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# Introducing the Gauteng Scrutiny of Subordinate Legislation Act

## I Introduction

On 4 December 2008, the Gauteng Provincial Legislature (GPL)[1] voted to approve the Gauteng Scrutiny of Subordinate Legislation Act 5 of 2008 (GSSLA). In doing so nearly 12 years after the promulgation of the Constitution of the Republic of South Africa, 1996 and 15 years after the adoption of the Breakwater Declaration,[2] Gauteng became the first democratic legislature in South Africa to enact a parliamentary regime for oversight of subordinate legislation. The provisions of this legislation fit neatly into the constitutional categories created by the 1996 Constitution. Subsections 140(3) and (4) of the 1996 Constitution provide:

> (3) Proclamations, regulations and other instruments of subordinate legislation of a province must be accessible to the public.
>
> (4) Provincial legislation may specify the manner in which, and the extent to which, instruments mentioned in subsection (3) must be – (a) tabled in the provincial legislature; and (b) approved by the provincial legislature.

Indeed, Act 5 of 2008 fits so neatly into these constitutional provisions that a primary question raised by the 2008 passage of this law is quite simply 'what took Gauteng so long'? And of course, that question raises an additional question of why the other legislatures have not as yet exercised their competence in a similar manner.[3]

This note takes as its point of departure a proposition, perhaps well-known to those who struggled against the apartheid system, that the process of democratic institutional reforms is inherently contestable and therefore often slow. Without claiming them to be by themselves sufficient, this note suggests that two factors were necessary for the eventual passage of the Act: sustained political support at provincial leadership level and a close match between the extent of desired institutional innovation, on the one hand, and the everyday experience of governance on the part of both public servants and elected politicians, on the other. This note thus aims to present the enactment of the GSSLA within the current (albeit ever-changing) contours of South Africa's constitutional democracy.

The first section discusses the content of the Act, viewed from the perspectives of both constitutional and administrative law, and notes a number of elements that might form part of a regime of legislative scrutiny, but which are

1 All references to the 'legislature' in this article are, unless otherwise stated, referring to the Gauteng Provincial Legislature.

2 The first item of agreement for the Breakwater Declaration in 1993 reads as follows: 'Legal regulation of public power should include judicial review of administrative action as well as a range of procedures and institutions to ensure good governance, including: (i) effective Parliamentary control and supervision of the nature and scope of delegated power and the way in which it is exercised; …'. H Corder (ed) *Administrative Law Reform* (1993) 19.

3 Indeed, while a significant and growing body of work examines the factors crucial to success in public interest litigation, the existing literature seems to pay less attention to the factors underlying the success or failure of legislative initiatives.

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not present in the Act.[4] The following section outlines the development of this oversight mechanism in Gauteng Province, specifying the sustained political support the bill enjoyed at leadership level as well as its eventual fit between actual and aspirational governance. The concluding section briefly notes the history and current status of a similar law reform initiative at national level and then uses the experience of the GSSLA to explore possibilities for deepening constitutional democracy in South Africa.

## II Introducing the Substance of the Act

As its title would suggest, the Act provides for the scrutiny of subordinate legislation by the Gauteng Provincial Legislature. The core mechanism consists of four steps. The Act requires the tabling of provincial subordinate legislation.[5] 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'.[6] The Act then mandates this standing committee to scrutinise the subordinate legislation according to three standards and to report to the legislature any subordinate legislation that fails to meet those standards.[7] Finally, the legislature may disallow subordinate legislation reported to it.[8]

In addition to this core mechanism, the Act also provides for two provisions not strictly speaking integral to the above tabling and approval mechanism.[9] These provisions are nonetheless integrated into the core mechanism in such a manner as to promote the same goals of executive accountability and broadened democracy as the tabling and approval provisions. Firstly, the Act provides for publication of provincial legislation, using such publication as the start of the time period within which such tabling must occur (15 days).[10] Secondly, the Act directs the Office of the Premier to compile, maintain, and publish an accessible index of all provincial subordinate legislation.[11]

4 For a political science view of the challenges facing parliaments in Africa, see MA Mohammed Salih (ed) *African Parliaments: Between Governance and Government* (2005).

5 GSSLA s 2(2). This action of tabling must be taken by the responsible MEC.

6 GSSLA s 3. See also s 116(2)(a) of the Constitution which generally obliges a provincial legislature to establish committees through rules. T Madlingozi & S Woolman 'Provincial Legislative Authority' in S Woolman et al (eds) *Constitutional Law of South Africa* 2 ed (2005) chapter 19, 4.

