A Critical Analysis of Parliamentary Control over Delegated Legislation in light of Zimbabwe's 2019 fiscal and monetary regulations.

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DECLARATION

I, ABUDHABI ASALI, hereby declare that:

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CHAPTER ONE

ABSTRACT

The study seeks to clarify the nature of Parliamentary oversight over delegated legislation in light of Zimbabwe's 2019 fiscal and monetary regulations and the significance thereof in preventing the executive from abusing its authority through arbitrary behavior and ensuring that policies are implemented in accordance with enacted laws passed by Parliament.

Further and in light of the foregoing, the study also seeks to shed light on some the forms of Parliamentary oversight under the Zimbabwean constitutional system that are relevant to fiscal and monetary regulation.

Practically and owing to the doctrine of separation of powers as contemplated by the 2013 Constitution of Zimbabwe, the study also seeks to shed light on the necessity of Parliamentary control over the executive's exercise of delegated legislative powers in order to guarantee that these powers are not abused to the detriment of citizens. Fundamentally, these forms of Parliamentary oversight lead to a number of objectives which are principally inclusive of holding the executive branch accountable, ensuring transparency and openness of executive activities and upholding of the rule of law.

Where necessary the study also tries to draw attention to some international experiences on how oversight mechanisms have been designed in order to highlight lacunae and trying to remedy them.

In conclusion, the study seeks to identify the challenges posed by the current forms of Parliamentary oversight while at the same time proposing legal and administrative recommendations to curb these challenges in order to bolster effectiveness of Parliamentary oversight.

1.0 Introduction

Prior to contemporary states policies, matters relating to domestic and foreign policies fell under executive prerogatives. However there are now other institutions such as the legislature that share the responsibility of governance with the executive branch. Substantially, the legislature now enjoys broader powers as it participates in power with the executive through both the legislative and oversight functions. Put differently, it is Parliament that makes or unmakes the laws presented to it by the executive, or those submitted by its members. It is also Parliament that monitors the acts of the executive branch, through various means, in order to ensure that the government's policies are implemented and whether or not they are having the desired impact. Parliamentary oversight therefore constitutes a parallel reality to the executive as it plays a role in balancing power and responsibility between the two branches.

Since the accumulation of powers in one branch of the state may justly be pronounced the very definition of tyranny[1], the distribution of these powers among different bodies prevents tyranny. Therefore, there must be a separation of powers, which cannot be absolute, but an intertwined separation with a spirit of cooperation that makes each authority a watchdog of the work of the other authority. In order for each authority to form a counterweight to the other, each must be independent in the exercise of its powers and such independence is important. Parliament cannot exercise its control over delegated legislation unless it has a degree of autonomy and cannot maintain its independence without the oversight function.

In accordance with the principle of separation of powers established by the Zimbabwean Constitution, Parliament exercises the oversight function under the provisions of the Constitution and related laws, court rulings, standing orders and Parliamentary committee rules. Among the forms of oversight techniques sanctioned by the foregoing legal

[1] Madison, J. The Particular Structure of the New Government and the Distribution of Power among Its Different Parts, the Federalist Papers. No. 47, February 1788. Yale Law School. Accessed January 21, 2020. https://avalon.law.yale.edu/18th_century/fed47.asp

authorities, we find in particular the right to questioning, specialized investigations by various Parliamentary portfolio committees, vote of no confidence in the government, impeachment, petitions and complaints.

1.1 Statement of the Problem

This study aims to inquire into the concept of delegated legislation and potential Executive abuse of power given that Zimbabwe does not have strong constitutional and legislative mechanisms for Parliamentary oversight over delegated legislation. Delegated legislation (sometimes referred as secondary, subordinate or subsidiary legislation) may be construed as every exercise of power to legislate by an agency that is subordinate to the legislature. Power is transferred from the principal lawmaker to the subordinate body, which may be the executive, minister, local authority or a specific administrative agency, by the mechanism of delegation.[2] Section 134 of the Zimbabwean Constitution confers to the legislature power to delegate part of its law making function to the executive. However, there exists a possibility of abuse of delegated legislative powers by the executive owing to lack of or weaker Parliamentary control over delegated legislation. Parliamentary controls under Zimbabwean laws involves two mechanisms; a mandatory one whereby delegated legislation first comes into effect with a possibility of disallowance within a specified period of time, and a discretionary one that involves scrutiny of draft delegated legislation referred to the Parliamentary Legal Committee by the delegate.[3] Besides these two mechanisms, there are other tools employed by Parliament when discharging its oversight function such as questions, investigations by portfolio committees and vote of no confidence. The existing mechanisms and oversight tools do not seem to have worked

[2] Nature and Definition of Delegated Legislation. Accessed January 21, 2020. https://www.abyssinialaw.com/about-us/item/309/

[3] Section 152(3) (c). Constitution of Zimbabwe Amendment (No 20) ACT 2013.
See also section 36 of the Interpretation Act [*Chapter 1:01*]. "Regulations, rules and by-laws to be placed before Parliament Where the President, a Minister or any other person or body is by any enactment authorized to make regulations, rules or by-laws for purposes stated in such
Enactment, copies of such regulations, rules or by-laws shall be laid before Parliament on one of the thirty days on which Parliament next sits after the publication of such regulations, rules or by-laws in the Gazette".

so far in Zimbabwe's relatively new constitutional framework owing to the fact that the Executive still enjoy powerful law making power through delegated legislation as seen with the recent upsurge in the volume of Statutory Instruments governing the fiscal and monetary regime. Another contributory factor towards the executive's enjoyment of powerful law making power is the current Parliament's scope and capacity to exercise its oversight function which is influenced by the legislative – executive relations. Government is formed by a political party that commands the majority in Parliament. This leads to a weakened oversight function since the executive is part of the legislature. This is because political party discipline often hinders ruling party members of from critiquing the government leaving the opposition party members as the only serious check on the executive. To address this problem, the following hypotheses is put forward.

1.2 Hypothesis

- Parliamentary oversight over delegated legislation is key in checking possible abuses of power by the executive.

1.3 Theoretical Framework

Jurisprudential theories are meant to provide insight and a researcher is required to seek value in the most suitable theory and its applicability to the topic under study. It is against this background that this study is grounded on Kelsen's Pure Theory of law. This study also seeks value in the theory underpinning separation of powers.

1.3.1 Kelsen's Pure Theory of law

Positivism is a school of legal thought largely developed in the 19th century by legal thinkers such as Jeremi Bentham (1748-1832) and John Austin (1790-1859). Legal positivism is described as that direction of legal thought which insists on drawing a sharp

distinction between “the law that is” and “the law that ought to be”.[4] As opposed to Austin and Bentham who describe law as a system of rules, Hans Kelsen (1881-1973) an Austrian-American jurist, committed to the doctrines of positivism, who wrote the Austrian Constitution (adopted in 1920), became a judge of the Austrian Supreme Constitutional Court and, after emigrating to the US and participated in the drafting of the Charter of the United Nations[5] describes law as a system of coercive norms[6]. The object of Kelsen’s theory is to assist in an understanding of positive law in general.[7] The theory attempts to explain what the law is, and not what it ought to be.[8] As a Positivist, Kelsen believed that the existence, validity and authority of law had nothing at all to do with such non-legal factors as politics, morality, religion, and ethics and so on.[9] He therefore sought to identify the essential elements which constituted the ‘bare bones’ of the law and to present these systematically, in a manner which would enable people to determine the existence and analyse the content of law anywhere where law is to be found.[10] He believed this would constitute a ‘pure theory’ of law, which was scientific and accurate in answering the question ‘what is the law?’[11] To this end, Kelsen sought to make a rigorous enquiry based upon a strict methodology which assumed that the Pure Theory of Law is a theory of positive law and as a theory, it is exclusively concerned with the accurate definition of its subject matter.[12] It endeavors to answer the question ‘what is the law?’, but not the question ‘what ought it to be?’ It is a science of law and not a politics of law. That all this is described as a ‘pure’ theory of law means that it is concerned solely with that part of knowledge which deals with law, discarding from the science of law everything which

[4] LB Curzon, *Jurisprudence*, 2nd Edition, Cavendish Publishing Limited, 1995. 79.

[5] Curzon (n 4 above) 119.

[6] JW Harris, *Legal Philosophies*, 2nd Edition, Oxford University Press, 2004. 73.

[7] Curzon (n 5 above) 119.

[8] Curzon (n 7 above) 119.

[9] A Chinhengo*, Essential Jurisprudence*, 2nd Edition, Cavendish Publishing Limited, 2000, 39.

[10] Chinhengo (n 9 above) 19.

[11] Chinhengo (n 10 above) 19.

[12] Chinhengo (n 11 above) 19.

does not strictly belong to it.[13] Meaning to say that its fundamental methodological principle endeavors to free the science of law from all foreign adulterating elements.[14]

The essence of the Pure Theory of Law lies in that law is a system of coercion imposing norms which are laid down by human acts in accordance with a constitution.[15] The law is primarily concerned with the application of sanctions to persons who have acted in certain specific ways.[16] Similarly, if delegated legislation satisfies the legal and constitutional requirements, it becomes binding just as primary legislation and anyone who contravenes its provisions becomes liable. The theory is presented as 'pure' in that it is logically self-supporting and not dependent in any manner upon extralegal values.[17]

Kelsen regards the law as a system that is constituted by norms (statements of what ought to be), which inform officials of a state as to the instances when they may apply sanctions to persons whose actions have fulfilled the conditions under which such sanctions must be applied.[18] These norms express the reality of the law to the people who are tasked with enforcing it, even though the actual rules of the system may be phrased differently.[19] Norms either arise through custom, as do the norms of common law, or are enacted by conscious acts of certain institutions aiming to create law, as a legislature acting in its law-making capacity.[20]

A norm is either valid or invalid and validity of a norm is derived, according to Kelsen, solely from its having been authorised by another legal norm of a higher rank in the hierarchy of norms.[21] For instance, if the Finance Minister makes regulations under Statutory Instrument 142 of 2019 relating to sole currency to be used as a legal tender in Zimbabwe. The validity of the Statutory Instrument would reside in the Reserve Bank of

[13] Chinhengo (n 12 above) 19.

[14] Chinhengo (n 13 above) 19.

[15] Curzon (n 8 above) 120.

16 Chinhengo (n 14 above) 40.

17 Curzon (n 15 above) 120.

18 Chinhengo (n 16 above) 40.

19 Chinhengo (n 18 above) 40.

20 Curzon (n 17 above) 121.

21 Curzon (n 20 above) 121.

Zimbabwe Act [*Chapter 22:15*], which is the enabling Act authorising the Finance Minister to make such regulations. If no such power exists, then the regulations would be invalid regardless of their nobility or utility. Also, the Statutory Instrument would be generally invalidated if the parent Act were to be invalidated or repealed. This Reserve Bank Act owes its validity to its strict enactment in accordance with Parliamentary procedure, which owe its validity to the provisions of the Constitution. Generally constitutions confer to certain administrative authorities the power to enact general norms by which the provisions of a statute are elaborated and such general norms not enacted by the legislature are referred to as regulations.[22] Under some constitutions, certain administrative organs especially the Head of State or cabinet ministers are authorised under extra ordinary circumstances to issue general norms to regulate subject matter which are ordinarily to be regulated by the legislature through statutes. Kelsen argues that the distinction between Acts of Parliament and delegated legislation is evidently of legal importance only when enactment of general norms or statutes is in principle reserved to special legislative body which is not identical to the executive and more so in an system where there is separation of powers.[23] Kelsen further contends that laws in the material sense (general norms in the form of a law) should be distinguished from laws in a forma sense (anything which has the form of a law). The net effect of this is that it may happen that a declaration without any legal significance whatsoever is made in the form of a law.[24] For instance, some appointments, postings and transfers of public officials which are often notified in the Gazette are not regarded as subordinate legislation and as such do not have the force of law.[25]

As per Kelsen, the Pure Theory of Law hinges on the notion of a 'basic norm' which he referres to as the *Grundnorm*. The *Grundnorm* is the initial hypothesis upon which the whole system rests[26]. The validity of the basic norm does not derive its bindingness from a superior norm. It is the ultimate source of authority from which in a hierarchy of norms,

[22] H Kelsen, *General Theory of Law and State*, Transaction Publishers, 2006, 130.

[23] Kelsen (n 22 above) 131.

[24] Kelsen (n 23 above) 131.

[25] TK Viswanathan, *Legislative Drafting: Shaping the Law for the New Millennium*, Indian Law Institute, 2007. 448.

[26] VD Mahajan, Jurisprudence *and Legal Theory*, 5th Edition, Eastern Book Company 1987. 545.

all lower norms in a legal system are understood to derive their authority. According to Kelsen, coerciveness of legal norms can be understood without tracing it ultimately to some supernatural source such as God or Nature. The reason for the validity of a norm is always another norm[27]. For instance, if delegated legislation were said to be valid, the reason for its validity would be an enabling Act of Parliament. The reason for the validity of the Act of Parliament resides in the constitution. All valid norms can be traced and linked back to the *Grundnorm*. The norms are linked hierarchically from the lowest to the highest norm. It is the essence of this theory that is being sought to inform the analysis of the subject matter under study.

1.3.2 Separation of Powers Doctrine

Constitutions of different countries around the world have entrenched provisions on the doctrine of separation of powers. Other countries do not have constitutional provisions that explicitly state that there shall be separation of powers but they provide for the three arms of state. For example, in *Glenister v President of the Republic of South Africa*[28] , the South African Constitutional Court stated that the doctrine of separation of powers is part of the South African Constitutional design. Owing to these differences different models of separation of powers exist from country to country. These models, invariably raise important constitutional issues as it is widely accepted that there is no universal model of separation of powers.

Separation of powers refers to the division of government responsibilities into distinct branches to limit any one branch from exercising the core functions of another. This doctrine is fundamental to the organisation of a state and to the concept of constitutionalism to the extent that it prescribes the appropriate allocation of powers, and the limits of those powers, to differing state institutions.[29] In any state, three arms exist to

[27] Harris (n 6 above) 73.

[28] *Glenister v President of the Republic of South Africa* 2009 (1) SA 287 (CC) at page 810.

[29] H Barnet, *Constitutional and Administrative Law*, 10th Edition, Routledge, 2013. 68.

which government responsibility is shared.[30] Within the constitutional framework these three branches and their functions are, the Legislature with the power to make, amend and repeal laws; the Executive with the power to formulate policies and implement rules of law and the Judiciary with the power to interpret law and how it should be applied in resolving disputes. It is the relationship between these arms of state which must be evaluated against the backcloth of the doctrine.[31] The essence of the doctrine is that there should be, ideally, a clear demarcation of personnel and functions between these arms in order that none should have excessive power and that there should be in place a system of checks and balances between the institutions.[32]

1.3.2.1 Historical Development

The constitutional seeds of the doctrine were sown early, reflecting the need for government according to and under the law, a requirement encouraged by some degree of a separation of functions between the institutions of the state.[33] Aristotle (384–322 BC) in *The Politics*, proclaimed that: "There are three elements in each constitution in respect of which every serious lawgiver must look for what is advantageous to it; if these are well arranged, the constitution is bound to be well arranged, and the differences in constitutions are bound to correspond to the differences between each of these elements. The three are, first, the deliberative, which discusses everything of common importance; second, the officials; and third, the judicial element."

The theory was further developed by John Locke (1632 – 1704), an English Philosopher who in his Second Treaties of Civil Government 1690 argued that it is too great a temptation for the same persons who have power of making laws to also have power to execute them whereby they may exempt themselves from the law, both in its making and

[30] C Murray & L Nijzink, Building Representative Democracy South Africa's Legislatures and the Constitution 2002, *The Parliamentary Support Programme*. 34.

[31] Barnett (n 29 above) 68.

[32] Barnett (n 31 above) 68

[33] Barnett (n 32 above) 68.

execution to their own private advantage.[34] Locke however did not give a way in which this too great a temptation could be avoided.

Systematic and scientific formulation of the theory with greater clarity was ultimately granted by a French philosopher Montesquieu (1689–1755, living in England from 1729–31). He recognised that there are three pillars of state authority which includes the executive, the legislative and the judiciary which organs carry different functions through different office bearers. He argued that all would be in vain if the person or the same body officials were to exercise these three powers.[35] Montesquieu's idea eventually developed into a norm consisting of four basic principles[36];

a) There must be a formal distinction of the three arms of state (judiciary, executive and the legislative)

b) There must be a separation of the personnel which means that each one of these three distinct organs must be staffed with different officials and employees. A person serving in one organ is therefore disqualified from serving another

c) There must be separation of functions which means that each organ must carry its own functions without interfering with the other.

d) There must be some checks and balances which requires that each organ of the state authority be entrusted with special powers to keep a check on the exercise of functions by the others in order that equilibrium in the distribution of powers may be upheld. This represents the special contribution of the United States to the notion of separation of powers.

The separation of powers doctrine does not insist that there should be three institutions of government each operating in isolation from each other for indeed, such an arrangement would be unworkable.[37] It is essential that there be a sufficient interplay

[34] A Caroll, *Constitutional and Administrative Law*, 9th Edition, Pearson Education Limited, 2017. 40 -41

[35] Caroll (n 34 above) 40.

