



**WESTMINSTER
FOUNDATION FOR
DEMOCRACY**



POST-LEGISLATIVE SCRUTINY

**Comparative study of practices of Post-Legislative Scrutiny in selected
parliaments and the rationale for its place in democracy assistance**

2017

POST-LEGISLATIVE SCRUTINY

COMPARATIVE STUDY OF PRACTICES OF POST-LEGISLATIVE
SCRUTINY IN SELECTED PARLIAMENTS AND THE RATIONALE
FOR ITS PLACE IN DEMOCRACY ASSISTANCE

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Acronyms

BALEG	Committee on Legislation of Indonesian House of Representatives
CAG	Comptroller and Auditor General (of India)
CSOs	Civil Society Organizations
DFID	Department for International Development (UK)
DPR	House of Representatives of Indonesia
EU	European Union
FCO	Foreign and Commonwealth Office (UK)
HoC	House of Common (UK)
HoL	House of Lords (UK)
MP	Member of Parliament
NGOs	Non-Governmental Organizations
PAC	Public Accounts Committee
PCA	Parliamentary Control of the Administration (in Switzerland)
PLS	Post-Legislative Scrutiny
RIS	Regulatory Impact Statement
RoP	Rules of Procedure
SEVAL	Swiss Evaluation Society
UK	United Kingdom
UNDP	United Nations Development Programme
WFD	Westminster Foundation for Democracy

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EXECUTIVE SUMMARY

As parliament is responsible for adopting legislation, it also has a role in monitoring implementation of legislation and evaluating whether the laws it has passed have achieved their intended outcomes. Because implementation is a complex task which does not happen automatically, parliament has a role to monitor the implementation of legislation. The act of evaluating laws that a parliament has passed is known as Post Legislative Scrutiny. The UK Law Commission outlined four main reasons for having more systematic Post-Legislative Scrutiny: to see whether legislation is working out in practice, as intended; to contribute to better regulation (secondary legislation); to improve the focus on implementation and delivery of policy aims; to identify and disseminate good practice so that lessons may be drawn from the successes and failures revealed by this scrutiny work. In addition, one can mention the need to act preventively about potential adverse effects of new legislation on fundamental rights.

This comparative study describes in further detail the process and reasons for Post-Legislative Scrutiny, presents relevant facts and trends in selected countries, and identifies opportunities relevant to the parliamentary strengthening programming of the Westminster Foundation for Democracy (WFD) and other democracy assistance organizations.

This study examines the relevant trends in Post-Legislative Scrutiny by parliaments in the UK (Westminster Parliament and Scottish Parliament), Belgium, Canada, India, Indonesia, Lebanon, Montenegro, Pakistan South Africa and Switzerland. The case-studies were chosen to demonstrate the various relevant practices of Post-Legislative Scrutiny taking place within different parliamentary systems, and to showcase in particular those that are taking place within WFD's partnering parliaments. Key observations include:

- In the **UK Westminster parliament** (House of Commons and House of Lords), there is freedom for all Committees to conduct Post-Legislative Scrutiny work. A good portion of the Select Committees activities involves Post-Legislative Scrutiny work, even if Members do not explicitly describe it this way. The regular Post-Legislative Scrutiny work by parliamentary Committees is supplemented by the formal requirement that the government publish a memorandum on the

implementation of legislation three to five years after Royal Assent. The primary audience of these memorandum is Parliament, and in particular the Select Committees of the House of Commons. The referent department tables its Post-Legislative Scrutiny Memorandum with the relevant House of Commons Select Committee that must decide whether further inquiry is needed. Other Committees may also take an interest.

- In the **Scottish Parliament**, the committees conduct Post-Legislative Scrutiny as part of their regular work in holding the Executive to account. The Scottish Standards, Procedures and Public Appointments Committee considered several options for how committees might prioritise which legislation should be subject to review. One recommendation that may be useful for others is the need to establish "trigger points" to prompt committees to undertake Post-Legislative Scrutiny. In addition, the Committee suggested that committees could be pro-active in seeking out views on what legislation Post-Legislative Scrutiny should undertake. Very recently, the Scottish Parliament decided to broaden the remit of the Public Audit Committee, which is now called the Public Audit and Post-Legislative Scrutiny Committee.
- In 2007, the **Belgian Federal Parliament** created a parliamentary committee for the ex-post evaluation of legislation. There are three 'triggers' for the Committee to examine a piece of legislation. First, a committee may receive a petition highlighting problems arising from the implementation of a specific law, which might launch a post-legislative scrutiny review process if that law has been in force for a minimum of three years. Second, the committee may conduct post-legislative review on the basis of recommendations made by the the rulings of the Court of Arbitrage/Constitutional Court on the application of specific legislation. Third, a committee review of legislative may be triggered in response to issues raised within the annual report that is submitted by the General Prosecutor to Parliament, which can highlight problems related to the interpretation or enforcement of specific laws.

