op cit (n 150).

¹⁶¹ Joint Subcommittee on Delegated Legislation op cit (n159).

¹⁶² Ibid.

members of the Committee also sat on the Justice Portfolio Committee which meant that their schedules often clashed.¹⁶³

The Committee expressed the need for someone from Parliament's legal services to summarise Corder's in-depth report 'into a more concise and manageable format for the members of the committee to discuss.'¹⁶⁴

The Committee also agreed that the Chairperson would apply for the committee to meet when the House was in session.¹⁶⁵ Time constraints and the availability of members to attend meetings would continue to be an issue that plagued the existence of the Subcommittee and the Interim Committee.

At a meeting of the NCOP Rules Committee in March 2000 to discuss a report of the Subcommittee on Delegated Legislation, one of the members, Mr Moosa, mentioned that given the amount of work that the required for scrutiny the Subcommittee should consider a mechanism which would not require members 'to do the bulk of the work.'¹⁶⁶ He suggested a unit of lawyers and researchers to 'provide the necessary support and alert members to potential problems.'¹⁶⁷

At meeting in October 2000 of Subcommittee on Delegated Legislation the legal advisors explained that there were 'inconsistencies' when it came to the scrutiny of delegated legislation in South Africa, for instance, not all delegated legislation has to be tabled or published in the Gazette.¹⁶⁸

The Chairperson indicated that it was 'urgent there be principles around delegated legislation' as it was being done on an 'ad hoc' basis.¹⁶⁹

The members disagreed on whether a joint committee would be most appropriate for the task. One member argued that most of the legislation passed in Parliament was section 75 legislation and if it were to be a joint committee, the NCOP would be looking at delegated legislation 'that is outside its competency'.¹⁷⁰

¹⁶³ NCOP Subcommittee on Delegated Legislation (27 September 2000).

¹⁶⁴ Ibid.

¹⁶⁵ Ibid.

¹⁶⁶ NCOP Rules Committee 'Deliberations' (8 March 2000).

¹⁶⁷ Ibid.

¹⁶⁸ Joint Subcommittee on Delegated Legislation 'Report on Methods for Scrutiny of Legislation by Parliament' (10 October 2000).

¹⁶⁹ Ibid.

¹⁷⁰ Ibid.

One member, Mr Mathee, suggested that the Subcommittee would need ‘full-time legal expertise, as well as specialists in specific areas.’ He also suggested that a registry of delegated legislation be made and the Chairperson agreed as currently ‘this information was inaccessible’.¹⁷¹

Another member, Mr Surty, complained that Corder's report should have looked at South Africa pre- and post-1994 comparatively and that the Committee had ‘to look at the South African situation in practical terms.’ It was suggested that the Committee re-engage with Corder to give him more specific instructions as to what they required.¹⁷²

The Chairperson felt that Corder's report did not capture the ‘present constitutional democracy and its ideals of openness and transparency.’¹⁷³

On the 5th of December 2000 municipal elections took place in South Africa, as a result the subcommittees did not meet on a regular basis that year.¹⁷⁴

At a NA Rules Committee meeting in November 2001 two members proposed the amalgamation of the Subcommittee on Delegated Legislation and the Subcommittee on Oversight and Accountability because there was ‘link between the functions of the two Subcommittees.’¹⁷⁵

The Speaker opposed the idea and said that the committees had been kept separate because of the big workload, but despite that, the subcommittees had not produced substantive reports for the past two or three years.¹⁷⁶

The Joint Committee did not meet at all in 2001.

In 2002 the Joint Subcommittee continue its work with new level of vigour and direction. This could possibly be ascribed to the election of two new co-chairpersons, Adv TM Masutha (NA) and TS Setona (NCOP).

At a meeting in January 2002, co-chairperson Setona noted that the Committee had been in existence for more than three years, but for a number of reasons had not completed its task,

¹⁷¹ Ibid.

¹⁷² Ibid.

¹⁷³ Ibid.

¹⁷⁴ NCOP Rules Committee 'Deliberations' (28 March 2001).

¹⁷⁵ National Assembly Rules Committee 'Auditor General's Report on Financial Support to Political Parties & Workshop Proposals' (1 November 2001).

¹⁷⁶ Ibid.

including that members did not prioritise the Committee and that there had been no programme in place.¹⁷⁷

At the same meeting the Committee deliberated on what actually constituted delegated legislation and also briefly discussed the key areas of the Corder report.¹⁷⁸

The Committee agreed on a programme for the first term of 2002 and decided to organise a workshop wherein experts and stakeholders would make submissions.¹⁷⁹

Shortly after the Joint Subcommittee had established its first term programme, it was informed that the National Assembly Rules Committee had agreed that the Joint Subcommittee, while proceeding to complete its task, had to expedite a separate proposal for an interim mechanism for the scrutiny of delegated legislation. This was because the process by then had already been a prolonged one.¹⁸⁰

At a meeting on the 5th of February 2002 the NA Rules Committee discussed the scope of amendment bills, but the issue of oversight of regulations also came up.¹⁸¹

The Speaker remarked that 'in theory committees should set the parameters in legislation within which regulations should fall and not give the Executive blank a cheque to draft them.'¹⁸²

One member, Mr De Lange, commented that through delegated legislation Parliament had handed over its legislative power to the executive and it could not take it back and say that it should approve all regulations. He referred to other Commonwealth Parliaments which had created subcommittees to look at regulations and to ensure that the regulations 'fall within the parameters of the law and are not ultra vires.'¹⁸³

The Speaker appealed to parties to take an active interest in the work of the Joint Subcommittee on Delegated Legislation and asked the Subcommittee to expedite the consideration of an interim mechanism to monitor regulations.¹⁸⁴

In the first half of 2002 the Committee discussed various topics related to the establishment of a scrutiny mechanism, including a definition of delegated legislation, scrutiny criteria and

¹⁷⁷ Joint Subcommittee on Delegated Legislation 'Committee Programme' (25 January 2002).

¹⁷⁸ Ibid.

¹⁷⁹ Ibid.

¹⁸⁰ Joint Subcommittee on Delegated Legislation 'Draft Minutes of Proceedings' (19 February 2002).

¹⁸¹ National Assembly Rules Committee 'Deliberations' (5 February 2002).

¹⁸² Ibid.

¹⁸³ Ibid.

¹⁸⁴ Ibid.

mechanisms, access to delegated legislation, whether portfolio and select committees was best placed to perform the scrutiny, the scrutiny of provincial and municipal by-laws, the automatic lapsing of regulations, whether legislation was needed and other matters related thereto.¹⁸⁵

Finally, on the 29th of October 2002, the Joint Subcommittee on Delegated Legislation presented its Interim Report to the Joint Rules Committee and proposed the creation of an interim mechanism for the scrutiny of delegated legislation.

The Subcommittee acknowledged that parliamentary scrutiny of delegated legislation formed a ‘critical element in any modern system of constitutional democracy’ and furthermore, had the potential to ‘enhance constitutional values and principles, improve the quality of Acts of Parliament and save legal costs and court time in the future by anticipating challenges to the constitutional validity of such legislation.’¹⁸⁶

The Subcommittee recommended firstly, that legislation be passed setting out norms and standards for the implementation of section 101(4) of the Constitution and, secondly, that section 17 of the Interpretation Act be reinforced, ‘at least as far as tabling is concerned’.¹⁸⁷

The Subcommittee also recommended that the executive investigate ways to make subordinate instruments more accessible, as well as the possibility of the automatic lapsing of subordinate instruments after a certain period of time.¹⁸⁸

It was decided that a specialist joint committee would be the most appropriate mechanism for the scrutiny of delegated legislation and delegating provisions, as portfolio and select committees had time and capacity constraints.¹⁸⁹

The Subcommittee recommended that an interim scrutiny committee be established to:

- act in an advisory capacity to portfolio and select committees with regard to the scrutiny of delegating provisions in enabling statutes referred to it;
- scrutinise any delegated instruments requiring approval by Parliament; and
- be provided with the necessary capacity and legal expertise.¹⁹⁰

¹⁸⁵ Joint Subcommittee on Delegated Legislation meetings on 25 January 2002, 19 February 2002, 27 February 2002, 20 March 2002, 30 April 2002, 15 May 2002.

¹⁸⁶ Interim Report op cit (n38) 2.

¹⁸⁷ Ibid at 8.

¹⁸⁸ Ibid at 25.

¹⁸⁹ Ibid at 34.

¹⁹⁰ Ibid at 45.

When the Joint Rules Committee met in May 2003 Masutha indicated that Corder had expressed his general agreement with the report. Political parties were told to consider the report and that another meeting would be held to discuss the report.¹⁹¹

In August 2003 the Joint Rules Committee met again and it was indicated that the NCOP had held a workshop (on the 11th of August 2003) to consider and debate the interim report of the Joint Subcommittee on Delegated Legislation and it was suggested that the National Assembly conduct a similar workshop, where after the recommendations could be considered.¹⁹² At the meeting the Deputy Chairperson of the NCOP expressed concern that it had been a year since the Report was published, yet there had been no action.¹⁹³

The Report was not taken any further in the second Parliament and in April 2004 South Africa's third democratic national election was took place.

In August 2004, when the Joint Rules Committee of the third Parliament met for the first time, the Report was presented to the new members as a legacy issue.¹⁹⁴

The NCOP Subcommittee had held a workshop on the 19th and 20th of September 2004 which allowed members to engage with the Report before they had to discuss it in the Joint Rules Committee meeting.¹⁹⁵

Although the Joint Rules Committee agreed to receive a presentation on the report at a special meeting at the end of August 2004, the meeting only took place on the 25th of May 2005 because of time constraints.¹⁹⁶

During this meeting Masutha briefed the Joint Rules Committee on the report. Committee members were encouraged to consider the recommendations and to return with specific responses 'so that the committee would be in a position to issue instructions on what was needed to follow up on agreed positions.'¹⁹⁷

The Joint Rules Committee met again on the 22nd of March 2006. One of the committee members suggested that a presentation be made to the executive on this matter, but the Speaker was worried that the process would be delayed even further and, according to the

¹⁹¹ Joint Rules Committee 'Subcommittee Reports: consideration' (19 May 2003).

¹⁹² Joint Rules Committee 'Deliberations' (19 August 2003).

¹⁹³ Ibid.

¹⁹⁴ Parliament of South Africa 'Procedural Developments in the National Assembly' (2006) at 23.

¹⁹⁵ NCOP Rules Committee 'Deliberations' (20 October 2004).

¹⁹⁶ Procedural Developments op cit (n194) 23.

¹⁹⁷ Ibid at 24.

minutes, feared that ‘Parliament might be influenced to pander to the wishes of the executive.’¹⁹⁸

It was agreed that an interim structure was needed to deal with delegated legislation. The Speaker also made an appeal to parties to finalise the matter ‘because it has been around for ages.’¹⁹⁹

At the end of August 2006 the Joint Rules Committee agreed to the establishment of an interim mechanism with interim rules which would determine its function. The rules would be drafted by the Joint Subcommittee on the Review of the Joint Rules.²⁰⁰

On the 20th of June 2007 Joint Rules Committee agreed to adopt the draft resolution proposed by the Subcommittee for the establishment of an Interim Scrutiny Committee.²⁰¹

Masutha explained that ultimately a ‘comprehensive framework would govern delegated legislation’, but for the present the interim committee would scrutinise instruments that require action by Parliament as stipulated in the enabling act. He added that the committee would function as an ‘advisory body to portfolio and select committees’.²⁰²

However, by the end of the third Parliament in 2009, the draft rules had not been completed and the matter was left to the fourth Parliament to take forward.²⁰³

In December 2006 the presiding officers of Parliament initiated the Independent Panel Assessment of Parliament. The Panel produced a report in 2009 in which it ‘strongly’ urged Parliament to establish a scrutiny mechanism for delegated legislation as it ‘reflects directly on Parliament’s independence and the effectiveness with which it exercises its legislative mandate.’²⁰⁴

The Panel expressed its concern that such a mechanism had not been established - calling it ‘overdue’²⁰⁵ - especially considering that the mechanism had been proposed in the interim report of the Joint Subcommittee on Delegated Legislation in 2002.²⁰⁶

¹⁹⁸ Joint Rules Committee ‘Progress Reports’ (22 March 2006) Parliamentary Monitoring Group.

