

The Quality and Constitutionality of Enabling Provisions in Legislation in St. Kitts and Nevis

Michelle Jan Saurie Slack*

Abstract

Notwithstanding historical arguments surrounding the constitutionality of the delegation of legislative power, the practice is now an accepted feature of the legislative process in St. Kitts and Nevis to the extent that it is more likely than not that laws are passed which include provisions enabling ministers or other senior public officials to make subsidiary legislation. The Eastern Caribbean Supreme Court has considered the question of the constitutionality of the delegation of legislative power and has ruled that the practice is 'not unconstitutional per se'. The critical question is, what makes it constitutional or not and what is necessary to ensure that the making of subsidiary legislation is within the bounds of the Constitution. Stated otherwise, what is necessary to ensure an effective enabling clause?

This article highlights how it is necessary to include measures within enabling clauses that circumscribe the exercise of delegated legislative power and require parliamentary oversight of the making of subsidiary legislation. By so doing, the quality of enabling clauses in St. Kitts and Nevis legislation can be greatly improved.

Keywords: quality, constitutionality, delegated legislation, enabling clause.

A Introduction

We are living in the golden age of regulation.¹ Laws and regulations pervade almost every aspect of the daily life of citizens.

From environmental protection to consumer protection, safety and health, labour standards, and social justice rules such as equal opportunity, no government activity in OECD countries has grown faster since 1980 than government regulatory functions.²

* Hon. Michelle Jan Saurie Slack LL.B (Hons) UWI, LEC, LL.M (Institute of Advanced Legal Studies, London) (Dist.), email: michellejslack@gmail.com.

1 Scott Jacobs (2000) 'The Golden Age of Regulation'. *Head of Programme on Regulatory Reform Organisation for Economic Co-operation and Development*, Paris, http://regulatoryreform.com/wp-content/uploads/2014/11/the_golden_age_of_regulation_scott_jacobs.pdf (accessed 27 July 2022); See also Scott Jacobs (1999) 'The Second Generation of Regulatory Reforms', *Paper Presented at IMF Conference on Second Generation Reforms*, 8-9 November 1999, Washington, D.C., www.imf.org/external/pubs/ft/seminar/1999/reforms/jacobs.htm (accessed 27 July 2022).

2 *Ibid.*

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Laws for the regulation of e-commerce, cybercrime and laws necessary to cater for advancements in economy, society and technology are being made at a rapid rate. Most times, the instruments in which these regulations are made are not Acts of Parliament, but subsidiary legislation made by executive bodies or public officials outside of the public parliamentary process. The increasing reliance on subsidiary legislation raises concerns because there are dangers inherent to law-making in this way.³ There are risks of unconstitutionality and erosion of the principle of separation of powers, risk of infringement of rule of law principles regarding the law-making process, and risks of abuse of powers conferred on public officials by enabling provisions in primary legislation. The materialization of these risks hinders effective legislation.

The Constitution of St. Kitts and Nevis (SKN) declares itself as the supreme law of the land, and any Act of Parliament, or power exercised pursuant to an Act of Parliament, or any Act done by any person which is inconsistent with any provision of the Constitution is void to the extent of the inconsistency, and the provisions of the Constitution prevail.⁴ The Constitution of SKN provides that Parliament may make laws for the peace, order and good government of SKN⁵ and makes no provision for the Legislature to delegate the making of legislation to any other branch of government. Despite this, the Interpretation Act of SKN contains provisions in relation to the making of subsidiary legislation which includes regulations, rules, by-laws, proclamations, orders in council, orders, directions, notices, forms or other instruments made pursuant to an Act.⁶ The Interpretation Act of SKN makes provision for their commencement, their relationship to primary Acts, provisions in relation to enabling clauses and the effect of repeals of primary Acts on subsidiary legislation.

Generally, the delegation of legislative power has become an accepted feature of the legislative process in SKN to the extent that it is more likely than not that laws are passed which include provisions enabling ministers or other senior public officials to make subsidiary legislation. The Eastern Caribbean Supreme Court has considered the question of the constitutionality of delegation of legislative power and has ruled that the practice is 'not unconstitutional *per se*'.⁷ This language is not definitive and suggests that delegation of legislative power may also be unconstitutional. The critical question then is, what makes it constitutional or not and what is necessary to ensure that the making of subsidiary legislation is within the bounds of the Constitution. Stated otherwise, what is necessary to ensure an effective enabling clause? This is critical because a law which is unconstitutional,

3 Lorne Neudorf, (2018) Vol 41 (Issue 2), 'Reassessing the Constitutional Foundations of Subsidiary Legislation in Canada' *Dalhousie Law Journal*, 522.

4 St. Christopher (Kitts) and Nevis Constitution Order 1983, Section 2.

5 *Ibid.*, Section 37(1).

6 Although these instruments may in other places be referred to as 'delegated legislation', 'secondary legislation', 'subordinate legislation', the term 'subsidiary legislation' will be used in this article given that it is the defining term for such instruments made pursuant to an Act of Parliament as defined in the Interpretation Act CAP 1.02 (SKN).

7 *J. Astaphan & Co (1970) Ltd v. The Comptroller of Customs and the Attorney General of the Commonwealth of Dominica* [1999] 2 LRC 569.

and ultimately struck down on that basis is powerless to achieve that which it aimed to do, and thus, ineffective.

The reasoning of the Courts and much of the academic discourse about subsidiary legislation highlights that the substance of the enabling provision in the primary Act which delegates legislative power has a significant bearing on whether the delegated power and the subsidiary legislation made pursuant to it may be found to be constitutional or not. It is in the drafting of the enabling provision that safeguards may be introduced to limit the extent of the powers delegated, and to ensure that Parliament maintains effective control over the executive in carrying out the limited law-making function transferred to it. The enabling provision therefore functions as the tiny rudder that steers the big ship of the regulatory package, either safely towards the harbour of effective legislation or towards the whirlpool of unconstitutionality. The enabling provision is the most effective tool to restrain abuse of delegation of legislative power from the pre-enactment stage, as the *ultra vires* doctrine and judicial review are able to do in the post-enactment stage.⁸ This discourse focuses on enabling provisions, specifically, and statutory provisions and legislative interventions generally as they relate to the delegation of legislative power which can safeguard the process from before a law or subsidiary legislation is made up to its passage, and thereafter.⁹

The delegation of legislative power has always been discussed critically, but the increasing reliance on the process and the increasing awareness of the dangers which are incidental to its use have resulted in a discussion on the issue to regain prominence. In 2020, regulation-making by ministers was a significant feature in national responses to the Covid-19 pandemic, and in some cases, delegated powers were seemingly limitless. This sets a dangerous precedent. In SKN, the issue is more pronounced than in some other jurisdictions because although reliance on the process has increased, there has been no correlating focus given to the implementation of statutory mechanisms to ensure that Parliament maintains effective control of its law-making function by circumscribing the exercise of delegated powers or implementing parliamentary oversight procedures whether through amendments to the existing framework or proposals for reform of the process. We are therefore passing laws which are increasingly susceptible to ineffectiveness. As such, a discourse on this subject is relevant and necessary at this time.

Case law has shown that what is required in enabling clauses are safeguards to ensure that Parliament retains effective control over its law-making function.¹⁰ This may be by including limitations in the enabling clause to sufficiently circumscribe the exercise of the delegated power since it is wide unfettered power

8 Daniel Greenberg (ed.) (2020) *Craies on Legislation: A Practitioners' Guide to the Nature, Process, Effect and Interpretation of Legislation*, 12th edn. Sweet & Maxwell, London, 178; See also Ian McLeod (2009) *Principles of Legislative and Regulatory Drafting*. Oxford and Portland, Oregon, 159.

9 The principles of judicial review and the *ultra vires* doctrine are relevant to the subject post enactment, and from the standpoint of interpretation. They are therefore not within the scope of this article and will not be discussed further.