- In **Canada**, the (regular) practice of sunset legislation empowers the federal parliament to re-examine laws after an established period of time and re-classify them as temporary if this re-examination shows that they are no longer useful, or conversely recommend their continuation if the re-examination shows that they are still useful.
- In **India**, there is no mandatory requirement for ex-post evaluation of laws. Various Commissions outside of parliament, such as the Law Commission, conduct reviews of legislation. The Commission consults the public, organizes seminars and workshops, and takes evidence. In addition, the Standing Committees of the Indian Parliament consider many issues on their agenda, including policy oversight and post-legislative scrutiny. The Government Assurances Committee, found within the Indian Parliament, conducts policy oversight and is therefore charged with following-up on the government's commitments to implement legislation.
- In **Indonesia**, the House of Representatives (DPR) established a Standing Committee on Legislation called Badan Legislasi (BALEG). This committee has a central role in the law-making process within the DPR, particularly in conducting Post-Legislative Scrutiny. The Committee monitors whether the government enacts implementing regulations or not, monitors if the law is being challenged at the Constitutional Court, and evaluates the applicability of the laws by the implementing agencies and the impact of the laws to the people. BALEG refers the results of its Post-Legislative Scrutiny to relevant subject committees, which then take further actions to government ministries/agencies or judiciary agencies within their jurisdictions. The DPR has also established the Centre for Post-Legislative Scrutiny, hosting 17 legal analysts. The Centre responds to the requests of BALEG and subject Committees. In addition, the Centre develops annual plans of Post-Legislative Scrutiny work, particularly to monitor and evaluate laws of pressing national importance such as those with a strong impact on the national budget or those which are subject to challenge by the constitutional court. In addition, post-legislative scrutiny takes place at an administrative level as the Chair of BALEG often requests the committee's expert staff to carry out some form of Post-Legislative Scrutiny analysis.
- In **Lebanon**, the Speaker of Parliament recently established a Special Committee on Post-Legislative Scrutiny. It is not a permanent committee, and therefore its mandate will expire at the end of the parliamentary term, though the Speaker can reconstitute it in the next Parliament. Although the PLS Committee doesn't have full time staff, it can rely on the support of two staff from the parliament's secretariat. After each legislative session, the staff drafts a list of laws which require secondary legislation or decrees for their implementation, and this list is distributed to all MPs. The Committee communicates and holds meetings with the ministers on the implementation of the laws related to their ministries, in addition to cooperating with relevant stakeholders, CSOs and citizens. Over the last two years, the work of the Committee has triggered the adoption of regulatory and enforcement texts for a limited number of laws which were still pending due to political or administrative reasons.
- In **Montenegro**, the EU's framework for accession has prompted greater investment in post-legislative scrutiny. Scrutinizing the implementation of law often takes the form of a "consultative hearing". In such a hearing, representatives of the Government are called upon to report on the implementation of the law, while other speakers may also be invited to take part. As a follow-up, Committees make specific recommendations to the House or plenary session. The main objective of these recommendations and their adoption is to lend greater attention to some provisions of the law that are either not or only partially being implemented. If the House adopts these recommendations the Committee thereafter monitors their implementation. In some cases, discussions on the implementation of a law lead to immediate legislative amendments that may propose corrective intervention, or adjust its initial provisions to accommodate for events that have transpired since the law was adopted. Parliament is also obliged by certain acts to carry out concrete measures of post-legislative scrutiny. For example, the Law on Election of Councilors and Members of Parliament requires Parliament to monitor the application of electoral legislation. To date, the Committee for Gender Equality exceeds all others in the extent to which it has examined the implementation of legislation.
- In **Pakistan**, until recently, no authentic list and texts of all laws in force in the country were available on any official website or in hard form as a consolidated code. This impacted the ability of any state or non-state actor to evaluate the effective implementation of legislation. In March 2016 the Parliament of Pakistan passed the Publication of Laws of Pakistan Act that

seeks to ensure the text of laws of Pakistan, free from errors, are printed and made accessible to citizens. The Parliament of Pakistan also adopted new legislation such as the National Commission for Human Rights Act, 2012, the National Commission on the Status of Women Act, 2012, and the Right to Information laws, aimed at overseeing relevant legislation, though the Commissions face resource challenges.