¹⁹⁹ Ibid.

²⁰⁰ Joint Rules Committee ‘Rules for Joint Sitting Debates; Local Government Participation in Joint Sitings; Interim Mechanism for Scrutiny of Delegated Legislation’ (31 August 2006).

²⁰¹ Joint Rules Committee ‘Deliberations’ (20 June 2007).

²⁰² Ibid.

²⁰³ Procedural Developments in the National Assembly Issue 17 (2011) at 14.

²⁰⁴ Govender et al. ‘Report of the Independent Panel Assessment of Parliament’ (2009) at 25.

²⁰⁵ Ibid at 33.

²⁰⁶ Ibid at 25.

The Panel also noted that the ‘interim’ nature of the scrutiny mechanism proposed by the resolution would not be sufficient and recommended that Parliament ‘develop permanent structures and processes as a matter of urgency.’²⁰⁷

4.2.2 Interim Joint Committee on Scrutiny of Delegated Legislation

Finally in 2011 the National Assembly (on 22 June 2011)²⁰⁸ and the National Council of Provinces (on 20 September 2011)²⁰⁹ respectively passed a motion to establish an Interim Joint Committee on Scrutiny of Delegated Legislation. The Committee would consist of nine NA members and five NCOP members.

The Committee was tasked with scrutinising – in accordance with the criteria identified in the interim Rules –

- (a) delegated legislation -
 - (i) requiring approval by Parliament for it to enter into force;
 - (ii) which Parliament may disapprove, thus invalidating it; and
 - (iii) that requires consultation with Parliament;
- (b) delegating provisions in bills before their formal consideration by the House; and
- (c) any other delegated legislation agreed upon by the Committee.²¹⁰

Delegated legislation was to be scrutinised according to some or all of the following criteria:

- (a) whether they impose levies, taxes or duties not authorised through a money bill passed in accordance with section 77 of the Constitution;
- (b) whether they comply with procedural aspects pertaining to delegated legislation;
- (c) whether they impinge on the jurisdiction of the courts;
- (d) whether they are retrospective in nature and, if so, whether that is permitted in terms of the parent Act;
- (e) whether they conform with the objects of the parent Act;
- (f) whether they appear to make unusual use of powers conferred by the parent Act;
- (g) whether they have been properly drafted;
- (h) whether they trespass on personal rights and liberties, including those set out in the Bill of Rights, in a manner inconsistent with the Constitution; or
- (i) whether they amount to substantive legislation.²¹¹

Delegating provisions in bills were to be scrutinised in accordance with some or all of the following criteria:

²⁰⁷ Parliament ‘Report of the Independent Panel Assessment of Parliament’ (2009) at 25.

²⁰⁸ NA ATC [22 – 2011] at 2151, 22 June 2011.

²⁰⁹ NCOP ATC [30 – 2011] at 308, 20 September 2011.

²¹⁰ NA ATC [22 – 2011] at 2151, 22 June 2011, NCOP ATC [30 – 2011] at 308, 20 September 2011.

²¹¹ NA ATC [22 – 2011] at 2151, 22 June 2011, NCOP ATC [30 – 2011] at 308, 20 September 2011.

- (a) whether they impose levies, taxes or duties not authorised through a money bill passed in accordance with section 77 of the Constitution;
- (b) whether they impinge on the jurisdiction of the courts; or
- (c) whether they have been properly drafted.²¹²

Upon completion of the scrutiny process, the Committee was required to report its findings to the National Assembly for the information of the relevant portfolio or select committee and other members.²¹³

The Committee had to specifically report to the NCOP on delegated instruments dealing with matters contained in Schedule 4 of the Constitution.²¹⁴

Despite a motion having been passed in both houses of Parliament by September 2011, the Committee only met for the first time on the 2nd of May 2012 with the only order of business being the selection of the co-chairpersons (one from the NA and one from the NCOP).²¹⁵

In a memorandum to the members of the Committee regarding the first meeting it was acknowledged that all members were already serving on other committees and availability of members to attend meetings would therefore be a challenge.²¹⁶ At the Committee's second meeting in May 2012 best practices and legal requirements were discussed.²¹⁷

From August 2012 to February 2014, the Interim Committee held four meetings during which a number of regulations were scrutinised and deliberated on.

In August 2012 the Committee met to consider its first set of regulations, the Housing Development Agency Regulations of 2011 (these had also been referred to the Committee on Human Settlements).²¹⁸

A senior parliamentary legal advisor briefed the Committee on the housing regulations and raised issue with the granting of unusual powers, certain contradictions between the draft

²¹² Ibid.

²¹³ Ibid.

²¹⁴ Ibid.

²¹⁵ Interim Joint Committee on Scrutiny of Delegated Legislation op cit (n147).

²¹⁶ Parliament 'Memorandum to the members of the Interim Joint Committee on Scrutiny of Delegated Legislation' (2012).

²¹⁷ Interim Joint Committee on Scrutiny of Delegated Legislation 'Best practices and legal requirements' (15 May 2012).

²¹⁸ Jenkins, FS 'Briefing Note: Housing Development Agency Regulations' (2011).

regulations and the Act, as well as some drafting mistakes. The Committee resolved to adopt a report indicating their concerns in respect of the draft regulations.²¹⁹

In May 2013 the Committee met to deliberate and consider regulations made in terms of section 19 and directives made in terms of section 20(1)(b) and section 20(3)(a) of the Protection from Harassment Act²²⁰.

The Parliamentary Legal Services advised the Committee that it was of the opinion that the regulations and directives made in terms of the Protection from Harassment Act complied with the scrutiny criteria. The Committee formally adopted a report on the regulations.²²¹

The Committee also considered the Alien and Invasive Species Regulations made in terms of the National Environmental Management: Biodiversity Act²²² and referred to it in terms of section 8(3) of the Act, read with section 146(6) of the Constitution.²²³

The Parliamentary Legal Services also advised that after scrutiny of the delegating provision of the National Environmental Management Biodiversity Act, it had been found that necessary consultative process in terms of section 99 and 100 of the aforementioned Act had been complied with.²²⁴

However, section 8(3) of the National Environmental Management: Biodiversity Act read with section 146(6) of the Constitution only required the Minister to submit regulations for approval if there was a conflict between the national regulations and provincial regulations or a provincial act.²²⁵

In this instance the Department had confirmed that there was no conflict and therefore there was no need for the regulations to be submitted for approval or disapproval. However, in terms of the Committee's rule 3(2)(c), the Committee could scrutinise any regulations agreed upon.²²⁶

The Committee adopted a report stating that the regulations complied with the scrutiny criteria and that the regulations should be referred back to the Minister of Environmental

²¹⁹ Interim Joint Committee on Scrutiny of Delegated Legislation 'Amended Operational Guidelines for the Interim Joint Committee on Scrutiny of Delegated Legislation: presentation by Table Staff; Briefing on the Housing Development Agency Regulations, 2011' (15 August 2012).

²²⁰ 17 of 2011.

²²¹ Interim Joint Committee on Scrutiny of Delegated Legislation 'Regulations under Protection from Harassment Act & Biodiversity Act status: deliberations' (22 May 2013).

²²² 10 of 2004.

²²³ Interim Joint Committee on Scrutiny of Delegated Legislation op cit (n221).

²²⁴ Ibid.

²²⁵ Ibid.

²²⁶ Ibid.

Affairs given that it was no requirement for the Minister to submit the regulations for approval or disapproval.²²⁷

In June 2013 the Committee met to consider amendments to the National Road Traffic Regulations, 2000, made in terms of the National Road Traffic Act.²²⁸

The Legal Services Section indicated that the amendments to the National Road Traffic Regulations complied with the scrutiny criteria, except where it applied retrospectively. The National Road Traffic Act did not provide for the application of provisions with retrospective effect.

The Committee adopted a report reflecting this opinion and recommended that the Department of Transport ‘change the dates that are retrospective in nature and make them prospective.’²²⁹

On the same day the Committee also considered and deliberated on the regulations for a supply chain management system for Parliament, made in terms of section 65(1)(e) of the Financial Management of Parliament Act²³⁰.

Section 65(6) of the Financial Management of Parliament Act required that the regulations issued by the executive authority may only come into effect after approval by Parliament.²³¹

Legal Services advised the Committee that in terms of the regulations the majority of the required scrutiny criteria had been complied with, except for the procedural requirements as set out in section 65(5) of the parent Act and that the draft regulations were inconsistent with the general drafting style used in legislation and regulations (in terms of style, numbering and format).²³²

However, after further input from the parliamentary legal advisors it was decided that a report on the matter would be premature. The draft regulations had also been referred to the Standing and Select Committees on Finance in accordance with section 65(5) of the Act which required publication for public comment.²³³

²²⁷ Ibid.

²²⁸ 93 of 1996.

²²⁹ Interim Joint Committee on Scrutiny of Delegated Legislation ‘National Road Traffic Regulations, Financial Management of Parliament Act Regulations: deliberations’ (5 Junie 2013).

²³⁰ 10 of 2009.

²³¹ Interim Joint Committee on Scrutiny of Delegated Legislation op cit (n229).

²³² Ibid.

²³³ Ibid.

At that time the Standing and Select Committees on Finance still had to conduct hearings and it was advised that the Committee wait for this process to be completed before reporting on the regulations. The importance of the coordination between the Interim Joint Committee and that of the Standing and Select Committees of Finances was highlighted.²³⁴

The members of the Committee noted the importance of having the chairpersons of parent committees present during presentations involving their committees, both chairpersons had sent apologies for this specific meeting.²³⁵

The Committee decided not to report until the procedural requirements of section 65(5) of the Act had been complied with.²³⁶

In February 2014 the Committee met to deliberate and consider four sets of rules and regulations.²³⁷

The Committee considered draft regulations made in terms of section 24(1)(a) of the Military Veterans Act²³⁸ on the criteria that military veterans have to meet in order to qualify for benefits. Section 24(3) of the Act required that regulations made in terms of 24(1)(a) had to be tabled in Parliament at least 30 days before the regulation is published.

The Legal Services Section was of the opinion that the draft regulations made in terms of the Military Veterans Act complied with the scrutiny criteria, but that the draft regulations ‘should be properly drafted in order to comply with drafting convention in respect of accurate grammar, numbering and cross referencing.’²³⁹

The Committee adopted a report stating that the scrutiny criteria had been complied with, but recommended that the regulations be properly drafted.²⁴⁰

The Committee then considered the Housing Development Agency draft regulations submitted for consultation with Parliament in terms of section 32 of the Housing Development Agency Act.²⁴¹

²³⁴ Ibid.

²³⁵ Ibid.

²³⁶ Ibid.

²³⁷ Interim Joint Committee on Scrutiny of Delegated Legislation ‘Draft Regulations on Military Veterans, Housing Development Agency, Credit Rating Agency, Supply Chain Management System for Parliament: Parliamentary Legal Adviser's input and adoption’ (19 February 2014).

²³⁸ 18 of 2011.

²³⁹ Interim Joint Committee on Scrutiny of Delegated Legislation op cit (n237).

²⁴⁰ Ibid.