10 Astaphan (n 7).

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that is problematic¹¹ and which is the blight of some enabling provisions in legislation in SKN. Additionally, the features of openness and transparency that characterize the constitutionally prescribed parliamentary process of law-making are absent from the process of making subsidiary legislation.¹² In SKN, ministers or other senior public officials who are given power to make subsidiary legislation do so largely in private. The public is not a part of the process, nor is there any public debate or scrutiny of the subsidiary legislation. Enabling provisions ought to also include mechanisms to ensure parliamentary oversight of the making of subsidiary legislation so as to remove the obscurity in which it is normally shrouded and to cloak the practice with features prescribed by the Constitution for law-making. Without provisions for oversight, there is no internal statutory mechanism to ensure that the delegate on whom legislative power is transferred has not exceeded the limits of the power set out in the enabling provision, or whether the power has been exercised at all. This too deprives Parliament of effective control over its law-making function and thus infringes the constitutional principle of separation of powers. Inevitably, this leads to an ineffective regulatory package given that the subsidiary legislation which is meant to complete the regulatory message is not enacted because the enabling provision has been struck down.

This article will show that the enabling provisions relied on in primary legislation in SKN border on unconstitutionality because they do not consistently contain the mechanisms required to ensure that Parliament retains effective control of its law-making function. Further, that enhancing enabling provisions to circumscribe the exercise of the power delegated is a necessary safeguard. The analysis will also emphasize the need for parliamentary oversight of the making of subsidiary legislation and amendment or operationalization of the existing framework and legislation respectively to minimize the dangers associated with the delegation of legislative power.

In the discussion of the subject referenced, the author considers academic literature, scholarly writings including parliamentary committee reports, decisions of the Court and statute to assess:

- 1 The separation of powers doctrine and the constitutional provisions regarding the power to make laws;
- 2 How the making of subsidiary legislation may be considered an affront to this constitutional principle;
- 3 Why enabling provisions and subsidiary legislation are utilized despite their apparent conflict with constitutional principles;
- 4 An assessment of the qualities of an effective enabling clause, and the statutory elements which if included in enabling provisions guard against the risk of unconstitutionality; these best practices will be assessed against enabling provisions in four Acts of the SKN Parliament passed within the past 5 years,

11 Helen Xanthaki (2013) *Thornton's Legislative Drafting*. Bloomsbury Publishing Plc, Haywards Heath, 419.

12 Neudorf (n 3), 549.

- to ascertain the sufficiency of mechanisms included in enabling provisions to ensure effectiveness and guard against unconstitutionality; and
- 5 Other legislative mechanisms which may be used to guard against infringement of constitutional principles regarding the delegation of legislative power taking examples from other jurisdictions.

B The Separation of Powers Doctrine

Montesquieu has been credited as having authored the principle of the separation of powers based on the premise that the concentration of power in the same hands is tyrannical and that a balance of power between the three branches of government is the basis of the liberty of citizens.¹³ Montesquieu's principle was based on his observation of UK conventions and was advanced as being a new, universal constitutional principle. In the United Kingdom, the overlapping of the powers of the Judiciary, the Executive and the Legislature that is evident in the operation of government has been referred to as an impure application of the doctrine attributed to the absence of a codified Constitution in the United Kingdom.¹⁴ The 1932 UK Report of the Committee on Minister's Powers (Donoughmore Report) confirms that although the doctrine of separation of powers undoubtedly existed in the English Constitution, there was never a clear-cut division.¹⁵ It has also been posited that the overlapping of the three branches is the result of the manner of development of the state machinery where each branch developed with autonomy and independence, but not with strict exclusivity of function, and not with any statutory permission.¹⁶ In SKN, the Constitution is codified and the doctrine of separation of powers is an institutional feature of the Constitution.¹⁷ The doctrine requires a functional separation of the three branches of government and is evidenced in how the powers are divided and conferred on the Legislature, the Executive and the Judiciary separately in the Constitution. Although codified, there still appears to be an overlapping of the functions of the branches and the functionaries in these branches of government.

C The Constitution and the Rule of Law

Chapter IV of the Constitution of SKN outlines the composition, powers and procedure of Parliament. Chapter V addresses the Executive arm and Chapter IX deals with judicial provisions. In Chapter IV, Section 37(1) provides that Parliament may make laws for the peace, order and good government of SKN. Similarly, the

13 Venkat Iyer (2018) 'Separation of Powers: The UK Experience', 5 *Journal of International and Comparative Law* 508.

14 *Ibid.*

15 1932 Report of the Committee on Minister's Powers (Cmd. 4060) presented by the Lord High Chancellor to Parliament by Command of His Majesty, April 1932, London (Donoughmore Report), 8.

16 *Ibid.*, at 10.

17 *Moses Hinds et al v. Attorney General of Jamaica* [1977] A.C. 195.

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National Assembly (Elections) Act provides that subject to the provisions of the Constitution, Parliament may make laws for the peace, order and good government of SKN, and that this power is to be exercised by bills passed by the National Assembly.¹⁸ The Constitution does not provide for the delegation of law-making power to any other branch of government or person.¹⁹ But notably, where the Constitution references the law-making power of the Nevis Island Legislature, the power is referred to as being exclusive. The sole reference to delegation in the Constitution of SKN is under Chapter V where the executive authority of SKN is vested in Her Majesty but may be exercised on behalf of Her Majesty by the Governor-General either directly or through officers subordinate to him.²⁰ As such, while there is express provision for the Governor-General to delegate executive function to subordinate officers, there is no similar power expressly vested in the Parliament to do so. It is therefore arguable that the delegation of legislative function from the Legislature to the Executive is an affront to the strict application of the separation of powers doctrine set out in the Constitution.

Apart from its apparent inconsistency with the separation of powers doctrine, the delegation of legislative powers from the Legislature to the Executive raises concerns for rule of law principles related to the manner in which laws are enacted. One of the principles of the rule of law relates to the enactment of laws in public.²¹ The National Assembly (Elections) Act which makes provision to regulate the procedure in Parliament (subject to the Constitution) requires a public setting with debates on bills and accessibility to the public.²² This is fundamental to the legitimacy of law-making in a democracy. The views expressed in *Executive Council, Western Cape Legislature v. President of the Republic of South Africa*²³ encapsulates this:

The reason why full legislative authority, [within the South African Constitutional framework], is entrusted to Parliament and Parliament alone, would seem to be that the procedures for open debate subject to *ongoing press and public criticism*, the *visibility of the decision-making process*, the involvement of civil society in relation to committee hearings, and the *pluralistic interaction* between different viewpoints which Parliamentary procedure promotes, are regarded as essential features of the open and democratic society contemplated by the Constitution.²⁴

This statement is equally applicable to other democratic societies with a codified Constitution which is the supreme law. "The acceptance of broad delegated powers

18 Constitution of SKN, Section 42(1); National Assembly (Elections) Act (SKN), Section 13(1).

19 For a constitution which includes a power to delegate legislative power, see the Constitution of the Republic of The Gambia 1997, Section 101(8).

20 Constitution of SKN, Section 51(2).

21 World Justice Project Four Universal Principles of the Rule of Law, <https://worldjusticeproject.org/sites/default/files/documents/WJP-INDEX-21.pdf> (accessed July 15, 2022).

22 National Assembly (Elections) Act (SKN), Section 21.

23 (1995) (4) SA 877 (CC).

24 *Ibid.*, at para. 205.

that are exercised through an opaque law-making process is inconsistent with this notion of the rule of law.²⁵ Delegation of legislative power to ministers of government or other public officers also undermines the constitutional role of Parliament because decisions which affect the general population are made in a way that excludes Parliament and the constitutionally established parliamentary process which is characterized by democracy, representation and accountability.²⁶

Although the procedure by which subsidiary legislation is made runs counter to the open and transparent process under which law-making is intended to operate in democratic societies, it has been considered justifiable. The Court in *Western Cape* having outlined the qualities incidental to the enactment of laws by Parliament in public stated further that:

It is the Parliament's function and responsibility to deal with the broad and controversial questions of legislative policy according to these processes. It is not its duty to attend to all details of implementation. Indeed, if it were to attempt to do so, it would not have the time to serve its primary function. Hence the need for subsidiary legislation, which has become a feature of Parliamentary democracies throughout the world.²⁷

This is the alternative and prevailing view in relation to the reliance on delegated legislative powers. This view is justified by the reasoning that the plenary legislative power vested in the Legislature includes the power of delegation which is necessary for effective law-making and is implicit in the power to make laws.²⁸ Consequently, there is no need for express provisions in the Constitution enabling Parliament to delegate its law-making function. Further, that there cannot be a strict application of the doctrine in *SKN* (and the Commonwealth Caribbean region) because the Ministers who exercise an Executive function also serve as members of the Legislature/Parliament and make laws.²⁹

D The Justification for Making Subsidiary Legislation – Practical Necessity

The Donoughmore Report of 1932 acknowledged that law-making by way of delegation is inherently dangerous and liable to abuse, but that the practice is necessary, inevitable and has definite advantages.³⁰ In the United Kingdom, the use of subsidiary legislation grew tremendously from around the 1950s onwards with an average of 3000 statutory instruments being made annually.³¹ By that time, the legitimacy of subsidiary legislation would have long been accepted in the

25 Neudorf (n 3), 552.

26 *Ibid.*, 549.