7 Section 4(1) of GSSLA reads as follows: 'The committee established in accordance with section 3 must scrutinize tabled subordinate legislation to determine whether it: *(a)* is constitutional and, among other things, does not interfere with the jurisdiction of the courts or infringe rights or the rule of law; *(b)* is authorized by the Act under which it was made; and *(c)* does not constitute an unfair use of the power under which it was made'. In terms of s 4(1)(a), the GPL will engage in constitutional interpretation. For an overview of issues of coordinate construction in a comparative jurisdiction, see K Roach 'Sharpening the Dialogue Debate: The Next Decade of Scholarship' (2007) 45 *Osgoode Hall Law J* 169.

8 GSSLA s 5.

9 See for instance the treatment of the topic of 'Parliamentary Scrutiny of Subordinate Legislation' in s 3.36f separate from the treatment of the topics of 'Publication' from s 3.27f and 'Accessibility of Legislation' from s 3.118f. SALRC Discussion Paper 112 *Interpretation Act 33 of 1957* (Project 25) (2006).

10 GSSLA s 2(1) & (2).

11 GSSLA s 6.

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As should be clear, the category of provincial subordinate legislation is a key operating concept for the Act. The Act's brief definition of 'subordinate legislation' includes regulations, but excludes other secondary legislative instruments such as proclamations, rules, notices, and determinations.[12] This definition is broadened for the purposes of the provincial subordinate legislation index, but that is the only section that uses a broader categorical definition of provincial subordinate legislation.[13]

Enforcement is provided for in two places in the Act. First, both publication and tabling are mandated as preconditions for enforcement of provincial subordinate legislation.[14] Second, the effect of disallowance by the legislature of subordinate legislation reported to it is prospective invalidity.[15] While the first power operates automatically, the second power of enforcement is, of course, dependent on the political will of the legislature.

Viewed from a constitutional perspective, the justification for legislation such as the GSSLA is readily apparent. As part of its exercise of legislative power, a provincial legislature has a set of explicit oversight powers conferred upon it. In particular, s 114(2) of the Constitution enjoins the provincial legislature to provide for mechanisms that ensure that all the provincial executive organs of state in Gauteng are accountable to it, as well as mechanisms that allow the provincial legislature to maintain oversight of the manner in which executive provincial authority is exercised in the province, including the implementation of legislation ~~as well as provincial organs of state~~.[16] It would appear that provision for such oversight mechanisms is a mandatory duty placed on the legislatures.[17] Furthermore, s 114(2) – read with or without ss 140(3) & (4) (discussed further below) – would appear to constitute a separate and specific grant of constitutional competence with respect to providing for such oversight mechanisms through legislation or other measures.

These legislative oversight provisions of the 1996 Constitution respond to a significant feature of modern government. In governance in the modern era, it is readily accepted that, although legislatures are the primary law making bodies in any sphere of government, there will always be a need to allow for certain legislative powers to be delegated to the executive for purposes of effective government. The importance and necessity of delegated legislation

12 GSSLA s 1. Note that regulations are the type of subordinate legislation that the legislature itself seeks to oversee. See Gauteng legislature 'Establishment of the Committee for the Scrutiny of Subordinate Legislation' unpublished paper (26 May 2008) 3.

13 See s 1 of the Interpretation of Legislation Bill, 2006 (definition of subordinate legislation). SALRC Discussion Paper (note 9 above) Annexure A.

14 GSSLA s 2(3).

15 GSSLA 5(3). Note that in terms of s SSLA 5(2) read with 5(3), the legislature has the power to suspend such invalidity. The term 'permit' and 'allow' need to bear such a meaning in order to make sense when read with s 5(3).

16 The parallel section to s 114(2) at national level is s 55(2). There appears not to be extensive academic commentary on these sections, apart from the notable exception of the Corder Report (1999).

17 As such, the obligation is ultimately enforceable via s 237: 'All constitutional obligations must be performed diligently and without delay'.

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in the functioning of the modern state was succinctly and effectively expressed in the following dicta by Chaskalson P:

> In a modern state detailed provisions are often required for the purpose of implementing and regulating laws, and Parliament cannot be expected to deal with all such matters itself. There is nothing in the Constitution which prohibits Parliament from delegating subordinate regulatory authority to other bodies. The power to do so is necessary for effective law making.[18]

It is thus well accepted that the executive is conferred with powers to legislate in the manner described above. This acceptance filters down to the provincial level as well.[19] Nonetheless, this form of law making raises several issues of concern, including (a) abuse of power, (b) encroachment or violation of rights and (c) substandard or substantively inaccurate drafting.