[36] PM Mojapelo, The Doctrine of Separation of Powers (a South African perspective), 2012, *The Middle Temple South Africa Conference*.

[37] Barnett (n 33 above) 68.

between each arm of the state where primary functions of the state should be allocated clearly and that there should be checks to ensure that no institution encroaches significantly upon the functions of the other. For the purposes of this study, only the legislature and the executive are pertinent.

1.3.2.2 Theories Underpinning Separation of Powers.

It would appear that there is considerable disagreement with regards values underpinning the separation of powers doctrine. Some scholars have argued that the purpose of the doctrine is to curb abuse of power, partly by preventing its concentration in the hands of one person or body while others went on to say that its purpose is to safeguard liberty and the rule of law.[38] Others argue that the doctrine centers on ensuring efficiency in government, where efficiency is understood as the matching of tasks to those organs best suited to execute them.[39] Aileen Kavanagh[40] argues that the doctrine is underpinned by the deeper value of coordinated institutional effort between branches of government in the service of good government. Kavanagh refers to this as the joint enterprise of governing. According to this value the branches of government must take account of the acts and decisions of the other branches when carrying out their own tasks and no one branch can carry out all the tasks of governing. Therefore, each branch makes a necessary partial contribution to the joint enterprise. The legislature may enact the general rules and provide the statutory framework, but the judiciary must decide what those general rules mean and require in particular cases, which may involve resolving indeterminacy in meaning, filling in gaps in the framework, and integrating particular statutory provisions into the broader fabric of legal principle. In some contexts, the interaction between the branches takes the form of oversight, where the goal is to check, review, and hold the other to account and other times, the interaction will be a form of

[38] A Kavanagh, The constitutional separation of powers, Oxford Scholarship Online, 222.
DOI: 10.1093/acprof:oso/9780198754527.003.0012

[39] Kavanagh (n 38 above) 223.

[40] Kavanagh (n 39 above) 240.

cooperative engagement where the branches have to support each other's role in the joint endeavor.[41]

1.3.2.3 Separation of Powers and Delegated Legislation

Barnet argues that Delegated legislation raises important questions relating to the separation of powers. Delegated legislation refers to laws, rules and regulations, made by the executive in accordance with power conferred to it by the legislature. This is regarded as a clear violation of the doctrine of separation of powers as contemplated by Montesquieu. In addition to the delegation of power to make secondary legislation, Acts of Parliament may on occasion confer on the executive the power to amend or enact primary legislation as the case with section 2 of the Presidential Powers (Temporary Measures) Act.[42] The implication of delegated legislation in constitutional terms is that a legislative function is being exercised by the executive and not Parliament.[43] However delegation of law making powers is constitutionally justified on the basis of efficiency, speed, practical necessity, modern complexity of subject-matter and flexibility. Generally Parliament has limited time available to deal in detail with the multifarious matters which claim its attention and to burden it with the task of enacting all new statutory rules and scrutinising every technical detail of a Bill would result in the choking of the legislature. Provided the existence of effective Parliamentary oversight and vigilance of the judiciary in ensuring that delegated powers are exercised *intra vires* the law, it may be concluded that this ostensible breach of the separation of powers is unavoidable, although whether it is subject to adequate scrutiny and control remains questionable.[44]

[41] Kavanagh (n 40 above) 237.

[42] Presidential Powers (Temporary Measures) Act [*Chapter 10:20*].

[43] Barnett (n 37 above) 77.

[44] Barnett (n 43 above) 77.

1.3.2.4 Separation of Powers and Legislative Oversight

The underpinning philosophy of legislative oversight in a democracy is that of checks and balances through which elected representatives can scrutinise the actions of the executive and providing the executive with a feedback. The importance of checks and balances in a constitutional order can never be overemphasised. The theory of checks and balances necessitates that no branch of state should be given unchecked power within its sphere. Many scholars argue that such checks are the very essence of the separation of powers.[45] In order to curb abuse of power it is necessary to combine separation with oversight.[46] Checks and balances are required by the separation of powers in order to prevent one branch of government usurping another and to provide each branch with the necessary constitutional means to resist such usurpation and prevent it occurring.[47] Checks and balances help to protect the separation, as well as helping to ensure that each branch does not overstep its role in the constitutional scheme.[48] Writing in *The Federalist Papers*, James Madison argued that the first task for the separation of powers was to make some division of the government into distinct and separate departments, where each department must have a 'will of its own', but then the next and most difficult task is to provide some practical security for each, against the invasion of the others: Madison contended that it would not sufficient to mark, with precision, the boundaries of these departments, and to trust to the parchment barriers against the encroaching spirit of power; and in order to avert the risk of abuse of power we must so contrive the interior structure of the government as that its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places. [49] Consistent with the doctrine of separation of powers, legislative oversight of the executive is of fundamental importance in ensuring that the government acts under the law and does not usurp power. In terms of section 119 and 139 of the Constitution of

[45] Kavanagh (n 41 above) 233.

[46] Kavanagh (n 45 above) 233.

[47] Kavanagh (n 46 above) 234.

[48] Kavanagh (n 47 above) 234.

[49] Kavanagh (n 48 above) 233 – 234.

Zimbabwe, as read with the 2019 Standing Orders, Parliament has power to exercise oversight on all organs of state.

1.4 Research Questions

For this study to be conducted in an orderly and methodical way, the following research questions will be explored and answered.

a. What is the nature of delegated legislation and to what extent can the executive enjoy its exercise of delegated legislative powers?

b. What are the opportunities for effective monetary and fiscal regulation in Zimbabwe's Parliamentary oversight system?

c. What is the legal and constitutional context of Zimbabwe's 2019 fiscal and monetary regulations in relation to Parliamentary oversight?

d. What lessons can be learnt by Zimbabwe from comparative jurisdictions?

e. What are the recommendations and conclusions that can be drawn in relation to Parliamentary oversight over delegated legislation?

1.5 Significance of the study

The importance of this study lies in highlighting the significance of oversight mechanisms as a means of positive relationship between the executive and the legislature. Parliamentary oversight is one of the most prominent manifestations of cooperation between the legislative and executive authorities, which lead to stability and balance in relations between the two. This is so because Parliamentary oversight represents the public interest in the state mandate and accountability. In addition, the practical application of the study in Zimbabwe gives it a greater degree of significance as Zimbabwe is constitutionally a democratic state founded upon observance of the principle of separation of powers and supremacy of the constitution. By and large, this study may

give more clarity to the Parliamentary function of oversight and the extent to which the executive can exercise delegated legislative powers. Conclusions and implications obtained from the study can be used to assist Parliament in buttressing its oversight function.

1.6 Literature Review

Delegated legislation has been defined as law made by ministers or certain public bodies under powers given to them by an Act of Parliament, but it is just as much part of the law of the land as are those Acts.[50] Not all constitutions around the world expressly authorise nor explicitly prohibit Parliaments to delegate law making powers to other public bodies. One such constitution is the Australian constitution. However, the *locus classicus* that has been held to support the Commonwealth Parliament's power to do so is the High Court's decision in *Baxter v Ah Way.*[51] In this case O'Connor J. of the High Court rationalised the power to make regulations in the following terms: “Now the legislature would be an ineffective instrument for making laws if it only dealt with the circumstances existing at the date of the measure. The aim of all legislatures is to project their minds as far as possible into the future, and to provide in terms as general as possible for all contingencies likely to arise in the application of the law. But it is not possible to provide specifically for all cases, and, therefore, legislation from the very earliest times, and particularly in more modern times, has taken the form of conditional legislation, leaving it to some specified authority to determine the circumstances in which the law shall be applied, or to what its operation shall be extended, or the particular class of persons or goods to which it shall be applied[52].”

[50] R Rodgers & R Walters, *How Parliament Works*, 7th Edition, Routledge, 2015. 223.

[51] *Baxter v Ah Way* 1910 (8) CLR 626. 637–8.

[52] *Baxter v Ah Way* 1910 (8) CLR 626, 637–8.

Arasnson, Gellhorn and Robinson[53] in their article adopt a two pronged approach rationalising delegation. They justify it in terms of what they refer to as managerial and political explanations. They posit that the managerial explanation comprises of essentially four arguments as follows: (1) reducing congressional workloads; (2) elimination the need for frequent statutory amendments as conditions change; (3) having specialists decide matters about which congress is not knowledgeable and (4) establishing relative permanence among the decision makers who control certain problems.[54] They go on to argue that despite the widespread acceptance of managerial explanations, none of these withstand close scrutiny. With regards the political explanation, they contend that these involve normative questions of public policy. The foremost political explanation is that legislative delegation helps to "depoliticize" the problem under review, because delegation removes the problem from a political (and putatively "irrational") forum and places it in a nonpolitical (and allegedly "rational") one.[55] To this extent, this article will be of significance to the subject matter under study. While this article is significant in that it tries to justify the reasons for legislative delegation, this researcher disagrees with some of the justifications as it will be shown by this paper that regulation of issues that have a bearing on fundamental human rights such as property rights should not be left to the politicians.

Feltoe[56] examines the constitutionality of delegated legislation. He discusses the question whether it is constitutional for Parliament to delegate to the president or the executive the power to amend legislation passed by Parliament. He cites the South African Constitutional Court case of *Executive Council Western Cape Legislature v President of the Republic of South Africa* (1995).[57] It was held that it is unconstitutional for Parliament to delegate to the president or executive the power to amend or repeal Acts of Parliament when there is no state of emergency and such delegation was not justified by urgent

[53] PH Aranson, E Gellhorn, GO Robinson, Theory of Legislative Delegation, 1982, Vol 68, *Cornell Law Review*.

[54] PH Aranson *et al* (n 53 above) 21.

[55] PH Aranson *et al* (n 54 above) 25.

[56] G Feltoe, *A Guide to the Administrative and Local Government Law in Zimbabwe*, 4th Edition, Legal Resources Foundation, 2006. 20.

[57] *Executive Council Western Cape Legislature v President of the Republic of South Africa* (1995) ZACC 8.

necessity. The court went on to state that delegating to the executive the power to amend or repeal Acts of Parliament was quite different to delegating subordinate legislative powers. In terms of the constitution it is Parliament that is vested with the power to make and amend legislation. With respect to the Zimbabwean context, he argues that the President's broad powers in terms of the Presidential Powers (Temporary Measures) Act to make regulations that override other laws including Acts of Parliament even when there is no declared state of emergency are arguably unconstitutional.[58] These arguments will be of much significance to this study as the researcher shares the same views. Although these arguments are significant, this study critiques these issues in greater detail.

Limington[59] addresses the issue of delegation to the President of primary law making power. He raises similar arguments as Feltoe. Generally both authors comment on delegated legislation prior to the 2013 Constitution; and not in the context of fiscal and monetary regulation. It is to this extent that this study seeks to fill the gap left by these authors.

From the foregoing, it is clear that delegated legislation is not without criticism. In his book, *Caroll*[60] argues that in the absence of proper Parliamentary control, a powerful executive can abuse its delegated legislative powers by way of making arbitrary regulations. Some of the abuses associated with this are inclusive of making of regulations with a retrospective effect, alteration of Acts of Parliament, exclusion of judicial review and a government by decree.[61] Another argument is that it is undemocratic to confer powers of law making to an ancillary body as much legislation will be made by an unelected group of people.[62]

The need for Parliamentary oversight arises as a means of effectively restraining the executive from abusing delegated legislative powers conferred to it by Parliament.

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[58] Feltoe (n 56 above) 21.

[59] G Limington, *Constitutional Law of Zimbabwe*, Legal Resources Foundation, 2001.

[60] Carroll (n 35 above) 169.

[61] Carroll (n 60 above) 169.

[62] Doctrine of Delegated Legislation.

Accessed January 27 2020.

https://www.lawteacher.net/free-law-essays/judicial-law/doctrine-of-delegated-legislation.php?vref=1%3E

Parliamentary control is best understood as a right to comprehensive information relating to all executive actions. This right is necessary for the legislator to make and correct decisions, and for the legislator and the public to make a political evaluation of the performance of the executive and Parliament, which provided the executive with legislative functions.[63]

Barnett[64] contends that the close union between the legislature and the executive would suggest that the potential for abuse against which Montesquieu warned exists at the heart of the constitution. He further states that tenable grounds for such an argument exist but these must be set against the extent to which procedural mechanisms in Parliament avoid an actual or potential abuse of power by the executive. The constitutional principle entailed in this close union between the executive and the legislature, deriving from historical practice, is that of responsible government: that is to say legislative powers of the executive are scrutinised adequately by a democratically elected Parliament.[65]

1.7 Research Methodology

This study adopted a doctrinal or theoretical legal research approach which can be defined as research which asks what the law is in a particular area and then seeks to collect and analyse primary sources of law in the form of a body of case law, together with any relevant legislation.[66] This is often done from a historical perspective and may also include consultation of secondary sources such as journal articles or other written commentaries on the case law and legislation with the objective of describing a body of law and how it applies.[67] A doctrinal research methodology would be incomplete if leading textbooks on the subject matter are not consulted. While not authoritative, they may be persuasive. Over and above that, they often represent the standard form of expression of

[63] Mollers C: *The Three Branche: A Comparative Model of Separation of Powers*, UP Oxford, 2013. 121.

[64] Barnett (n 44 above).

[65] Barnett (n 44 above) 103.

[66] M McConville, W Chui, *Research Methods for Law*, Edinburgh University Press, 2007, 18 – 19.

[67] McConville, Chui (n 66 above) 18 – 19.

particular areas of law.[68] Further, the study also examined standing orders and committee rules of the Parliament of Zimbabwe, opinions of various constitutional jurisprudence, collection of information from the records of the national assembly of Zimbabwe (Hansard), research articles and literature related to the study. Relevant online material was also consulted. This therefore is a library based[69] and desktop research. The study also relied on exploring materials and judicial decisions from other jurisdictions.

Owing to the increasing influence of regional and international legal materials, and the increasing need for legal scholars to refer to materials from a variety of jurisdictions, reliance was also placed on comparative legal research which can be defined as research that inquire into how different legal systems and legal cultures have addressed problems that domestic law faces but in a different way, and with what degree of perceived success or failure.[70] To this end the study also explores materials and judicial decisions from other jurisdictions. This study therefore adopted a mixed approach which is mainly library[71] and desktop based.

1.8 Delimitation

Although it is trite that Parliamentary oversight is an aspect of the doctrine of separation of powers, this study will only be limited to examining the relationship between the legislature and the executive in terms of delegated legislative power. However, this study will not be examining the relationship between the legislature and the judiciary or the

[68] McConville, Chui (n 67 above) 28.

[69] McConville, Chui (n 68 above) 47.

Doctrinal research which 'is library-based, focuses on a reading and analysis of the primary [such as the legislation and case law] and secondary materials [such as legal dictionaries, textbooks, journal articles, case digests and legal encyclopedias.

[70] M Salter, J Mason, *Writing law dissertations: An Introduction and Guide to the Conduct of Legal Research*, Pearson Education Limited, 2007, 183.

[71] McConville, Chui (n 69 above) 47.

Doctrinal research which 'is library-based, focuses on a reading and analysis of the primary [such as the legislation and case law] and secondary materials [such as legal dictionaries, textbooks, journal articles, case digests and legal encyclopedias.

executive and the judiciary. This study is mainly focused on Parliamentary scrutiny of delegated legislation with respect to Statutory Instruments that governed the fiscal and monetary regime in Zimbabwe subsequent to the enactment of the 2013 Constitution of Zimbabwe Amendment Number 20. The relevant period under study is 2019 which witnessed the introduction of statutory instrument 33 of 2019 and statutory instrument 213 of 2019 which were both promulgated in terms of the Presidential Powers (Temporary Measures) Act as well as introduction of statutory instrument 142 of 2019 which was promulgated in terms of the Reserve Bank of Zimbabwe Act.

This study is also restricted to examining some of the common oversight tools such as the ministerial question, specialized investigations by various Parliamentary portfolio committees, petition, vote of no confidence in the government and impeachment. This study is not going to be focusing on other common oversight mechanisms such as budget oversight, ombudsman and annual appropriations hearings. Substantial reference has also been made to the constitutional jurisprudence of other jurisdictions such as the United Kingdom, United States of America, South Africa and India to the extent that is relevant for any remodelling of the Zimbabwean framework.

1.9 Limitations

Just like any other study, academic research invariably has potential limitations due to a number of various factors hence the findings of this study have to be seen in light of several limitations. The first limitation was with regards time required to submit the dissertation. A time framework was put in place to act as a guide to different stages of the study to which the researcher restricted himself. Zimbabwean prior research studies on the topic that would have assisted in laying a better foundation for understanding the research problem being investigated could not be found. There is also a scarcity of Zimbabwean academic articles, literature and constitutional and administrative law textbooks.

Where necessary, the researcher resorted to searching for other relevant material from the internet. Due diligence was exercised while dealing with material available on internet

in order to establish the authenticity of the materials and the academic credentials of the authors. This was necessitated by the inadequacy on safeguards to the reliability of material that can be published on the internet. In this regard, web search engines that indexes the full text or metadata of scholarly literature across an array of publishing formats and disciplines such as Google Scholar were relied on. Other credible digital libraries such as were also found to be useful.