27 *Executive Council, Western Cape Legislature v. President of the Republic of South Africa* (1995) (4) SA 877 (CC) (n 24), para. 205.

28 BVIHCV 2014/0151 *Partnerselskabet Parsifal v. the Attorney General of the BVI*, (2018) January 12, para. 104.

29 *Ibid.*, at para. 39.

30 Donoughmore Report (n 15), 4-15.

31 Greenberg (n 8), 140.

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United Kingdom.³² As a result, when SKN became independent in 1983 and thereafter received the laws, practices and customs of the United Kingdom, the delegation of legislative power was already well established, and also adopted in SKN as being a necessary part of law-making. Today, almost every aspect of the life of citizens appears to be the subject of regulation. The OECD coined the term regulatory inflation in the 1990s to explain the rapid increase in regulation.³³ With the development of modern society, advances in technology, the economy, social media and the general way business is conducted, laws and regulations have been made for an increasing range of matters. The matters over which governments are now required to legislate due to these political, social and economic advancements have become so wide and varied that to encapsulate all such provisions in an Act of Parliament would result in statutes which are prolix and complicated.³⁴

Further, due to the growing quantity of laws passed on an annual basis, Parliament would not have the time to finalize all the legislative details of the regulatory message in time for the debate of the bill in Parliament, and the limited time which is available to Parliament ought to be spent on debating issues of substance and policy.³⁵ In a large measure, the details left for delegation are technical matters which may be more appropriate to have dealt with at the departmental level.³⁶ To include such details in Acts would produce laws which are cluttered³⁷ and unsuitable for meaningful parliamentary debate on its provisions because of the amount of detail and the need to change detail from time to time.³⁸ As the recent experience with the Covid-19 pandemic has shown, certain matters requiring legislation are fraught with uncertainty or urgency which it would be impractical to leave to Parliament provided that it has addressed the policy matters in the primary legislation.³⁹

While these are the usual reasons advanced to justify delegation of legislative power, these reasons are not adequate in all cases. The need to avoid taking up unnecessary Parliamentary time is insufficient when used to justify the delegation of powers that can influence significant and permanent legal provisions.⁴⁰ Further,

32 Delegated Powers and Regulatory Reform Committee (November 2021) 'Democracy Denied? The urgent need to rebalance power between Parliament and the Executive' *HL Paper 106*, Para 24 <https://publications.parliament.uk/pa/ld5802/ldselect/lddelreg/106/10605.htm#footnote-184> (accessed 25 July 2022).

33 OECD (1997) *The OECD Report on Regulatory Reform: Synthesis*. Organisation for Economic Cooperation and Development, Paris, 9.

34 Rick Bigwood (2004) *The Statute Making and Meaning*. LexisNexis, Wellington, 85; See also Donoughmore Report (n 15), 5.

35 (1995) (4) SA 877 (CC).

36 Donoughmore Report (n 15), 23.

37 Bigwood (n 34), 85.

38 Donoughmore Report, (n 15), 23; See also Delegated Powers Scrutiny Committee, 1st Report, Session 1992-93 (HL Paper 57), para. 1.

39 Thomas Yeon (2021) 'Comparative Reflections on COVID-19 Responses: Drafting, Powers and Interpretation', 20 *Statute Law Review* 4; See also F.A.R Bennion (2008) *Bennion on Statutory Interpretation*, 5th edn. Lexis Nexis, London, Section 50, 242-243.

40 Hansard Society (UK) (April 2022) 'Compendium of Legislative Standards for Delegating Powers in Primary Legislation', 11, www.hansardsociety.org.uk/publications/reports/compendium-of-legislative-standards-for-delegating-powers-in-primary (accessed 9 May 2022).

the details of subsidiary legislation ought to be generally worked out before a bill is presented in Parliament, the failure to do so can lead to an ineffective Act. Likewise, Covid has shown the speed with which primary legislation can also be made by Parliament if necessary.⁴¹ Consequently, speed and economy of time are not always justification enough. Those who find these reasons to be insufficient do not suggest an abandonment of the use of subsidiary legislation. Rather, that the practice be sufficiently scrutinized and subjected to safeguards to avoid the dangers incidental to its use.⁴² One such danger is the blurred line between matters which ought to be included in primary Acts and those which may within the parameters of the Constitution be delegated. This is an issue which has been seen in SKN legislation and may be attributed to the development of the practice in an ad hoc way without an established system.⁴³ Provisions which would have previously been the strict remit of primary legislation are now contained in subsidiary legislation, which is problematic since the nature of matters which ought to be addressed in statute, and be subject to the public parliamentary process is of a different category to the nature of matters to be included in subsidiary legislation.⁴⁴ Subsidiary legislation now often involves significant matters of substance which greatly impact the public and not solely matters of procedure or technical detail.⁴⁵ The determination of what matters will be included in primary legislation and what will be included in subsidiary legislation is usually made on a case-by-case basis.⁴⁶ However, this has proved problematic. Because the laying down of legislative policy is a legislative function, matters of policy ought not to be delegated, and when this happens, it puts in question the validity of the delegated power and the subordinate legislation made pursuant to it.⁴⁷

The general principle advanced to curb this issue is that substantive matters of policy ought to be included in the primary legislation while matters of detail or procedure that are likely to be subject to frequent amendment, or technical details required for the implementation of the Act, administrative arrangements for the implementation of legislation and provisions to bring primary legislation into force are more appropriate for subsidiary legislation.⁴⁸ This is reflected by the analogy of the relationship between primary and subsidiary legislation advanced as early as the 1930s of a parent and a child subsidiary legislation being the 'growing

41 *Ibid.*; See also Delegated Powers and Regulatory Reform Committee (2019-2021), 14th Report, HL Paper 74, paras. 10, 14(d).

42 Neudorf (n 3), 522.

43 Donoughmore Report (n 15), 16.

44 House of Lords Secondary Legislation Scrutiny Committee, 'Government by Diktat: A call to return power to Parliament', 20th Report 2021-22 (HL Paper 105) 5.

45 The 1975 Renton Report (UK) suggested that matters of detail which are liable to frequent modification ought to be included in statutory instruments – Report of a Committee appointed by the Lord President of the Council and Leader of the House of Commons of the UK Parliament, 'The Preparation of Legislation' (Renton Report) (May 1975), Recommendation 30.

46 Bigwood (n 34), 86; See also Hansard Society (n 40), 5.

47 P.M. Bakshi (January-March 1994) 'Subordinate Legislation: Scrutinising the Validity' 36(1) Journal of the Indian Law Institute 2.

48 Helen Xanthaki (2014) *Drafting Legislation: Art and Technology of Rules for Regulation*. Oxford and Portland, Oregon, 264-265.

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child called upon to relieve the parent of the strain of overwork, and capable of attending to minor matters while the parent manages the main business'.⁴⁹ While the division of labour suggested here is helpful, it minimizes the significance of implementation provisions usually in subsidiary legislation which are anything but minor. In fact, regulations and other subsidiary legislation at times more significantly impact the lives of citizens than the provisions of the primary Act.