As we have seen, the Constitution provides the competence to address these issues of concern through ss 114(2) and 140(4). Still, the Constitution does not specify the content of the measures that provincial legislatures must take for overseeing the enactment and implementation of subordinate legislation. In other words, inasmuch as the executive must be made to be accountable, there are no prescribed constitutional measures nor any indicator of the level of the accountability required ~~of the executive~~. In this respect the various legislatures have been left with the duty of establishing their own measures and levels of scrutiny and oversight.

The Constitution is nonetheless relatively specific in identifying at least one aspect of this oversight competence in ss 140 (3) and (4).[20] Subsection 4 uses the terms 'tabling' and 'approval' in granting the provincial legislatures competence to enact laws providing for legislative scrutiny of subordinate legislation. Subsection (3) not only identifies the category of provincial subordinate legislation but also (and primarily) requires that such legislation – in its terms 'proclamations, regulations and other instruments of subordinate legislation of the province' – must be accessible to the public.

In fleshing out the particular shape of legislation providing for oversight of subordinate legislation, two other constitutional doctrines are arguably relevant.[21] Firstly, the making of subordinate legislation would be subject

18 *Executive Council of the Western Cape Legislature v President of the Republic of South Africa* 1995 (4) SA 877 (CC) para 51.

19 See Madlingozi & Woolman (note 6 above) (concluding that delegation of provincial legislative authority to provincial organs of state is probably constitutional).

20 There are similar sections relating to the national legislature in ss 101(3) and (4). In both the national and provincial locations, the two subsections are not necessarily linked (and might conceptually be separately fulfilled) but do appear to function best together. Indeed, in the Constitution, ss (4) refers to the category of provincial subordinate legislation established in ss (3). More substantively, as discussed above, the GSSLA contains some core provisions fulfilling ss 140(4) while other provisions would arguably fulfil s 140(3).

21 It would also be important to take into account the extent to which the collective Cabinet responsibility for provincial policy is implemented to include control and regulation over the making of subordinate legislation. Section 133(2) of Constitution makes Members of the Executive Council both individually and collectively accountable to the legislature for the exercise of their powers and the performance of their powers.

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to the constitutional principle of legality and rationality. This constitutional principle entrenches lawfulness but does not have much if any component of procedural fairness.[22] Secondly, the making of subordinate legislation may be additionally subject to the right of just administrative action in s 33, meaning that the right to procedurally fair administrative action is engaged, as well as the Promotion of Administrative Justice Act (PAJA) and in particular s 4 thereof.[23] These doctrines appear to provide independent legal bases for the legislature's exercise of power.[24]

From the perspective of administrative law, the Act is likely to be seen as a welcome innovation and an additional step in the direction of administrative justice.[25] As noted above, its core mechanism fulfils part of the first item in the (agreed) wish-list of the Breakwater Declaration that attempted to move South African administrative law into a post-apartheid mode. Moreover, two non-core elements of the GSSLA, the publication requirement and the index of provincial subordinate legislation, were two elements of the draft Administrative Justice Bill that were left behind in the parliamentary translation of that draft legislation into PAJA.[26] By providing for these elements that are largely missing from the post-apartheid statute book, in at least one province, the Act will provide new opportunities to contest and hopefully also deepen administrative justice in South Africa.

Of course, especially from the perspective of administrative law, one should recognise that the Act is only a point of departure. Indeed, one should be clear about what the Act does not specifically enact. Several elements that are present in some comparable oversight regimes and that might well be developed further in Gauteng (and at national level) are not provided for in the GSSLA. These include a sunset requirement for subordinate legislation, as well as specific provision for consultation procedures, for drafting review and for regulatory impact statements.[27]

22 *Masetlha v President of the Republic of South Africa and Another* [2007] ZACC 20; 2008 (1) BCLR 1 (CC).

23 *Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others (Treatment Action Campaign and Another as Amicus Curiae)* [2005] ZACC 14; 2006 (2) SA 311 (CC); 2006 (1) BCLR 1 (CC).

24 GSSLA Preamble. Since s 140(4) (and s 114(2)) itself clearly gives the competence to the provincial legislature to enact a provision providing for scrutiny of subordinate legislation, the principle of legality and the right to just administrative action would thus provide additional supplemental authority.