1.10 Chapter Synopsis

Chapter ONE deals with introductory issues of the subject matter under study. It introduces the research topic, discusses the concept of delegated legislation and outlines the problem statement. The main point made in Chapter One is that Parliamentary oversight over delegated legislation is a key feature in modern constitutional democracies, and without strong mechanisms for its exercise, the executive power is likely to be abused to the detriment of citizens.

Chapter TWO explores the historical development, nature and extent of delegated legislation. It also examines the justification for delegated legislation and the dangers inherent thereto as well as constitutional limitations on delegated legislative powers.

Chapter THREE examines the nature and legal framework for Parliamentary oversight as well as the opportunities for effective monetary and fiscal regulation in Zimbabwe's Parliamentary oversight system.

Chapter FOUR examines the role of Parliament in scrutinizing Zimbabwe's 2019 fiscal and monetary regulations and lessons from other jurisdictions.

Chapter FIVE presents the study's findings, implications and recommendations in order to enhance and invigorate Parliamentary oversight in Zimbabwe.

CHAPTER TWO

HISTORICAL DEVELOPMENT, NATURE AND EXTENT OF DELEGATED LEGISLATION

2.0 Introduction

This chapter provides an overview of delegated legislation by exploring the historical development, nature and extent of delegated legislation. It also examines the justification for delegated legislation and the dangers inherent thereto as well as constitutional limitations on delegated legislative powers as given in the academic discourse. Although this chapter is far from being exhaustive of this complex subject, it will be sufficient to address key aspects of delegated legislation.

2.1 Definition and Nature of Delegated Legislation

At a simplistic level, one of the primary roles of Parliament is making and unmaking of laws by which people are governed. However Parliament does not make all the laws by which people are governed. Some laws are still the product of the common law and as such they are made by judges although Parliament always has the authority to change rules of common law and customarily does so with enactment of new legislation.[72] Other laws are made by different bodies or individuals under certain legal powers empowering them to make those laws. Any other legislation not made by Parliament is known as delegated legislation. Although there is no fixed definition of delegated legislation in its comprehensive sense, it can be construed as every exercise of power to legislate by an agency that is subordinate to the legislature. Delegated legislation may be described as 'secondary' legislation, by comparison with the primary legislation found in Acts of Parliament.[73] It may also be called 'subordinate' legislation in the sense that it is invalid if

[72] AW Bradley, KD Ewing, CJS Knight, *Constitutional & Administrative Law*, 16th Edition, Pearson Education Limited, 2015. 185.

[73] Bradley, Ewing, Knight (n 72 above) 185.

it so conflicts with the enabling Act of Parliament.[74] Further it is called 'delegated' legislation in that the public body or individual making the legislation does not derive legislative power direct from the Constitution as does Parliament which is thus said to enjoy original legislative power.[75] It can also be referred to as subsidiary legislation.[76] The subordinate body acquires the power from the act of Parliament.[77] Power is transferred from the principal lawmaker to the subordinate body, which may be the executive, minister, local authority or a specific administrative agency, by the mechanism of delegation.[78] Put differently, delegation refers to the act of entrusting another authority or empowering another to act as an agent or representative.[79] By the same token, delegation of legislative powers means the transfer of law-making authority by the legislature to the executive, or to an administrative body.[80] In line with the power granted to them by the legislature, administrative agencies can issue rules, regulations and directives, which have a legally binding effect.[81]

2.2 Categories of Delegated Legislation

There is various terminology through which to express delegated legislation. Most pieces of delegated legislation in Zimbabwe are contained in statutory instruments.[82] Section 3 of the Interpretation Act [Chapter 1:01] defines Statutory Instrument as "any proclamation,

[74] L Boulle, B Harris, C Hoexter, *Constitutional & Administrative Law Basic Principles*, Juta, 1989. 173.

[75] Boulle, Harris, Hoexter (n74 above) 173.

[76] Feltoe Feltoe (n 58 above) 15.

[77] Nature and Definition of Delegated Legislation.

Accessed January 21, 2020.

https://www.abyssinialaw.com/about-us/item/309/

[78] Nature and Definition of Delegated Legislation (n 77 above).

[79] Nature and Definition of Delegated Legislation (n 78 above).

[80] Nature and Definition of Delegated Legislation (n 79 above).

[81] Nature and Definition of Delegated Legislation (n 80 above).

[82] Feltoe Feltoe (n 76 above) 16. The title Statutory Instrument was adopted as from Statutory Instrument 381 of 1979. Prior to this, Statutory Instruments were referred to as Government Notices. This designation applied to Government Notice 380A of 1979.

rule, regulation, by-law, order, notice or other instrument having the force of law, made by the President or any other person or body under any enactment."

2.2.1 Proclamations

A proclamation is a formal public announcement made by the government.[83] Legislation can in pursuance of some constitutional power be in the form of a proclamation. It is the foregoing sense that is contemplated by section 143(2) of the Constitution where the President has power to dissolve Parliament by proclamation if the Senate and national Assembly, sitting separately, by the votes of at least two-thirds of the total membership of each house pass resolutions to dissolve.

2.2.2 By-Law

This is the name given to laws made by local authorities such as urban or rural councils, public corporations or other companies vested with statutory powers.[84] A by-law is an ordinance affecting the public or some of members of the public and it necessarily involves restrictions on liberty of action by persons coming under its operation as to acts which if not for the by-law they would be at liberty to do.[85] The enabling legislation for by-laws made by local authorities in Zimbabwe is the Urban Councils Act [Chapter 29:15].[86]

2.2.3 Rules

The expression rule can be defined as a general norm mandating or guiding conduct or action in a given type of situation.[87] The most common way of delegating legislative power is to authorise other public bodies or individuals to frame rules for carrying into effect the

[83] Black's Law Dictionary 8th Edition, 2004. 3813.

[84] Carroll 171.

[85] Viswanathan 447.

[86] Feltoe (n 82 above) 16.

[87] Black's Law Dictionary 4146.

objects and purposes of the enabling Act.[88] The enabling or parent Act invariably sets out for the guidance of the delegate issues on which such rules may be made even though the issues so set out are not to be and may not be exhaustive.[89] Zimbabwean courts have power to make rules governing their own procedures.[90]

2.2.4 Regulations

A regulation can be defined as a rule or order, having legal force, usually issued by an administrative agency.[91] Regulations are regarded as the most common form of delegated legislation. Most enabling Acts insert a section providing for general regulation making power towards or at the end of the Act. In the Zimbabwean context, the Minister has power in terms of section 159 of the Rural District Councils Act [Chapter 29:13] to make regulations for various purposes and the Zimbabwe Electoral Commission has the power in terms of section 192 of the Electoral Act [Chapter 2:13] to make regulations on various matters pertaining to the holding of an election.[92] The President has regulatory powers on issues relating to gold, currency and securities in terms of section 2 of the Exchange Control Act [Chapter 22:05].

2.2.5 Orders

Orders as opposed to rules which are general in character and indiscriminate in their application, are specific and may be discriminate in their application.[93] In Zimbabwe,

[88] Viswanathan 446.

[89] Viswanathan (n 88 above) 446.

[90] Feltoe 16.

See also Constitution of Zimbabwe Section 167(5), 169(4), 171(4).

[91] Black's Law Dictionary 4018.

[92] Feltoe (n 90 above) 16.

[93] Viswanathan (n 89 above) p447.

various orders can be made by the Minister and certain other authorities in terms of the Exchange Control Act [Chapter 22:05].[94]

2.2.6 Notices

The term notice can mean a legal notification required by law or agreement, or imparted by operation of law as a result of some fact such as the recording of an instrument.[95] In cases of public matters, it can generally mean that a person whose duty is to give a notice, issues it in the manner so prescribed and to such persons entitled to receive it.[96] Notices may be classified in to two categories; (a) only such gazetted notices laying down some rules of conduct for certain persons and regarded as secondary legislation have the force of law whereas (b) other appointments, postings and transfers of public officials which are often notified in the Gazette are not regarded as subordinate legislation and as such do not have the force of law.[97] In Zimbabwe, the Minister in terms of section 13 of the Shop Licences Act [Chapter 14:17] can issue notices for adding or removing trades or business specified in the First Schedule of the Act.[98]

2.2.7 Statutory Instruments

Statutory instrument is an expression that is generally given to various types of delegated legislation made by the President, Minister, any other person or public body under any enactment.

2.2.8 Orders in Council

[94] Delegated or Subsidiary Legislation. Accessed January 21, 2020 https://zimlii.org/content/delegated-or-subsidiary-legislation.

[95] Black's Law Dictionary 3368.

[96] Viswanathan 448.

[97] Viswanathan (n 96 above) 448.

[98] n 94 above.

This expression refers to legislative power delegated to the British government as a whole as opposed to an individual minister. The enabling Act will usually provide that the power should be exercised by 'the Queen in Council'.[99] Orders in Council contain a set of regulations relating to the matter covered by the enabling Act.[100] Delegated legislation in the form of Orders in Council tend to be reserved for instances where unusual delegated legislative powers have to be exercised for matters of greater importance or constitutional significance than those which are thought to be the proper subject-matter of ministerial regulations.[101] For instance, Orders in Council may be used to make changes to the boundaries of Parliamentary constituencies (Parliamentary Constituencies Act (1986) or to effect emergency regulations, as under the Civil Contingencies Act of 2004.[102] For procedural purposes, Orders in Council are treated as statutory instruments.[103]

2.3 Historical Development of Delegated Legislation

In the context of English Parliamentary legislation, delegated legislation is not regarded as a purely modern experience. Delegated legislative powers were exercised as early as the sixteenth century.[104] It is stated that the Statute of Sewers enacted in 1531 which vested the Commissioners of Sewers with full powers to make laws and decrees concerning drainage schemes and the levying of rates to pay for them was an indicator of a more general trend of delegated legislation.[105] Subsequent to that, the Statute of Proclamations 'for the good order and governance' enacted in 1539 gave King Henry VIII extensive powers to legislate by proclamation.[106] One of the justifications for this statute was that sudden occasions might arise when speedy remedies were needed which could

[99] Carroll 170.

[100] Carroll (n 99 above) 170.

[101] Carroll (n 100 above) 170.

[102] Carroll (n 101 above) 170.

[103] Carroll (n 102 above) 170.

[104] Barnett 321.

[105] PP Craig, *Administrative Law*, 3rd Edition, Sweet & Maxwell Ltd, 1994. 245.

[106] Craig (n 105 above) 245.

not wait for the meeting of Parliament.[107] The origin of delegated legislation as it has come to be known is however attributed to the social and economic reforms of the nineteenth century. During this period delegated legislation developed on an incremental basis. The Poor Law Amendment Act of 1834 vested the Poor Law Commissioners with the power to make rules for the management of the poor. There were other nineteenth century statutes that vested in other public bodies the power to make rules. After 1890, statutory rules and orders were published annually.[108] The events of the First World War which lasted from 1914 to 1918 had an effect on delegated legislation. The Defence of the Realm Act of 1914 vested in the government power to make regulations for securing the public safety and the defence of the realm.[109] Since the generality of empowering provisions declined after the First World War but did not entirely wane, the Emergency Powers Act of 1920 gave the government extensive powers to deal with peacetime emergencies.[110]

At the outbreak of the Second World War which lasted from 1939 to 1945, empowering provisions which had declined after the First World War were resuscitated. The volume of decisions that had to be made in a timely manner was considerable and consequently the Emergency (Defence) Acts of 1939 and 1940 delegated to the Crown powers to make regulations for public safety, maintenance of order, defence of the realm, the maintenance of supply and detention of persons whose detention appeared to the Secretary of State expedient in the interests of public safety or defence of the realm.[111] Although extensive delegated powers could be accepted during war or civil emergency, the tendency to regulate certain matters by subordinate legislation had earlier attracted a great deal of attention and considerable hostile comment. This apparent surrender by Parliament of a large part of its legislative functions to the executive departments of the State was focused in 1929 by the Lord Chief Justice of England, Lord Hewart of Bury in his book the New

[107] Bradley A W, *et al*: *Constitutional & Administrative Law,* 16th Ed, (2015), p582.

[108] Craig P. P: *Administrative Law* 3rd Ed, (1994), p245

[109] Ibid, 245

[110] Ibid, p245

[111] Ibid, p245

Despotism (London).[112] Lord Hewart voiced the fears that were felt by some lawyers and politicians that the wide scale of legislative powers was out of control and would lead to a rule by the executive. In The New Despotism (1929), Lord Hewart argued that the increased use of delegated legislation, particularly during the First World War under the Defence of the Realm Act 1914, amounted to an effective supplanting of the sovereign lawmaking powers of Parliament.[113] The publication of Lord Hewart's book had been preceded by the appointment on the 30th October, 1929, of a Committee known as the Doroughence Committee to consider the powers exercised by Ministers of the Crown by way of delegated legislation and to report on safety measures that were desirable or necessary to guarantee the constitutional principles of the sovereignty of Parliament and the supremacy of the law.[114] The report of that Committee was published in 1932 by H.M's stationery Office as Cmd. 4060.[115] The committee's report,[116] while recognising the need for improved Parliamentary scrutiny of delegated legislation, however underscored its necessity with respect to legislative efficiency.

In the United States of America legislative delegation developed gradually. . The Supreme Court turned away early challenges to congressional delegations by narrowly interpreting the delegated powers.[117] The earliest reported Supreme Court case on delegation of legislative powers is *Brig Aurora v. United States.*[118] The case was in relation with American efforts to remain neutral during the Napoleonic Wars. It sustained the conferment of power to the President to revive the Non-Intercourse Act of 1809 which Act granted to the president the power to impose an embargo against either Great Britain or France upon the President's ascertaining the existence of specific conditions.[119] If the President ascertained that either of the nation ceased "to violate neutral commerce" involving American ships, he was free to impose an embargo on the remaining

[112] Viswanathan T. K: *Legislative Drafting: Shaping the Law for the New Millennium*, (2007), p449.

[113] Barnett 321.

[114] Viswanathan 450.

[115] Viswanathan (n 114 above) 450.

[116] Report on Ministers' Powers, Cmnd 4060, 1932, London: HMSO, as cited in Barnett.

[117] Aranson, Gellhorn, Robinson 7.

[118] *Brig Aurora v. United States* 11 U.S. 382: (1813).

[119] P Lehman, American *Constitutional Law*, 5th Edition, 1972. 62.

offender.[120] President James Madison ascertained that France was the first to comply with the Act and consequently he imposed an embargo against Great Britain.[121] The Court held that the president's role was merely one of fact finding as opposed to lawmaking. Thus, in the opinion of the Court, no unconstitutional delegation of power had taken place.[122] In the case of *Field v. Clark*[123] (1892), the American Supreme Court upheld the Tariff Act of 1890, which imposed tariffs on certain imports if the president was satisfied that the exporting country placed "reciprocally unequal and unreasonable" tariffs on American products.[124] The Court justified the role of the President as fact finding rather than lawmaking. It was only in the 1920s that the Supreme Court acknowledged the emerging reality by articulating the legal criteria for sustaining delegations of legislative powers.[125] In *J. W. Hampton & Company v. United States*[126] the Supreme Court sustained a flexible tariff legislation authorising the President to either raise or lower tariff rates by fifty percent in order to equalize the cost of production in the United States and competing foreign countries.[127] The Court broadened the scope of congressional delegations by holding that it would sustain delegations of legislative power whenever Congress dictates an "intelligible principle" to which an agency must conform.[128]

The challenged congressional delegations in the aforementioned cases dealt primarily with issues to do with foreign relations. In international relations the delegated power need not be encumbered by restrictions.[129] In *United States v. Curtiss-Wright Export Corporation*[130] the Court distinguished congressional delegations of legislative power

[120] Stephens O H. Jr, Scheb II J, *American Constitutional Law: Sources of Power and Restraint, Volume I,* 4th Edition, Thomson Wadsworth, 2008. 238.

[121] Stephens, Scheb II (n 120 above) 238.

[122] Stephens, Scheb II (n 121 above) 238.

[123] *J. W. Hampton & Company v. United States* 143 U.S. 649: (1892).

[124] Stephens, Scheb II (n 122 above) 238. See also Lehman (n 119 above) 62.

[125] Aranson, Gellhorn, Robinson (n 117 above) 7-8.

[126] *J. W. Hampton & Company v. United States* 276 U.S 394: (1928).

[127] Lehman (n 124 above) 62.

[128] *J. W. Hampton & Co v. United States* 276 U.S 394: (1928) at 409, as cited in Aranson, Gellhorn, Robinson 8.

[129] Lehman (n 127 above) 64.