²⁴¹ 23 of 2008.

In term of the Housing Development Agency draft regulations, the Legal Services Section indicated that the majority of the required scrutiny criteria had been complied with, except for regulation 23 which dealt with penalties and offences. The Legal Services Section stated that the Act did not empower the Minister to make regulations regarding offences and penalties. By making such a regulation the Minister would be acting ‘outside the scope and powers granted by the Act.’²⁴²

Section 32 of the parent Act required that the Minister must make regulations after consulting with the Agency and Parliament. At the time the regulations were also before the Portfolio Committee on Human Settlements.²⁴³

The Committee formally adopted a report stating that the regulations complied with the scrutiny criteria, ‘except for clause 23 which requires further engagement by the Portfolio Committee on Human Settlements.’²⁴⁴

The Committee then considered the draft Credit Rating Agency Rules made in terms of section 24 of the Credit Rating Services Act.²⁴⁵ Section 24(3)(a)(ii) of this Act requires that before the registrar makes any rule in terms of section 24, the draft rule must be submitted to Parliament at least one month prior to promulgation.

In terms of the draft rules, the Legal Services Section was of the view that all the scrutiny criteria had been complied with and the Committee adopted a formal report to that effect.²⁴⁶

The Committee reconsidered the draft regulations on a supply chain management system for Parliament, which had first come before the Committee on 5 June 2013.

Since the Committee’s first consideration of the regulations, the procedural requirements had been complied with and both the Select and Standing Committee on Finance had reported to both houses on the regulations. As all the requirements had been met, the Committee adopted a formal report stating that the scrutiny criteria had been complied with.²⁴⁷

In the Committee’s very threadbare report on the activities undertaken during the 4th Parliament, it indicated no set programme existed for the Committee because of the ‘legal

²⁴² Interim Joint Committee on Scrutiny of Delegated Legislation op cit (n237).

²⁴³ Ibid.

²⁴⁴ Ibid.

²⁴⁵ 24 of 2012.

²⁴⁶ Interim Joint Committee on Scrutiny of Delegated Legislation op cit (n237).

²⁴⁷ Ibid.

and procedural technicalities of the functions of the Committee and that the committee is still “finding its functional feet”.²⁴⁸

The Committee identified key challenges which it had experienced since its inception. This included that it was not always possible for the Committee to meet because of the clashing programmes, so the finalisations of reports depended on the programme of Parliament and the availability of the members.²⁴⁹

In terms of the constitutional mandate of the Committee, it recommended that a ‘Discussion Document’ be drafted to assist portfolio and select committees when they dealt with bills with provisions delegating law making. Lastly the Committee wanted to determine its role in ensuring that delegation legislation is made accessible to the public and consider methods to determine how to make it more accessible to the public.²⁵⁰

In early 2014 Parliament closed in preparation for the national election which was held on the 7th of May 2014.

The fourth Parliament’s (2009 – 2014) legacy report recommended that the fifth Parliament consider whether to establish a permanent mechanism for the scrutiny of delegated legislation or whether to continue with the interim joint committee. In case of the latter, the draft operational guidelines proposed by the current committee would need to be considered.²⁵¹

In its report on the fourth Parliament the Parliamentary Monitoring Group referred to the ‘very late’ establishment of the Interim Joint Committee on Scrutiny of Delegated Legislation.²⁵²

The Report also referred to the difficulty that some joint and ad hoc committees had with scheduling meetings, but remarked that the Interim Committee on Delegate Legislation had

...operated extremely effectively to date through ensuring that all members receive documents well in advance, that chairpersons of committees whose regulations are being discussed are present, and by the proactive stance of both chairpersons, who not only round up members themselves after House sittings, but ensure that the meetings are comprehensive yet succinct with no waste of time.²⁵³

²⁴⁸ Parliament of South Africa ‘Report of the Interim Joint Committee on Scrutiny of Delegated Legislation on its activities undertaken during the 4th Parliament (September 2011–March 2014)’ ATC [40 – 2014] at 2240.

²⁴⁹ Ibid.

²⁵⁰ Ibid.

²⁵¹ Parliament of the Republic of South Africa ‘4th Parliament Legacy Report 2009 – 2014’ at 35.

²⁵² Williams ‘Overview of Fourth Parliament of South Africa 2009-2014’ (2014) at 10.

²⁵³ Ibid.

Herman Groenewald, who was a member of the Interim Committee for the Democratic Alliance, believes that a committee of this nature could play an important role in the legislative process, but added that the Interim Committee had contributed ‘very little’.²⁵⁴

Groenewald remembers that it was very difficult to get all the members present at meetings, because they had already been placed with other committees. The Committee had not been established at the beginning of the fourth Parliament, only much later.²⁵⁵

Vincent Smith was one of the co-chairpersons of the Interim Committee for the African National Congress and according to him the purpose of the Committee was clear, however, the actual detail of the work method and work load was unknown. The Committee ‘learnt as we went along.’²⁵⁶ Smith believes the Committee should be re-established.

4.2.3 The Fifth Parliament

Despite the recommendations in the fourth Parliament’s legacy report, the Interim Joint Committee on Scrutiny of Delegated Legislation was not continued in the fifth Parliament.

Given the unceremonious end to the Committee, after more than a decade of preparation and a mere 19 months of work, it is entirely appropriate and fitting to requote Baxter, as if he did not write these words in 1983, but in 2017:

In South Africa, where the balance between political parties is much more one-sided, and where scrutiny procedures are virtually non-existent, the executive has little if anything to fear from Parliament – hence even the duty to lay copies of delegated legislation has proved too great an effort.²⁵⁷

His words of course refer to our pre-constitutional era, characterised by a lot less openness and transparency, but it is clear that executive dominance of the South African Parliament has left little to no appetite for additional mechanisms to scrutinise the executive’s rule-making.

A further blow to the prospects of reviving the mechanisms came when the Rules Committee of the National Assembly met on the 17th of April 2015 to discuss chapters 12 to 15 of the rules of the National Assembly.²⁵⁸

²⁵⁴ Correspondence with Herman Groenewald, Member of Parliament, on 13 February 2018.

²⁵⁵ Ibid.

²⁵⁶ Correspondence with Vincent Smith, Member of Parliament, on 16 February 2018.

²⁵⁷ Baxter op cit (n71) 215.

²⁵⁸ National Assembly Rules Committee 'Discussion of Chapters 12-15 of the National Assembly Rules' (17 April 2015).

Upon the discussion of section 165 on subcommittees it was indicated that only the Subcommittee on Review of the Rules would remain, the others, including the Subcommittee on Delegated Legislation, would be removed.²⁵⁹

²⁵⁹ Ibid.

5. Scrutiny by the Gauteng Provincial Legislature

5.1. Gauteng Scrutiny of Subordinate Legislation Act

The Gauteng Provincial Legislature is the only legislature in South Africa that has managed to create a permanent mechanism to oversee delegated legislation.

The Gauteng Scrutiny of Subordinate Legislation Act²⁶⁰ (GSSL Act) was approved by the Gauteng Provincial Legislature on the 4th of December 2008 and commenced on the 9th of February 2009.

According to Klaaren and Sibanda, the success of the undertaking to give the legislature the power to scrutinise subordinate legislation can be credited to the provincial leadership's sustained political support and a 'close match between the extent of desired institutional innovation, on the one hand, and the everyday experience of governance on the part of both public servants and elected politicians, on the other'.²⁶¹

In the same year that the Act commenced, the Legislature's Scrutiny of Subordinate Legislation Committee identified certain 'gaps and defects'²⁶² which led to the introduction of the Gauteng Scrutiny of Subordinate Legislation Amendment Bill of 2010.

Before the amendment, the Act mandated the tabling of subordinate legislation after its publication in the Provincial Gazette (when it had already taken effect). After the amendment, the Act mandated that subordinate legislation had to be tabled in draft form.²⁶³

The Committee was of the opinion that tabling regulations for scrutiny post- publication, as was required by the original GSSL Act, 'defeats the object of the Legislature's approval of subordinate legislation as envisaged by section 140(3) of the Constitution of the Republic of South Africa, 1996.'²⁶⁴

The amended Act now also requires that a regulation introduced by a Member of the Executive Council has to be accompanied by an appropriate certificate from a State Law Adviser.²⁶⁵

²⁶⁰ 5 of 2008.

²⁶¹ Klaaren and Sibanda op cit (n59) at 161.

²⁶² Gauteng Provincial Legislature 'Standing Committee on the Scrutiny of Subordinate Legislation – Annual Report for the Financial Year 2013/14'.

²⁶³ 5 of 2008 as amended at section 2(1).

²⁶⁴ Gauteng Scrutiny of Subordinate Legislation Amendment Bill at 3.

²⁶⁵ 5 of 2008 as amended at section 2(2).

The original Act required that subordinate legislation had to be scrutinised according to three criteria namely, whether it:

- (a) is constitutional and, among other things, does not interfere with the jurisdiction of the courts or infringe rights or the rule of law;
- (b) is authorised by the act under which it was made; and
- (c) does not constitute an unfair use of the power under which it was made.²⁶⁶

The Amendment Bill proposed replacing the section quoted above with the following:

- (a) is consistent with the Constitution;
- (b) is authorised by the Act under which it is to be made;
- (c) complies with any condition set out in that Act; and
- (d) does not constitute an unfair use of the power under which it is to be made.²⁶⁷

It appears that the amendment bill was mainly aimed at fixing some clumsy drafting, however the amended Act that was eventually passed contained an additional four criteria to the four listed above and were most likely added during the committee deliberations (the entire section is listed below).

The amendment Bill also introduced a timeframe in which the Committee is required to approve or disapprove the subordinate legislation, and provided for matters connected therewith.²⁶⁸

The passage of the GSSL Act in 2008, and its subsequent amendment in 2011, stands in contrast with the National Assembly which only got as far a motion to set up an interim measure for the scrutiny of delegated legislation in 2011. No legislation has been passed to make this mechanism permanent.

The Act defines subordinate legislation narrowly. It includes regulations, but excludes other secondary legislative instruments such as proclamations, rules, notices and determinations.²⁶⁹

The GSSL Act has several mechanisms to foster executive accountability of which the core mechanism is the establishment of the Committee on the Scrutiny of Subordinate Legislation (CSSL).

The CSSL's manual describes the Committee's role as follows:

Due to the volume and complexity of legislation in a modern society, the Legislature cannot attend to all details. It provides the policies, principles and frameworks in the

²⁶⁶ 5 of 2008 at section 4(1).

²⁶⁷ Gauteng Scrutiny of Subordinate Legislation Amendment Bill, 2010 at section 4.

²⁶⁸ 5 of 2008 as amended at section 5.

²⁶⁹ Ibid at section 1.

principal Act, and delegates the authority to fill in the administrative and technical details by the way of subordinate legislation to the Executive. However, constitutionally the Legislature remains responsible to oversee the activities of the Executive on behalf of the voters. This includes oversight over subordinate legislation made by the Executive.²⁷⁰

The CSSL consist of a chairperson and seven members from the provincial legislature spanning differing political parties and is supported by administrative staff.²⁷¹

The GSSL Act requires that when a provincial functionary wants to make subordinate legislation, the functionary has to first table these regulations in the Provincial Legislature for scrutiny by the CSSL.²⁷²

The functionary responsible for the draft regulations may request the Speaker – after consultation with the chairperson of the CSSL – to exempt the draft regulation from the tabling requirement and as such the regulations will not get referred to the CSSL.²⁷³

The MEC (or a delegate) of the responsible department then presents to the committee, either verbally or in writing.²⁷⁴

The CSSL is tasked with scrutinising both the granting of a power in a statute to make subordinate legislation and the actual subordinate legislation.²⁷⁵

Draft subordinate legislation is scrutinised to determine whether it -

- (a) is consistent with the Constitution;
- (b) is authorised by the Act under which it is to be made;
- (c) complies with any condition set out in the Act; and
- (d) does not constitute an unreasonable exercise of the power under which it is to be made;
- (e) raises or spends revenue not authorised by the Act;
- (f) is vague or ambiguous;
- (g) has retrospective effect without express authority by that Act; or
- (h) does not fulfil formal drafting requirements.²⁷⁶

²⁷⁰ Gauteng Provincial Legislature ‘Manual of the Committee on the Scrutiny of Subordinate Legislation’ (2013) at 8.