25 See J Klaaren & G Penfold 'Just Administrative Action' in S Woolman et al (eds) *Constitutional Law of South Africa* (2008) chapter 63, 16-17 (distinguishing the earlier Gauteng regime from the legality-based suggestion of Sachs J in his minority opinion in *New Clicks* paras 611–40).

26 See C Hoexter *Administrative Law in South Africa* (2007) 99–101 (noting innovations in the draft bill either watered down or rejected).

27 See for example SALRC Discussion Paper (note 9 above) para 3.128 (sunsetting), para 3.48 (consultation), para 3.72 (drafting review), and para 3.108 (regulatory impact assessment). See generally C O'Regan 'Rules for Rule-making: Administrative Law and Subordinate Legislation' 157, 168–75 in Corder (note 2 above) (discussing inter alia a central drafting office, periodical review of subordinate legislation, a national register, and consultation).

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## III The Genesis And Development of Legislative Scrutiny in Gauteng

The development of this scrutiny mechanism in Gauteng may be analysed in three steps. The first step in the development of this oversight mechanism was the adoption of standing rules providing for legislative scrutiny of subordinate legislation. The drafting of the rules themselves followed from the consideration and eventual adoption of a report recommending such adoption by an ad hoc committee in late 2003.[28] In 2004, the legislature, initially under the leadership of the then Speaker Firoz Cachalia, concluded a process of deliberation regarding accountability in general and in particular the content of a set of draft rules. These draft rules included scrutiny by a specialised committee of subordinate legislation and of grants of power to make subordinate legislation.[29] The legislature subsequently adopted Standing Rules providing for and regulating such scrutiny.[30] By means of these Rules, the legislature undertook to establish a Committee on Scrutiny of Subordinate Legislation (CSSL).[31] While the CSSL had not in fact been established as of May 2008, the office of the Speaker of the GPL reconfirmed its intention to establish this committee as a standing committee before the end of the term in 2009.[32]

The GPL Rules-based scrutiny mechanism had two parts: 'review of principal legislation in the form of bills that are introduced in the legislature and scrutiny of the actual instruments of subordinate legislation, once made'.[33] The first part of the mechanism covers bills being considered by the legislature. The Speaker is placed under an obligation to refer every bill that contains a grant of power to the executive or another body to adopt subordinate legislation to the CSSL.[34] In terms thereof, the Committee must ensure that the grant of power (a) does not give the executive or another body the power to make policy; (b) has clear parameters and is not unduly general or without clear directions to the subordinate law-making authority; and (c) does not authorise the executive or another body to make subordinate legislation which would not comply with the Constitution.[35] As noted in Rule 220(3), '[t]he oversight role of the Legislature includes scrutiny

28 *Gauteng Legislature Ad-Hoc Committee on Ministerial Accountability Final Report* (adopted by committee 8 December 2003, adopted by the House 29 November 2004) 38, 40 (recommending the adoption of an Act providing for scrutiny of delegated legislation).

29 See also J Klaaren & S Sibanda 'Preliminary Report to the Gauteng Legislature' unpublished paper (17 May 2004) 5.

30 This step was accompanied by a report to the legislature by two outside consultants (the co-authors of this article). See Klaaren & Sibanda (ibid).

31 For the version of these rules current as the final drafting of the scrutiny legislation took place in 2008, see Rules 220, and 224–7 of the Standing Rules of the Gauteng legislature.

32 GPL Report 3. For an overview of South African legislatures, see C Murray & L Nijzink *Building Representative Democracy: South Africa's Legislatures and the Constitution* (2002). For an assessment of the Gauteng Provincial Legislature's first five years, see E Maloka 'The Gauteng Legislature: The First Five Years' in Y Muthien, M Khosa & B Mgubane (eds) *Democracy and Governance Review: Mandela's Legacy 1994–1999* (2000).

33 GPL Report 6. Note that by comparison with the Rules-based regime, the Act prioritises and appears to view as most apt for immediate legislative enactment the aspect contained in the second part of the Rules-based mechanism, the scrutiny of subordinate legislation proper (Rules 224–5) rather than the scrutiny of a grant of a power to make subordinate legislation (Rules 226–7).

34 Rule 224(1).

35 Rule 224(2).

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of the extent to which the province is fulfilling its obligation, in section 7 of the Constitution, to promote and fulfil the rights in the Bill of Rights'.