- In **South Africa**, the Parliament has commissioned an external panel of senior experts to conduct a systematic examination of the effects of laws passed by the National Assembly since non-racialized majority-rule was established in 1994. While the work of the panel is still ongoing, the process that is being followed in South Africa offers a useful comparative guide for other parliaments that can identify a similar check-point in time around which to examine the impact of passed legislation. It is also a useful comparator for those parliaments who do not have the internal capacity to engage in such an extensive review, but in which there exists sufficient funding to employ the use of experts to evaluate a parliament's legislative output in a specified area. The case of South Africa also demonstrates that building public awareness and public participation can lend authority to, and fortify, the strength and merit of the exercise of post-legislative review.
- In **Switzerland**, the constitution establishes a direct obligation for the parliament to evaluate the effectiveness of the legislation and other measures adopted. The federal parliament set up in 1991 the Parliamentary Control of the Administration (PCA), a specialized service which carries out evaluations on behalf of the Parliament. The PCA works based on mandates on behalf of parliamentary committees. The Unit cannot decide to conduct research on its own. The Unit has fewer than five staff and issues approximately three (large) research reports per year. The Unit has a budget to hire experts and outsource part of the work. Its evaluation methods are based on the standards set by the Swiss Evaluation Society and international associations.

Following case-studies on Post-Legislative Scrutiny of primary legislation in 10 countries, this study also considers the different national approaches to carrying out Post-Legislative Scrutiny of secondary legislation. Some of the key observations of this review include:

- In Canada, the Standing Committee on the Scrutiny of Regulations examines regulations made by the executive to make sure they conform with the laws passed by the legislature.

The Committee has established a set of criteria to review secondary legislation. This criteria refers to questions of legality and the form of regulations rather than the merits of regulations or the policy they reflect. The Committee also has the “power of disallowance” (or “negative resolution procedure”). Disallowance is one of the traditional means at the disposal of parliaments to control the making of delegated legislation. It means that the parliament could reject a subordinate law. The power of disallowance applies to all regulations that are referred to the Committee.

- In Australia, several of its jurisdictions automatically repeal subordinate legislation after it has been in force for a certain amount of time. This process is sometimes referred to as “sun-setting”. Though legislative scrutiny committees do not necessarily have a hands-on role in the process, the sun-setting of subordinate legislation is important because it requires the makers of subordinate legislation to consider, as the “sunset” date approaches, whether the subordinate legislation is still required and, if so, whether it should be re-made in the same form or in an amended form.
- In India, parliamentary control over secondary or delegated legislation is conducted in three ways. Firstly, there is control over delegated legislation through the debate on the act, through parliamentary questions and notices, and by moving resolutions and notices in the house. Secondly, there is special control over delegated legislation through the technique of “laying” on the table of the House rules and regulations framed by the administrative authority. Thirdly, there is indirect control exercised by Parliament through its Scrutiny Committees.
- In Pakistan, the Senate has created a Committee on Delegated Legislation. This committee checks all past and present delegated legislation and has the power to recommend annulment, in full or partially, or suggest amendments in any respect.

This Study also comprises a chapter on gender analysis and Post-Legislative Scrutiny that looks at how gender mainstreaming is incorporated into legislative processes. The chapter shows that gender analysis is more likely to occur in the ex ante phases of both policy development and legislative drafting, rather than the ex post phases of the policy process. Relevant data and evidence collected on women and men, as well as other demographic distinctions, are in many countries predominantly drawn upon at the inception phase to inform the development of policy and legislation. Applying gender analysis from the

outset can lead to specific gender-based indicators and targets by which the subsequent law or policy are assessed and evaluated. However, because there are not standard structures for gender analysis, the presence of such measurements to accommodate Post-Legislative Scrutiny are not guaranteed. The possible exception to this is the budget process. Because gender budgeting involves tracking and analysing government spending, it can be as readily applied in the ex post phases of policy decision-making as it is in the ex ante stages.