²⁷¹ Ibid at 5.

²⁷² 5 of 2008, as amended at section 2(2).

²⁷³ Ibid at section 2(3), (4) and (5).

²⁷⁴ ‘Manual of the Committee on the Scrutiny of Subordinate Legislation’ op cit (n270) at 12.

²⁷⁵ 5 of 2008, as amended at section 3.

²⁷⁶ Ibid at section 4.

The CSSL may refer the draft subordinate legislation to another committee for comment.²⁷⁷ If the CSSL finds that any provision of the draft subordinate legislation does not comply with the standards listed above, the CSSL must request the functionary to remedy the defect and to submit the amended draft to the Committee.²⁷⁸

Within 21 working days from when the first draft legislation was referred to the Committee or from the date on which it received an amended draft, the CSSL must decide whether to approve or disapprove the draft subordinate legislation.²⁷⁹

According to the CSSL's manual, the Committee will not withhold approval only on the basis of formal shortcomings, like in the case of a drafting mistake. The Committee will also not disapprove of the draft regulations without consulting with the relevant Portfolio Committee and without referring the regulations back to the functionary for amendment.²⁸⁰

The CSSL can also invite the chairperson of the relevant portfolio committee to attend a meeting of the CSSL. The Standing Rules allow for two committees to convene a joint meeting to consider a matter that might be of mutual interest – such as regulations and their possible impact.²⁸¹

In the case of 'important or controversial regulations', the CSSL can, with the help of a portfolio committee, schedule a public hearing to provide for public participation in the scrutiny of the draft regulations.²⁸²

Where more than 21 days is needed to make a decision, the chairperson, after consultation with the Speaker, must inform the responsible MEC in writing of the reasons why more time is required and indicate the date by which the CSSL will complete the scrutiny process. It may not be later than 14 days after the expiry of the prescribed 21 days.²⁸³

If the Committee does not take a decision within the prescribed period, the draft subordinate legislation shall be deemed to have been approved.²⁸⁴

If the Committee approves draft subordinate legislation, the chairperson of the Committee must notify the provincial functionary in writing of the decision and ensure that a notice of

²⁷⁷ Ibid at section 4(2).

²⁷⁸ Ibid at section 4(3).

²⁷⁹ Ibid at section 4(5).

²⁸⁰ 'Manual Committee on the Scrutiny of Subordinate Legislation' op sit (n270) 13.

²⁸¹ Gauteng Legislature Standing Rules (2017) at section 155.

²⁸² 'Manual Committee on the Scrutiny of Subordinate Legislation' op sit (n270) 14, also Standing Rule 148(1).

²⁸³ 5 of 2008, as amended at section 4(6).

²⁸⁴ Ibid at section 4(7).

the decision is published in the Legislature's announcements, tablings, and committee reports.²⁸⁵

The CSSL may only disapprove draft subordinate legislation if it finds that it did not comply with the eight criteria set out in section 4(1) of the Act as quoted above.²⁸⁶

If the CSSL, for whatever reason set out in the Act and despite steps to avoid it, decides to disapprove the draft subordinate legislation, the Committee must report the disapproval to the House for consideration and decision.²⁸⁷

In the case of approval of the draft regulations by the CSSL or the House, the functionary may go ahead and make the regulations and the responsible Department must publish the regulations in the Gazette within 14 days.²⁸⁸

The Act also requires that the Office of the Premier compile, maintain, and publish an up-to-date and accessible index of all provincial subordinate legislation.²⁸⁹ The index must be made available regularly by electronic means and be published at least once a year in the Provincial Gazette.²⁹⁰

Klaaren and Sibanda are of the view that the requirement mentioned above promotes the same goals of 'executive accountability and broadened democracy as the tabling and approval provisions.'²⁹¹

The indexing requirement resembles the provisions proposed by the draft Administrative Justice Bill which never made it into Parliament's version of the Bill or the eventual Promotion of Administrative Justice Act.²⁹²

5.2 Standing Rules of the Gauteng Legislature

The Gauteng Legislature's Standing Rules also contain provisions governing subordinate legislation.

It requires that the Committee for the Scrutiny of Subordinate Legislation scrutinise and review all subordinate legislation, but also review every provincial bill granting power to a

²⁸⁵ Ibid at section 4(9).

²⁸⁶ Ibid at section 4(8).

²⁸⁷ Ibid at section 5(2).

²⁸⁸ 'Manual Committee on the Scrutiny of Subordinate Legislation' op cit (n220) at 17.

²⁸⁹ 5 of 2008, as amended at section 6(1).

²⁹⁰ Ibid at section 6(2).

²⁹¹ Klaaren and Sibanda op cit (n59) at 162.

²⁹² 3 of 2000.

provincial executive or any other body to adopt subordinate legislation.²⁹³ The latter requirement is not covered by the GSSL Act.

Every bill that gives the executive or another body the power to adopt subordinate legislation must be referred to the CSSL.²⁹⁴ When reviewing these bills, the CSSL must ensure that the grant of power has ‘clear parameters and is not unduly general or without clear directions to the subordinate law-making authority’ and does not authorise the making of unconstitutional subordinate legislation.²⁹⁵

If the CSSL considers that a grant of power to adopt subordinate legislation does not meet the requirements in rule 235(2), the CSSL must consult with the relevant portfolio committee and make recommendations on how to correct the problem.²⁹⁶ A report of the CSSL on the relevant bill with the relevant portfolio committee report must be tabled in the House.²⁹⁷

It is unclear why the latest Standing Rules contain provisions covered by the GSSL Act, especially since the scrutiny criteria in the Act and in the Rules do not match.

The Standing Rules also state that ‘[a]ll Subordinate Legislation made in terms of a National or Provincial Act must be submitted to the Legislature by the person who made it.’²⁹⁸

This could indicate that the provisions on the scrutiny of subordinate legislation in the Standing Rules date from before the amendments to the GSSL Act requiring the tabling of *draft* subordinate legislation and have just never been revised. This is also reflected by sections 239 and 240 of the standing rules relating to the powers of the committee and the invalidation of subordinate legislation.

The review criteria for subordinate legislation listed in the Standing Rules differ from those listed in the GSSL Act as amended, with some level of overlap. However, various sections of the Committee’s manual stipulates that the CSSL must scrutinise draft regulations in terms of the criteria stipulated in the GSSL Act.²⁹⁹

The Standing Rules require that when the CSSL reviews subordinate legislation, it must ensure that the legislation is constitutional, does not interfere with the jurisdiction of the

²⁹³ GL Standing Rules at section 185(1)(a) and (b).

²⁹⁴ Ibid at section 235(1).

²⁹⁵ Ibid at section 235(2)(a) and (b).

²⁹⁶ Ibid at section 237(1).

²⁹⁷ Ibid at section 237(2).

²⁹⁸ Ibid at section 238(2).

²⁹⁹ 'Manual Committee on the Scrutiny of Subordinate Legislation' op cit (n220) at 9, 13, 14.

courts or infringe rights or the rule of law; and is authorised by the act under which it was made.³⁰⁰

In fulfilling its function as described above, the CSSL must consider that the subordinate legislation:

- a) is authorised by the terms of the enabling Act and complies with any condition set out in the Act;
- b) is in conformity with the Bill of Rights; and does not:
 - (i) have a retrospective effect without express authority having been provided for in the enabling legislation;
 - (ii) impose a tax, levy or duty or requires spending by the Province without express authority having been provided for this in the enabling Act;
 - (iii) impose a fine, imprisonment or other penalty without express authority having been provided for this in the enabling Act;
 - (iv) tend directly or indirectly to exclude the jurisdiction of the courts;
 - (v) appear for any reason to infringe the rule of law;
 - (vi) make the rights of the person unduly dependent on administrative discretion or is not consistent with the rules of natural justice;
 - (vii) contain matter more appropriate for enactment by the Legislature; and
 - (viii) is not defective in it's [sic] drafting or requires explanation as to it's [sic] form or purport.³⁰¹

5.3 The Work of the Committee

The table below indicates the number of bills and regulations considered by the CSSL in each financial year since its work began.

Financial Year	Number of Bills	Number of Instruments
2011/2012	Not available	Not available
2012/2013	1	8
2013/2014	2	2
2014/2015	1	5
2015/2016	0	4
2016/2017	1	7

³⁰⁰ GL Standing Rules at section 238(3).

³⁰¹ Ibid at section 238(5).

The CSSL produces quarterly reports and annual reports setting out the Committee's activities in that year; the overall socio-economic impact of the legislation scrutinised; the overall analysis of legal compliance of regulations; the overall performance of the Committee; the way forward; and recommendations.

The Committee's reports for the financial years 2012/2013, 2013/14, 2014/2015, 2015/16 and 2016/2017 indicate that the Committee 'observed and commended a general compliance by Departments with procedures and processes of the committee.' In all those years the Committee also found that the regulations introduced in the specific year under review 'were essentially in line with the requirements' as set out in the Constitution, the GSSL Act and the Gauteng Provincial Standing Rules.³⁰²

In the 2012/13 financial year the CSSL held eight Committee meetings, adopted eleven Committee Reports, and drew attention to the matters.

The Committee could not scrutinise one set of regulations, the Gauteng Petition Regulations, 2013, after raising concerns about the drafting process and how the regulations interrelated or connected with the Gauteng Petitions Act. The Committee advised the Proceedings Unit to follow the GSSL Act, especially with regards to following due process in terms of public engagement for comments.³⁰³ It was proposed that the Gauteng Petitions Regulations be redrafted.

In the same year, the Department of Health, through the MEC, tabled three sets of regulations which were exempted from normal scrutiny in the interest of 'service delivery'. The Committee 'accepted the mitigating circumstances'.³⁰⁴

The Committee further identified certain problem areas in regulations which would require departments' attention during the implementation phase and these observations were referred to the relevant portfolio committees 'for further monitoring'.³⁰⁵

In 2013/14 the CSSL held seven Committee meetings and two joint committee meetings with the Portfolio on Economic Development, adopted 14 committee reports and had a joint public hearing with the Portfolio Committee on Economic Development on the draft Gauteng Liquor Bill, 2013.

³⁰² Annual Report of the CSSL in 2012/2013, 2013/14, 2014/2015 and 2015/16.

³⁰³ Annual Report of the CSSL 2012/13 at 6.

³⁰⁴ Ibid at 8.

³⁰⁵ Ibid at 10.

In 2014/15 the Committee held eight Committee meetings, one joint committee meeting with the Portfolio Committee on Sport, Recreation and Arts and Culture and adopted 14 committee reports.

In 2015/16 the Committee held five committee meetings and adopted 14 committee reports.

In 2016/17 the Committee held nine committee meetings and one joint meeting with the Committee on Sport, Recreation, Arts and Culture, one strategic planning review session and adopted 14 committee reports.

When comparing each of the Committee's annual reports, it appears that the Committee's stated findings and recommendations are quite repetitive. This could indicate that certain issues will always plague the work of a Committee of this nature or that the Committee is often let down by external factors or that the Committee is failing to address certain persistent issues.