The second part of the GPL Rules-based scrutiny mechanism refers to the actual instruments of subordinate legislation, requiring all provincial subordinate legislation to be referred to the legislature by the person who made it.[36] The Speaker then must refer such subordinate legislation to the CSSL.[37] In terms of the Rules, the CSSL will scrutinise this subordinate legislation to ensure that such provincial subordinate legislation (a) is constitutional and, among other things, does not interfere with the jurisdiction of the courts or infringe rights or the rule of law; (b) is authorised by the Act under which it was made; and (c) does not constitute an unusual or unexpected use of the authority under which it was made.[38] Rule 226(4) further lists the considerations that must be taken into account in the process of scrutiny.[39]

In the Rules-based scheme, the CSSL does not have powers in its own right to act where it finds subordinate legislation wanting in terms of the standards and considerations established in the Rules. Where the CSSL considers that a piece of subordinate legislation fails to meet these standards, the Committee must request the relevant Member of the Executive Council or head of the relevant organ of state to amend the subordinate legislation.[40] If a request made in terms of the appropriate Rule is not complied with, then a law that has been found wanting by the CSSL may still continue to have the force of law in spite of the problems identified by the CSSL.[41]

36 Rule 226(1).
37 Rule 226(2).
38 Rule 226(3).
39 These are:
   a. Is the subordinate legislation authorised by the terms of the enabling Act and does it comply with any condition set out in the Act;
   b. Is the subordinate legislation in conformity with the Bill of Rights;
   c. Does the subordinate legislation have retroactive effect without express authority having been provided for in the enabling legislation;
   d. Does the subordinate legislation impose a tax, levy or duty or requires spending by the province without express authority having been provided for this in the enabling Act;
   e. Does the subordinate legislation impose a fine, imprisonment or other penalty without express authority having been provided for this in the enabling Act;
   f. Does the subordinate legislation tend directly or indirectly to exclude the jurisdiction of the courts;
   g. Does the subordinate legislation appear for any reason to infringe the rule of law;
   h. Does the subordinate legislation make the rights of the person unduly dependent on administrative discretion or is not consistent with the rules of natural justice;
   i. Does the subordinate legislation make some unusual or unexpected use of the powers conferred by the enabling Act;
   j. Does the subordinate legislation contain matter more appropriate for enactment by the Legislature;
   k. Is the subordinate legislation defective in its drafting or for any other reason requires elucidation as to its form or purport.
40 Rule 227.
41 Scrutiny and review of subordinate legislation, much like statutory drafting and interpretation, is by its nature a fairly technical enterprise. Arguably, this requires those tasked with the job to understand its technicalities as well as the broader public import of the subordinate legislation. The members of a committee such as the CSSL may have been able to build such understanding and technical skills among themselves during the period of operation of their committee.

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Moreover, in this Rules-based model, neither the CSSL (where the technical assessment of the subordinate legislation in question would happen) nor the legislature has any power in the decision as to whether the subordinate legislation becomes law or continues to have legal effect. In the Rules-based scheme, there is no presumption in favour of disallowance nor does the CSSL have the power to recommend to the House disallowance of a bill with a grant of power to adopt subordinate legislation, without consulting with the Committee responsible for the bill.[42]

The GPL Rules-based model of scrutiny of subordinate legislation did not prove satisfactory. The committee was never established under that regime. As noted by the legislature, the executive did not table any subordinate legislation, even where the duty to table such legislation stems from the provincial legislation itself rather than the directory provisions of the Interpretation of Statutes Act.[43] Nonetheless, the commitment made by the legislature to the concept of oversight of subordinate legislation was crucial in further development of the institution.

The second step in the development of the GSSLA was the province's formulation of an Executive Accountability Framework in July 2007. Tabled in the legislature on 26 July 2007, this Framework developed a shared understanding of executive accountability for the executive and the legislature. In particular, this framework recognises the everyday character of accountability and of the questions often raised in practice. As the Framework puts it:

> Accountability is at the heart of the system of good governance and reinforces other elements such as participation and transparency. The importance of accountability for good governance is nowhere more clearly demonstrated than in the day-to-day exercise of duties and responsibilities in the functioning of the Executive and the Legislature. What is less clear however, is how accountability in this context is conceived and interpreted and how the exercise of accountability influences and shapes the relationship between the Executive and the Legislature. While the accountability of the Executive may be defined by broad constitutional obligations, the interpretation and practical application of these provisions often lead to ambiguity in terms of the respective roles of the Executive and the Legislature.[44]

The third and final step was the drafting of legislation.[45] In August 2008, the Office of the Premier, on the instructions of the Leader of Government Business in Gauteng Firoz Cachalia, began the process of identifying and contracting with an outside consultant (one of the co-authors).[46] This was the start of a two-month drafting process, which included senior legal representatives of both the legislature and the executive. After consideration by a sub-committee of the Rules Committee on 27 November and (with Cachalia attending) on 2 December, the GPL considered and enacted the Act on 4 December 2008.