E Enabling Provisions and the Criteria for Constitutionality

The Courts of the Eastern Caribbean, and the Privy Council in London which remains the highest Court of SKN, have made pronouncements on the constitutionality of the delegation of legislation in the local context. In *Moses Hinds et al v. Attorney General of Jamaica*,⁵⁰ the Privy Council on appeal from Jamaica considered the separation of powers doctrine in the context of a written Constitution. The Court reasoned that the Constitution of Jamaica (and similar constitutions across the Commonwealth Caribbean) was developed based on existing systems and institutions in the United Kingdom including the separation of powers doctrine. The institutions were to exercise powers which although larger than what existed, remained similar to what was vested in the corresponding institution which it replaced. Considering this, the Court reasoned that:

the constitution does not normally contain any express prohibition upon the exercise of legislative powers by the executive or of judicial powers by either the executive or the legislature... Nevertheless it is well established as a rule of construction applicable to constitutional instruments under which this governmental structure is adopted that the absence of express words to that effect does not prevent the legislative, the executive and the judicial powers of the new state being exercisable exclusively by the legislature, by the executive and by the judicature respectively.

Notwithstanding its acceptance of the separation of powers doctrine, the Court accepted that if the Legislature sets certain parameters within which delegated powers may be exercised that this would be within the remit of the Constitution.⁵¹ *Hinds* has been relied on as the most authoritative pronouncement on the constitutionality of delegation of legislative power applicable to the Commonwealth Caribbean region. However, the decision does not delve into the extent to which this delegation of legislative power was to operate in light of the continued existence of the separation of powers doctrine. The Court had occasion to consider the matter again in *J. Astaphan & Co (1970) Ltd v. The Comptroller of Customs and the Attorney General of the Commonwealth of Dominica*⁵² the Court relied on the decision in *Hinds* as the starting point for consideration of the question of whether the

49 Donoughmore Report (n 15), 16.

50 [1976] 1 All ER 353.

51 *Ibid.*, at 370.

52 [1999] 2 LRC 569.

delegation or transfer of legislative power offends the principle of separation of powers implicit in the Constitution. The Court held that the delegation of legislative power to the Executive 'is not per se inconsistent with the principle of separation of powers' provided that the Legislature retains effective control over the Executive in the latter's exercise of the delegated or transferred legislative power by circumscribing the power or by prescribing guidelines or a policy for the exercise of the power.⁵³ In that case which dealt with the imposition of a tax or penalty by the Comptroller of Customs, the setting of a maximum penalty or factors to guide the Comptroller's exercise of discretion were considered sufficient to circumscribe the power. Based on the reasoning in this decision, the question therefore becomes whether the Legislature has retained effective control over the powers delegated. This may be by including safeguards in the enabling provision of the primary Act aimed at circumscribing the exercise of the power delegated and providing for Parliamentary oversight of the delegation of power and the process of making subsidiary legislation.

In the SKN High Court decision in *Kelsick v. Petty*,⁵⁴ the Court considered a challenge to the Companies Act which delegated power to a Minister to regulate finance business on the basis that the Minister's power was unrestrained and so offended the constitutional principle of separation of powers. The sections complained against allowed the Minister to prescribe 'any matter which may be prescribed by this Act' determine the definition of finance business – a substantive matter of policy salient to the Act, and to subject such companies to such regulations as the Minister prescribes. The Minister was also given the power to provide for the payments of fees, the imposition of fines and default fees for breaches of certain matters, and 'such transitional, consequential, incidental or supplementary provisions as appear to the Minister to be necessary or expedient for the purposes of the Order'. The issue for the Court in this matter, and in all questions of the constitutionality of enabling provisions is whether Parliament retained effective control over the Minister in his exercise of the powers conferred upon him. The Court applied the decision in *Astaphan* and held that the Act did provide that effective control required. At paragraph 29, Ventose J stated:

[29] Section 244 of the Companies act provides that effective control by providing:

- (1) that any order must relate only to companies (section 244(1));
- (2) that any order must relate only to finance business (section 244(1));
- (3) that any order made is limited to companies that: (a) intend to carry on; or (b) are carrying on, finance business (section 244(1));
- (4) for the payment of annual fees and other fees and for the imposition of fines and daily default fines for breaches of matters specified in the order (section 244(2));

53 *Ibid.*, at 575.

54 SKBHCV2014/0119 2018: November 12.

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- (5) that any company that is to be incorporated for the purposes of carrying on finance business must obtain the authorization that is required to carry on finance business (section 244(3)); and
- (6) that any existing company or external company that intends to for the purposes of carrying on finance business must obtain the authorization that is required to carry on finance business (section 244(4)).

Essentially, the Court found that the limitations inherent in the subject matter of the statute were sufficient to circumscribe the power of the Minister and so there was no violation of the separation of powers doctrine. This though appears to be an unfortunately narrow interpretation of the holding in *Astaphan* and principles generally relating to safeguards which ought to be put in place by Parliament to prevent abuse of delegated power. Based on the decision in *Kelsick*, almost all enabling provisions in statute would be considered to retain effective control in the Parliament over the delegation of power if they merely reference the subject matter of the statute in the enabling provision. By parity of reasoning, a provision under an Employment Act that gives a Minister power to make regulations in relation to vacation leave sufficiently circumscribes the exercise of the power. This, however, is a far cry from what is necessary to maintain the balance of power between Parliament and the Executive, and for Parliament to retain control over its constitutional function to make laws. Merely stating the subject matter still leaves the window open for the delegate to unconstitutionally make regulations on matters of policy pertaining to that subject. The Constitution and the principles embodied in it are regarded as sacrosanct, and practices such as delegation which are 'not unconstitutional per se' but which may amount to an infringement of the Constitution, and which offend against practices of openness and transparency incidental to democratic governance ought to be subject to more stringent controls and treated with greater seriousness.⁵⁵

Notably, the Court did not address what was clearly put forward by the Appellant in *Kelsick* as well as held in *Astaphan* in relation to guidelines or policies for the exercise of delegated legislative power. *Kelsick* provided an opportunity for the Court to highlight the importance of parliamentary scrutiny of subsidiary legislation, the reliance on safeguards against abuse and the care that must be taken in drafting enabling legislation to take such matters into account and ensuring effectiveness. In *SKN*, there remain no guidelines, principles or policies regarding necessary mechanisms to be included in enabling provisions, or otherwise, and no parliamentary or other scrutiny of delegated legislative power. Meanwhile, laws continue to be made and Parliament continues to delegate the law-making power to the Executive within a framework where the constitutionality of enabling provisions is questionable.

55 Neudorf (n 3), 523.

F Drafting Effective Enabling Provisions

The legitimacy of subsidiary legislation is derived from the enabling provision in the primary legislation, and any question of validity usually begins with a consideration of the provisions of the enabling clause.⁵⁶ A well written Act that is not or cannot be implemented is ineffective for the regulatory reforms to be achieved cannot be produced.⁵⁷ Provisions for the implementation of the legislation are usually within the remit of delegated instruments, but its wellspring is the enabling clause in the primary Act. Ultimately, the drafter must bear in mind that if an enabling clause is found to be unconstitutional, it may be struck down by the Court. Without subsidiary legislation, the implementation arm of the regulatory package, the aims of the legislation cannot be achieved. Extraordinary attention in drafting enabling provisions is therefore significant, for the absence of the necessary mechanisms to ensure that the delegated power is within the remit of the Constitutional institution of the separation of powers affects the effectiveness of the entire statute and regulatory message. In this sense, unconstitutionality is ineffectiveness.

While keeping constitutional and rule of law principles in mind, as well as the pronouncements of the Court on the subject, the drafter of the enabling provision must also bear in mind the virtues of clarity, precision and unambiguity which serve effectiveness.⁵⁸ This is relevant to the complete regulatory package and does not end with the passage of the law.