In every report for the financial years 2012/2013, 2013/14, 2014/2015 and 2015/16 the CSSL observed that to further strengthen the Committee's processes, it would need to develop procedural guidelines on the 'internal process of engaging with Regulations from tabling to approval.'³⁰⁶

Similarly, when the CSSL looks to the future or makes recommendations, many issues consistently reappear, namely:

- Increased capacity building for members and staff (2012/13, 2013/14, 2014/15);
- Popularising the work of the Committee and creating focused awareness campaigns on the work of the CSSL (2012/2013, 2013/2014, 2014/15, 2015/16, 2016/17);
- Improving the integrated working relationship with other portfolio committees (2012/2013, 2013/14, 2014/15, 2015/16, 2016/2017);
- That departments must table draft regulations to the legislature timeously in order to allow sufficient time for processing (2013/14, 2014/15, 2015/16, 2016/17); and
- Public participation on draft regulations require further strengthening by the departments (2012/13, 2013/14, 2014/15, 2015/16, 2016/17).

The Committee's annual reports also include a section on the socio-economic impact of regulations on the people of Gauteng.

³⁰⁶ Annual Report of the CSSL in 2012/2013, 2013/14, 2014/2015 and 2015/16.

For instance in both 2012/13 and 2013/14 the Committee recommended that public participation on draft regulations required further strengthening because this would ‘assist in curbing the negative socio-economic impact on the people of Gauteng.’³⁰⁷ In both 2013/14 and 2014/2015 the Committee found that the ‘provision that grants power to MEC to make regulations within the Bills scrutinised by the Committee did not have any direct or indirect negative socio-economic impact on the citizens of Gauteng.’³⁰⁸

The Committee’s decision to comment on the socio-economic impact of the subordinate regulations is interesting, considering that it is not listed as one of the scrutiny criteria in the GSSL Act.

However, the Standing Rules do require that every report of a committee must ‘[e]xplain the implications of the matter under consideration for promoting the rights in the Bill of Rights and particularly, gender, equity, and socioeconomic rights.’³⁰⁹

For the sake of clarity the Legislature should look towards amending its rules so that there is no confusion with regards to whether the Standing Rules or the GSSL Act applies.

³⁰⁷ Annual Report of the CSSL in 2012/13 and 2013/14.

³⁰⁸ Annual Report of the CSSL in 2013/14 and 2014/2015.

³⁰⁹ GL Standing Rules at section 162.

6. Scrutiny of Delegated Legislation in Foreign Legislatures

In order to document the South African Parliament's progress in overseeing delegated legislation, it is helpful to investigate the mechanisms designed and implemented by other legislatures around the world.

This chapter will discuss how the United Kingdom, Australia, Canada, Kenya, Zambia, Tanzania, and Ghana – countries with a Westminster style government - have implemented oversight mechanisms and will briefly examine the situation in Germany.

6.1 United Kingdom

The British Parliament – which has been model for many other national legislatures - consists of two houses, the House of Lords (the upper house) and the House of Commons (the lower house). The House of Lords is comprised of 800 members appointed by the Queen on the advice of the prime minister, and it is subordinate to the House of Commons which is comprised of an elected 650 members.

Delegated legislation in the United Kingdom is governed by the Statutory Instruments Act of 1946.

An act granting a functionary the power to make a statutory instrument may require that the instrument be made subject to a negative resolution procedure. This means that the instrument will become law unless there is an objection by one of the two houses of Parliament within 40 days (through a motion calling for annulment).³¹⁰ Instruments subject to negative resolution 'are few are far between'.³¹¹

An act may also make an instrument subject the affirmative resolution procedure. The instrument is then tabled in draft form, but cannot become law unless the draft is approved by both houses (or in the case of instruments dealing with financial statutory instruments, only the House of Commons).³¹²

An act can also require that an instrument must merely be tabled in Parliament without undergoing parliamentary scrutiny or it can stipulate that tabling is not necessary at all.³¹³

³¹⁰ Statutory Instruments Act of 1946 at section 5.

³¹¹ House of Commons Information Office 'Statutory Instruments' Fact Sheet L7 Legislative Series (2008) at 4.

³¹² Statutory Instruments Act of 1946 at section 6.

³¹³ Ibid at section 4.

The committees created by each house of Parliament to scrutinise statutory instruments is discussed below.

Joint Committee on Statutory Instruments (JCSI)

The Committee is comprised of seven members of the House of Commons, seven members of the House of Lords and chaired by a member of the House of Commons. The Committee considers whether the relevant functionary's powers are being carried out in accordance with the enabling act and does not consider the merit or underlying policy of the instrument.³¹⁴

The JCSI can take oral and written evidence, but only from the government department responsible for the statutory instrument.³¹⁵

The JCSI is tasked with considering statutory instruments made in exercise of powers granted by an act of Parliament (there are some exclusions) to determine whether the special attention of the House should be drawn to the instrument on any of the following grounds:

- (i) that it imposes a charge on the public revenues or contains provisions requiring payments to be made to the Exchequer or any government department or to any local or public authority in consideration of any licence or consent or of any services to be rendered, or prescribes the amount of any such charge or payment;
- (ii) that it is made in pursuance of any enactment containing specific provisions excluding it from challenge in the courts, either at all times or after the expiration of a specific period;
- (iii) that it purports to have retrospective effect where the parent statute confers no express authority so to provide;
- (iv) that there appears to have been unjustifiable delay in the publication or in the laying of it before Parliament;
- (v) that there appears to have been unjustifiable delay in sending a notification under the proviso to section 4(1) of the Statutory Instruments Act 1946, where an instrument has come into operation before it has been laid before Parliament;
- (vi) that there appears to be a doubt whether it is *intra vires* or that it appears to make some unusual or unexpected use of the powers conferred by the statute under which it is made;
- (vii) that for any special reason its form or purport calls for elucidation;
- (viii) that its drafting appears to be defective;

or on any other ground which does not impinge on its merits or on the policy behind it; and to report its decision with the reasons thereof in any particular case.³¹⁶

³¹⁴ House of Commons Standing Order No. 151(1)(B).

³¹⁵ *Ibid* at 151(7).

³¹⁶ House of Commons Standing Order No. 151(1)(B) and House of Lords Standing Order No. 73.

The Committee (or any of its sub-committees) has the power to require any applicable government department to submit a memorandum explaining any instruments or to depute a representative to appear before it to explain the instrument.³¹⁷

House of Commons - Select Committee on Statutory Instruments

This Committee considers instruments made in exercise of an Act which are only subject to House of Commons scrutiny.

House of Commons – Delegated Legislation Committees

Whereas the Joint Committee on Statutory Instruments and the Commons Select Committee on Statutory Instruments scrutinises technical aspects of delegated legislation, these committees discuss the merits of a particular instrument.³¹⁸

Debates on statutory instruments are conducted in meetings of several ad hoc Delegated Legislation Committees comprised of 16 to 18 members each.³¹⁹

House of Lords: Secondary Legislation Scrutiny Committee (SLSC)

This Committee was established in 2003 as the Merits of Statutory Instruments Committee, but was renamed in 2012 to reflect the widening of its responsibilities.

The Committee is tasked with scrutinising (with certain exceptions) every instrument (whether statutory instrument or not) or draft of an instrument and every proposal which is in the form of a draft of such an instrument and which has been laid before each House of Parliament under an act of Parliament, with a view to determine whether or not the special attention of the House should be drawn to it³²⁰ on any of the following grounds:

- (a) that it is politically or legally important or gives rise to issues of public policy likely to be of interest to the House;
- (b) that it may be inappropriate in view of changed circumstances since the enactment of the parent Act;
- (c) that it may inappropriately implement European Union legislation;
- (d) that it may imperfectly achieve its policy objectives;
- (e) that the explanatory material laid in support provides insufficient information to gain a clear understanding about the instrument's policy objective and intended implementation;
- (f) that there appear to be inadequacies in the consultation process which relates to the instrument.³²¹

³¹⁷ House of Commons Standing Order No. 151(6).

³¹⁸ UK Parliament 'About Parliament'

³¹⁹ Ibid.

³²⁰ House of Lords 'Secondary Legislation Scrutiny Committee Terms of Reference' section 1(a) and (b).

³²¹ House of Lords 'Secondary Legislation Scrutiny Committee Terms of Reference' at section 2.

The Committee must also consider general matters that relate to the effective scrutiny of secondary legislation and which arise from the performance of its functions, except matters within the order of reference of the Joint Committee on Statutory Instruments.³²²

House of Lords: Select Committee on Delegated Powers and Regulatory Reform

The role of this Committee is to consider whether the provisions of any bill inappropriately delegate legislative power or whether it is subject to an inappropriate level of parliamentary scrutiny.³²³

Strathclyde Review

In October 2015 the UK Government commissioned Lord Strathclyde to lead a review into secondary legislation and the primacy of the House of Commons. This followed the defeat of the Conservative government's draft Tax Credits (Income Thresholds and Determination of Rates) (Amendment) Regulations of 2015 in the House of Lords.

The mandate of the Strathclyde Review was to consider 'how more certainty and clarity could be brought to the passage [of statutory instruments] through Parliament'.

Lord Strathclyde published his report in December 2015 and the report suggested three options which might 'provide the House of Commons with a decisive role on statutory instruments'.³²⁴

The first suggestion was to remove the House of Lords from statutory instrument procedure altogether, but said the report 'it would be controversial and would weaken parliamentary scrutiny of delegated legislation and could make the passage of some primary legislation more difficult.'

The second suggestion would retain the present role of the House of Lords with regards to statutory instruments, but would require that the restrictions on the exercise of its powers be clarified in a resolution.

The third suggestion was to create a new procedure set out in statute, whereby the Lords would invite the Commons to 'think again when a disagreement exists and insist on its

³²² Ibid at section 5.

³²³ House of Lords 'House of Lords Delegated Powers and Regulatory Reform Committee page'.

³²⁴ UK Government 'Strathclyde Review: Secondary Legislation and primacy of the House of Commons' (2015).

primacy.’ The Review preferred the third option which would bring it more in line with how the House of Commons currently interacts with primary legislation.

The Report stated that the convention that the House of Lords reject statutory instruments ‘is longstanding but has been interpreted in different ways, has not been understood by all, and has never been accepted by some members of the House.’ This suggested that the convention ‘is now so flexible that it is barely a convention at all.’³²⁵

The House of Lords responded in a special report by concluded that ‘further work should be carried out by the two Houses working together, most appropriately as a Joint Committee, to consider the scrutiny of delegated legislation by Parliament as a whole.’³²⁶

Although South Africa does not have a structure that is comparable to the House of Lords, the Strathclyde Review serves to illustrate the tension that can arise between the executive and the legislature over the passage of delegated legislation. It is perhaps better for scrutiny committees to avoid confrontation and instead seek compromise.

6.2 Australia

The Australian Parliament – consisting of the House Representatives and the Senate – is frequently studied as a model for parliamentary oversight of delegated legislation.

Australia’s oversight of delegated legislation dates back to the 1904 Interpretation Act, which required the tabling of all regulations before the House of Representatives and the Senate. Any member of either House could move for disallowance. If the motion was passed in either House, the regulation would be repealed.

Currently, the Australian Parliament’s oversight of delegated legislation is governed by the Legislation Act of 2003³²⁷ (a 2016 version of a renamed and expanded Instruments Act of 2003).

For the purposes of this study it is worth highlighting four aspects of this Act.

Firstly, the Act requires that a rule-maker for a legislative instrument or a notifiable instrument must lodge the instrument for registration as a notifiable instrument as soon as

³²⁵ UK Government ‘Strathclyde Review: Secondary Legislation and primacy of the House of Commons’ (2015) at 15.

