

Establishing a Legislative Scrutiny Framework

The Case of Delegated Legislation in the Parliament of South Africa

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Abstract

There is one indispensable contravention to the principle of separation of powers: parliaments must grant the executive the authority to make law in a delegated capacity. No modern state can be effectively governed without the executive making laws to supplement Acts of parliament. Delegating power does not mean that parliament loses its power. For parliament to retain its legislative authority what is required is a framework to support parliament to review the laws (and powers) that are being delegated, and that it has the capacity to monitor and regulate the use of that power by the Executive. At the start of South Africa's new democracy in 1994, parliament had the opportunity to create a framework for effective delegated law-making. Yet the parliament took almost 10 years to develop its approach and a further 6 years to have this framework approved. Since then, the application of parliament's scrutiny framework is challenged by a lack of political will that makes it difficult for this oversight to take place effectively, and a permanent, powerful mechanism to be agreed upon. A close look into how South Africa's post-1994 delegated framework was developed offers insight into the challenges of developing parliamentary rules, practices and procedures in the context of a new representative democracy with significant developmental challenges. As parliament's legislative supremacy is at stake, these insights are of vital importance to our consideration of how to strengthen the position, place and performance of parliaments as democracy assistance professionals, academics, MPs and parliamentary staff.

Keywords: parliamentary process, post-legislative scrutiny, procedural framework, delegated legislation.

A The Call for a Framework for Delegated Legislation in South Africa

The need for delegated legislation can be multiple, stemming from state policy demands as well as parliamentary needs. In the case of South Africa, Sections 101 and 140 of the Constitution provide parliament with both the mandate and the authority to develop a framework for delegated legislation (1996, Constitution Section 101 and 140). There is also a corresponding obligation on the state to

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ensure people act within the law by making laws readily available in their most up-to-date form (1996, Constitution), and the Constitution requires that special provision be made to enable the NCOP to fulfil its specific constitutional mandate. In addition, establishing a parliamentary process to scrutinise delegated legislation was vital given that parliament repealed many of the country's existing laws to align with the new post-apartheid constitution, resulting in a vast number of subordinate instruments being delegated.

B Developing a Framework for the Scrutiny of Delegated Legislation

Creating a framework for the scrutiny of delegated legislation involved two interconnected processes: the process of developing a draft framework based on research and analysis, a process that enabled involved MPs to build their knowledge and capacity in this area; and the political processes through which this proposal was filtered, agreed upon and brought into effect.

The *Joint Subcommittee on the Scrutiny of Delegated Legislation* (JSSDL) was established to make recommendations as to how the new parliament should give effect to the oversight of delegated legislation. The subcommittee reported its findings to the JRC in 2002, strongly recommending that parliament create a comprehensive framework for the scrutiny of delegated legislation that included both a legislative and a parliamentary component (Parliament of the RSA, 2003 p. 4). Specifically, it recommended that parliament amend Section 17 of the Interpretation Act and establish a specialist joint committee – the *Interim Joint Committee on the Scrutiny of Delegated Legislation* (IJCSDL) – to begin scrutinizing delegated legislation and delegating provisions in enabling legislation (Parliament of the RSA, 2003). This would require criteria to be created and adopted within the rules to ensure a consistent evaluation of legislation in terms of constitutional imperatives.¹

I Reaching Political Agreement on the Framework

The broader political processes by which these findings and recommendations were filtered for approval began with the subcommittee presenting its report to the JRC in 2003. However, none of the recommendations were adopted before the dissolution of that parliament in 2004. The JRC agreed to schedule a special meeting to consider the report again at the end of August 2004, which for various

1 Criteria for the scrutiny of subordinate instruments are practically uniform in most jurisdictions and are usually set out in legislation. They include, for example, checking whether the legislation imposes levies, taxes or duties; impinges on the jurisdiction of the courts; are retrospective in nature and, if so, whether that is permitted in terms of the parent Act; conforms with the objects of the parent Act; appears to make unusual use of powers conferred by the parent Act; has been properly drafted; trespasses on personal rights and liberties, including those set out in the bill of rights; and whether they amount to substantive legislation, as delegated legislation should not purport to replace the parent Act.

reasons was postponed until 25 May 2005.² At this meeting no agreement was reached. The Speaker therefore urged the committee to carry out internal party consultations and return to the JRC with inputs to finalize this process (Parliament of the RSA, 2003-2009). However, the committee did discuss the framework again until 22 March 2006, in which the conversation turned on the extent to which the Executive needed to be notified and approve of the framework prior its adoption (Parliament of the RSA, 2006-2007). At this meeting, the JRC finally agreed on the report and to establish a Joint Interim Committee for the Scrutiny of Delegated Legislation,³ which was then adopted by the NA on 22 June 2011, and by the NCOP on 20 September 2011 (Parliament of the RSA, 2003-2011).

C Developing Parliamentary Rules, Practices and Procedures

The Parliament of South Africa took almost 10 years to develop its approach to scrutinizing delegated legislation, and a further 6 years to have this framework be approved. Both processes were held back by several factors relating to the broader political context and limited parliamentary experience, in addition to those that stem from failures in the framework itself, political party management and poor implementation support.