In *Astaphan*, cited earlier, the Court held that the delegation of legislative power is not inconsistent with the principle of separation of powers if the Legislature retains effective control over the Executive's exercise of the delegated or transferred legislative power. The first aspect of effective control as set out by Sir Vincent Floissac CJ in that case is by circumscribing the delegated power. The decision in *Partnerselskabet Parsifal v. AG of the BVI*⁵⁹ is helpful in this regard. The Court found the enabling clause in issue was unconstitutional and therefore void. In arriving at its decision, the Court was satisfied that where the legislative scheme reveals 'such a width or uncertainty of subject matter to be handed over, that the enactment attempting it cannot be a valid law'.⁶⁰ Likewise, Xanthaki advises against enabling clauses which are superfluous, wide and where the statutorily imposed limits are unclear.⁶¹ If a power has the ability to make more wide-ranging change than necessary to achieve the aims or purpose of the legislation, then the provision is inappropriately wide.⁶² Wide powers of delegation also increase the

56 Xanthaki (n 48), 268.

57 Xanthaki (n 48), 5-7; See also Helen Xanthaki, 'Quality of Legislation: an Achievable Universal Concept or a Utopian Pursuit?' in Marta Travares Almeida (ed.), *Quality of Legislation* (Nomos, Baden-Baden, 2011), 75-85.

58 Xanthaki, *Quality of Legislation* (n 57).

59 BVIHCV 2014/0151 *Partnerselskabet Parsifal v. the Attorney General of the BVI*, 2018: January 12.

60 *Ibid.*, at 35 [108].

61 Helen Xanthaki (2013) *Thornton's Legislative Drafting*. Bloomsbury Publishing Plc, Haywards Heath, 419.

62 Hansard Society (n 40), 9.

risk of abuse by the delegate.⁶³ A suggested technique is to confer legislative power for specific reasons, in relation to a specified subject matter or setting out particular powers.⁶⁴ As such, instead of a wide power to a Minister to make subsidiary legislation, the power may go on to specify what type of instrument is to be made and the range of matters to be addressed.

Further, ambiguity must also be avoided. In enabling provisions, ambiguity is usually reflected in the reference to the type of subsidiary instrument which the delegate has the power to make. For example, some enabling provisions state that the Minister may make *regulations and orders* to better give effect to the provisions of the Act.⁶⁵ This creates the impression that both regulations and orders are to be made. Xanthaki recommends that if the intention is for the transfer of power to make more than one of these instruments, then clarity and unambiguity is achieved by separating these powers into different provisions.⁶⁶

Another feature of an effective enabling provision is one which strikes the correct balance between specificity and generality in the powers outlined. A failure to set out clearly the full range of powers conferred by a clause means that the clause either has to be construed very narrowly, with the risk that it would fail to deliver an effective and workable system, or has to be construed as conferring broad unspecified powers,⁶⁷ which is also dangerous. The specific powers delegated ought to be set out in the enabling legislation as well as a general regulation-making power.⁶⁸ Such an approach is contemplated in Section 21(d) of the Interpretation Act of SKN but importantly, it provides that specific powers are not deemed to derogate from the generality of the powers conferred.⁶⁹ What this appears to suggest is that even where specific powers are prescribed, the delegated powers are not limited by them and the delegate nonetheless has freedom to take such actions as they fall within the general power. This approach is inconsistent with the need to effectively circumscribe the exercise of legislative power. The preferred approach which would be consistent with circumscribing the exercise of delegated power would be to construe the general power as being ancillary to the specific powers delineated in the enabling legislation as the Privy Council concluded in the 1965 decision in *Utah Construction and Engineering Pty Ltd v Pataky* [1965] 3 All ER 650 at 653.⁷⁰ If there is to be any effective limitation on the delegation of legislative power, Section 21(d) of the Interpretation Act would need to be revisited.

Finally, the inclusion of purpose clauses in legislation is also a tool which can assist in producing an effective enabling provision and regulatory package. Firstly, from the standpoint of the drafter of the instrument, a purpose clause can assist a drafter in making the determination of whether an enabling clause is drafted in terms that are too wide, and make necessary adjustments to ensure the clause does

63 Greenberg (n 8), 143.

64 Xanthaki (n 61), 419.

65 Covid-19 Prevention and Control Act, 2020 (SKN) Section 25.

66 Xanthaki (n 61), 416.

67 Hansard Society (n 40), 9.

68 Xanthaki (n 61), 417.

69 Interpretation Act CAP 1.02 (SKN) Section 21(d).

70 Xanthaki (n 61), 418.

not allow the delegation of wider powers than are necessary. From the point of view of the delegate, the presence of a purpose clause is an aid in ensuring that the instrument made pursuant to the power is able to further the objects of the primary Act. Moreover, it is not unusual to see an enabling provision which confers power to do some Act or make some decision *to further the objects of the legislation*. If the objects or purpose are clearly set out in the statute, this would assist the delegate in the exercise of powers conferred to ensure that they do further the aims of the Act.⁷¹

In the round, the principles advanced for the drafting of effective enabling provisions in primary legislation are in keeping with the application of the virtues of clarity, precision and unambiguity which ultimately serve effectiveness.

G Review and Analysis of Enabling Provisions in SKN

The majority of laws passed in SKN include a provision for regulations to be made by the Minister responsible for the matter being legislated. To consider the quality and constitutionality of enabling provisions in SKN legislation, the following Acts will be considered.

- 1 The Gaming (Control) Act, 2021;
- 2 The Electronic Communications Act, 2021;
- 3 The Covid-19 Prevention and Control Act, 2020; and
- 4 The Credit Reporting Act, 2018.

These statutes are apposite for the present discourse. They are all recent Acts of Parliament which would allow for an examination of the current practice, and are substantive Acts on matters which were previously unregulated, and all include provisions for subsidiary legislation to be made. Reviewing these statutes which have been passed over the past 5 years is a reasonable sample or cross section of statutes from the jurisdiction which makes the findings reflective of the current general approach.

1. *The Gaming and Control Act, 2021*

46. Regulations.

- (1) The Minister may, after consultation with the Commission, make regulations generally for the purpose of controlling gaming and betting in Saint Christopher and Nevis.
- (2) Without prejudice to the generality of subsection (1), the Minister may make regulations for the following purposes, that is to say,
 - (a) ... prescribing the form and content of the application for a gaming licence;
 - (b) prescribing the criteria for eligibility for obtaining a gaming licence;
 - (c) prescribing the terms and conditions to be attached to a gaming licence;

...

71 Duncan Berry (April 2011) 2 'Purpose Sections: Why They Are a Good Idea for Drafters and Users', Loophole 49, 50.

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- (m) for any purpose for which regulations are authorised or required to be made under this Act;
- (3) Regulations made under this section may provide for offences for breach of any regulation so made and may provide for a fine not exceeding twenty-five thousand dollars.

1.1 Description and Analysis

The enabling provision in the Gaming and Control Act specifies the person on whom the power is conferred as well as the type of statutory instrument to be made. The provision includes a general power to make regulations followed by a specific enumeration of the types of matters for which regulations may be made. The majority of the specific powers listed in the enabling clause are administrative matters, matters of detail or matters necessary for implementation. However, the inclusion of the power of the Minister to prescribe the criteria for eligibility to obtain a licence is a power that ought to be part of the policy decision of the Parliament and as such is an inappropriate power to be delegated to a Minister. As earlier stated, it is a matter of judgment in each case to determine the matters which are appropriate for delegation and those which are to form part of the primary Act. However, the accepted rule of best practice that matters of principle or policy are part of the legislative function of Parliament and ought not to be delegated⁷² was disregarded in this Act.

The enabling clause also allows for offences to be created by regulations and stipulates the maximum penalty which may be imposed.⁷³ Without such a restriction, any purported exercise of the power to create an offence and impose a penalty would have been questionable,⁷⁴ although the Interpretation Act prescribes a maximum penalty for breach of regulations.

2. *The Electronic Communications Act, 2021*

155. REGULATIONS.

- (1) The Minister may, on the recommendation of ECTEL, make Regulations to give effect to the objects and provisions of this Act.
- (2) Without limiting the generality of subsection (1), the Minister may, on the recommendation of ECTEL, make Regulations providing, in particular, for or in relation to —
- (a) forms, procedures and time frames in respect of the grant of a licence or a frequency authorisation;
 - (b) matters relating to the provision of universal service and access and the management of the Universal Service and Access Fund;
 - (c) the type of terminal equipment to be connected to a public electronic communications network; ...

⁷² Bakshi (n 47).

⁷³ Gaming (Control) Act, 2021 (SKN) Section 46(3).

⁷⁴ Astaphan (n 7).