³²⁶ House of Lords ‘Special Report: Responses to the Strathclyde’ (Review Delegated Powers and Regulatory Reform Committee, 25th Report of Session 2015–16) (2016) at 28.

³²⁷ 139 of 2003.

practicable after it is made.³²⁸ Unless an instrument is registered as a legislative instrument, it is not enforceable by or against any person.³²⁹

Secondly, the Act encourages high standards in the drafting of legislative and notifiable instruments by requiring the First Parliamentary Counsel to ‘cause steps to be taken to promote the legal effectiveness, clarity, and intelligibility to anticipated users, of legislative instruments and notifiable instruments.’³³⁰ This may include, but is not limited to, undertaking or supervising the drafting of these instruments, scrutinising preliminary drafts of these instruments, providing advice with regards to drafting, providing training in drafting, seconding staff to departments or other agencies, or providing drafting precedents.³³¹

Thirdly, within six days after the registration of the instrument, the Office of Parliamentary Counsel³³² must arrange for a copy of each registered legislative instrument to be laid before each House of Parliament.³³³

If the above is not done, the legislative instrument ceases to have effect immediately after the last of the six day time period.³³⁴

Either House may then disallow the legislation instrument or a provision within a certain time after the instrument’s tabling.³³⁵

Finally, a legislative instrument is automatically repealed after the tenth anniversary of its registration, with provisions for certain exceptions.³³⁶ This practice is also commonly known as ‘sunsetting’.

After being tabled in Parliament, the instruments are referred to the Senate’s Standing Committee on Regulations and Ordinances for scrutiny.³³⁷

³²⁸ Legislation Act of 2003 at section 15G(1) and (3).

³²⁹ Ibid at section 15K(1).

³³⁰ Ibid at section 16(1).

³³¹ Ibid at section 16(2).

³³² The main functions of this office is the drafting of bills and amendment bills for introduction into either House of Parliament.

³³³ Section 38(1) of the Legislation Act of 2003

³³⁴ Ibid at section 38(3).

³³⁵ Ibid at section 42.

³³⁶ Ibid at section 50.

³³⁷ Australian Senate, Standing Order at section 23(2).

The Committee consists of six members, three members of the government party in the Senate and three who are not members of the government party.³³⁸ The chair of the Committee is required to be one of the members belonging to the government party.³³⁹

Delegated legislation is scrutinised according to the following criteria:

- that it is in accordance with the statute;
- that it does not trespass unduly on personal rights and liberties;
- that it does not unduly make the rights and liberties of citizens dependent upon administrative decisions which are not subject to review of their merits by a judicial or other independent tribunal; and
- that it does not contain matter more appropriate for parliamentary enactment.³⁴⁰

After scrutiny, if the Committee is concerned about an instrument it is practice to require the responsible minister to explain or provide more information or to seek an undertaking that the Committee's concern will be addressed.³⁴¹

The Committee meets in each sitting week of the Senate and seeks to conclude any matters within the period that the instrument may be disallowed.³⁴²

The outcome of the Committee's meetings are published in the Delegated Legislation Monitor and its Disallowance Alert webpage lists all instruments subject to a notice of motion for disallowance and the progress and outcome of any such notice.³⁴³

Another Senate committee, the Standing Committee for the Scrutiny of Bills, is tasked with reporting whether bills or acts 'inappropriately delegate legislative powers' (amongst other things).³⁴⁴

6.3 Canada

The Canadian Parliament has two houses, an upper house, the Senate (105 members, appointed), and a lower house, the House of Commons (338 members, elected).

³³⁸ Ibid at section 23(4)(a).

³³⁹ Ibid at section 23(6).

³⁴⁰ Ibid at section 23(3).

³⁴¹ Parliament of Australia 'Role of the Committee'.

³⁴² Ibid.

³⁴³ Ibid.

³⁴⁴ Australian Senate op cit (n355) at section 24(1)(a)(iv).

The Canadian Parliament's Standing Joint Committee for the Scrutiny of Regulations has existed since the early 1970s and its mandate is to review and scrutinise statutory instruments.³⁴⁵

The Statutory Instruments Act³⁴⁶ provides that every statutory instrument issued, made or established after the 31st of December 1971, can be referred to Parliament for reviewing and scrutiny.³⁴⁷ The Committee is also empowered by the Standing Orders of the House of Commons and the Rules of the Senate.

The Chair of the Committee is a member of the governing party, the first vice-chair a member of the official opposition, and the second vice-chair a member of the opposition party other than the official opposition party.³⁴⁸

Since 1979, at the beginning of each session, the House and the Senate has renewed a permanent reference authorising the Committee:

to study the means by which Parliament can better oversee the government regulatory process and in particular to enquire into and report upon:

1. the appropriate principles and practices to be observed
 - (a) in the drafting of powers enabling delegates of Parliament to make subordinate laws;
 - (b) in the enactment of statutory instruments;
 - (c) in the use of executive regulation — including delegated powers and subordinate laws;

and the manner in which Parliamentary control should be effected in respect of the same

2. the role, functions and powers of the Standing Joint Committee for the Scrutiny of Regulations.³⁴⁹

In addition, at the beginning of each parliamentary session, both houses also approve the Committee's proposed review and scrutiny criteria. The following is from the 2016 report:

Whether any regulation or other statutory instrument within its terms of reference, in the judgment of the committee:

- 1) is not authorised by the terms of the enabling legislation or has not complied with any condition set forth in the legislation;
- 2) is not in conformity with the Canadian Charter of Rights and Freedoms or the Canadian Bill of Rights;

³⁴⁵ Standing Orders of the House of Commons (2016) at 108(4)(b).

³⁴⁶ Statutory Instruments Act (R.S.C., 1985, c. S-22) at section 19.

³⁴⁷ Ibid.

³⁴⁸ Standing Orders of the House of Commons, 106(2) (Consolidated version as of 29 November 2016).

³⁴⁹ Parliament of Canada 'Report 1 - Review of Statutory Instruments' (2016).

- 3) purports to have retroactive effect without express authority having been provided for in the enabling legislation;
- 4) imposes a charge on the public revenues or requires payment to be made to the Crown or to any other authority, or prescribes the amount of any such charge or payment, without express authority having been provided for in the enabling legislation;
- 5) imposes a fine, imprisonment or other penalty without express authority having been provided for in the enabling legislation;
- 6) tends directly or indirectly to exclude the jurisdiction of the courts without express authority having been provided for in the enabling legislation;
- 7) has not complied with the Statutory Instruments Act with respect to transmission, registration or publication;
- 8) appears for any reason to infringe the rule of law;
- 9) trespasses unduly on rights and liberties;
- 10) makes the rights and liberties of the person unduly dependent on administrative discretion or is not consistent with the rules of natural justice;
- 11) makes some unusual or unexpected use of the powers conferred by the enabling legislation;
- 12) amounts to the exercise of a substantive legislative power properly the subject of direct parliamentary enactment; or
- 13) is defective in its drafting or for any other reason requires elucidation as to its form or purport.³⁵⁰

Regulations are initially reviewed by the Committee's legal advisors and non-conforming instruments are brought to the attention of the Committee.³⁵¹

If the Committee finds problem with the regulations, it will first attempt to resolve it with the ministry or agency responsible for the regulation. Only when this does not produce a satisfactory solution, will the Committee recommend disallowance in its report.³⁵² Both the Senate and the House of Commons must agree to a disallowance resolution.³⁵³

The Joint Committee can introduce a report to the Senate and the House of Commons containing a resolution that a regulation or part of a regulation be revoked (an advanced notice of 30 days to the regulation-making authority is required).³⁵⁴

The Committee's report is deemed adopted by the Senate or the House of Commons after 15 sitting days, unless a minister files a motion that the resolution should not be adopted, which means the House will debate the resolution.³⁵⁵

³⁵⁰ Ibid.

³⁵¹ Parliament of Canada 'Standing Joint Committee for the Scrutiny of Regulations' (2015).

³⁵² Ibid.

³⁵³ Kirkby 'The Standing Joint Committee for the Scrutiny of Regulations' (2014).

³⁵⁴ Statutory Instruments Act (R.S.C., 1985, c. S-22), section 19.1(1).

³⁵⁵ Ibid at section 19.1(5) – (7).

When both houses adopt or are deemed to have adopted the resolution that all or a portion of a regulation be revoked, the regulation-making authority is required to revoke the regulation (or part thereof) within 30 days or on a later date stipulated in the resolution.³⁵⁶

6.4 Kenya

The Parliament of Kenya consists of the Senate (upper house) and the National Assembly (lower house).

Kenya's Statutory Instruments Act³⁵⁷ requires that a copy of a statutory instrument shall, seven sitting days after its publication, be transmitted to the clerk for tabling in Parliament.³⁵⁸

Every statutory instrument issued, made, or established after the Act commenced, stands referred to the parliamentary committee established to review and scrutinise statutory instruments. The committee may also scrutinise statutory instruments which were published before the Act commenced.³⁵⁹

The Act further requires that the Committee, when scrutinising a statutory instrument or published bill, must be guided by 'the principles of good governance, rule of law' and the Committee must consider whether the statutory instrument—

- a) is in accord with the provisions of the Constitution, the Act pursuant to which it is made or other written law;
- b) infringes on fundamental rights and freedoms of the public;
- c) contains a matter which in the opinion of the Committee should more properly be dealt with in an Act of Parliament;
- d) contains imposition of taxation;
- e) directly or indirectly bars the jurisdiction of the Courts;
- f) gives retrospective effect to any of the provisions in respect of which the Constitution or the Act does not expressly give any such power;
- g) involves expenditure from the Consolidated Fund or other public revenues;
- h) is defective in its drafting or for any reason the form or purport of the statutory instrument calls for any elucidation;
- i) appears to make some unusual or unexpected use of the powers conferred by the Constitution or the Act pursuant to which it is made;
- j) appears to have had unjustifiable delay in its publication or laying before Parliament;
- k) makes rights liberties or obligations unduly dependent upon non-reviewable decisions;
- l) makes rights liberties or obligations unduly dependent insufficiently defined administrative powers;
- m) inappropriately delegates legislative powers;

³⁵⁶ Ibid at section 19.1(9).

³⁵⁷ 23 of 2013.

³⁵⁸ Ibid at section 11.

³⁵⁹ Ibid at section 12.

- n) imposes a fine, imprisonment or other penalty without express authority having been provided for in the enabling legislation;
- o) appears for any reason to infringe on the rule of law;
- p) inadequately subjects the exercise of legislative power to parliamentary scrutiny; and
- q) accords to any other reason that the Committee considers fit to examine.³⁶⁰

The Committee may exempt certain instruments or a class of statutory instruments from scrutiny, if the Committee 'is satisfied that the scrutiny is not reasonably practical due to the number of regulations in that class.'³⁶¹

If the Committee deems that the statutory instrument does not meet the relevant considerations, the Committee should report to Parliament a resolution that the statutory instrument be revoked.³⁶² The report must identify which section of the statutory instrument warranted the report, indicate in what matter it offends the scrutiny criteria, and include its recommendations.³⁶³

If the Committee does not make the report within 28 days after the date of the referral (or by whatever period the House may, by resolution, approve) the instrument shall be deemed to have met the considerations.³⁶⁴

Before tabling such a report and where practical, the Committee must confer with the regulation-making authority about the statutory instrument 'for their information and modification where necessary'.³⁶⁵

The statutory instrument shall be deemed to be annulled if Parliament passes a resolution to that effect following the tabling of the report on it.³⁶⁶

The sections of the Statutory Instruments Act discussed above are largely mirrored in section 210 and 211 of the Standing Orders of the Kenyan Parliament³⁶⁷ and sections 214 and 215 of the Standing Orders of the Kenyan Senate.³⁶⁸

³⁶⁰ Ibid at section 13.