I Broader Political Context

Establishing the framework within which parliament scrutinizes delegated legislation stood over in the first parliament in the juggle of what needed parliament's urgent attention, which predominantly focused on repealing and amending apartheid legislation.⁴ By the time parliament turned its attention to this aspect of its constitutional mandate the broad political context had shifted.⁵ The ruling African National Congress (ANC) responded to widespread concerns over slow social transformation by taking its most senior and experienced representatives out of parliament and placing them into Executive or state administrative positions.⁶ The result was a less experienced, less confident and more junior majority party leading the development of a technical framework for greater oversight.⁷ This was exacerbated by the change in leadership from Nelson Mandela to Thabo Mbeki in 1999, and later to Jacob Zuma in 2009, which was over time seen to alter the con-

2 The main reasons stated at the time was that political parties were not yet clear on their positions. Other events were taking precedence over the scheduling of this meeting (Parliament of the RSA, 2003-2009).

3 However, it was not agreed that legislation would be created to establish parliament's authority to review delegated legislation as recommended or that amendments would be made to existing legislation to that effect.

4 The first parliament of the new South Africa ran from 1994 to 1999.

5 The second parliament of the new South Africa ran from 1999 to 2004.

6 See R. Mattes, 'South Africa: Democracy Without the People?', *Journal of Democracy*, Vol. 13, No. 1, 2002 (January), pp. 22-36. The ANC held 67% and 70% of the seats in parliament over the first and second parliament, respectively.

7 However, it had become an unwritten convention that decisions taken in the Rules Committee would as far as possible be done by consensus rather than by proportional voting.

fidence with which members of the ruling majority party oversaw the Executive.⁸ The evolving nature of parliament's political composition and confidence, alongside the wider concerns of the country, over time made it increasingly harder for parliament to apply itself to this technical aspect of its role and quickly reach agreement on it. The evolving political landscape as Jacob Zuma took over as President of the ANC and the country in 2009 pre-empted a further shift away from expanding parliament's procedural authority.⁹ Not long after President Zuma took office, rule amendments were proposed, and later adopted, by the ANC's newly appointed Chief Whip to limit the frequency of parliamentary question sessions in the House, reduce the number of questions asked and limit the opposition's right to ask the President questions for oral reply.¹⁰

II *Limited Parliamentary Experience*

The exclusive nature of parliamentary practice was compounded in the case of South Africa by the fact that the majority of South Africans were excluded from formal representation prior to 1994, and that those elected to it after 1994 were new to the institution. Creating a new set of rules and procedures when existing rules and processes are yet fully familiar is not a simple task (Parliament of RSA, 2006.a). It is within this context that parliament took the time to first develop an understanding of delegated legislation as well as its constitutional mandate before considering the framework necessary to legitimately create and oversee delegated legislation. The JRC took from 2003 to 2006 to agree to most of its recommendations in part owing to a lack of confidence in its own understanding of the subject matter, and insufficient political attention to the matter within political parties contributed to this further.¹¹

III *Failures in the Framework and Implementation Support*

There has been very little scrutiny of delegated legislation since the framework was adopted by both Houses in 2011. A current member of the *IJCSDL* noted that the committee has not met this annual session, which is not dissimilar to the infrequency with which the committee met in previous years. The lack of administrative support is one part of a two-part problem. A former MP and member of the NA Rules Committee observed that there is little appetite on the part of MPs to spend significant portions of their time engaging in this 'backroom process'

8 See J. Barkan, *Emerging Legislature or Rubber Stamp? The South African National Assembly After Ten Years of Democracy*, Cape Town, Centre for Social Science Research, 2005. J. February, 'More than a Law-Making Production Line? Parliament and Its Oversight Role', *State of the Nation, South Africa 2005-2006*, Cape Town, HSRC Press, 2006. A. Feinstein, *After the Party: A Personal and Political Journey inside the ANC*, Johannesburg & Cape Town, Jonathan Ball Publishers, 2007. R. Calland & P. Graham, *Democracy at the Time of Mbeki*, Cape Town, Idasa, 2005. R. Calland, *Anatomy of South Africa: Who Holds the Power*, Cape Town, Zebra Press, 2006.

9 See, e.g., 'Leadership Online' 26 November 2010.

10 See Minutes of the Rules Committee: Parliament of the RSA, 2009.

11 See, e.g., Minutes from the JRC found in parliament's internal parliamentary papers (Parliament RSA, Minutes of the JRC 1994-2011).

that are too technical to receive the broader social and media interest that MPs need to gain visibility (June 2018):

when you have a specialised committee that is technical there is no media interest; it is not sexy, so there is no motivation to go and do your job. MPs want to be in the press all the time, so no one would volunteer or give too much time to it. (June 2018)

From an MP' perspective the framework cannot be accommodated within the reality of their focus and priorities, and as such is not prioritized.

The fact that the framework is centralized, with one committee being tasked with scrutinizing all delegated legislation, seems to exacerbate the problem further. As a former MP explained, "having all legislation go to one committee requires them to be jack-of-all trades, which they are not". A centralized technical review system requires MPs to either have in-depth legislative insight into any thematic policy area, or readily obtain this through strong administrative content support, which is presently lacking.

D Key Recommendations

- 1 It is imperative that there is buy-in at an institutional level to support the detailed task of creating rules and a framework, and that this is maintained over time.
- 2 A decentralized scrutiny mechanism is needed at times when technical capacity is lacking to enable MPs to efficiently draw on their portfolio committee knowledge.
- 3 Technical scrutiny processes need to be constituted in ways that plug into other broader oversight or representative parliamentary mechanisms, for example, by forming a part of an MPs portfolio committee work.