[130] *United States v. Curtiss-Wright Export Corporation* 299 U.S 304, 57 S.Ct 216, 81 L.E.d. 255 (1936).

over foreign relations and those that involved domestic affairs. In *Zemel v. Rusk*[131], the Supreme Court elaborated on this view by saying that "Congress—in giving the Executive broad authority over matters of foreign affairs—must of necessity paint with a brush broader than that it customarily wields in domestic affairs."[132]

With regards to issues involving domestic affairs, the Supreme Court has applied the 'intelligible principle' standard of the *Hampton* case in the determination of congressional delegations for the purposes of limiting expansive transfers of power from Congress to other branches and agencies of government.[133] In *Wayman v. Southard*[134] a challenge to congressional delegation of power to the Supreme Court to regulate its own processes was brought before the Supreme Court and as per Chief Justice John Marshall, this delegation was constitutional. In justifying his decision he developed a two sided approach;

1. The subject was of "less interest" to the Congress than to the Court,
2. The Court was merely "filling in the details" of a more general congressional provision.

The latter of Marshall's two justifications survived to become a precedent in this area. This was fundamentally the position adopted by the Court in the *Hampton* case, when the Court allowed delegations as long as executive discretion was guided by an "intelligible principle."[135]

Prior to 1935 no statute had ever been held invalid due to unconstitutional delegation of power to the executive.[136] However, In *Panama Refining Company v. Ryan*[137], also known as the hot oil case, the Court held unconstitutional a provision of the National Industrial Recovery Act granting power to President Franklin D. Roosevelt to prohibit the

[131] *Zemel v. Rusk* 381 U.S. 1, (1965).

[132] Stephens, Scheb II (n 124 above) 239.

[133] Stephens, Scheb II (n 132 above) 239.

[134] *Wayman v. Southard* 23 U.S. 1 (1825).

[135] Stephens, Scheb II (n 134 above) 239.

[136] Lehman (n 129 above) 63.

[137] *Panama Refining Company v. Ryan* 293 U.S. 388 (1935).

interstate shipment of oil produced in violation of state regulations.[138] The Court noted that an absolute and uncontrolled discretion had been vested in the executive since the statute was devoid of policy and standard by which the validity of the President's action could be judged.[139]

In *Schechter Poultry Corporation v. United States*[140] also known as the sick chicken case, the Court condemned central provisions of the National Industrial Recovery Act that granted the president authority to enact "codes of fair competition" for a broad range of industries.[141] The Schechter Poultry Corporation was convicted on several counts of violating the Live Poultry Code developed by the National Industrial Recovery Act.[142] The discretion of the president under the National Industrial Recovery Act was said by the Court to be 'virtually unfettered.'[143] The key issue was whether the delegation was accompanied by standards sufficiently clear to pass constitutional test.[144] While writing for the Court, Chief Justice Hughes invalidated the delegation on the basis that in earlier delegations Congress had created expert administrative bodies "acting under statutory restrictions adapted to the particular activity" and National Industrial Recovery Act could not make such claims.[145] Consequently National Industrial Recovery Act could not pass the non-delegation test.[146]

The current position of the Supreme Court on congressional delegation is well represented by its unanimous decision in *Whitman v. American Trucking Associations*[147], in which the Court had an opportunity to apply the non-delegation doctrine. The American

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[138] Lehman (n 129 above) 63.

[139] Lehman (n 129 above) 63.

[140] *Schechter Poultry Corporation v. United States* 295 U.S. 495, 55 S.Ct. 837, 79 L.E.d. 1570 (1935).

[141] Stephens, Scheb II (n 135 above) 240.

[142] Stephens, Scheb II (n 141 above) 240.

[143] Lehman (n 139 above) 63.

[144] Stephens, Scheb II (n 142 above) 240.

[145] Aranson, Gellhorn, Robinson (n 125 above) 9.

[146] Stephens, Scheb II (n 144 above) 240.

The non-delegation doctrine holds that Congress may not delegate the legislative power vested in it by the Constitution.

[147] *Whitman v. American Trucking Associations* 531 U.S. 457. (2001).

Trucking Associations and other business interests challenged new Environmental Protection Agency limits on ozone and soot, arguing, *inter alia*, that the Clean Air Act under which the Environmental Protection Agency promulgated the regulations constituted an unlawful congressional delegation of legislative power.[148] Writing for the Court, Justice Scalia stated that 'the scope of discretion [the challenged provision] allows is in fact well within the outer limits of our non-delegation precedents.'[149] In the same judgment he observed that 'a certain degree of discretion, and thus of lawmaking, inheres in most executive or judicial action.'[150]

In the Zimbabwean context, delegation of legislative powers can be regarded as a modern experience. Before the arrival of the initial British settlers in the land now known as Zimbabwe in 1890, the northern part of the land (now known as Mashonaland) was occupied by the Shona and the southern part (now known as Matebeleland) was occupied by the Ndebele people, both whose chiefs exercised sovereign power over the territory.[151] The legal system that obtained before the British occupation was the traditional legal system or customary law of the local tribes living in Zimbabwe at that time which had remarkable differences although sharing some similarities. Chiefs and their kraal heads administered the traditional law whose legitimacy was derived from culture and tradition. As judges who had the final say in the resolving disputes, Chiefs enjoyed the power to issue royal decrees which would become precedent. Customary laws and judgments were enforced by the king or chiefs warriors whore were also known as *indunas*. In addition to judicial power, Chiefs also enjoyed administrative and political power. There was no legislative delegation during this period due to the non-existence of the legislature and non-adherence to the doctrine of separation of powers.

Subsequent to 1890, the British decided to colonise the territory through a company known as the British South Africa Company which was chartered on the 29th of October 1889.[152] The company was to govern the daily administrative, legislative and judicial

[148] Stephens, Scheb II (n 146 above) 243.

[149] Stephens, Scheb II (n 148 above) 243.

[150] Stephens, Scheb II (n 149 above) 243.

[151] Limington 1.

[152] Limington (n 151 above) 1.

matters of the territory although the British Government retained residual powers sufficient to override the company's decisions whenever it appeared necessary.[153] In 1893, the Ndebele's were defeated in a war that broke out between the Company and Lobengua (the famous and powerful chief who exercised general power of control over Mashonaland and Matebeleland).[154] In the ensuing year, a High Court was established from which appeals could be made to the Supreme Court in the Cape of Good Hope and it was during this period that the territory came to be known as Southern Rhodesia.[155]

One of the earliest delegation of legislative powers recorded was in the form of a Southern Rhodesia Order in Council of 1898 which provided that Southern Rhodesia should continue to be governed by the company through an appointed administrator who was to act on the advice of an executive council.[156] Prior to this, the British monarchy had used the 1889 Charter[157] to sub-delegate legislative powers to the British South Africa Company. In terms of clause 13 of the Charter, the company had power to regulate the sale of any spirits or other intoxicating liquor to any natives. In terms of clause 21, the Company could make regulation for the preservation of elephants and other game. The first constitution of Rhodesia enacted in 1923 did not expressly authorise nor explicitly prohibit the legislature from delegating law making powers to the executive. However legislative delegation could be inferred from its provisions.[158] Section 50 of the second Rhodesian Constitution promulgated in 1961 explicitly authorized delegated legislation in the form of Statutory Instruments.[159] The third Rhodesian Constitution of 1965 also had

[153] Limington (n 152 above) 1.

[154] Limington (n 153 above) 3.

[155] Limington (n 154 above) 3.

[156] Limington (n 155 above) 3.

[157] Charter of the British South Africa Company 1889.

[158] Section 17 of The Southern Rhodesia Constitution Letters Patent 1923; "The first and every other session of the legislature shall be held in such a place and such a time as may be notified by the Governor by Proclamation in the Gazette".

[159] Section 50 of The Southern Rhodesia Constitution 1961; "Whenever a Statutory Instrument is published in the Gazette, a copy will be transmitted to the Speaker and to the Constitutional Council…"

provisions that authorized the legislature to delegate law making power to the executive.[160]

The position of the Court (Privy Council) on delegated legislation was expressed by its 1969 decision in *Madzimbanuto v Lardner-Burke*[161], in which the Court invalidated the government's passing of a Statutory Instrument that had an effect of extending Emergency Power Regulations due to the fact that the unilateral declaration of independence by the Southern Rhodesian government was invalid. This was because the United Kingdom retained full sovereignty over Southern Rhodesia and acts done by the *de facto* government of the territory were not to be recognized. The complainant in this case was detained under Emergency Power Regulations, which were enacted before the unilateral declaration of independence. Although regulations expired in 1965, the regulations were extended by the Southern Rhodesian government which had now become self-governing after declaring its independence. The Court held that the continued detention of the complainant was unlawful. Similarly, section 71 of the fourth Rhodesian constitution of 1969 authorised Parliament to delegate its law making powers to other executive bodies.[162]

2.4 Extent of Delegated Legislation

Theoretically and owing to the doctrine of Parliamentary sovereignty under English Law, law making can only be exercised by Parliament yet the executive now performs some legislative functions together with pure administrative functions due to practical necessity.

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[160] Section 26 of The Constitution of Rhodesia 1965; "… and the powers of the Legislature shall include the power to repeal or amend any such Act, order, rule or regulation in so far as the same is part of the law of Rhodesia".
See also Section 95; "Every Statutory Instrument shall be published in the Gazette and thereupon an authenticated copy thereof shall be transmitted by the prescribed authority in the prescribed manner to the Constitutional Council within such period of the date of the coming into force of the Statutory Instrument as may be prescribed".

[161] [1969] 1 AC 645.

[162] Section 26 of The Constitution of Rhodesia 1969; "… an authenticated copy of every Statutory Instrument be published in the Gazette shall be transmitted by the prescribed authority in the prescribed manner to the Secretary to Parliament within such period of the day of the coming into force of the Statutory Instrument as may be prescribed and the Secretary to Parliament shall forthwith refer such Statutory Instrument to the Senate Legal Committee".

Although the principle of delegating legislative powers to the executive has not been accepted in its essence in the United States of America, in practice the United States Congress confers legislative powers to the executive. The foregoing practice raises a fundamental question; to what extent is such delegation of legislative powers permissible? It has been settled that Parliament cannot delegate its primary law making function to any subordinate body at any rate. Section 134 of the constitution provides in so far as is relevant that Parliament may, in an Act of Parliament, delegate power to make statutory instruments within the scope of and for the purposes laid out in that Act, but Parliament's primary law-making power must not be delegated. The enabling Act should lay down the legislative policy and principle and must afford clear guidance for carrying out the said policy before delegating its subsidiary powers.[163] This is done to shield delegated legislation from being exercised capriciously or outside the legislative parameters set by the enabling legislation. The executive should only exercise its delegated legislative powers in circumstances where explicit provisions in the enabling Act confer to it powers to legislate hence every piece of secondary legislation should refer to specific provisions in the parent Act granting the delegate *vires* to make a Statutory Instrument.

The extent to which Parliament's primary law making function may be delegated was adequately answered in *S v Gatsi* and *S v Rufaro Hotel (Pvt) Ltd WA Rufaro Buses*[164] where the court held that; "… Parliament could competently delegate legislative powers to the President. Parliament's power to legislate is a plenary, not a delegated power. There could be no question that Parliament can delegate its lawmaking power to some extent; the question was, the extent to which it could do so without delegating its fundamental authority. The provisions of the Act, though extensive and wide ranging, are contingent upon the existence of defined circumstances and are made subject to the control of Parliament itself by the tabling procedure…" This position is buttressed by section 134 of the 2013 Zimbabwe Constitution.

[163] *V.M. Sanjanwalla v The State of Bombay*, AIR 1961, as cited in Viswanathan 441.

[164] *S v Gatsi* and *S v Rufaro Hotel (Pvt) Ltd WA Rufaro Buses* 1994 (1) ZLR 7 (HC).

2.5 Rationale behind Delegated Legislation

Delegated legislation raises important questions relating to the separation of powers as it confers law-making powers to other public bodies and individuals. This is regarded as a clear violation of the doctrine of separation of powers. However it is constitutionally justified on the following basis;

2.5.1 Efficiency

Efficiency is regarded as one of the principal justification for legislative delegation. It is through granting of law-making powers to the executive that Parliament is freed from scrutinising every technical detail of a Bill.[165] Generally Parliament does not enjoy much time to deal in detail with the multifarious matters which claim its attention and to burden Parliament with the task of enacting all new statutory rules and scrutinising every minute detail of legislation would result in the legislative machine clogging up.[166] Delegated power also enables ministers and other public bodies to 'fill in the details' after the enabling Act has been promulgated.[167]

2.5.2 Speed

It is not possible to predict all future changes in circumstances which may necessitate modifications in detailed legal rules during the process of drafting a Bill, hence if these future changes were to occur, both the public and law makers would risk frustration if Parliament (as is always the case) could not get sufficient time to amend the legislation. However secondary legislation can expeditiously be amended to address the obtaining circumstances by promulgation of a new Statutory Instrument.

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[165] Barnett 77.

[166] Bradley 582.

[167] Bradley (n 166 above) 582.

2.5.3 Practical Necessity

Although legislative delegation represents an overlap involving the executive performing a function of the legislature, it is justified constitutionally on the basis of practical necessity. It would practically be impossible for Parliament to legislate all the details of all the laws that are necessary in a modern society characterized by technological sophistication and economic interdependence.[168] In many instances Parliament has neither time, capacity nor inclination to legislate on complex matters. The general principle governing delegated legislation is that the enabling Act contains the general principles and policies of the legislation, while the secondary legislation compliments these general principles and policies with detailed provisions, thus, filling in the finer details of legislation,[169] provided that there are procedures to ensure that some oversight is exercised by Parliament.[170] The necessity of delegated legislation is seen when it is taken into consideration that much of it deals with technical issues that are best regulated by a process in which relevant expertise and economic and other interests can be fully take advantage of. The greater the technicality involved in the content of such issues, the less suitable they are for consideration by the usual legislative process and the less likely they are to generate enough political interest to be included in the government's legislative programme.[171] Another factor is that in many areas of government, especially when new services or schemes are established, it is not possible to envisage every challenge that may arise in practice and detailed rules may be needed to accompany the enabling Act, hence delegated legislation makes it possible to amend such rules as it is discovered how the rules are operating.[172] Needless to say that vast majority of laws promulgated each year are in the form of delegated legislation.

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[168] M Ryan, *Unlocking Constitutional & Administrative Law*, 3rd Edition, Routledge, 2014. 79. See also Stephens, Scheb II (n 150 above) 236.

[169] Ryan (n 168 above) 79.

[170] Bradley 583.

[171] Bradley (n 170 above) 583.

[172] Bradley (n 171 above) 583.

2.5.4 Modern Complexity of Subject-Matter

It is impossible for Parliament to possess the expertise necessary to effectively legislate on many of the complex and technical issues which require legal regulation.[173] While for instance, it is possible for Parliamentarians to possess general knowledge and views on Radiation Sources, it is very less likely that the Parliamentarians may possess adequate technical knowledge that can enable them to make laws with practical use with regards to safety and security of radiation sources. The preparation of legislation on such technical issues requires detailed consultations between the relevant government ministry and experts in that particular field.[174] There is little use in Parliament attempting to legislate specifically on matters that are more complex in nature which Parliamentarians do not fully comprehend, nor would the public interest be well served by legal rules which relate only imperfectly to the matters to which they are directed.[175]

2.5.5 Flexibility

While Parliament ordinarily enacts legislation that requires updating of minor statutory provisions from time to time, delegated legislation allows the law to be flexible and responsive. It would be time consuming if Parliament had to pass an Act every time it was decided to make a minor alteration to legal rules regulating the levels of prescription charges, eligibility for legal aid, or any of the other numerous charges and benefits which the state administers.[176] An example of delegated legislation responding to the dynamic needs of a modern society, is Statutory Instrument 209 of 2019 which alters standard scale of fines.

[173] Carroll 168.

[174] Carroll (n 173 above) 168.

[175] Carroll (n 174 above) 168.

[176] Carroll (n 175 above) 168 – 169.

2.5.6 Times of emergency

Despite the normative requirements of the rule of law and the separation of powers, it is generally accepted that a substantial degree of law-making authority should be entrusted to the executive in the event that the state or society is threatened by, *inter alia*, war, terrorism or natural disasters.[177] The assumption here is that in such times those in government, who may have to act quickly, are best placed to judge what is required in terms of legislation for the protection of the state and its citizens.[178] Delegated legislation can therefore address emergency situations in a swift manner as they arise without any need to wait for time consuming Parliamentary processes required for enacting normal legislation that can address those particular emergencies.

2.6 Dangers of Delegated Legislation

The foregoing justifications of delegated legislation are considered as practical and necessary for an efficient legislative and administrative process yet they can become flawed and dangerous if they are used to justify the indefinite extension of executive authority. In the early part of the twentieth century, critics of delegated legislation have argued the following dangers particularly if no effective restraints on its abuse are put in place.[179]

2.6.1 Government by Decree

The fear is that a government could use its majority in Parliament to enact enabling legislation which authorises it to make law on matters of general principle or policy as opposed to matters of administrative detail as is believed to be the proper domain of delegated law-making power.[180] There may be no formal control to prevent this nor are

[177] Carroll (n 176 above) 169.

[178] Carroll (n 177 above) 169.

[179] Carroll (n 178 above) 169.

[180] Carroll (n 179 above) 169.

there any clear rules as to what policy is and what detail is.[181] Even in circumstances where clear controls are available, government may still use its majority in Parliament to act on partisan lines.