³⁶¹ Ibid at section 14.

³⁶² Ibid at section 15.

³⁶³ Ibid at section 17.

³⁶⁴ Ibid at section 15(2).

³⁶⁵ Ibid at section 16.

³⁶⁶ Ibid at section 18.

³⁶⁷ Parliament of Kenya Standing Orders (2013).

³⁶⁸ Senate of Kenya Standing Orders (2013).

6.5 Zambia

Zambia has a unicameral legislative body, the National Assembly.

The Zambian Constitution states that despite it vesting the legislative authority of the Republic in Parliament,³⁶⁹ this ‘shall not prevent Parliament from conferring on a person or authority power to make statutory instruments’.³⁷⁰

It also requires that a statutory instrument must be published in the Gazette no later than 28 days after it is made.³⁷¹

The Interpretation and General Provisions Act (Cap 2) of the Laws of Zambia requires that all rules, regulations, and by-laws be tabled in the National Assembly as soon as possible after they are made.³⁷²

If the National Assembly, within 21 days after it was tabled, decides to pass a resolution to annul the instrument, the instrument is void, but it does not prejudice the validity of action taken thereunder.

The National Assembly’s Standing Orders establishes the Committee on Delegated Legislation.³⁷³ When members are appointed to the Committee, preference is given to those who have legal background and experience.³⁷⁴

The Committee scrutinises subsidiary legislation after it has taken effect and checks that instruments must:

- (a) be in accordance with the Constitution or statute under which they are made;
- (b) not trespass unduly on personal rights and liberties;
- (c) not make the rights and liberties of citizens depend upon administrative decisions; and
- (d) be concerned only with administrative detail and not amount to substantive legislation which is a matter for parliamentary enactment.³⁷⁵

If considered necessary by the Committee, it may invite stakeholders which the statutory instrument will likely impact to interact with the Committee.³⁷⁶

³⁶⁹ Constitution of the Republic of Zambia at section 62 and 63.

³⁷⁰ Ibid at section 67(1).

³⁷¹ Ibid at section 67(2).

³⁷² Interpretation and General Provisions Act (Cap 2) at section 22(1).

³⁷³ Zambia Standing Orders of the National Assembly (2016) at section 154.

³⁷⁴ Ibid at section 154(2).

³⁷⁵ Ibid at section 154(3).

³⁷⁶ Republic of Kenya Parliament ‘The Sessional Committee on Delegated Legislation, A Report on the Study Visit to Zambia on 4th to 10th May, 2014’ (2014).

If the Committee is of the opinion that the whole or part of a statutory instrument should be revoked or that it should be amended in any other way, it reports its opinion and the grounds thereof to the House. The consideration of the report is through a motion in the National Assembly, which, if carried, becomes a decision of the House.

Following the decision, the executive is required to take appropriate action on the recommendations and table an Action Taken Report on the recommendations within sixty days from the date of the adoption of the House's report.³⁷⁷

6.6 Tanzania

Similar to the Zambian Constitution, the United Republic of Tanzania's Constitution contains a provision which specifically states that the legislative powers provided to parliament by the constitution does not preclude it from enacting laws making provisions which confer on any person or department of government the power to make regulations having the force of law.³⁷⁸

Section 35 to 43 of Tanzania's Interpretation of the Laws Act³⁷⁹ deals extensively with how subsidiary legislation may be made and matters incidental thereto - that is should not be inconsistent with the written law under which it is made, that it should be published in the Gazette and so forth.³⁸⁰

Section 38(1) also requires that all regulations must be tabled in the National Assembly within six sitting days of the next sitting following the publication of the regulations in the Gazette.³⁸¹

The National Assembly can pass – notwithstanding any provision in any other act to the contrary – a resolution disallowing any regulations within 14 sitting days after the regulations have been tabled. If the regulations are not tabled in the National Assembly in accordance with section 38(1), the regulations will cease to have effect. In 2007 the Tanzanian Parliament established by standing order, the Subsidiary Legislation Committee to scrutinise delegated legislation.³⁸²

³⁷⁷ Republic of Zambia 'Report of the Committee on Delegated Legislation for the First Session of the Twelfth National Assembly' (2016).

³⁷⁸ Constitution of the United Republic of Tanzania [CAP 2 R.E. 2002] at 97(5).

³⁷⁹ Cap. 1, R.E. 2002.

³⁸⁰ Interpretation of the Laws Act [CAP 1 R. E.2002].

³⁸¹ Ibid at section 38(1).

³⁸² Parliamentary Standing Orders No. 115 sub-order 1 and annexure 8 (1) (d).

6.7 Ghana

Ghana's Parliament created the Committee on Subsidiary Legislation.³⁸³ The Committee consists of no more than 25 members and is chaired by a member of the minority party (the only committee in parliament with this arrangement).³⁸⁴

The Standing Orders require that any orders, rules, or regulations made in pursuance of the Constitution or the legislative functions delegated by Parliament to a subordinate authority, shall be tabled in Parliament and referred to the Committee by the Speaker.³⁸⁵

After the subordinate instrument is referred to the committee, it is tasked with considering:

- a) whether it is in accordance with the provisions of the Constitution or that Act pursuant to which it is made;
- b) whether it contains any matter which in the opinion of the Committee should more properly be dealt with in an Act of Parliament;
- c) whether it contains imposition of any tax;
- d) whether it directly or indirectly bars the jurisdiction of the courts;
- e) whether it gives retrospective effect to any of the provisions in respect of which the Constitution or the Act does not expressly give any such power;
- f) whether it involves expenditure from the Consolidated Fund or public revenues;
- g) whether it appears to make some unusual or unexpected use of the powers conferred by the Constitution or that Act pursuant to which it is made;
- h) whether there appears to have been unjustifiable delay in its publication or in laying it before Parliament;
- i) whether for any reason its form or purport calls for any elucidation.³⁸⁶

If the Committee is of the opinion that an instrument should be annulled, it will report so and the grounds for the opinion to the House. It may also report to the House any other matter relating to the instrument.³⁸⁷

The executive also provides the Committee with evidence of stakeholder consultation, so that the Committee can satisfy itself that there was 'robust stakeholder engagement' before the proposed regulations were made.³⁸⁸

³⁸³ Parliament of Ghana, Standing Orders at section 163.

³⁸⁴ *Ibid* at section 163.

³⁸⁵ *Ibid* at section 163.

³⁸⁶ *Ibid* at section 163.

³⁸⁷ *Ibid* at section 164(1) & (2).

³⁸⁸ Gauteng Committee on the Scrutiny of Subordinate Legislation 'Draft Report on the Committee on the Scrutiny of Subordinate Legislation Study Tour to Ghana, Accra and Western Australia, Perth' (2016).

The executive, if it decides to withdraw a regulation after it had been tabled, can do so on the floor of the House with the permission of the Speaker.³⁸⁹

6.8 Germany

The Federal Republic of Germany has two houses of parliament, the *Bundesrat* (upper house) and the *Bundestag* (lower house).

The *Bundesrat*'s 69 representatives are nominated by the governments of the 16 *Länder* (states), while the *Bundestag*, the national legislative assembly, has 662 elected members.

Article 80 of the *Grundgesetz* (Basic Law), Germany's Constitution, deals with the issuance of statutory instruments. It states that a law may authorise the federal government, a federal minister or the land governments to issue statutory instruments. The law must specify the content, purpose and scope of the authority conferred and the statutory instrument shall contain a statement of its legal basis.³⁹⁰

Unless a federal law provides otherwise, the consent of the *Bundesrat* shall be required for statutory instruments:

...issued by the Federal Government or a Federal Minister regarding fees or basic principles for the use of postal and telecommunication facilities, basic principles for levying of charges for the use of facilities of federal railways, or the construction and operation of railways, as well as for statutory instruments issued pursuant to federal laws that require the consent of the *Bundesrat* or that are executed by the *Länder* on federal commission or in their own right.³⁹¹

6.9 Comparison

There are several observations to be made about the practice of scrutinising delegated legislation from the examples discussed above.

Where some countries require that instruments have to be tabled after taking effect, others require instruments to be laid in draft form. In the UK it depends on the parent act.

³⁸⁹ Ibid.

³⁹⁰ *Grundgesetz* at section 80(1).

³⁹¹ Ibid at ssection 80(2).

Instruments are either subject to an affirmative resolution procedure, a negative resolution procedure, or none at all. The procedure is determined by a general statute on delegated legislation or in each enabling act.

In some countries all instruments issued after a certain date can be scrutinised at any time, not only those tabled in the legislature at a particular point in time.

With regards to the criteria against which delegated legislation is scrutinised, the majority of countries examine the technical aspects of delegated legislation. In the UK there are separate committees, one to examine the technical aspects of delegated legislation and one to debate the merit or underlying policy of the delegated legislation.

The composition of scrutiny committees indicates that this process is largely intended to be of a bi-partisan nature. This is achieved by splitting the seats of the committee between the governing party and opposition parties, as well as awarding the chairmanship or vice-chairmanship to someone from an opposition party.

In many cases before an instrument can be disallowed, legislatures require that there be some kind of engagement with the functionary who made the instrument, usually with a view to try and resolve the conflict or concern. This is surely intended to reduce confrontation between the legislature and the executive.

7. Accessibility of Delegated Legislation

As discussed in chapter two, section 101(3) of the Constitution requires that subordinate legislation must be accessible to the public.³⁹² To what extent we should interpret ‘accessible to the public’ as required in this section is not clear. The ordinary meaning of the word accessible is ‘able to be reached or easily got’.³⁹³

The South Africa Constitution Court has pronounced that the ‘need for accessibility, precision, and general application flow from the concept of the rule of law. A person should be able to know of the law, and be able to conform his or her conduct to the law’.³⁹⁴

Delegated legislation becomes law after it is promulgated by publication in the Government Gazette.³⁹⁵

According to the National Library’s Official Publications Depository Manual ‘[c]itizens are expected to keep up to date with all legislation published in the Government Gazette, and ignorance is not permitted as a defence for violating a law or regulation.’³⁹⁶

An index to the Government Gazette is printed once a year, but it does not indicate subject matter and therefore it is very time-consuming to find what one is looking for.³⁹⁷ A University of Pretoria guide to finding legislation states that everyday use of the Government Gazette is not preferable as ‘the material is very scattered and may be difficult to find.’³⁹⁸

The website of the publisher of the Government Gazette, Government Printing Works, stores digital copies of national gazettes from 2012 onwards.³⁹⁹ Physical copies of the Government Gazette can be found at official publication depositories (usually libraries). Ironically, a list of where the publication depositories are is published in the Government Gazette.

At present neither the publisher of the Government Gazette nor a government entity provides a register or index of all delegated legislation, per subject or per the act in terms of which it was made.⁴⁰⁰

³⁹² Section 140(3) of the Constitution repeats these provisions for the provincial executives.

³⁹³ *Cambridge Advanced Learner’s Dictionary & Thesaurus* Cambridge University Press

³⁹⁴ *President of the Republic of South Africa and Another v Hugo* 1997 (6) BCLR 708 (CC) at para 102.

³⁹⁵ Du Bois Wille’s *Principles of South African Law* 9th ed at 47.

³⁹⁶ National Library of South Africa ‘Official Publications Depository Manual’ (August 2007) at 16.

³⁹⁷ O’Regan op cit (n56) at 170.

³⁹⁸ Gilmore (ed) ‘PULP Guide: Finding legal information in South Africa - Third edition’ (2014) at 30.

³⁹⁹ Accessible at: <http://www.gpwonline.co.za/Gazettes/Pages/default.aspx>

⁴⁰⁰ Burger *A Guide to Legislative Drafting in South Africa* (2002).