42 Rule 225.
43 GPL Report 2, 8.
44 Gauteng Provincial Government 'Executive Accountability Framework' (July 2007).
45 For an overview of the legislation drafting process in Gauteng, see Gauteng Provincial Government 'The Path to Legislation and Legislative Guidelines in Gauteng' (2008).
46 Letter from Mogopodi Mokoena to Jonathan Klaaren (27 August 2008).

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From the above account, we can conclude that at least two factors were present during this development of legislation which greatly facilitated it: (1) sustained political support at leadership level; and (2) a close match between the extent of desired institutional innovation, on the one hand, and the everyday experience of governance on the part of both public servants and elected politicians, on the other. With respect to the first factor, while the entire government of Gauteng may take credit for the Act, it is nonetheless apparent that the sustained support of Cachalia (first in a role as Speaker of the legislature and later in a role as MEC (the leader of government business in Gauteng) was crucial to the development and passage of the Act. With respect to the second factor, at least three pieces of evidence support its identification: the relative light touch approach of the model adopted,[47] the alignment, as noted above, of the legislative and executive branches policies on accountability, and the inclusion of senior legal professionals within both branches on the drafting committee.

## IV Towards Deepening Democracy

Baxter in his classic 1984 text, *Administrative Law*, detailed an abortive attempt between 1947 and 1955 to institutionalise parliamentary scrutiny of subordinate legislation. In noting the failure of this, he remarked that 'South African practice is considerably backward by comparison with countries such as Britain and Canada'.[48] Since Baxter wrote (and after the demise of apartheid) there has been one serious effort to put such an oversight mechanism into place at national level. As detailed below, this effort has come to naught, at least with respect to parliamentary scrutiny of subordinate legislation. Thus, parliamentary practice at national level and in relation to this aspect of oversight appears to remain more or less in the 1950s.

After the enactment of the 1996 Constitution, Parliament embarked upon a process that could have resulted in national legislation providing for oversight of subordinate legislation, among other oversight mechanisms.[49] This process may be viewed in two parts. First, Parliament commissioned and considered reports by an outside consultant proposing the enactment of legislation providing for scrutiny of subordinate legislation.[50] Prepared by a team under the direction of Prof Hugh Corder, this set of reports is known as the Corder Report.[51] Directly in line with the Breakwater Declaration, this report called for the elaboration of s 55(2) of the Constitution in a number of ways including the enactment of legislation providing for legislative oversight of subordinate

47 The regime of legislative scrutiny adopted by the GPL is by no means the strongest version possible. For instance, it is weaker than the one proposed by O'Regan in 1993, which proposed adopting the United Kingdom model, with subordinate legislation being tabled in the legislature prior to implementation. C O'Regan 'Rules for Rule-making: Administrative Law and Subordinate Legislation' 157 in Corder (note 2 above) 170–1.

48 L Baxter *Administrative Law* (1984) 212–4.

49 T Hughes 'The South African Parliament's Failed Moment' in Salih (note 4 above) 231–5.

50 In doing so, Parliament was arguably fulfilling s 101(4) of the Constitution (see above).

51 See generally Hoexter (note 26 above) 73–4, 100–1.

legislation. Second, three years after its submission, a parliamentary committee effectively responded to the Corder Report, rejecting and contesting much of its content. Referring the matter to the Joint Rules Committee (JRC) in 2002, the responding ad hoc committee did however recommend the adoption of an Accountability Standards Act. In the third and final episode on 19 March 2008, the JRC accepted the final report of its Task Team on Oversight and Accountability Model. As presented to the JRC, this report 'introduced several new mechanisms to further strengthen accountability and oversight … [and ] … focused on maximising current mechanisms, appointing ad hoc committees and extending the timeframe for a response by the Executive'.[52] Focusing on other elements in order to strengthen Parliament's oversight role along the lines of amending the rules 'to allow committees of a House that are clustered for oversight and other legislative work to report jointly on transversal matters', the final report did not specifically identify or recommend the development of legislation providing for scrutiny of subordinate legislation. Taking into account the points raised in discussion, the report was adopted by the JRC.[53]