- (3) Without limiting the generality of subsection (1), the Minister may, on the recommendation of ECTEL, make Regulations creating offences for breach of any provision of the Regulations and for a penalty not exceeding \$50,000 for any such offence.
- (4) ECTEL shall make recommendations under this section after consultation with the Commission.

2.1 Description and Analysis

The enabling provision identifies the delegate of the power, the type of instrument to be made and enumerates the type of matters to form the subject of regulation followed by a general power. The specifically enumerated matters are of a technical nature related to the subject of the legislation and do not comprise any matters which may be properly considered matters of policy. The specific enabling provision states that the regulations are to be made to give effect to the objects and provisions of the Act. The objects clause at Section 3 of the Act is therefore a useful tool for the Minister in circumscribing the exercise of the powers conferred.

The enabling clause also allows for offences to be created by regulations and stipulates the maximum penalty which may be imposed.⁷⁵ Unlike in *Astaphan*, if there was no statutory maximum penalty which could be imposed, the provision would not have been impugned, since the Interpretation Act prescribes a maximum penalty that applies where the enabling provision is silent.⁷⁶

3. *The Covid-19 (Prevention and Control) Act, 2020 provides that:*
25. Regulations.

The Minister, in consultation with the CMO, may make Regulations and Orders to better give effect to the provisions of this Act.

3.1 Description and Analysis

The enabling provision in the Covid-19 Act specifies the delegate of the power and requires the Minister to consult with the CMO to make regulations and orders. The provision is drafted in very wide terms contrary to the guidance of the Courts and best practice on what is required to ensure the delegation of legislative power is within the bounds of the constitutional principle of separation of powers. If the reasoning in *Partnerselskabet Parsifal v. AG of the BVI*⁷⁷ were to be applied, the enactment is likely to have been declared invalid given the ‘width or uncertainty of subject matter...handed over...’.⁷⁸ Further, the provision references the making of both regulations and orders, which creates ambiguity since regulations and orders are not identical. Clarity would have required the different instruments to be included in different provisions if the intention is to confer power to create both. The provision is also faulty because it fails to strike the required balance between

75 Electronic Communications Act, 2021 (SKN), Section 155(3).

76 Interpretation Act CAP 1.02 (SKN), Section 21(b).

77 *Parsifal* (n 28).

78 *Ibid.*, para. 80.

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specificity and generality. The provision does not enumerate the types of regulations or orders anticipated or give any suggestion of the possible range of matters which may be covered. It is appreciated that Covid-19 was a unique experience with much uncertainty, but the urgency of Covid-19 or any other situation requiring legislation to be made or changed quickly does not justify the transfer of wide powers to legislate on ministers.⁷⁹ The form of this enabling provision is contrary to the principles in *Astaphan* and best practice generally that the delegation of legislative power is unconstitutional unless the Parliament retains effective control over the delegate by circumscribing the power or putting in place policy or guidelines in relation to the exercise of the power. The provision is also ineffective since it is unclear, lacks precision and is ambiguous. The effectiveness of this enabling provision could be improved by including provisions to circumscribe the delegated power by specifying the range of matters for which regulations may be made, by requiring some form of Parliamentary oversight of the making of the subsidiary legislation, and in providing for these matters clearly, precisely and without ambiguity.

4. *The Credit Reporting Act 2018*

56. Regulations.

- (1) The Minister on the recommendation of the Central Bank may make Regulations—
 - (a) for the purpose of implementing the provisions of this Act; or
 - (b) respecting any other matter that the Minister considers necessary to carry out the intent or purposes of this Act.
- (2) Without limiting the generality of subsection (1), the Minister on the recommendation of the Central Bank may make Regulations prescribing—
 - (a) the fees to be paid for the grant of licences, ...
 - (e) the procedures for the resolution of complaints and disputes respecting data subjects and breaches of this Act and the Regulations;...
 - (g) any other matter that is required or authorised by this Act to be prescribed.
- (3) The Minister on the recommendation of the Central Bank may, by Regulations, provide for offences and prescribe for such offences penalties not exceeding ten thousand dollars.
- (4) Regulations made under this Act are subject to negative resolution of the National Assembly.

4.1 Description and Analysis

The enabling provision in the Credit Reporting Act sufficiently identifies the delegate on whom power is conferred. The provision includes a general regulation-making power followed by the enumeration of the specific matters for which subsidiary legislation may be made. The Minister is empowered to make regulations as ‘the Minister considers necessary’. This approach is inappropriate and discouraged because it incorporates an element of subjectivity on a matter

⁷⁹ Hansard Society (n 40), 11.

which ought to be objectively determined.⁸⁰ The range of matters over which subsidiary legislation is to be made relate to implementation, procedural and administrative matters which are appropriate for subsidiary legislation. The enabling provision also allows for the creation of offences and appropriately also includes a provision for the maximum penalty which may be imposed. The Act requires that regulations made pursuant to the enabling provision be subject to a negative resolution of the National Assembly. This is commendable and allows Parliament to have oversight of the process of making subsidiary legislation. Particularly, the subject of the legislation is a matter affecting the financial system of SKN so the oversight is appropriate. This matter is addressed substantively in section K.

H General Conclusions on the Examination of the Legislation

The findings from the examination of the Acts confirm in the majority of statutes there are measures included in the enabling provisions aimed at maintaining effective control in Parliament over delegated power. Largely, the powers delegated are limited to matters of detail, or technical, procedural or administrative matters all in the realm of implementation. However, this is not the case throughout as is reflected in the Gaming (Control) Act which includes a policy matter as the subject of delegation, and leaves matters to the subjective discretion of the Minister. The Covid-19 Act is also problematic and clearly exhibits the delegation of power in a way which offends the separation of powers principle. Parliament has no control over what is legislated under this Act. This evidences the need for oversight in the process of delegation of legislative power to ensure that matters inappropriate for delegation are not included in enabling provisions, and that enabling provisions are not overly wide. The inconsistency is partly due to the absence of guidelines or policy regarding the making of subsidiary legislation.

Interestingly, in all Acts reviewed, there is a requirement to consult with an official who appears to have specialized knowledge in relation to the subject matter being legislated. This is a prudent measure to ensure that the technical advice required is provided and factored into the process of making the subsidiary legislation.

Further, the enabling provisions in these Acts are to operate within the framework of the provisions of the Interpretation Act. Consequently, it is concerning that the Interpretation Act provides that the specific powers conferred or the range of matters over which subsidiary legislation may be made as specified in the enabling provision of an Act do not derogate from a general power to make subsidiary legislation for other matters. Unless construed strictly, the provision automatically widens enabling provisions which leads to ineffectiveness. It is therefore evident that in SKN, statutory mechanisms in enabling provisions are not watertight and are inconsistently applied. While some mechanisms are included that serve as a significant safeguard against the unconstitutional

80 Greenberg (n 8), 166.

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delegation of legislative power, there is a need for the general framework to be strengthened. If the Constitution, and the principles enshrined in the Constitution are not to be eroded, then the safeguards to protect these ideals must be capable of doing so. The enabling provision is a good start, but more is required by way of consistent application of the mechanisms already identified, the application of best practices, general parliamentary oversight procedures and guidelines or policies to guide the process. By their implementation, the potential for ineffective legislation and abuse of delegated powers can be further minimized.

I Parliamentary Oversight of Subsidiary Legislation

The public nature of law-making and parliamentary procedure is a salient feature of the rule of law. Law Lord Thomas Bingham wrote that ‘The core of the rule of law is that all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly made, taking effect (generally) in the future and publicly administered in the courts’.⁸¹ Similarly, the World Justice Project’s four universal principles of the rule of law include that ‘the law is clear, publicized, and stable and is applied evenly’. Further, that ‘the processes by which the law is adopted, administered, adjudicated, and enforced are accessible, fair, and efficient’.⁸² The delegation of legislative power from the Legislature in Parliament, to the Executive, in their offices therefore raises concerns for rule of law principles related to the manner in which laws are enacted.⁸³ Wide powers of delegation undermine Parliament’s constitutional role and functions because the process excludes the openness, transparency, democracy, representation and accountability which characterizes the parliamentary process.⁸⁴

Importantly, Parliament’s duty is not only in the making of the law, but the making of the law in the public domain. To maintain due regard for the publicity element of enactment of laws included in the rule of law principles and the constitutional features of parliamentary procedure, as well as for Parliament to maintain oversight of its law-making function, subsidiary legislation ought to be subject to some form of public Parliamentary scrutiny. Not only this, but since the legitimacy of subsidiary legislation is derived from its being authorized by Parliament, the accountability to Parliament must always be evident in the process.⁸⁵ Oversight procedures would also generally minimize the inconsistent application of statutory mechanisms which guard against the delegation of wide unfettered powers, or the making of subsidiary legislation which includes matters of policy.