2.6.2 Alteration of Acts of Parliament

Although in accordance to section 134(a) of the Constitution it is unconstitutional for Parliament to delegate its primary law making power, it is not unknown for a parent Act to contain a provision which confers to the executive the power to make legal rules which alter either the provisions of the parent Act itself or those in other Acts of Parliament.[182] While in other jurisdictions it may be acceptable for a Statutory Instrument to amend an enabling Act upon specific authorisation by the enabling Act and provided the amendment is restricted to matters of administrative detail, cause for concern may arise, however, where the executive uses such delegated power to alter matters of general principle or policy. In 2018 the Finance and Economic Development Minister Mthuli Ncube imposed the 2% intermediated transaction tax under Statutory Instrument 205 of 2018 which repealed and replaced section 22G of the Finance Act [Chapter 23:04], and section 36G of the Income Tax Act [Chapter 23:06]. The Statutory Instrument was later ruled by the High Court to be unconstitutional on the basis that the executive could not legally amend an Act of Parliament using a Statutory Instrument.[183] Zhou J stated that; 'Repealing an Act is the prerogative of Parliament which according to s 134(a) may not be delegated … A Minister, who is a member of the Executive, or any other arm or agency of Government does not have the power to amend, repeal or enact and Act of Parliament. Only the Legislature has that power. The Legislature is precluded by the constitution from delegating that power to any other authority.' In the case of *Executive Council of the Western Cape Legislature v President of the Republic of South Africa*,[184] the South

[181] Carroll (n 180 above) 169.

[182] Carroll (n 181 above) 169.

[183] *Mfundo Mlilo v Minister of Finance and Economic Development*; HH 605-19.

[184] *Executive Council of the Western Cape Legislature v President of the Republic of South Africa* 1995 (4) SA 877(CC).

African Constitutional Court held that the "manner and form" of the Constitutional provisions prevent Parliament from delegating to the Executive the power to amend the provisions of the parent Act. In the American case of *Panama Refining Co v Ryan*,[185] Hughes CJ held that; 'The Congress manifestly is not permitted to abdicate or transfer to others, the essential legislative functions with which it is thus vested.'

2.6.3 Imposition of Taxation

In most countries there is a basic constitutional principle that any act of taxation must have a legal basis and this principle means that no tax can be levied, varied or removed except under the specific authority of a law.[186] The use of secondary legislation to impose or vary rates of taxation is in clear violation of Section 298(2) of the Constitution which provides that "No taxes may be levied except under the specific authority of this Constitution or an Act of Parliament." Material changes in matters relating to revenue and direct taxation are now effected in terms of the Finance Act or the Income Tax Act. However enabling Acts may contain provisions conferring to the Minister specific authority to vary taxation of different types, inter alia, PAYE, VAT, income tax and capital gains tax. It would appear that alteration of taxes is necessitated by the volume and complexity of the legal rules operating in this context and by the need to have in place a system of law-making which permits ready application of the fiscal policies.[187]

2.6.3 Retrospectivity

As a general rule retrospective legislation is contrary to the rule of law.[188] The expectation is likely, therefore, that any retrospective provisions in a Bill will be the subject of adverse comment and debate in Parliament before the measure is enacted yet not all delegated legislation is subject to such close Parliamentary scrutiny, nor does it attract great public

[185] *Panama Refining Co v Ryan 293 US 388 (1935) at p. 421; 79 L Ed 446.*

[186] F Vanistendael, Tax Law Design and Drafting, 1996, Vol 1, *International Monetary Fund*, 2.

[187] Carroll 169

[188] Carroll (n 187 above) 169.

awareness.[189] The risk of retrospective legislation being introduced in this way, and going unnoticed or unchallenged is, therefore, increased.[190] However an enabling Act may confer power to a delegate to make subordinate legislation that have a retrospective effect. Conferment of such power may be done on the express authority of the enabling Act[191] or inferred by necessary implication.[192]

2.6.4 Exclusion of the Jurisdiction of the Courts

The Significance of delegated legislation, and the potential for abuse of such delegated powers, necessitates that it should be open to judicial review on both substantive and procedural grounds at all times.[193] The power of the courts in reviewing delegated legislation is therefore restricted to declaring it *ultra vires*, whether on grounds of substance or procedure.[194] The effectiveness of judicial review may however be negatively affected by extraordinarily wide and subjectively framed enabling provisions such as; 'The Minister responsible may make such regulations as he or she may consider necessary or expedient for the administration of this Act'. Judicial control may also be affected by the inclusion of an express ouster provision; that is to say a provision stating that the validity of regulations made under the enabling Act may not be subject to any court procedure.[195]

[189] Carroll (n 188 above) 169.

[190] Carroll (n 189 above) 169.

[191] See *R (Stellato) v Home Secretary* [2007] UKHL 5, [2007] 2 AC 70, as cited in Bradley 585.

[192] *Indramani v. W.K. Natu*, AIR 1963 SC 274 at 286 as cited in Viswanathan 469.

[193] Viswanathan (n 192 above) 469.

[194] Bradley 585.

[195] Carroll (n 190 above) 169.

2.7 Constitutional Limitations on Delegated Legislation

Delegated legislation is not without limitations. The Zimbabwean constitution vests wide powers of legislative delegation to Parliament. However, these powers are subject to a variety of limitations.

2.7.1 Non-delegation of Primary Law Making Power

Section 134(a) contains a provision which expressly states that Parliament cannot delegate its primary law making power. Primary law making power consists of determination or choosing of the legislative policy and of formally promulgating that policy into an Act of Parliament,[196] hence delegation is only valid when the legislative policy and guidelines to implement it are adequately laid down.[197] Primary law making entails making and unmaking laws of the land. Unmaking of a law or repealing an Act of Parliament is the prerogative of Parliament which according to section 134(a) may not be delegated.[198] In *Mfundo Mlilo v Minister of Finance and Economic Development,*[199] Zhou J held that; 'That section (section 3 of the Finance Act) cannot be read as granting to the Minister power to make Regulations which amend an Act thereby exercising Parliament's primary law-making power. To do so would undermine the separation of powers principle which is the very basis upon which our nation is founded and the government is structured. A Minister, who is a member of the Executive, or any other arm or agency of Government does not have the power to amend, repeal or enact an Act of Parliament. Only the Legislature has that power. The Legislature is precluded by the constitution from delegating that power to any other authority'.

[196] *H Bagla v. State of M.P*, AIR 1954 SC 465 at 468 as cited in Viswanathan 454.

[197] *Tata Iron & Steel Co. v. Workmen*, AIR 1972 SC 1917 at 1922 as cited in Viswanathan 454.

[198] Viswanathan (n 197 above) 454.

[199] *Mfundo Mlilo v Minister of Finance and Economic Development* HH 605-19.

2.7.2 Violating or Limiting Fundamental Rights and Freedoms

Sections 134(b) provides that delegated legislation must not infringe or limit any of the rights and freedoms set out in the declaration of rights. These rights and freedoms are entrenched in Chapter 4 of the Constitution. The executive or any other public body have a constitutional duty to respect, protect, promote and fulfil the rights and freedoms set out in the declaration of rights.[200] When juxtaposed with section 2 of the Constitution it becomes apparent that any delegated legislation enacted in violation of the principle of constitutional supremacy is null and void and without force or effect. Constitutional supremacy entails that no laws whether made by Parliament, executive or any other body can violate any of the provisions of the Constitution. In *Pharmaceutical Manufacturers Association of South Africa: In re: ex parte President of the Republic of South Africa*,[201] the Constitutional Court of South Africa held as that: There are not two systems of law, each dealing with the same subject matter, each having similar requirements, each operating in its own field with its own highest court; There is only one system of law; It is shaped by the Constitution which is the supreme law, and all law, including the common law, derives its force from the Constitution and is subject to constitutional control. This South African position supports section 134(b) of the Zimbabwean Constitution.

2.7.3 Consistency with the Enabling Act

It is implicit that every time Parliament delegates legislative power to another body or authority the power delegated by the enabling Act should be exercised within the limits of authority conferred to by the provisions of the enabling Act. Section 134 (c) of the Constitution provides that delegated legislation must be consistent with the Act of Parliament under which it is made. It is not intended for secondary legislation to supplant provisions of the enabling Act but rather to supplement them. A subordinate cannot override provisions of the enabling Act either by way of exceeding the authority or by

[200] Section 44 of the Constitution of Zimbabwe.

[201] *Pharmaceutical Manufacturers Association of South Africa: In re: ex parte President of the Republic of South Africa* 2000 (2) SA 674 (CC).

making provisions inconsistent with the enabling Act[202] unless power to override is expressly or impliedly conferred to the delegate by Parliament. In *S* v *Delta Consolidated (Pvt) Ltd & Ors*,[203] the court ruled that it has inherent jurisdiction to declare null and void subsidiary legislation on the ground that it is *ultra vires* if it cannot be construed so as to accord with the intention of a reasonable legislature; It is presumed that Parliament, which is the maker of primary legislation, intended that regulations should be imposed only where reasonably necessary to further the objects of the primary legislation.[204]

2.7.4 Gazetting

Section 134(e) of the Constitution provides that a statutory instrument will not have the force of law unless it has been published in the Government Gazette. The same requirement is also contained in section 20 of the Interpretation Act [Chapter 1:01]. In the case of *Hayes v Baldachin & Ors*,[205] Fieldsend CJ said; 'It is a recognised principle in Zimbabwe that no law becomes effective until it has been published in the *Gazette*, but the general rule that before a law or any regulation or by-law having the force of law can become operative it must be duly promulgated,[206] must be read subject to the qualifications that the word 'law' in the rule must not be given too wide a connotation …'[207] The object of gazetting is seen in the Indian Supreme Court case of *Harla v. State of Rajasthan*,[208] were Bost J. said: 'Natural justice requires that before a law can become operative, it must be promulgated or published. It must be broadcast in some recognizable way so that all men may know what it is, at the very least there must be some special rule or regulation or customary channel by or through which such knowledge can be acquired with the exercise of due and reasonable diligence.'

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[202] Viswanathan 458.

[203] *S* v *Delta Consolidated (Pvt) Ltd & Ors* 1991 (2) ZLR 234 (S).

[204] Feltoe 9.

[205] *Hayes v Baldachin & Ors* (2) 1980 ZLR 422 at 427(S), 1981 (1) SA 749 (ZS) at 754.

[206] Promulgation refers to the official publication of a new law or regulation, by which it is put into effect.

[207] Feltoe (n 204 above) 7.

[208] *Harla v. State of Rajasthan* AIR 1951 SC 467.

2.7.5 Laying

Section 134 (f) of the Constitution provides that statutory instruments must be laid before the National Assembly in accordance with its Standing Orders and submitted to the Parliamentary Legal Committee for scrutiny. This raises a critical issue as regards failure to comply with the requirement of laying. In *State* v *Gatsi*, *State* v *Rufaro Hotel (Private) Limited T/A Rufaro Buses*,[209] Smith J observed that; 'Where a statute requires that something be done without stating the consequence of non-compliance with the provision, the normal course followed in order to determine the consequence is to ascertain whether the provision concerned is peremptory or merely directory. If it is peremptory, then the act is a nullity; if it is directory, then the act has legal effect despite the non-observance of the provisions of the statute.' It would appear that the rationale behind the constitutional requirement of laying is to subject the delegate to the control of Parliament. However compliance with the requirement of laying does not confer any validity to the Statutory Instrument if it is *ultra vires* the enabling Act.

2.8 Sub-delegation

When an Act of Parliament confers legislative power to a minister, exercisable by statutory instrument, the assumption is that Parliament intends the statutory instrument itself to contain all the rules.[210] Is it then proper for a statutory instrument to sub-delegate by authorising rules to be made by another body or by another procedure? A simple answer to this will be the legal maxim, *delegatus non potest delegare*, which means that a delegate may not sub-delegate his or her power. However this may be overridden by the enabling Act if it contains provisions that expressly or impliedly authorises sub-delegation. In the absence of express or implied authority in the enabling Act, the validity sub-delegation of legislative powers is doubtful, and whenever sub-delegation occurs, control by Parliament becomes more difficult.[211]

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[209] *State* v *Gatsi*, *State* v *Rufaro Hotel (Private) Limited T/A Rufaro Buses* 1994 (1) ZLR 7 (H).

[210] Bradley 585.

[211] Bradley (n 210 above) 585.

2.9 Overview

Notwithstanding its justifications, delegated legislation has not been without criticisms. Opponents argue that delegation of legislative powers violates the constitutional principle of representative government that lies within the grant of legislative power to the legislature, whose members are elected by the people.[212] The delegation of legislative power can be viewed as lacking democracy and antithetical to the ideal of representative government as the legislative function of Parliament is shared with unelected people.[213] Another concern raised is that delegation of legislative powers violates the constitutional principle of separation of powers as Parliament transfers its own power to the executive. Since delegated legislation is subject to less Parliamentary scrutiny as opposed to Bills, it then follows that Parliament does not enjoy sufficient control over delegated legislation. The net effect of this is that in addition to laws becoming inconsistent, there is a possibility of using delegated legislation in a manner which had not been anticipated by Parliament when it conferred the power through the enabling Act. Another argument is to do with publicity. As opposed to primary legislation which enjoys wide publicity, the public is not always notified when delegated legislation is promulgated which in turn makes it difficult to discover present law. This is due to the annual volume of delegated legislation that is made by the executive. Concern has been expressed that delegated legislation is now constituting too much law to the extent that the child now dwarfs the parent.

With respect to arguments based on convenience, flexibility and efficiency, it is argued that the foregoing are sound arguments for delegation within due limits although they become unsound and dangerous if they are used to justify the indefinite extension of executive powers.[214] Speed and efficiency may be bought at too high a price, and indeed a State which makes efficiency its highest god is very apt to become an all devouring monster.[215] Again, while "flexibility" may be much more convenient than the notorious rigidity of statutes, it is certain that if an enactment is flexible enough, it may soon be bent

[212] Stephens, Scheb II 237.

[213] Stephens, Scheb II (n 212 above) 237.

[214] Allen C.K: *Law and Order*, (1945), as cited in Viswanathan 451 – 452.

[215] Viswanathan (n 214 above) 451 – 452.

entirely out of its original shape possibly, in the opinion of some, to a better shape, but still not that which Parliament designed.[216] In short, administrative efficiency ceases to be a proper constitutional aim when it is employed to relieve Parliament of its responsibilities.[217]

[216] Viswanathan (n 215 above) 451 – 452.

[217] Viswanathan (n 216 above) 451 – 452.

CHAPTER THREE

OPPORTUNITIES FOR EFFECTIVE MONETARY AND FISCAL REGULATION IN ZIMBABWE'S PARLIAMENTARY OVERSIGHT SYSTEM.

3.0 Introduction

This chapter examines opportunities for effective monetary and fiscal regulation in Zimbabwe's parliamentary oversight system. It also elaborates upon the relationship between the legislature and the executive as well as possible ways of balancing between checks and balances and separation of powers to enable efficiency. It also interrogates safeguards that can protect delegated legislative powers from being abused by the executive. Analysis is also carried out on different oversight tools relevant to monetary and fiscal regulation. This chapter where necessary provides a comparative analysis of oversight related mechanisms in legislative bodies in other democracies in order to highlight lacunae as well as trying to offer remedies.

3.1 Definition and Nature of Parliamentary Oversight

Given the gravity of the oversight function, it has become an international custom for legislative oversight function to be embedded in constitutional documents. On the other hand scholars have defined oversight in varying forms. The South African understanding of oversight would be "the informal and formal, watchful, strategic and structured scrutiny exercised by legislatures in respect of the implementation of laws, the application of the budget, and the strict observance of statutes and the Constitution"[218] Yamamoto defines oversight as "the review, monitoring and supervision of government and public agencies,

[218] Parliament Monitoring Group, Oversight and Accountability Model: Assisting Parliament's Oversight Role in enhancing Democracy, Parliament of South Africa. Accessed March 13, 2020. www.pmg.org.za/report/20080319-final-report-task-team-oversight-and-accountability.

including the implementation of policy and legislation".[219] Although there is no agreed definition of oversight at its broadest, it would appear that oversight refers to the crucial role of Parliament in reviewing, monitoring and supervising acts of the executive with respect to spending, implementation of laws and policies. It aims at holding the executive accountable for its actions and ensuring that policies are executed in accordance with the laws and budget passed by Parliament.

The underpinning philosophy of oversight in a democracy is that of checks and balances through which elected representatives can scrutinise the actions of the executive and providing the executive with a feedback. Through effective oversight, Parliament can maintain a balance of power and assert its role as the defender of people's interests more particularly against the executive's decisions.[220] Reviewing and monitoring of executive actions is carried out through a variety of tools and mechanisms that are invariably provided for in the constitution and other regulatory provisions such as the standing orders. The specifics of how a Parliament can utilise its oversight function is reliant on the existence of a legal framework, which strengthens the position of the Parliament as an oversight institution and guarantees its oversight powers and independence within the legal system.[221] In terms of section 119 and 139 of the Constitution of Zimbabwe, as read with the Standing Orders, Parliament has power to exercise oversight on all organs of state.