While Parliament of course remains free to adopt such scrutiny legislation (and indeed as argued in this note is under a duty to do so), it would appear that adoption of legislation like the GSSLA is not a current project at national level. This has not gone unnoticed by outside observers. A 2005 observation of the national Parliament's oversight role was to the effect that 'it is difficult to establish evidence of new initiatives or developments emerging in practice from the "oversight and accountability" consultancy, or indeed from the ad hoc sub-committee's work'.[54]

In respect of parliamentary scrutiny of subordinate legislation, there is one yet live development at national level – the work of the South African Law Reform Commission (SALRC). This project is apparently derived directly from the parliamentary process noted above. In July 2006, the Department of Justice and Constitutional Development requested the Commission to take on board the development of legislation for the scrutiny of subordinate legislation.[55] This request was complied with as part of the SALRC's review of the existing Interpretation Act and proposed drafting of a replacement statute.[56] As part of its Discussion Paper finalised at the end of 2006, the

52 These new mechanisms included proposals for joint reporting on transversal matters and the establishment of a Joint Parliamentary Oversight and Government Assurance Committee as well as the development of an Oversight Advisory Section to provide technical support. See Presentation to the JRC on the Oversight and Accountability Model (19 March 2008) (available at Parliamentary Monitoring Group (PMG) website).

53 See minutes available at the website of the PMG.

54 See Hughes (note 49 above) 225, 234. More recently in the Report of the Independent Panel Assessment of Parliament (2008) it was noted that in as far as the scrutiny of subordinate legislation is concerned, there is a need for Parliament to 'develop permanent structures and processes as a matter of urgency' 25–6.

55 Para 3.36 SALRC Discussion Paper (note 9 above).

56 For a discussion focusing on aspects other than those of this note, see W le Roux 'The Law Reform Commission's Proposed Interpretation of Legislation Bill: Critical Comments' (2007) 22 *SAPL* 520.

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SALRC has thus published for comment several draft statutory provisions of a new Interpretation Act that focus upon scrutiny of subordinate legislation. These proposed provisions cover both provincial and national legislation and with respect to subordinate legislation extend from publication through to its tabling.[57] The Discussion Paper also discusses a number of comparative experiences with the legislative scrutiny of subordinate legislation.[58] As of September 2008, no submissions or proposals regarding the scrutiny of subordinate legislation had been received.[59] The SALRC process thus remains at the stage where it was at the end of 2006.

## V Conclusion

We might take this opportunity to speculate on the possible further directions for deepening constitutional democracy in South Africa pointed to by the GSSLA. Perhaps most obviously, the passage of the GSSLA may point to greater potential than has yet been generally acknowledged to provide a platform for rights-regarding legislation.[60] Especially to the extent that the political process (as distinct from the judicial one) is seen as either a preferable or a necessary route towards realising rights, the different facets of that process should be explored and exploited.[61] We suggest that this type of rights-regarding legislation may indeed signal a key point in the maturation process of the Gauteng legislature. Put differently, the development in the Gauteng legislature may be read as a bold move towards coming to terms with its own constitutional power and function that clearly envisage it (and other legislatures) playing a leading role in the promotion of a human rights culture. If the suggestion made here is indeed correct, this would be a very positive development that goes a long way towards dispelling one of the oft-raised criticisms against South Africa's legislatures that they are the institutionally weak when compared with the other branches of government.[62]

At a level of principle, one might ask what the GSSLA says about democracy, or somewhat less grandly what the Act says about democracy as understood

57 Para 3.117 read with Annexure A.

58 See in particular sections in Chapter 3.

59 Much of the SALRC interpretation of legislation initiative appears to be consistent with the policy position of the Gauteng Province regarding the topic of legislative scrutiny of subordinate legislation.

60 There are other Gauteng laws that could be considered in this respect such as the Gauteng Political Party Fund Act 3 of 2007 and the Gauteng Petitions Act 5 of 2002 (repealing the 1998 Act) (and the amendment act?).

61 See for instance the argument that the reigning judicial socio-economic rights paradigm channels potential for change away from the courts and into the political process. See M Pieterse 'On "dialogue", "translation" and "voice": A reply to Sandra Liebenberg' in S Woolman & M Bishop (eds) *Constitutional Conversations* (2008) 331.