The final chapter of the Study discusses how the Westminster Foundation for Democracy may identify new areas of support to the parliaments it works with. For the purpose of preparing a democracy building programme, the Study identifies three types of Post-Legislative Scrutiny: reformatory Post-Legislative Scrutiny, instructive Post-Legislative Scrutiny and public Post-Legislative Scrutiny. The Study gives preliminary suggestions as to which programming points can be considered under each of these three types of Post-Legislative Scrutiny.

If a parliament, with WFD programme support, wants to consider how to develop its post-legislative scrutiny practices, some preliminary questions that it ought to consider include: (1.) what form should this take?; (2.) what level of priority/resources should it be provided with?; (3.) what procedures are needed to determine when such a process is triggered? This study hopes to help such parliaments begin to reflect on these questions by sharing the variety of legislative review practices within the parliaments mentioned in this study. Parliaments considering the value of post-legislative scrutiny may also consider the merits of taking pre-emptive measures for ensuring post-legislative support, such as including a “sunset clause” within certain legislation to make legislative evaluations mandatory. A parliament may also consider the application of secondary legislation (regulations), as well as look at the nature of relevant ‘trigger points’ for the initiation of such an exercise.

If a parliament has the will but not the resources to engage on post legislative scrutiny, developing a pilot project with the assistance of WFD, by which the Parliament examines the implementation of a limited set of laws (two to three) over a specified period, could be considered. After this specified period, the pilot project can be evaluated, and lessons learned identified for a more generalized and institutionalized approach. Finally, it is advisable that the post legislative scrutiny work shows its relevance to the public and be conducted in a way that citizens can contribute to evaluation of legislation.

I. INTRODUCTION

One of the roles of parliament is to create laws that meet the needs of the country's citizens. This is expressed through their choice of government and consolidated into law through a series of parliamentary proceedings that seek to review those needs and have them responded to appropriately. This represents the cornerstone of a parliament's democratic place in most countries.

However, it is also a parliament's role to evaluate whether the laws it has passed achieve their intended outcome(s). Post-Legislative Scrutiny refers to the moment in which a parliament applies itself to this particular question: whether the laws of a country are producing expected outcomes, and if not, why not.

Despite its importance for the respect of the rule of law, it is not uncommon that the process of reviewing the implementation of legislation be overlooked. In several countries, there is the risk that laws are voted but not applied, that secondary legislation is not adopted, or that there is insufficient information to inform us on the actual state of a law's implementation and its effects.

Implementation is a complex matter depending on the mobilization of mechanisms, funds and different actors. Implementation does not happen automatically and several incidents can affect its course including: changes in facts on the ground, diversion of resources, deflection of goals, resistance from stakeholders and changes in the legal framework of related policy fields.

Despite these challenges there are four overarching reasons why parliaments are compelled to monitor and evaluate the implementation of legislation:

- (1.) to ensure the requirements of democratic governance and the need to implement legislation in accordance to the principles of legality and legal certainty, are being met;
- (2.) to enable the adverse effects of new legislation to be apprehended more timeously and readily;
- (3.) to support a consolidated system of appraisal for assessing how effective a law is at regulating and responding to problems and phenomena;
- (4.) to support improvements in legislative quality

by learning from experience both in terms of what works and what does not, and in terms of the relationship between objectives and outcomes.

Legislative improvement remains, for the most part, a by-product of a parliament's legislative process. By reviewing government action or inaction, and by amending legislation of various kinds, a parliament takes measure of the extent to which the laws of a country are fit for purpose, as well as the extent to which a government is managing the effective implementation of its policies and abiding by statutory obligations. However, this link is not always formally recognised within the parliamentary system, and relevant information is not always captured, directed and responded to on that basis.

The act of carrying out Post-Legislative Scrutiny is therefore justified as a stand-alone activity that enables a parliament to self-monitor and evaluate, as well as reflect on the merits of its own democratic output and internal technical ability. Various parliaments, a variety of which are mentioned in this comparative study, are beginning to proceduralise Post-Legislative Scrutiny as a separate mechanism within parliament.