3.2 Objectives of Parliamentary Oversight

Through the function of oversight, Parliaments shed light on government's day to day activities by providing a public platform in which the policies and actions of government are debated, scrutinised, and subjected to public opinion.[222] This is done for the

[219] H Yamamoto, *Tools for Parliamentary oversight: A comparative study of 88 national Parliaments*, Inter-Parliamentary Union, 2007. 9.

[220] UNDP, Parliamentary Function of Oversight. Accessed March 13, 2020. https://agora-parl.org/resources/aoe/oversight.

[221] UNDP (n 220 above).

[222] UNDP (n 220 above).

purposes of improving transparency of government operations and enhancing public trust in the government, which is itself a condition of effective policy delivery.[223] Transparency of government operations also aids in detecting and preventing abuse, arbitrary behaviour, or unconstitutional conduct on the part of the cabinet and other public bodies. At the core of this is the protection of the fundamental rights and liberties of citizens.[224]

The oversight function helps in holding the government to account in relation to how the taxpayers' money is used. It detects abuse and waste within the government and public bodies with the aim of improving the economy, efficiency, as well as effectiveness of government spending.[225] Through oversight, Parliament ensures that the government delivers on policies authorised by Parliament. This is done through monitoring the achievement of goals set by legislation, government policies and examining potential abuses of power, arbitrary behavior, and illegal or unconstitutional conduct by government.[226]

3.3 Legislative-Executive Relations in Different Systems of Government

It would appear that the relationship between the legislature and the executive is at the heart of constitutional law. Essentially the type of governmental system under which a country operates determines the structure and tenor of legislative-executive relations.[227] The effectiveness of legislative oversight is reliant on the nature of the relationship between the legislature and the executive. Parliament's scope and capacity to exercise its oversight function is influenced by the democratic system in a particular country. There is no system of government that can be said to be superior than the other because democratic systems adopted by different countries are influenced by a variety of factors

[223] Yamamoto (n 219 above) 10.

[224] Yamamoto (n 223 above) 9.

[225] Yamamoto (n 224 above) 9.

[226] Yamamoto (n 225 above) 9.

[227] National Democratic Institute for International Affairs (NDI), Strengthening Legislative Capacity in Legislative-Executive Relation, 2000, *Legislative Research Series*.5.

inter alia the country's history and political culture. Each system assigns certain fundamental privileges and responsibilities to the legislature and executive, respectively, while additional factors encourage cooperation or reward confrontation between these branches.[228] However each system also has ambiguities that enable an assertive legislature or an ambitious executive to expand its influence.[229] Legislators that desire to have a greater impact on the policy process or enhance oversight of the executive can work within these gray areas to enhance their influence.[230] Depending largely on the structure of the executive, most democracies can be characterized as either Parliamentary or presidential.

However some systems have features of both and are therefore characterized as hybrid or mixed systems. All systems have positive and negative attributes and it is entirely up to the citizens of each country to choose a system that best serves their interests.

3.3.1 The Zimbabwean Model

The Zimbabwean model is characterized by two dominant features namely presidential system and the Parliamentary system. Zimbabwe has created a very powerful president on the basis that while the presidential system has been followed, the checks and balances under the same system have not been incorporated. The Zimbabwean president is directly elected. He is not responsible to Parliament. However, Ministers must be drawn from Parliament except up to five who may be chosen for their professional skills and competence.[231] Parliament cannot remove the president on a mere vote of no confidence although it is allowed to pass a vote of no confidence in the government.[232] The government contemplated in section 109 does not include the president despite the president being the head of government in terms of section 89. A vote of no confidence in the government does not affect the president. Instead the president may remove all his

[228] NDI (n 227 above) 5.

[229] NDI (n 227 above) 5.

[230] NDI (n 227 above) 5.

[231] Section 104(2), (3) of the Constitution of Zimbabwe.

[232] Section 109(1) of the Constitution of Zimbabwe.

ministers or dissolve Parliament.[233] The president has powers of veto over legislation although this may be overridden by a 2/3 majority of the total membership of Parliament.[234] It is important to note that this 2/3 majority is unlike the American 2/3 majority. In the American system, it is 2/3 of those present and voting provided they constitute a quorum. Even where the president has been overridden by 2/3, he or she may still raise constitutional issues.[235] Where the President has constitutional reservations, he may refer the matter to the constitutional court.[236] If the Constitutional Court advises that the bill is constitutional, the president must assent to it and sign it immediately. The American president does not enjoy such powers. There is no room for the American president to argue with Congress yet the Zimbabwean president is permitted to argue with Parliament to the extent of involving the Constitutional Court. On the other hand, the South African president can only veto a bill on constitutional grounds, and he or she may raise constitutional issues when the Bill is presented for the first time. There is no room to refer the Bill back to Parliament – he/she must refer to the Constitutional Court. So, there is no room for the president arguing with Parliament.[237]

Zimbabwean vice president and ministers are accountable to Parliament in that they are required to answer questions in Parliament.[238] This arises under the doctrine of ministerial responsibility. However, there is no provision for Parliament to pass a vote of no confidence in an individual minister. A vote of no confidence may only be in respect of the government as a whole.

[233] Section 109(4) of the Constitution of Zimbabwe.

[234] Section 131 of the Constitution of Zimbabwe

[235] Section 131(8) of the Constitution of Zimbabwe

[236] Section 131(8) of the Constitution of Zimbabwe.

[237] Section 50 of the Constitution of the Republic of South Africa, 1996.

[238] Section 107 of the Constitution of Zimbabwe Amendment.

3.3.2 Concluding Aspects on Legislative-Executive Relations

Generally there are no immutable principles on legislative-executive relations nor is there a universally applicable model. What is most important about legislative-executive relations is the desire to control abuse of state power. Each country has its own approach to these constitutional questions. In the South African case of *re-Certification of the constitution of the Republic of South Africa*[239], it was stated explicitly that the relationship between different branches of government and the power or influence that one branch of government has over the other differs from country to country. These observations were made by the court in response to various challenges made to the first draft constitution. It had been argued that dual membership of cabinet and Parliament was a violation of the principle of separation of powers. The Court rejected this argument. In another decision in 1998, *De Lang v Smuts No and others*[240] the same court had occasion to make the following remarks; "Overtime our courts will develop a distinctively south African model of separation of powers. One that fits the particular system of government provided for in the constitution, and that reflects, a delicate balancing, informed both by South Africa's history and its new dispensation between the need to control government by separating powers and enforcing checks and balances, and on the other to avoid separating power so completely that the government is unable to take timely measures in the public interest. This is a complex matter." It appears that the critical issue is of determining the proper scope for each branch with respect to issues that are legislative and executive as well as the extent to which the legislature may provide useful checks against the excesses of the executive.

3.4 Oversight Tools

Although Parliament exercises its oversight function on the executive, the functions of the two branches of government remain intertwined. In some countries, the head of state is required to pick members of cabinet from a pool of Parliamentarians. These ministers are

[239] *Re-Certification of the constitution of the Republic of South Africa* 1996 (iv) SA 744 (CC).

[240] *De Lang v Smuts No and others* 1998 (3) SA 785 (CC)

then called upon to give an account of the activities of the executive branch.[241] In a large minority of bicameral Parliaments, the upper chamber plays no oversight role, which is the sole preserve of the lower chamber.[242] Effectiveness in use of oversight tools might negatively be influenced by the leadership of the party that commands a majority in the national assembly through discouraging its members from internal dissent in Parliament. However the rules of procedure usually take account of the balance between the government side and the opposition side in Parliament, and often favor one or more of the main opposition parties in procedures such as debates.[243]

While constitutions may provide for certain oversight tools, the rules of procedure stipulate which actors are allowed to use which tools and on which occasions.[244] Further and consistent with the doctrine of responsible government, the accountability of the executive towards Parliament is of fundamental importance in ensuring that the executive acts under the law and in accordance with the principles of constitutionalism and democracy.[245] In the interest of evaluating the opportunities for effective monetary and fiscal regulation in Zimbabwe's parliamentary oversight system, the following procedural mechanisms must be examined.

3.4.1 Parliamentary Questions

A Parliamentary question is by definition a mechanism by which legislators can request information from government ministers and call them to account on policy actions.[246] Parliamentary questions are the classical form of oversight in Parliamentary systems.[247] Although originally developed in the British House of Commons, this practice has now become prevalent around the world.[248] However, regular question time is rare among

[241] Yamamoto 11.

[242] Yamamoto (n 241 above) 11.

[243] Yamamoto (n 242 above) 11.

[244] Yamamoto (n 243 above) 11.

[245] Barnett 328.

[246] NDI 31.

[247] NDI (n 246 above) 31.

[248] NDI (n 247 above) 31.

countries with a presidential system although it can occur.[249] Through questions, Parliamentarians can ask the government to clarify its stance on a particular issue or more generally its political course.[250] Parliamentarians can also move motions that relate to areas of their interest that require response from a Vice President, a specific government Minister or Deputy Minister.[251] Question time serves essentially two purposes, that is; oversight - compelling ministers to answer questions allows Parliamentarians and the generality of the public to examine and eventually pass judgment on government policies.[252] The second purpose is political; Parliamentary questions offer a forum to both ruling and opposition party members to engage in partisan debate, often for the benefit of an interested public.[253]

3.4.2 Types of Questions

Oral questions provide Parliamentarians with a rare, and much valued, opportunity to question ministers on the floor of the House.[254] This allows Parliament to obtain timely information as the government is under an obligation to provide an answer. [255] Answers to questions are made available not only to the author of the question but also to the rest of Parliamentarians in the house.[256] The general public and the media also take an increased interest in this aspect of Parliamentary proceedings.[257] Ordinarily members of the opposition focus primarily on policy issues which they disagree with the government.[258] In other countries where the president is the head of state and government, questions are directed to the vice-president, who is always a Member of

[249] Yamamoto (n 244 above) 51.

[250] Yamamoto (n 249 above) 49.

[251] Roles and Functions of Parliament. Accessed March 15, 2020.
https://www.parlzim.gov.zw/about-Parliament

[252] Yamamoto (n 250 above) 49.

[253] Yamamoto (n 252 above) 49.

[254] Carroll 177.

[255] Yamamoto (n 253 above) 49.

[256] Yamamoto (n 255 above) 49.

[257] NDI (n 248 above) 31.

[258] NDI (n 257 above) 31.

Parliament. In terms of Section 140(3) of the Constitution of Zimbabwe, the President may at the request of Parliament attend Parliament to answer questions on any issue.

Supplementary questions follow the initial oral question to enable members of Parliament to seek clarification on issues that the government may wish to keep vague or ignore to address at all.[259] In other words, these are questions that the executive branch has not been given the opportunity to consider beforehand.[260]

Urgent questions are oral questions put to a minister without the need to observe the normal rules as to notice.[261] These questions enable urgent matters to be raised for immediate ministerial response in the period subsequent to question time. Questions of particular value may be directed to the head of the executive branch because they allow members of Parliament to request for clarity on government's general policies.[262] Primacy over other Parliamentary business is given to urgent questions due to their nature.

Oral questions are not the only form of Parliamentary questions. Written questions now play a pivotal role in parliamentary oversight. Written questions have become the most commonly used tool of the oversight function. They enable members of Parliament to request detailed explanations and to seek information from different members of the government.[263] Requesting of information from the government is a right of each individual Member of Parliament.

In Zimbabwe questions are regulated in terms of Orders 64 – 74 of the National Assembly Standing Orders. These orders present parliamentarians with an opportunity to propose questions to government for decisions in matters relating to any Bill, motion or public matter connected with the business of the House. Members of Parliament are afforded an opportunity to influence effective monetary and fiscal regulations as such

[259] NDI (n 258 above) 54.

[260] NDI (n 259 above).

[261] Barnett 331.

[262] Yamamoto 52.

[263] Yamamoto (n 262 above) 55.

questions proposed for decision in the Chamber must be determined by a majority of the votes of the Members present and voting.

However questions may be an ineffective tool for oversight as they fail to address many issues and in other cases, Parliamentarians tend to ask irrelevant or inappropriate questions that focus on personal or political issues rather than on particular policies. [264] A common problem with question time is that substantive answers are often avoided as it is impossible to compel a minister to tell everything s/he knows on every topic.[265] Questions on a wide range of sensitive issues may be ruled out of order when government invoke the spectre *sub judice* rule to avoid answering.[266] The restraints on time and the number of questions and supplementaries which may be asked makes 'in depth' questioning impossible.[267]

3.4.3 Specialized Investigations by Parliamentary Committees

A Parliamentary committee is a group of Parliamentarians appointed by one chamber (or both chambers, in the case of joint committees in a bicameral Parliament) to undertake certain specified tasks.[268] The basic function of Parliamentary committees is to investigate matters of their own choosing within respective government departments and preparing annual or special reports for deliberation in the full chamber.[269] It is for the committee to determine, within the confines of the work of the government department, what subject matter to investigate and to determine what evidence the committee needs to assist in its examination, and accordingly, every aspect of government administration is potentially susceptible to inquiry.[270] Through the committee system, Parliament performs oversight of government activities, scrutinises draft legislation and ensures efficient use of scarce

[264] NDI (n 260 above) 33.

[265] NDI (n 264 above) 33.

[266] Carroll 180.

[267] Carroll (n 266 above) 180.

[268] Yamamoto 15.

[269] Yamamoto (n 268 above) 16.

[270] Yamamoto (n 269 above) 16.

and finite national resources. The nature of oversight which committees exercise is now central to the discourse on the oversight function. Generally, committees employ two oversight mechanisms; one allows committees to request written information and the other involves the hearing process.[271] Information and evidence is obtained from any person except the President, on oath or affirmation; that is to say from Ministers, civil servants, representatives of interest groups and public authorities, academics, members of the public, etc.[272] Both mechanisms allow committees to enjoy subpoena power to enforce such requests.[273]

Hearings which are often the result of citizen complaints, allow various stakeholders such as the business community, civic society, and citizens to comment on the effectiveness or efficiency of government programs.[274] Hearings may also give Parliamentarians, particularly members of the opposition, an opportunity to pose direct, policy-related questions to ministers or other government officials.[275] The hearing process may either be privately conducted or be open to the public. Another option combines public hearings with private briefings between legislators and key executive officials.[276] The decision on the type of hearing to be adopted carries major implications for the oversight role as private or closed hearings have the potential to increase intra-party and inter-party cooperation, and minimize government embarrassment whereas hearings held in public view may foster substantive policy changes over political competition.[277] Closed hearings reduce transparency and deprive the media and the public of an important opportunity to

[271] NDI (n 265 above) 28.

[272] Carroll 184.

[273] Standing Order 25, 2019 National Assembly Standing Orders.

[274] Standing Order 25.

[275] Standing Order 25.

[276] Available at: http://www.heritage.org/library/ testimony/test120399.html, as cited in NDI 51. According to former member of U.S. Congress Lee Hamilton, "the exchanges in briefings can be more important than those in a public hearing." Heritage Foundation Symposium, "Assessing the Effectiveness of Congressional Oversight," p. 4. December 3, 1999.

[277] NDI (n 276 above) 28.

engage in the process of policy development and implementation whereas open hearings may increase political incentives for oversight.[278]

The power of select committees to summon any person except the President to appear before it to produce any documents provided for by Standing Order 25(2) would be much impaired if the committee was obstructed in its attempt to gain access to evidence. In terms of section 107(2) of the Constitution, every Vice President, Minister and Deputy Minister must attend Parliamentary committees in order to answer questions relating to matters for which he or she is collectively or individually responsible. Failure to attend without being granted a leave of absence, the government official might be held to be in contempt of Parliament and consequently a sanction may be issued against him or her in terms of Privileges, Immunities and Powers of Parliament Act.[279] At the conclusion of debate on a report of a select committee, a Vice President or Minister must, in all cases, provide a comprehensive response to matters raised in the report within 10 sitting days.[280] The report is debated in the parent Chamber. Frequency of debates on published reports gives rise to criticism of the effectiveness of committee oversight systems. However, on many matters, opening debate to all Members of the House may involve a duplication of effort, with non-specialist Members of Parliament inexpertly attempting to re-analyse the information examined by the more specialised select committee Members.[281]

The foregoing description is mainly applicable to permanent Parliamentary committees. In addition to legislative oversight of government departments through permanent committees, ad hoc committees of inquiry can be established to which inquiries about specific issues can be referred.

Needless to mention is that not all committees play an oversight role. This study does not cover internal committees which are generally concerned with the smooth administration of Parliament such as the Committee on Standing Rules and Orders, Liaison and Coordination Committee, the Library Committee and the Internal Arrangements

[278] NDI (n 277 above) 28.

[279] Standing Order 63(4).

[280] Standing Order 26(2).

[281] Standing Order 26(2).

Committee. In this part of the study, the main focus will be on Investigative Committees that play an oversight role.