62 The dominance of the executive over the legislature is a point that has been made by several commentators. Some describe the relationship as one where the executive has a 'stranglehold' over the legislature. See M Pieterse 'Coming to Terms with Judicial Enforcement of Socio-Economic Rights' (2004) 20 *SAJHR* 386. See also S Seedorf & S Sibanda 'Separation of Powers' in Woolman et al (note 6 above) 12–21; I Currie & J de Waal *The New Constitutional and Administrative Law*: *Volume 1 – Constitutional Law* (2001) 92, 95.

within our constitutional democracy. Writing on this topic in South Africa legal academe thus far has largely worked from the theme that democracy must mean more than majority rule.[63] The operative contrast is made between representative democracy and direct (or participatory) democracy.[64] For instance, in an echo of rights jurisprudence, attention is thus paid to citizens' limiting powers on legislative decisions. This is of course in line with the key public involvement line of cases from the Constitutional Court.[65]

In line with this debate, the Constitutional Court has tended to focus in its discussion of democracy on the tension between representative democracy on the one side and participatory democracy on the other.[66] The majority of the Court in *Doctors for Life* has held that it is implicit in the Constitution's Preamble and s 1(d) that the South African democracy consists of mutually-supportive representative and participatory elements.[67] Likewise, in *Matatiele 2*, Ngcobo J stated:

> Our system of government requires that the people elect representatives who make laws on their behalf and contemplates that people will be given the opportunity to participate in the law-making process in certain circumstances. The law-making process will then produce a dialogue between the elected representatives of the people and the people themselves.[68]

The other side of this debate is held up by the minority in these cases, where for instance Yacoob J views participatory democracy as important but representative democracy nonetheless dominant and more significant. In Yacoob's view, s 1(d)'s phrase 'to ensure accountability, responsiveness and openness' does not refer to public involvement in the legislative process but to the broad objective of having 'a universal franchise, a national voters' roll, regular elections and multi-party system of democracy'.[69]

We do not here venture to suggest that the GSSLA as impacting directly on either participatory democracy or representative democracy. However it is most certainly arguable that legislation of this nature may serve to enhance our constitutional democracy by imposing an institutional mechanism to enforce executive accountability. It is our view that the greatest boon for our democracy from a legislative intervention of this nature may be that it could

63 See T Roux 'Democracy' in Woolman et al (note 6 above). See also T Roux 'Democracy' and D Brand 'Writing the Law Democratically: A Reply to Theunis Roux' in Woolman & Bishop (note 61 above).

64 We leave aside here nuances made in Roux's discussion such as the distinctions noted between participatory and deliberative democracy. See 'Democracy' 10-14 to 10-18.

65 See N Raboshakga 'The Reasonableness Approach in Public Involvement Cases: An Adequate Standard?' LLM research report, Wits (4 March 2009).

66 This paragraph draws upon Raboshakga ibid.

67 *Doctors for Life* paras 110–1.

68 *Matatiele 2* para 58. The Court also noted that '[o]ur constitutional democracy … is partly representative and partly participative' and these are 'essential elements which constitute its foundation' (para 57).

69 *Doctors for Life* paras 274–5.

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serve to deemphasise the role of the courts in promoting rights and defending the Constitution where subordinate legislation comes into question.[70]

The above content and contours provide for a valuable and needed debate, one that is proving to provide fertile dialogue particularly around rights jurisprudence. Still, any reading of democracy needs to do more than only focus on rights.[71] Nonetheless, this focus on majority rule and its beyond may however lead to a narrow reading of democracy in other respects. One element that might be considered missing in the current debate is the dynamic between the legislature and the executive. In brief, the separation of powers doctrine does not yet figure within the debate on democracy.[72] The enactment of the GSSLA could change that, enriching the substance of our ongoing debate. The passage of the Act reminds us of the continually surprisingly new idea that new conceptions of democracy (in particular attention to a non-trivial doctrine of separation of powers) can in fact come from the institutional representative of the people, the legislature.

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70 We are not suggesting here that legislation such as the GSSLA will be a cure for all of the institutional shortcomings inherent in our legislative system. For example, the current system of proportional representation places excessive power in the hands of party bosses who determine who will appear on party lists at election time. However, legislation such as the GSSLA will put in place objective standards against which subordinate legislation must be tested. For a similar argument in a comparative context, see A Francis 'The Review of Australia's Asylum Laws and Policies: A Case for Strengthening Parliament's Role in Protecting Rights Through Post-Enactment Scrutiny' (2008) 32 *Melbourne University Law Review* 83–114.

71 For an earlier treatment of some of these themes, see J Klaaren 'Structures of Government in the 1996 Constitution: Putting Democracy Back into Human Rights' (1997) 13 *SAJHR* 3.

72 For instance, Roux's reading of provisions regarding democracy in the legislatures does not feature the oversight provisions (note 61 above) 85.

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