Some institutions have attempted to fill the void. The University of Pretoria runs a website⁴⁰¹ where one can access regulations to acts for free (amongst other legal resources). However, the database is not comprehensive.

Another initiative is the ambitious, yet incomplete, OpenGazettes database. Driven by the non-profit operation OpenUp and the South African Legal Information Institute (SAFLII), with support from other organisations, it aims to create a ‘fully free, fully searchable, collection of gazettes online’. The website currently hosts close to 30 000 Gazettes dating from 1958 to 2017 and currently lets you search across 11 collections of South African gazettes.⁴⁰²

Commercial services like Jutastat, LexisNexis Butterworths and Sabinet supply the full text of regulations with the acts under which they were made, however, one has to pay a fee to access these resources. Printed resources like Butterworth Statutes and the Juta Statutes contain references to the regulations passed, but do not supply the full text of these regulations.

The term ‘accessible’ used in this context in the Constitution, could surely not have meant relying on a costly subscription to a private commercial publisher. Under these circumstances, expecting that people should be assumed to know the law is, as O’Regan rightly states ‘absurd’.⁴⁰³

The South African Law Commission’s proposed Administrative Justice Bill (as discussed in chapter three) included provisions for the publication of registers and indexes of rules and standards.⁴⁰⁴ In addition, it proposed that if an administrator decides to make a rule ‘it must take appropriate steps to communicate the rule to those likely to be affected by it’.⁴⁰⁵

The executive’s version of this bill as introduced to Parliament and the eventual Promotion of Administrative Justice Act⁴⁰⁶ passed by Parliament, only made mention of a duty to communicate the rule in the case of notice and comment procedures.⁴⁰⁷ The proposal to require by law the creation of a register of index had been watered down in PAJA to the extent that it merely gives the minister the discretion to establish an advisory council, which

⁴⁰¹ Available at: <http://www.lawsofsouthafrica.up.ac.za>

⁴⁰² Available at: <https://opengazettes.org.za/about>

⁴⁰³ O’Regan op cit (n56) at 170.

⁴⁰⁴ SA Law Commission, Administrative Justice Bill at section 13.

⁴⁰⁵ Ibid at section 12(1)(a).

⁴⁰⁶ 3 of 2000.

⁴⁰⁷ Ibid at section 4(3)(a).

amongst other things, could advise the him or her on whether to publish an index or register.⁴⁰⁸ Since the promulgation of PAJA, no such council has been established.

In its 2002 report the Joint Subcommittee on Delegated Legislation also considered section 101(3) of the Constitution and whether Parliament or the executive had the responsibility to ensure the accessibility of delegated legislation.⁴⁰⁹ It argued that because this section was in chapter five of the Constitution, dealing with the President and the National Executive, it is clear that the executive has the primary responsibility to make delegated legislation more accessible.

The Report recommended that Parliament propose to the executive that it investigate ways to make delegated legislation more accessible, which could include:

- A central index/register of all acts and their delegated instruments;
- The availability of the register in both printed and electronic form;
- The register - in both printed and electronic form – to be distributed to all public libraries and municipal offices;
- Bound volumes of the full text of regulations to be kept up to date and be widely available;
- Ways to be explored of popularising subordinate instruments as regulations, given the high rate of illiteracy in South Africa; and
- A provision in the standard-setting legislation to provide for the automatic lapsing of subordinate instruments after a certain period, unless they are reinstated.⁴¹⁰

Some foreign legislatures are, as with their mechanisms for parliamentary oversight of subordinate legislate, far ahead of South Africa in terms of making delegated legislation accessible to the public.

In Canada the Statutory Instruments Act⁴¹¹ requires the publication of a quarterly consolidated index of all regulations and amendments to regulations in force at any time after the end of the preceding calendar year.

In the United States of America the rules and regulations of federal agencies are arranged by subject in the Code of Federal Regulations (CFR). They are then arranged into 50 CFR titles – for instance ‘Energy’ (title 10), ‘Business Credit and Assistance’ (title 13), and ‘Highways’ (title 23). The CFR is updated once a year to reflect any changes or amendments.⁴¹²

⁴⁰⁸ Ibid at section 11(g).

⁴⁰⁹ Parliament of South Africa op cit (n38).

⁴¹⁰ Ibid at 25.

⁴¹¹ Statutory Instruments Act (R.S.C., 1985, c. S-22) at section 14.

⁴¹² Available at: <https://www.ecfr.gov/cgi-bin/ECFR?page=browse>.

Australia's Legislation Act⁴¹³ requires the establishment and maintenance of the Federal Register of Legislation which serves as a register of acts, legislative instruments and notifiable instruments.⁴¹⁴ It also requires that a rule-maker must lodge a legislative instrument for registration as soon as practicable after the instrument is made.⁴¹⁵

In 1993 O'Regan ruminated on the potential cost of a national register of all subordinate legislation⁴¹⁶, but with advances in data processing and the spread of the internet, this cost would likely be outweighed by the benefits.

⁴¹³ Legislation Act, 2003.

⁴¹⁴ Ibid section 15A.

⁴¹⁵ Ibid section 15G.

⁴¹⁶ O'Regan op sit (n56) at 170.

8. Future Scrutiny Mechanisms

After more than 20 years of our Constitution being in force, Parliament's drawn-out attempts at creating a mechanism to oversee delegated legislation have failed.

At the very minimum there is not even national legislation which requires the tabling of all delegated legislation in Parliament, despite the Constitution providing for this in section 101(4). The current Interpretation Act only requires that Parliament be given notice when an instrument is made.

Individual acts can stipulate that regulations made in terms of that act must be tabled in Parliament for consultation, notice or approval. It was these types of regulations which the Interim Joint Committee on Scrutiny of Delegated Legislation scrutinised – in conjunction with portfolio committees – during its short existence.

Any future attempts to revive Parliament's scrutiny mechanism must start with national legislation requiring the tabling of all delegated legislation.

In addition, it must be decided whether all regulations will be subject to an approval or disapproval mechanism in Parliament (as in Australia) or whether each enabling act will determine how Parliament must deal with a specific set of regulations (as in the UK).

One big issue to resolve will be whether to require tabling before or after promulgation, in other words tabling of draft delegated legislation or tabling of delegated legislation that is already in force.

Another challenge would be how to facilitate productive interaction between the scrutiny committee and portfolio committees.

The criteria according to which the Interim Committee scrutinised delegated legislation was very similar to the criteria employed by many foreign legislatures and the Committee did – despite its short existence – make some important findings with regards to drafting mistakes, retrospective clauses, the granting of unusual powers, and the creation of offences and penalties which was outside the scope of an act.

Besides scrutinising delegated legislation on technical grounds, Parliament should also consider allowing debate on the underlying policy and merits of delegated legislation, as is done in the UK. For instance, the Secondary Legislation Scrutiny Committee in the House of Lords can draw attention to an instrument if it is 'politically or legally important or gives rise

to issues of public policy likely to be of interest to the House'.⁴¹⁷ This could serve to reinvigorate political interest in the scrutiny procedures.

Another issue that continuously plagued the Joint Committee and the Interim Committee was the difficulty of finding time to meet and deliberate.

The Clerk of Papers compiles a list of notices, proclamations and regulations tabled in Parliament as a reference for office use. This is not an official list, but gives an indication of the amount of instruments tabled in Parliament in each year of the fifth Parliament so far.

In 2014, 135 instruments were tabled, in 2015 there were 180, in 2016 there were 254, and in 2017 there were 205.⁴¹⁸ If just 10 per cent of these instruments are regulations, it would mean a lot of work for any future scrutiny committee.

A serious attempt at reviving the mechanism would also have to include a paradigm shift on the part of Parliament.

The failure of the mechanism was not only indicative of a lack of will on the side of Parliament (made clear by how long it took the institution to establish only an interim committee), but also demonstrated that scrutinising delegated legislation can be both laborious and cumbersome because of the sheer volume of instruments and their technical nature. It does not always make for exciting politics.

What is therefore required is a mechanism which gives Parliament oversight over delegated legislation, but which does not burden the institution to the point that it cannot function.

The Interim Committee was advised by Parliament's Legal Services, but any future attempt at reviving the Committee should include the appointment of specialist staff who specifically work for the Committee. It might be worth re-examining the mechanism proposed in Parliament in the 1940s whereby a dedicated officer scrutinises delegated legislation and reports to a scrutiny committee. Similarly, in Canada regulations are initially reviewed by the committee's legal advisors and then brought to the attention of the committee if they do not conform.

Political parties should also prioritise the appointment of competent members to the scrutiny committee, it should not be a second or third priority for member of Parliament.

⁴¹⁷ House of Lord op cit (n319).

⁴¹⁸ Correspondence with Llewellynn Claassen, Parliament Clerk of Papers on 14 February 2018.

In Australia, Canada and Ghana they attempt to make the scrutiny effort bipartisan by requiring that a member of the opposition serve as chairperson or vice-chairperson. A proposal of this nature could elicit more participation from smaller political parties.

One of the easiest ways to ensure that delegated legislation is of a high quality even before it reaches Parliament, is the creation of a drafting office for drafting and protocols. This was one of the suggestions made by the South African Law Commission's Report on Administrative Justice, but was never pursued.

While we wait for any type of standard setting in terms of tabling and/or approval requirements, portfolio committees should take up the task of making sure that bills do contain provisions requiring tabling, and possibly approval by Parliament, of any delegated legislation made after the bill becomes an act.

Mechanisms that require tabling, scrutiny by committee, or motions to disallow would be labelled by some as 'perfunctory or even useless', but that is only if these procedures are practiced in isolation.⁴¹⁹ If they operate conjunctively, there is no reason why they cannot provide adequate safeguards to the citizen.⁴²⁰

Whether Parliament or the executive will embark on any additional reform remains to be seen. According to Hoexter it 'seems unlikely that the government will ever again have the necessary incentive to impose further tedious administrative procedures on itself, or the political will to do so.'⁴²¹

It feels, she says, as if government 'feels less threatened by the 'undemocratic' and 'destructive' institution of [judicial] review than it does about mechanisms that are far more likely to teach its officials how to govern-and how to govern well.'⁴²²

⁴¹⁹ Kersell *Parliamentary Supervision of Delegated Legislation* (1960) at 176.

⁴²⁰ *Ibid* at 176.

⁴²¹ Hoexter *op cit* (n122) at 399.

⁴²² *Ibid* at 399

9. Conclusion

This study began by addressing the seeming conflict between the doctrine of the separation of powers and Parliament's practice of delegating the power to create subordinate legislation to the executive.

It has been shown that our courts have fully acknowledged the existence of delegated legislation as part of our unique constitutional design and that our Constitution even allows for the creation of national legislation to govern the tabling and approval of these instruments in Parliament.

However, since 1994 legislative attempts at improving our administrative law system have failed to adequately provide for the oversight of delegated legislation.

Parliament itself took more than a decade before it established an interim mechanism for the scrutiny of delegated legislation and then the activities of the interim committee lasted a mere 19 months.

In South Africa the Gauteng Provincial Legislature is the only legislature that has established a permanent mechanism providing for the scrutiny of all regulations made by provincial functionaries.

Some foreign legislatures, including several on the African continent, are far ahead of South Africa with regards to their scrutiny mechanisms, even if one only takes into account the legislative frameworks enacted for this purpose.

Similarly, even in terms of making sure that delegated legislation is accessible to the public, both Parliament and the executive have failed to advance this constitutional imperative.

Whether there will be any appetite for a renewed attempt at reviving or creating mechanisms to ensure the oversight of delegated legislation and so improve our administrative law system remains to be seen, but the record of attempts does not bode well.

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