3.4.4 Parliamentary Legal Committee

In Zimbabwe this is a Committee appointed in terms of section 152 of the Constitution and Standing Order 27 and whose members are appointed for the life of a Parliament. The current laws enable this Committee to play an oversight role in relation to monetary and fiscal regulations. The provisions of 152 of the Constitution and Standing Order 27 confer to the Parliamentary Legal Committee power to examine the constitutionality of every Bill, draft Bill, Statutory Instrument, draft Statutory Instrument, amendment to a Bill, or amendment to a Statutory Instrument.[282] Standing Order 28(2)(b) provides that the Parliamentary Legal Committee must ensure that no Statutory Instrument derogates from the exercise of legislative power; while order 28(2)(e) provides that the Parliamentary Legal Committee must ensure that no Statutory Instrument shall

(i) contain matters more appropriate for parliamentary enactment;

(ii) make the rights and liberties of persons unduly dependent on administrative decisions which are not subject to review by a judicial tribunal; and

(iii) change an Act of Parliament unless permitted to do so by the enabling Act.

Yet it would appear that the power so conferred is rarely used to thoroughly scrutinise regulations that are laid before Parliament. This may be due to the multifarious nature of activities which claim the attention of parliament and the pressure on the timetable of Parliament. Moreover, there are no provisions which make examination of draft fiscal or monetary regulations by the Parliamentary Legal Committee mandatory before coming into effect. What is currently available is a mechanism that confers to the subordinate discretionary power to refer draft regulations to the Parliamentary Legal Committee for scrutiny before coming into effect. Where the subordinate so chooses not to refer draft regulations to the Parliamentary Legal Committee for scrutiny, which is almost always the

[282] Standing Order 26(2).

case, then it is mandated to lay a copy of the regulations before the Parliamentary Legal Committee for examination on one of the thirty days on which Parliament next sits after publication of such regulations in the *Gazette*.[283] However, effective monetary and fiscal regulation necessitates the removal of discretionary power upon the subordinate and making it mandatory for all draft monetary and fiscal regulations to be scrutinised before coming into effect.

3.4.5 Is there a need for a specialist Parliamentary sub-committee tasked with examining monetary and fiscal regulations?

Since the Parliamentary Legal Committee is also mandated with examining every Bill, other than a Constitutional Bill, before it receives its final vote in the Senate or the National Assembly as well as examining any Bill which has been amended after being examined by the Committee, before the Bill receives its final vote in the Senate or the National Assembly,[284] is there a need for a specialist Parliamentary committee or sub-committee to be tasked with examining monetary and fiscal regulations to ensure that the delegated authority is safe from abuse? Unlike the United Kingdom, Kenyan or other Commonwealth Parliaments where there are either committees or sub-committees on delegated legislation, Zimbabwean laws do not provide for such notwithstanding its importance in the exercise of parliamentary oversight. A committee on monetary and fiscal regulations can allow debate and scrutiny to take place before regulations come into effect. This forms a critical element in modern constitutional systems as it upholds constitutional values, norms and principles. Further, this can help improve the quality and certainty of monetary and fiscal regulations as well as save potential future legal costs and court time by anticipating challenges to regulations that may be ultra vires or falling outside the parameters of the law as was the case subsequent to the promulgation of the Finance (Rate and Incidence of Intermediated Monetary Transfer Tax) Regulations which were contained in Statutory Instrument 205 of 2018. The regulations sought to and indeed

[283] Section 152(3) (c) of the Constitution as read with section 36 of the Interpretation Act [Chapter 1:01].

[284] Section 152(3) of the Constitution.

imposed a 2% tax on digital transactions. The regulations were later set aside by the high court in the case of *Mfundo Mlilo v Minister of Finance and Economic Development*[285] as they were ultra vires the enabling Act. Zhou J had occasion to say; it was submitted on behalf of the respondent that in making the regulations the respondent was exercising power given to him by Section 3 of the Finance Act. That Section cannot be read as granting the Minister power to make regulations which amend an Act thereby exercising Parliament's primary law making power. To do so would undermine the separation of powers principle which is the very basis upon which our nation is founded and government is structured. A minister who is a member of the executive, or any other arm or agency of Government does not have the power to amend, repeal or enact an Act of Parliament. Only the legislature has that power. The court ordered the Minister to pay the legal costs; something that could have been avoided had there been a mechanism for effective monetary and fiscal regulation.

Notwithstanding the absence of any provision that establishes a permanent committee or sub-committee on delegated legislation, Standing Order 24(1) provides for an appointment of an ad hoc committee to carry out any task as Parliament may resolve. Members of Parliament under existing laws should consider setting up an ad hoc committee on monetary and fiscal regulation to act as an oversight body with a specific mandate of looking into effective monetary and fiscal regulation. The work of the ad hoc committee on monetary and fiscal regulation can be supplementary to the oversight function exercised by the Parliamentary Legal Committee.

3.5 Advantages and Disadvantages of Parliamentary Committee Oversight

Investigations by Parliamentary Committees are regarded as an effective oversight tool as they provide a systematic infrastructure of committees for the detailed scrutiny and monitoring of the acts of the executive.[286] This is achieved when Ministers and civil servants are questioned 'in depth' by committee members on issues not predetermined

[285] *Mfundo Mlilo v Minister of Finance and Economic Development* HH 605-19, HC 9723/18.

[286] Carroll 185.

by party leaders.[287] The attitude of Parliamentarians in Select Committees during proceedings is that of a team working for Parliament and not only for their respective parties, hence the adversarial party-political atmosphere that pervades Parliament is not so evident.[288] Thus in Committees, Parliamentarians are more prepared to act in a collective manner across party lines to pursue a more objective and credible approach in their investigations.[289] Further, Committees are able to elicit information which otherwise would not have been made available to Parliamentarians and the information so acquired may enable Parliamentarians to ask more incisive questions during debates.[290] Through their investigations and related research the committees produce useful 'banks' of information for reference by government, future Parliamentarians and interest groups.[291]

One of the main challenges with many committee systems that inhibits them from effectively carrying out their oversight function is that unlike the American Congressional Committees that can starve Departments of State by withholding finances if dissatisfied with their conduct, they cannot impose any sanctions or other direct pressures on government departments.[292] Another disadvantage is that only few of the committee reports are debated in Parliament.[293] Further discussing matters involving political controversy, sensitive information of a commercial or economic character, matters which may be the subject of sensitive negotiations and matters that are *sub judice* is avoided.[294]

[287] Carroll (n 285 above) 185.

[288] Carroll (n 287 above) 185.

[289] Carroll (n 288 above) 185.

[290] Carroll (n 289 above) 185.

[291] Carroll (n 290 above) 185.

[292] Carroll (n 291 above) 185.

[293] Carroll (n 292 above) 185.

[294] Carroll (n 293 above) 186.

CHAPTER FOUR

THE ROLE OF ZIMBABWEAN PARLIAMENT IN SCRUTINIZING 2019 FISCAL AND MONETARY REGULATIONS

4.0 Introduction

This chapter examines the role of Zimbabwean Parliament in scrutinizing 2019 fiscal and monetary regulations. Lessons are also drawn from other legislatures around the world for the purposes of assessing Zimbabwean Parliament's progress in scrutinising delegated legislation. The chapter also interrogates safeguards that can protect delegated legislative powers from being abused by the executive.

4.1 Legislative Oversight over Delegated Legislation

The necessity of delegated legislation is no longer a matter of dispute yet uncontrolled delegated legislation offers a fertile field for abuse of delegated legislative powers by the executive to the detriment of ordinary citizens. This is so because often times the lives of ordinary citizens are much more affected by delegated legislation than by acts of Parliament.

Apart from the oversight tools mentioned in the previous Chapter, there are two other common mechanisms that can be used as safeguards by Parliaments to scrutinize and protect delegated legislative powers from being abused by a powerful executive. Depending with jurisdiction, these two mechanisms may come with many variants. The first involves placing a requirement that delegated legislation be laid before Parliament and that it not come into effect until Parliament approves it either by an affirmative resolution, or by the lapse of a specific period of time without the legislation having been

disallowed.[295] The second mechanism involves the coming into effect of delegated legislation with a possibility of disallowance by Parliament within a specified period of time. What would be effective in both instances is for Parliament in the first place to painstakingly specify the limits of the delegate's law-making powers so that there can be no doubt as to when the delegate exceeds its powers.[296] If the enabling provisions are vague or ambiguous then the limits of the powers of the delegate will be unclear and control over the exercise of these powers will be made more difficult.[297] To this effect, the enabling Act should also clearly specify the person or body entrusted with the power to enact subsidiary legislation and the purposes for which such delegation may be created and the factors to be taken into account by the delegate upon enacting the subsidiary legislation.

4.1.1 United Kingdom

Scrutiny of Delegated Legislation in the United Kingdom Parliament takes three forms. The first is where Parliament decides that it does not need any control over the exercise of a power, for instance, exercise of power over the closing of a main road for road works.[298] The second form involves Negative Instruments whereby a statutory instrument can become law without a debate or vote in Parliament although in theory it can be opposed and rejected but not amended.[299] The disallowance procedure is very unsatisfactory since Parliament has no right to demand a debate, even if it identifies fatal defects in the statutory instrument.[300] The only available remedy is tabling a 'prayer',

[295] Parliament of Australia, Chapter 9: Parliamentary control of delegated legislation. Accessed May 21, 2020. https://www.aph.gov.au/About_Parliament/Senate/Powers_practice_n_procedures/~/link.aspx?_id=62501A4F244B4174BBDB1BF023BE12B1&_z=z.

[296] Delegated or Subsidiary Legislation. Accessed May 21, 2020. https://zimlii.org/content/delegated-or-subsidiary-legislation.

[297] n 296.

[298] House of Lords Briefing Looking at the Small Print: Delegated Legislation, (2009), p2. Accessed May 21, 2020. https://www.Parliament.uk/documents/lords-information-office/hoflbpdelegated.pdf.

[299] Parliament of Australia (n 295 above).

[300] Parliament of Australia (n 299 above).

which is a motion to disallow the instrument and if the prayer is not supported by the opposition spokesman, nothing happens.[301] The third form involves Affirmative instruments. This is whereby a statutory instrument comes into immediate effect but must be approved by an affirmative resolution of each house within 40 days.[302]

Although there is a drafting manual for statutory instruments, there is no formal procedure in the House of Commons for scrutiny of ministerial powers.[303] On the other hand, the House of Lords has two committees which complement each other and keep a watchful eye on delegated legislation. The first is the Delegated Powers and Regulatory Reform Committee which examines delegated powers in enabling Acts to see what powers ministers are asking for.[304] It then advises the House of Lords as to whether the provisions of any Bill inappropriately delegate legislative power, or whether they subject the exercise of legislative power to an inappropriate degree of Parliamentary scrutiny. The committee takes evidence in writing on each Public Bill from the relevant government department.[305] The evidence identifies all of the provisions for delegated legislation, describes their purpose, explains why the matter is proposed to be delegated and explains the degree of Parliamentary control provided for the exercise of each power (affirmative, negative or none at all) and why it is thought appropriate.[306] When examining the bill, the committee considers whether the power to make secondary legislation is appropriate.[307] This includes expressing a view on whether the subject matter is so important that it should only be regulated by primary legislation; always pays special attention to 'Henry VIII' powers which powers enable primary legislation to be amended or repealed by secondary legislation with or without further Parliamentary scrutiny; considers what form of Parliamentary control is appropriate and whether the proposed power calls for affirmative rather than negative resolution procedure.[308] Finally, the Committee makes its

[301] Parliament of Australia (n 300 above).

[302] Parliament of Australia (n 301 above).

[303] House of Lords Briefing 3.

[304] House of Lords Briefing (n 303 above) 3.

[305] House of Lords Briefing (n 304 above) 4.

[306] House of Lords Briefing (n 305 above) 4.

[307] House of Lords Briefing (n 306 above) 4.

[308] House of Lords Briefing (n 307 above) 4.

recommendations to the House and it is for the House to decide whether or not to act on those recommendations.[309]

The second committee is the Merits of Statutory Instruments Committee which examines the statutory instruments which results from the exercise of delegated powers. The Merits Committee performs a complementary function: when a minister uses one of the powers conferred to him/her, the Merits Committee looks at the policy in the statutory instruments and draws the attention of the House to any it considers: politically or legally important or that give rise to issues of public policy likely to be of interest; may inappropriately implement European Union legislation; or may imperfectly achieve its policy objectives.[310] The Committee usually reports in a neutral way, rather than taking a stance on the policy, although it may highlight areas where it feels the House may wish to make further inquiries. However, it has no power to block the passage of a statutory instrument.[311]

Members from both Houses constitute The Joint Committee on Statutory Instruments which considers whether each statutory instrument complies with the legal requirements set out by the enabling Act.[312] The committees give advice to the House as they have no power themselves: it is for individual Members of the House to pursue any delegated legislation through tabling questions or motions for debate.[313] Sometimes the House may agree to the statutory instruments but pass a critical resolution calling on the Government to change their policy and if it does, the Government is meant to come back to Parliament to say what it will do but there is no requirement for the Government to agree with the House.[314] The ultimate power is for the House to reject the statutory instrument in its entirety in what is referred to as a 'fatal motion'. The House does so rarely because it would make government very difficult if the House regularly rejected delegated instruments.

[309] House of Lords Briefing (n 308 above) 4.

[310] House of Lords Briefing (n 309 above) 4.

[311] House of Lords Briefing (n 310 above) 4.

[312] House of Lords Briefing (n 311 above) 3.

[313] House of Lords Briefing (n 312 above) 3.

[314] House of Lords Briefing (n 313 above) 3.

Finally, there is no Parliamentary system of regular review of existing delegated instruments to ascertain if they are still required or not.

4.1.2 South Africa

Section 44 of the Constitution of the Republic of South Africa allows its legislature to "assign any of its legislative powers, except the power to amend the Constitution, to any legislative body in another sphere of government". In 2011 the National Assembly and the National Council of Provinces passed a motion to establish an Interim Joint Committee on Scrutiny of Delegated Legislation. The Committee consisted of nine National Assembly members and five National Council of Provinces members. The duties of the committee entailed scrutinizing delegated legislation. The scrutinisation process included ascertaining whether subsidiary legislation, *inter alia* complied with procedural aspects pertaining to delegated legislation, whether they conform to the objects of the parent Act and whether they appear to make unusual use of powers conferred by the parent Act. However, despite the notable success of this committee, it never kicked off after a new Parliament was enacted in 2014.[315]

A remarkable achievement was made in Gauteng through the enactment of the Gauteng Scrutiny of Subordinate Legislation Act. The Act requires the tabling of provincial subordinate legislation. The legislature is required to establish a standing committee in order to scrutinize the granting of a power to make subordinate legislation and to scrutinize tabled subordinate legislation.[316] Section 3 of the Act then mandates this standing committee to scrutinise the subordinate legislation according to three standards 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;

[315] J Klaaren and S Sibanda, Introducing the Gauteng Scrutiny of Subordinate Legislation Act: notes and comments, 2009, Vol 2, *South African Journal on Human Rights* 162.

[316] Section 2 of the Gauteng Scrutiny of Subordinate Legislation Act (5/2008).

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;

and to report to the legislature any subordinate legislation that fails to meet those standards. The legislature may disallow subordinate legislation reported to it.[317] Furthermore, the Act provides for publication of provincial legislation, using such publication as the start of the time period within which such tabling must occur. This is ideal for transparency as citizens will be given an opportunity to support or object to the said regulations. The Act has various mechanisms to foster executive accountability. At the heart of the mechanisms is the establishment of the Committee on the Scrutiny of Subordinate Legislation whose task is to scrutinise both the granting of a power in a statute to make subordinate legislation and the actual subordinate legislation.[318] 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.[319]

The Committee on the Scrutiny of Subordinate Legislation may refer the draft delegated legislation to another committee for comment.[320] If the Committee on the Scrutiny of

[317] Section 4 of the Gauteng Scrutiny and Subordinate Legislation Act (5/2008).

[318] Section 3 of the Gauteng Scrutiny and Subordinate Legislation Act (5/2008).

[319] Section 4 of the Gauteng Scrutiny and Subordinate Legislation Act (5/2008).

[320] Section 4(2) of the Gauteng Scrutiny and Subordinate Legislation Act (5/2008).

Subordinate Legislation finds that any provision of the draft subordinate legislation does not comply with the foregoing standards, the Committee on the Scrutiny of Subordinate Legislation must request the functionary to remedy the defect and to submit the amended draft to the Committee.[321]

4.1.3 Zimbabwe

The Zimbabwean Parliament adopts two mechanisms; a mandatory one whereby delegated legislation first comes into effect with a possibility of disallowance within a specified period of time, and a discretionary one that involves scrutiny of draft delegated legislation referred to the Parliamentary Legal Committee by the delegate. In terms of section 152(3)(c)[322] as read with section 36 of the Interpretation Act [*Chapter 1:01*][323], copies of all delegated legislation must be laid before the Parliamentary Legal Committee for examination on one of the thirty days on which Parliament next sits after publication of such delegated legislation in the *Gazette*. If the Parliamentary Legal Committee considers that the delegated legislation is *ultra vires* the enabling Act it must report this to Parliament, the Vice-President, responsible Minister or authority concerned.[324] However, given that Parliament has limited time available to deal in detail with the multifarious matters which claim its attention, it is unlikely that it will scrutinise all delegated legislation that is laid before it. Further and in the absence of specialist Parliamentary sub-committee responsible for scrutinising delegated legislation as is the case, delegated legislative powers are bound to be abused.