81 Robert Stein (2019) ‘What Exactly is the Rule of Law’, 57 *Houston Law Review* 191.

82 <https://worldjusticeproject.org/sites/default/files/documents/WJP-INDEX-21.pdf> (accessed 15 July 2022).

83 Lord Bingham (2008) of Cornwall, ‘The Rule of Law and the Sovereignty of Parliament’, 19 *King’s Law Journal* 223, 225.

84 Neudorf (n 3), 549.

85 Peter Bernhardt (September, 2014) *Parliamentary Scrutiny of Delegated Legislation in Canada: Too Late and Too Little?*. CIAJ National Conference, Ottawa, 10.

J The Legislative Framework for Parliamentary Oversight of Delegated Legislative Powers

The Constitution of SKN is silent on the matter of delegation of legislative authority and makes no provision for any form of parliamentary scrutiny of subsidiary legislation. The Interpretation Act is the legislation which contains the most salient provisions in relation to the delegation of legislative power. Pursuant to the Interpretation Act, statutory rules and orders are subject to publication in the Official Gazette and either an affirmative resolution or a negative resolution of the National Assembly *if the enabling provision in the primary legislation so provides*.⁸⁶ Further, under the National Assembly Elections Act, it is a requirement for statutory instruments which do not require the approval of Parliament to be laid before the National Assembly as soon as possible after being made.⁸⁷ In practice, the agenda for National Assembly sittings in SKN routinely includes an item for presentation of papers and reports from committees but the papers usually laid pursuant to this section are annual reports or financial statements of statutory bodies and corporations that stipulate the presentation of the reports or statements to Parliament. Regulations or other forms of subsidiary legislation are rarely laid before Parliament pursuant to this section. Based on the review and analysis of enabling provisions in legislation in SKN, it is evident that this oversight process is absent but necessary.

Further, Order 65 of the Standing Orders of the National Assembly (Elections) Act provides for the appointment of committees by the National Assembly comprising any of its members to examine and report on any clause in a bill or for any other purpose.⁸⁸ The committee has leave to make reports to the National Assembly on its powers, functions and proceedings. The National Assembly of SKN has a finance committee and a public accounts committee. There is no committee or other body which reviews or scrutinizes delegated powers or subsidiary legislation.

K Analysis of the Legislative Framework for Parliamentary Oversight of Delegated Legislative Powers and Recommendations

The provisions of the Interpretation Act and the National Assembly (Elections) Act and Standing Orders of the National Assembly show that there is already a framework in place which can be used to facilitate parliamentary oversight of delegated powers and subsidiary legislation. However, in practice, the majority of subsidiary legislation becomes law without being subject to any parliamentary oversight procedures because there is no mandatory requirement that subsidiary legislation be subject to the negative or affirmative resolution procedure. In the Acts reviewed in this article being reflective of the general position of laws passed in the jurisdiction, only one Act included a requirement for subsidiary legislation

86 Interpretation Act CAP 1.02 (SKN), Section 46-47.

87 National Assembly (Elections) Act, (SKN), Section 16(3).

88 National Assembly (Elections) Act, CAP 2.01 (SKN), Schedule IV, Section 65.

to be subject to the affirmative or negative resolution procedure.⁸⁹ And, it appears that the affirmative or negative resolution procedures are only employed in the most obvious cases where the delegation would otherwise be clearly an infringement of the separation of powers doctrine or where the subject concerns matters of economics or taxation. For example, the Value Added Tax Act, 2010 provides that the Minister may calculate the rates of tax at rates other than the statutory rate as the Minister may by Order specify and that such order shall be subject to the Affirmative Resolution of the National Assembly.⁹⁰ Within the past 5 years in SKN, of the several statutes passed requiring the making of subsidiary legislation, only one substantive Act was passed requiring that subsidiary legislation be subject to parliamentary oversight in the form of either the negative or affirmative resolution procedure.⁹¹ A mandatory requirement for all subsidiary legislation to be subject to publication and laid before Parliament is likely to prove more effective than the approach currently existing in SKN where the framework under the Interpretation Act for parliamentary oversight, being discretionary, is largely disregarded.⁹² The development of guidelines to determine which procedure is appropriate (negative or affirmative) would therefore be necessary.

Under the National Assembly (Elections) Act, committees may be established to review enabling provisions and subsidiary legislation,⁹³ but this is not done. The failure to operationalize the available statutory mechanisms to enable parliamentary oversight of subsidiary legislation is symptomatic of disregard for the potential infringement on constitutional and rule of law principles involved in the delegation of legislative power. Without parliamentary oversight of the delegation of legislative power, there is a greater risk of delegates exceeding their powers, delegates being afforded powers which ought to be limited to Parliament, law-making in private, which is anathema to the constitutional prescriptions for law-making, and the absence of effective control by Parliament of its law-making function. These all expose enabling provisions to the potential of being struck down as unconstitutional and rendering the entire statute ineffective.

Subjecting legislation to the affirmative or negative resolution procedure is not a panacea for all ills, but it has been described as best practice in parliamentary procedure.⁹⁴ The provisions in the Interpretation Act for subsidiary legislation to be subject to these procedures, and Section 65 of the National Assembly (Elections) Act which provides for the establishment of committees to review clauses in bills or for any other purpose are a good starting point to provide the oversight required. The enabling provisions in bills which propose to confer legislative power ought to

89 See the Credit Reporting Act, 2018 (SKN), Section 56(4).

90 Value Added Tax Act, 2010 (SKN), Section 27(2).

91 Credit Reporting Act, 2018 (SKN), Section 56.

92 See for example the Standing Orders of the National Assembly of The Gambia, Order 80(1) which mandates publication and laying before Parliament for all subsidiary legislation, See also the Legislation Act 2003 of Australia, the Constitution of Zimbabwe Section 134(f) and the Constitution of Ghana, 1992, Section 11(7).

93 National Assembly (Elections) Act (SKN), Section 65.

94 Abubakarr Siddique Kabbah (June, 2020) 2 'Should the National Assembly of the Gambia Oversee Subsidiary Legislation? A Critique of Standing Order 80', The Loophole 57.

be extended from the current form to require that the instrument be subject to publication and either an affirmative resolution procedure or a negative resolution procedure. Alternatively, the Interpretation Act may be amended to mandate that all subsidiary legislation be subject to the affirmative or negative resolution procedure. Guidelines would therefore be necessary to determine which procedure is appropriate in each case. While this determination is to be made based on the subject of the instrument and other circumstances, the negative procedure should be avoided in significant matters.⁹⁵ Furthermore, the relevant department sponsoring the bill and the regulations should be required to produce a memorandum which explains and justifies the need for subsidiary legislation, the powers to be delegated and the degree of parliamentary scrutiny they consider appropriate.⁹⁶ Such a requirement would militate against the unnecessary and flippant delegation of legislative power which could lead to ineffective enabling provisions. A committee established under Section 65 may then review the enabling provisions in the primary legislation to scrutinize whether they inappropriately delegate legislative power or whether the delegated power is subject to an inappropriate degree of parliamentary scrutiny.⁹⁷ The committee would also consider the memorandum prepared by the relevant department and produce a report to the Parliament of their findings.