It is on this basis that Post-Legislative Scrutiny offers a useful entry point for democracy practitioners to develop a parliament's internal capabilities. It provides a starting point that is grounded in a tangible area of delivery within a parliament's micro-level system, but which has significant implications on how and how well a country's broader governance framework operates. The examples presented in this comparative study testify to the linkages between Post-Legislative Scrutiny and a parliament's broader democratic position.

II. DEFINITION AND RATIONALE FOR POST-LEGISLATIVE SCRUTINY

There are two types of Post-Legislative Scrutiny. Post-Legislative Scrutiny can refer to a broad legislative review, the purpose of which is to evaluate whether and to what extent a piece of legislation has achieved its intended purpose. It can also refer to a more focused evaluation of how a piece of legislation is working in practice. This latter variant is more focused and tends to be a purely legal and technical review.

In consequence, the act of Post-Legislative Scrutiny holds two distinct functions: (1.) a monitoring function, as the application of legislation and especially the adoption of the necessary secondary legislation is apprehended by parliament at identified moments (2.) an evaluation function, as parliaments seek to ensure the normative aims of policies are reflected in the results and effects of legislation.

2.1. Post-Legislative Scrutiny as a legislative enabler

The growing impetus for Post-Legislative Scrutiny coincides with the rationalisation of the law-making process, and a growing demand for the quality of legislation to be reviewed as well as procedures that can support parliaments to manage contemporary 'legislative complexity'. Legislative evaluation is an effort to support this by institutionalising and systematising a moment of analyse and assessment focusing specifically on improving the quality of legislation passed. Such an act should improve a parliament's understanding of the causal relations between a law and its effects as the accuracy of assumptions underlying legislation are tested after its enactment. Post-Legislative Scrutiny as a form of legislative evaluation is therefore a learning process that both contributes to a parliament's knowledge of the impacts of legislation but also its know-how in ensuring legislation is well-matched to its referent actors. By implication, Post-Legislative Scrutiny may reduce ambiguity and distrust and allows the legislator to learn by doing.

In its 2006 landmark report¹, the UK Law Commission outlined the main reasons for having more systematic

Post-Legislative Scrutiny as follows:

- to see whether legislation is working out in practice as intended;
- to contribute to better regulation;
- to improve the focus on implementation and delivery of policy aims;
- to identify and disseminate good practice so that lessons may be drawn from the successes and failures revealed by the scrutiny work.

2.2. Post-Legislative Scrutiny as a form of executive oversight

While Post-Legislative Scrutiny takes the form of a separate mechanism within parliament, the process of evaluation is also the by-product of a parliament carrying out effective executive oversight and effective law-making. By reviewing government action or inaction, and by amending legislation of various kinds, a parliament takes measure of the extent to which the laws of a country are fit for purpose as well as the extent to which a government is managing the effective implementation of its policies and abiding by statutory obligations.

However, the act of carrying out Post-Legislative Scrutiny on a primary basis is also one that extends beyond executive oversight, as an internal monitoring and evaluation system by which a parliament is also able to consider and reflect on the merits of its own democratic output and internal technical ability. Seen in this way, Post-Legislative Scrutiny also provides an approach that a parliament may take to its legislative role as one that is not only the maker of laws but also a country's legislative watchdog.

2.3. Limitations of Post-Legislative Scrutiny

The UK Law Commission made three cautionary comments about Post-Legislative Scrutiny:

¹ The Law Commission, Post-Legislative Scrutiny, Published as LAW COM No 302, London, October 2006, 62 p.

(1.) *Risk of replay of arguments:* Post-Legislative Scrutiny should concentrate on the outcomes of legislation. Unless self-discipline is exercised by the reviewing body, and those giving evidence to it, there is a danger of it degenerating into a mere replay of arguments advanced during the passage of the Bill. Reviews should be conducted in a constructive and future-oriented manner, with the aim of ensuring that errors are fully identified and lessons are learnt.

(2.) *Dependence on political will:* The evolution of a more systematic approach to Post-Legislative Scrutiny will depend on a combination of political will and political judgment. Parliament and Government have a common interest in strengthening Post-Legislative Scrutiny, as it helps to provide clarity to policy and aims and helps to ensure that the considerable resources devoted to legislation are committed to good effect.