With regards to the discretionary mechanism, in terms of sections 152(3) (e) and 152(4) the Parliamentary Legal Committee is required to examine all draft delegated legislation

[321] Section 4(3) of the Gauteng Scrutiny and Subordinate Legislation Act (5/2008).

[322] Section 152(3) (c) of the Constitution of Zimbabwe, "The Parliamentary Legal Committee must examine every statutory instrument published in the Gazette".

[323] "Regulations, rules and by-laws to be placed before Parliament Where the President, a Minister or any other person or body is by any enactment authorized to make regulations, rules or by-laws for purposes stated in such Enactment, copies of such regulations, rules or by-laws shall be laid before Parliament on one of the thirty days on which Parliament next sits after the publication of such regulations, rules or by-laws in the Gazette".

[324] See section 152 (4) of the Constitution of Zimbabwe.

referred to it by the executive, to determine whether if so enacted, any provision would be *ultra vires* any of the provisions of the Constitution or the enabling Act. If it considers that the draft delegated legislation would be *ultra vires* the Constitution or the enabling Act it must report its findings to the Parliament, the Vice-President, relevant Minister or the concerned authority.

Section 9 of the Fifth Schedule to the Constitution deals with what happens after the Parliamentary Legal Committee present its report before Parliament that a provision of a statutory instrument contravenes the Constitution or the enabling Act. Firstly, before the Senate or the National Assembly considers the report, the Parliamentary Legal Committee may withdraw the report if it is satisfied that the provision has been repealed or amended in such a way as to remove the contravention.[325] Secondly, if after considering the report of the Parliamentary Legal Committee, the Senate or National Assembly resolves that the provision contravenes the Constitution, the Clerk of Parliament must report the resolution to the authority which enacted the instrument and that authority must then within 21 days of the notification either apply to the Constitutional Court for a declaration that the statutory instrument is in accordance with the Constitution or repeal the statutory instrument.[326] Where the responsible authority applies to the Constitutional Court for such a declaration, the statutory instrument is suspended pending the Court's decision.[327] Thirdly, if after considering the report of the Parliamentary Legal Committee, the Senate or the National Assembly resolves that the statutory instrument is *ultra vires* the enabling Act, the provision then ceases to have effect and the Clerk of Parliament must thereafter without delay publish a notice in the *Gazette* for the purposes of notifying the public of the resolution and its effect.

In addition to the mandate of the Parliamentary Legal Committee set out in section 152 (3) of the Constitution, in terms of Standing Order 28, the Parliamentary Legal Committee may recommend the correction of any error or omission in any Statutory Instrument and must ensure that no Statutory Instrument derogates from the exercise of legislative

[325] See Section 9(1) of the Fifth Schedule to the Constitution.

[326] See Section 9(2) of the Fifth Schedule to the Constitution.

[327] See Section 9(3) of the Fifth Schedule to the Constitution.

power. Further it must ensure that no delegated legislation shall; contain matters more appropriate for Parliamentary enactment; make the rights and liberties of persons unduly dependent on administrative decisions which are not subject to review by a judicial tribunal; and change an Act of Parliament unless permitted to do so by the enabling Act.

4.2 The Legal and Constitutional Context of Zimbabwe's 2019 Fiscal and Monetary Regulations in Relation to Parliamentary Oversight

Section 117 of the Constitution confers law-making authority upon the legislature. In terms of this section, the legislature has the power to make laws for the peace, order and good governance of Zimbabwe; and to confer subordinate legislative powers upon another body or authority in accordance with section 134. Section 134, in turn, lists the various requirements upon which a lawful delegation of legislative powers may be occasioned. These requirements, *inter alia*, state that the delegation of law making authority must not delegate primary law making power. Further, the delegation must be consistent with the Act of Parliament under which they are made and the Act must specify the limits of the power, the nature and scope of the statutory instrument that may be made, and the principles and standards applicable to the statutory instrument. The Statutory Instrument must be laid before the National Assembly in accordance with its Standing Orders and submitted to the Parliamentary Legal Committee for scrutiny. In essence, these two sections read together are the legal basis and foundation upon which the Statutory Instruments of 2019 were premised.

4.2.1 Statutory Instrument 33 of 2019

With effect from the 12th of April 2009, the Government of Zimbabwe suspended the Zimbabwe Dollar as a currency and legal tender and adopted a multi-currency regime, with the United States Dollar as the dominant currency alongside, the British Pound Sterling the South African Rand, the Botswana pula and other currencies. In November 2016, The Reserve Bank of Zimbabwe introduced the bond note as an export incentive scheme at a rate of 1:1 to the US dollar.

On the 22nd of February 2019, Statutory Instrument 33 of 2019 was gazetted in terms of the Presidential Powers Act[328] and sought to amend the Reserve Bank of Zimbabwe Act[329]. It inserted a new provision which gave the Reserve Bank the sole power to issue or cause to be issued electronic currency in Zimbabwe called the RTGS Dollar. According to the new inserted section 44C (2) of the Reserve Bank of Zimbabwe Act, the issuance of electronic currency shall not affect or apply in respect of funds held in foreign currency designated accounts, otherwise known as "Nostro FCA accounts" which shall continue to be designated in such foreign currencies; and foreign loans and obligations denominated in any foreign currency, which shall continue to be payable in such foreign currency.

Section 4 of the regulations provided that for the purposes of section 44C, the Minister shall be deemed to have prescribed that Real Time Gross Settlement system balances expressed in the United States dollar (other than those referred to in section 44C(2) of the principal Act), immediately before the first effective date (22 February 2019), shall from the first effective date be deemed to be opening balances in RTGS dollars at par with the United States dollar; and that such currency shall be legal tender within Zimbabwe from the first effective date; and that, for accounting and other purposes, all assets and liabilities that were, immediately before the first effective date, valued and expressed in United States dollars (other than assets and liabilities referred to in section 44C (2) of the principal Act) shall on the first effective date be deemed to be values in RTGS dollars at a rate of one-to-one to the United States dollar. The implication of Statutory Instrument 33 of 2019 was that the RTGS dollar became be legal tender in Zimbabwe though nothing suggested that the prohibition the use of multiple currencies adopted in 2009.

However, what must be borne in mind is that the Constitution of the Republic of Zimbabwe only took effect in 2013. Prior to the advent of the 2013 Constitution, and indeed to date, the Presidential Powers Act existed. In terms of section 2 of this Act, the President is allowed to make regulations, "when it appears that a situation has arisen or is likely to arise which needs to be dealt with urgently in the interests of defence, public safety, public

[328] Presidential Powers (Temporary Measures) Act [*Chapter 10:20*].

[329] Reserve Bank of Zimbabwe Act [*Chapter 22:15*].

order, public morality, public health, the economic interests of Zimbabwe or the general public interest; and the situation cannot adequately be dealt with in terms of any other law; and because of the urgency, it is inexpedient to await the passage through Parliament of an Act dealing with the situation. Section 3 of the Act requires the President, unless he considers it inexpedient to do so because of the urgency of the situation, to provide a notice in the Gazzette outlining the nature of the regulations and inviting representations from interested parties. Further, section 6 of the Act provides that unless earlier repealed, regulations made in terms of the Act expire after 181 days (six months) following the date of commencement of the regulations. This effectively means that Statutory Instrument 33 of 2019 expired by operation of law at 12 midnight on the 21st of August 2019 and in terms of section 7 of the Act we were supposed to revert to the legal position that was in existence before promulgation of Statutory Instrument 33 of 2019.

4.2.2 Statutory Instrument 142 of 2019

On the 24th June 2019 Statutory Instrument 142 of 2019 was promulgated pursuant to section 64 as read with section 44A of the Reserve Bank Act of Zimbabwe. Section 64 allows the Minister of Finance and Economic Development to make regulations prescribing anything which in terms of this Act is required to be prescribed or which, in his opinion, is necessary or convenient. Section 44A of the same Act allows the Minister to prescribe a tender of payment in any currency other than Zimbabwean currency to be legal tender in all transactions or in such transactions as may be specified in regulations made in terms of section 64. In terms of section 2 of this Statutory Instrument, the government banned the use of the multi-currency system in Zimbabwe and officially reintroduced the Zimbabwean Dollar as the sole legal tender for all domestic transactions except for the purposes of opening or operation of foreign currency designated accounts known as “Nostro FCA accounts” and payment in foreign currency for customs duty payable on the importation of luxury goods. The new Zimbabwean Dollar includes bond notes and coins which were already in circulation as well as the RTGS Dollars.

4.2.3 Finance (No. 2) Act of 2019

Upon expiration of Statutory Instrument 33 of 2019 on the 21st of August 2019, Finance (No. 2) Act of 2019 was passed into law. It re-enacted both Statutory Instrument 33 and Statutory Instrument 142. The Finance Act now provides that the Zimbabwe Dollar is the sole currency for purposes of legal tender. It also provides for the issuance of electronic currency. It converts contracts that were denominated in foreign currency before the effective date of Statutory Instrument 33 of 2019 into RTGS contracts at the rate of one-to-one to the United States dollar. Clearly this has a huge bearing on citizens who had contracted in USD before the effective date of Statutory Instrument 33 as they will incur huge loses owing to the loss in value of the RTGS dollar.

4.3 Parliamentary Oversight of 2019 Fiscal and Monetary Regulations

Section 134 of the Constitution provides that Parliament's primary law-making power must not be delegated. It then follows that in promulgating statutory instrument 33 of 2019, the president should not have been creating original legislation. Arguably section 2(2) of the Presidential Powers Act is inconsistent with section 134 of the constitution as is grants primary law making powers to the president. Parliament has a degree of oversight over the Presidential Act and to that end, the Parliamentary Legal Committee had a duty to examine Statutory Instrument 33 of 2019 which was made in terms of that Act and to give an adverse report to Parliament. Section 4 of the same Act goes on to oblige regulations made pursuant to the Act to be tabled before Parliament within a period not exceeding eight days on which Parliament sits next after promulgation. If Parliament resolves that such regulations should be amended or repealed, the president has no discretion but to do so. Indeed the Parliamentary Legal Committee met on 5th March, 2019 and considered Statutory Instrument 33 of 2019. The Committee was of the opinion that the Statutory Instrument was not in contravention of the Declaration of Human Rights and any other provisions of the Constitution of Zimbabwe.[330]

[330] National Assembly Hansard 05 March 2019 Vol 45 No 37.

Statutory Instrument 142 of 2019 was promulgated on the 24th June 2019 and in terms of section 36 of the Interpretation Act,

With regards other Statutory Instruments made in terms of any parent Act other than the Presidential powers Act, if the Minister responsible or authority concerned so elects not to seek Parliamentary Legal Committee's opinion as to the constitutionality and legality of the statutory instrument before promulgation, the statutory instrument then has to be tabled before Parliamentary legal committee for scrutiny on one of the thirty days on which Parliament next sits after its publication in the Gazette.[331] Legislative oversight of Statutory Instrument 142 of 2019 was carried in the main chamber when Honorable T. Biti brought to the attention of Parliament that the Statutory Instrument was *ultra vires* the provisions of Section 44A (2) of the Reserve Bank of Zimbabwe Act.[332] His argument was that it sought to repeal the enabling Act. Further the Statutory Instrument was also debated in the main chamber on the 23rd of July 2019.[333] This study did not come across any adverse report in the Hansard with respect to Statutory Instrument 142 of 2019. The import of this is that the Parliamentary Legal Committee did not exercise its oversight function or it did not find anything to be inconsistent with either the bill of rights or any constitutional provision. This later is buttressed by the fact that Statutory Instrument 142 of 2019 is still the law.

[331] Section 36 of the Interpretation Act [*Chapter 1:01*] as read with Section 152(3) (e) and (4) of the Constitution.

[332] National Assembly Hansard 25 June 2019 Vol 45 No 65, page 9.

[333] National Assembly Hansard 23 July 2029 Vol 45 No 71.

CHAPTER 5

CONCLUSION AND RECOMMENDATIONS

5.0 Introduction

This chapter summarises the fundamental arguments carried throughout this dissertation. It also summarises major legal findings and conclusions made in this study. It culminates with discussing legal recommendations.

5.1 Summary of Major Arguments

The major argument underpinning chapter 1 was that legislative oversight over delegated legislation is a key feature in modern constitutional democracies, and without effective mechanisms for its exercise, a fertile field for abuse of delegated legislative powers by the executive to the detriment of ordinary citizens is likely to be created.

In chapter 2, the major argument was that despite violating the doctrine of separation of powers, power of delegation is a constituent element of the legislative power as a whole which is practically necessary in modern times to enable the executive to implement policy of legislation. Constitutional basis for legislative delegation was examined to support this argument.

Chapter 3 was premised on the argument that inter-branch accountability and separation of powers need to be balanced in order to enable efficiency in the government. To support this, the opportunities for effective fiscal regulation in Zimbabwe's Parliamentary oversight system were examined.

In Chapter 4, the major argument was that Zimbabwean Parliament has weaker mechanisms in place to control delegated legislation. To Support this, the role of Zimbabwean Parliament in scrutinizing 2019 fiscal and monetary regulations was

examined. In addition to this, a brief analysis of how other jurisdictions have designed their scrutiny mechanisms was also conducted.

5.2 Summary of Major Findings and Conclusions

5.2.1 Weakness in the Current Oversight Framework

One of the fundamental findings made in this research is that constitutional and legislative oversight framework currently in existence in Zimbabwe is weak and ineffective to scrutinize delegated legislation in general and monetary and fiscal regulation in particular. This study has shown that the oversight framework and instruments have not effectively worked in Zimbabwe's relatively new constitutional framework as the executive still enjoy wider delegated legislative powers.

5.2.3 Weak Oversight Institutions

Another major finding made in this study is that presently, there is no specialist Parliamentary committee or sub-committee mandated with scruitinising delegated legislation to ensure that the delegated authority is not being abused. The Parliamentary Legal Committee is not required to refer draft delegated legislation to other committees or the public for comments. Further, it operates under vague terms of reference. It was also shown that oversight of delegated legislation ends with issuance of a non-adverse certificate by the Parliamentary Legal Committee. There is no room for a Statutory Instrument to be debated in the full chamber after the issuance of a non-adverse certificate.

5.3 Summary of Recommendations

The current constitutional and legal framework regulating legislative oversight of delegated legislation should be reviewed so as to allow the full chamber to debate on the

underlying policy and merits of each Statutory Instrument as is the practice in the United Kingdom. Policy matters and merits should be carefully examined to see if they are of such importance that they should be debated and decided by the legislature as an amendment to the parent Act, rather than being slipped through by regulation.[334] This should be done to make sure that delegated legislation remains *vires* the enabling Act and the Constitution as well as making sure that the executive does not enjoy unreviewable power over the public.

Standing rules should be amended to include provisions that allow Statutory Instruments to be debated in the full house subsequent to issuance of a non-adverse certificate by the Parliamentary Legal Committee. This should be done to seek the opinions of other Parliamentarians who do not sit in the Parliamentary Legal Committee but have expertise on the technical issues regulated by the Statutory Instrument.

Parliament should consider introducing a permanent Specialist committee or sub-committee tasked with examining delegated legislation to ensure that the delegated authority is not being abused and ensure that regulations do not fall outside the parameters of the law. This specialist committee should be given terms of reference that are unambiguous, clear and precise. To assist in this end, Parliament should also consider establishing a Parliamentary research and information unit within Parliament.

Parliament should consider formulating technical support programs for members of the specialist committee on delegated legislation and Parliamentary Legal Committee, with a view to providing them with necessary information related to the oversight function of examining delegated legislation. These programs must be organized and planned in such a manner that they combine expertise and knowledge from within and outside Parliament.

Parliament should consider allowing the specialist committee on delegated legislation and Parliamentary Legal Committee to carefully examine any bills or statutes which delegate law making power to the executive so as to ensure that;

[334] Parliament of Australia, Chapter 9: Parliamentary control of delegated legislation.

a) Parliaments primary law making power is not delegated as is arguably the case with the Presidential Powers Act; and
b) Acts of Parliament do not confer wider law making powers on the executive. This can be done by ensuring that Bills or Acts of Parliament carefully spell out the limits of the delegated legislative powers so that there can be no doubt as to when the delegate is exceeding its powers.
c) Bills or Acts of Parliament carefully spell out the limits of any power of sub-delegation as, these powers are very difficult to scrutinise.[335]

With regards the role of media, what is required is for Parliament to allow the media to play its active role in the area of bringing communication closer between Parliament and citizens so as to facilitate a wide window for citizens to follow proceedings in Parliament. This enables oversight committees to painstakingly and effectively exercise their oversight function.

5.4 Conclusion

In conclusion, reference is made to the imperative of achieving legal reform aimed at improving Parliamentary oversight of delegated legislation, and this legal reform must undoubtedly include the implementation of the aforementioned recommendations.

[335] Parliament of Australia, Chapter 9: Parliamentary control of delegated legislation.
An extreme instance was given to the 1989 Commonwealth Conference on Delegated Legislation: An Act was passed. Regulations were made under the Act. Orders were made under the regulations. These orders delegated certain powers to the Secretary of the Department. The Secretary was empowered to delegate to a senior executive service officer who could delegate the power to delegate to a delegate, and that delegate could delegate the power to make a decision.

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