A second and equally important committee is one that would review the subsidiary legislation itself to ensure that the instrument is actually made, and made within a reasonable time, whether it raises any concerns from a public policy perspective, whether the mechanisms used to achieve the policy objectives are inappropriate, or that due to legal or policy issues the attention of the National Assembly is required.⁹⁸ This would be helpful to reduce the frequent unfortunate occurrence in SKN of primary legislation being passed which requires the making of subsidiary legislation, and a subsequent failure to exercise that power at all or within a reasonable time following the passage of the bill.⁹⁹ Importantly, the parliamentary oversight which would result from the consideration of enabling powers, the laying of subsidiary legislation, the scrutiny of subsidiary legislation and the statutorily mandated affirmative or negative procedure would provide a

95 Hansard Society (n 40), 14.

96 Daniel Greenberg (2011) *Laying Down the Law: A discussion of the People, Processes and Problems that Shape Acts of Parliament*, 1st edn. Sweet & Maxwell, London, 205.

97 This is the remit of the Delegated Powers and Regulatory Reform Committee in the UK that provides a model that may be adopted with modification if necessary. See <https://committees.parliament.uk/committee/173/delegated-powers-and-regulatory-reform-committee/role/> (accessed 18 July 2022).

98 These are some of the matters considered by the Secondary Legislation Committee in the UK which provides a model that may be adopted with modification if necessary. See <https://committees.parliament.uk/committee/255/secondary-legislation-scrutiny-committee/content/120278/toref> (accessed 18 July 2022); See also Standing Order 80(2) of the Gambia National Assembly Act which provides for a range of matters that their Subsidiary Legislation Committee scrutinizes.

99 An example is the Procurement and Contract Administration Act, 2012 (SKN). See OECD Assessment of SKN' Public Procurement System, Methodology for Assessing Procurement Systems, 2019 www.oecd.org/countries/saintkittsandnevis/MAPS-assessment_report-SKN.pdf (accessed 18 July 2022); See also the Integrity in Public Life Act, 2013 (SKN) and the Freedom of Information Act, 2018 (SKN).

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degree of publicity in the making of subsidiary legislation. Although the publicity and level of scrutiny referenced here is much less than what can be obtained in the enactment of bills, it provides a level of parliamentary oversight which reduces the potential for unconstitutional delegation of legislative power, and thus, ineffective statutes, and upholds the rule of law by ensuring that the fundamental underpinnings of the parliamentary process which include publicity and openness are included in the making of subsidiary legislation.¹⁰⁰

L Conclusion

Enabling provisions are subject to criticism and much discussion because they raise questions of constitutionality of the delegation of legislative power, among other things. If an enabling provision is not operationalized or is struck down because of unconstitutionality or for other reasons, it is ineffective.

The constitutionality of delegation of legislative power is a valid concern in democratic states like SKN that adhere to the principles of separation of powers and constitutional supremacy. It has been established that the delegation of legislative power is inconsistent with the strict application of the doctrine of separation of powers although there is no unreserved statement in the jurisprudence of the Commonwealth Caribbean on this matter. The position of the Court as expressed in the widely cited decision of the Eastern Caribbean Supreme Court in *J. Astaphan & Co (1970) Ltd v. The Comptroller of Customs and the Attorney General of the Commonwealth of Dominica*¹⁰¹ is that the delegation of legislative power 'is not unconstitutional per se'. The justification in most instances is that the plenary legislative powers conferred on the Legislature by the Constitution includes the power to delegate, so an express provision to that effect in the Constitution is not necessary.¹⁰² The Interpretation Act of SKN is premised on the existence of a power to delegate legislative power and sets out detailed provisions which pertain to the making of subsidiary legislation.

Against the backdrop of Court decisions to that effect, and statutory provisions for the exercise of the power, the focus in recent time has not been on whether the delegation of legislative power is constitutional, but rather that delegation of legislative power is necessary for effective law-making.¹⁰³ Further, that there are dangers inherent in the practice so it is important to safeguard the exercise of the power to minimize the risk of abuse.¹⁰⁴ The practice has become so acceptable that the inclusion in primary legislation of a power to delegate legislative power is the rule rather than the exception.

In determining whether subsidiary legislation or delegated power is constitutional or ineffective due to unconstitutionality, the first consideration is

100 *Parsifal* (n 28), para. 84-85.

101 [1999] 2 LRC 569.

102 BVIHCV 2014/0151 *Partnerselskabet Parsifal v. the Attorney General of the BVI*, 2018: January 12 Para. 104.

103 Bigwood (n 34), 85.

104 Neudorf (n 3), 522.

usually the enabling provision in the primary Act.¹⁰⁵ The enabling provision serves as the rudder which steers subsidiary legislation either towards an effective regulatory package or towards unconstitutionality.

To be effective, an enabling provision ought to be clear, precise and unambiguous. It would identify the delegate on whom power is conferred, state the specific range of powers delegated and include a general regulation-making power. It would also state the specific types of subsidiary legislation to be made. Importantly, it would contain sufficient measures aimed at circumscribing the exercise of the power by limiting the subject matter to which the power relates, or the specific reasons for the exercise of the power or setting out particular powers to be exercised. Additional measures include specifying a maximum penalty which may be charged for offences created by breach of the regulations. Additionally, specifying the appropriate parliamentary oversight mechanism whether in the form of an affirmative or negative resolution procedure is necessary particularly where the Interpretation Act makes that form of parliamentary oversight dependent on its inclusion in the enabling provision.

The Interpretation Act of SKN includes a provision for parliamentary oversight of delegated legislation by means of an affirmative or negative resolution procedure, but it is not mandatory unless the enabling provision in the specific legislation requires it. Consequently, while the majority of enabling provisions contain features which are geared towards preventing or minimizing the unconstitutional delegation of legislative power, this is not consistent. Added to this is the fact that enabling provisions operate within a wider framework set up by the provisions in the Interpretation Act and the National Assembly (Elections) Act. The effectiveness of enabling provisions could be enhanced if the related provisions in the Interpretation Act, and the National Assembly (Elections) Act are amended or operationalized respectively. Firstly, Section 21(d) of the Interpretation Act which provides that specific powers are not deemed to derogate from the general regulation-making power in an enabling provision. This reverses any attempt to circumscribe the delegate in the exercise of his power, and is contrary to best practice as even set out by the Privy Council on how the general regulation-making power is to be construed where the range of matters are particularized in the enabling provision.¹⁰⁶ Secondly, consideration ought to be given to Sections 46-47 of the Interpretation Act which makes the parliamentary oversight procedures discretionary, and whether it would be more appropriate to mandate parliamentary oversight by affirmative or negative resolution procedures in all cases of delegated legislative power. If the Constitution is still regarded as sacrosanct, and the principles which it embodies respected, if the rule of law still prevails, then the practices which contravene or border on contravention of their tenets ought to be strictly dealt with. No delegation of legislative power is to be treated lightly. No delegation of legislative power is to be unjustified. And since law-making is public business, some element of publicity is appropriate in all cases. The National Assembly (Elections) Act which provides for the establishment of committees to

105 *Ibid.*, 268.

106 See *Utah_Construction_and_Engineering_Pty Ltd v. Pataky* [1965] 3 All ER 650.

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examine clauses in bills or for any other purposes and which have leave to submit reports to the Assembly can assist in guarding against inappropriate delegation of legislative power, and ineffective regulatory packages. These powers are apposite for establishing a committee or committees to review and report on enabling provisions and subsidiary legislation made pursuant to them, and to report on whether the reason for delegation is justifiable.

The form of enabling provisions in SKN attempt effective control but they do not go far enough when one considers that what is being done through them is a departure from the strict application of the Constitution. The inclusion of mechanisms to circumscribe the exercise of delegated power is not evident in all statutes. Matters which ought to be limited to Parliamentary enactment are being delegated, and primary Acts are still being passed with wide, ambiguous enabling clauses. Consistently including provisions in enabling clauses to circumscribe the exercise of power, and requiring parliamentary oversight procedures would undoubtedly improve the effectiveness of enabling provisions. Therefore, the enabling provisions, the rudder of the ship of delegated legislative power must be fit for purpose, and not unlike a sailing vessel, there are other factors which must operate in tandem to ensure smooth sailing. The related legislation which affects the operation of enabling provisions (the Interpretation Act and National Assembly (Elections) Act) must also be reformed or operationalized respectively to help and not hinder the control which Parliament through enabling provisions ought to maintain over delegated powers, and the general effectiveness of enabling clauses.