(3.) *Resource constraints:* Post-Legislative Scrutiny will place demands on resources and time available. Therefore, such evaluation procedures will be most justified if concerned with legislation of some significance, for example because they involve the state in substantial expenditure or they have substantial social impact.²

Evaluations of this kind carry a cost not only in time and expenditure but because they typically depend

upon the acquisition of information from outside government. Consultation with key stakeholders is generally necessary if relevant data is to be obtained and an accurate evaluation of effectiveness is to be made. In these circumstances, it is usually beyond the capacity of parliaments to conduct systematic evaluation of *entire* legislative schemes. Nonetheless, the results of government evaluations can provide the basis upon which parliamentarians can question and hold to account those responsible for the policy and its implementation. Some parliaments have entrusted Departmental Select Committees to consider the operation of pieces of legislation. Other parliaments have created a special Select Committee on Post-Legislative Scrutiny. In any case, evaluations and evaluation reports aimed at contributing to accountability cannot be restricted to internal government use, and must be placed in the public domain.

Finally, it is worth mentioning the importance of how the findings of Post-Legislative Scrutiny are used, either by introducing amendments to legislation, submitting parliamentary questions, introducing motions, sending a report to the Executive and requesting a response within a period of time, or as input for a position paper in preparation for a new law.

Box 1: Typical questions addressed in ex-post evaluation of legislation³

- Have the original objectives of the law been achieved in quality, quantity and time, when measured against the base case of what would have happened without the intervention of this law?
- To what extent has the law brought about the achievement of the objectives or has it induced activity that would not otherwise have occurred?
- Has implementation been affected, adversely or advantageously, by external factors?
- Have any significant unexpected side effects resulted?
- Have all the inputs required from Government and the private sector been made as planned?
- Have any of the allocated resources been wasted or misused?
- Has the law implementation led to any unfairness or disadvantage to any sector of the community?
- Could a more cost-effective approach have been used?
- What improvements could be made to the law and its implementation that might make it more effective or cost-efficient?
- Overall is the law and how it has been applied well suited to meeting the desired objectives?
- Have assumptions made during the passage of legislation (on costs, or timings, or impact) held true and if not, why not?

² In 2004, the UK Lords Constitution Committee stated: "Post-legislative review is similar to motherhood and apple pie in that everyone appears to be in favour of it; but neither Parliament nor the Government has yet committed the resources necessary to make systematic post-legislative review a reality." House of Commons Library, Post-Legislative Scrutiny, Standard Note: SN/PC/05232; date: 23 May 2013, Authors: Richard Kelly and Michael Everett.

³ Based upon and further elaborating on: Patchett, K., Preparing, drafting and management of legislative projects, paper for Workshop on the development of legislative drafting, Beirut, 2003, 35 p.

III. POST-LEGISLATIVE SCRUTINY OF PRIMARY LEGISLATION IN THE UNITED KINGDOM

This chapter analyses Post-Legislative Scrutiny in the UK, specifically in the Westminster and Scottish Parliaments.⁴

3.1. Westminster Parliament: all Committees' role in Post-Legislative Scrutiny

In the Westminster parliament, one can identify different concepts associated with the evaluation of policies and legislation: evaluation of policies, post-implementation reviews, and Post-Legislative Scrutiny.

- *Evaluation* is the most general term and refers to regulatory policy. It can be carried out at any stage and in different ways and aims to offer an understanding of whether the policy has been implemented effectively, whether its objectives are met and what its economic impacts are.
- *Post-implementation review (PIR)* concerns any policy that has undergone an impact assessment and revisits the underlying assumptions of a policy to verify their validity and adequacy. It is conducted three to five years after policy implementation. The objectives of PIR are a) to identify whether the policy is achieving the desired results; b) to identify whether costs and benefits are in line with expectations; c) to inform future policy development; d) to improve delivery methods; and, e) to develop the techniques used to assess the impact of policy interventions.
- *Post-Legislative Scrutiny (PLS)* reviews how primary legislation is working in practice. Its specific objectives are a) to see whether legislation is working out in practice; b) to contribute to better regulation; c) to improve the focus on implementation and delivery of policy aims; and d) to identify and disseminate good practice. Post-Legislative Scrutiny is a preliminary review of the effectiveness of the legislation and revisits the extent to which the legislation and the supporting secondary legislation has been brought into force and consideration of the delegated legislation made under the Act. There is freedom for all Committees, in both the House of Commons and the House of Lords, to conduct Post-Legislative Scrutiny work. A significant

portion of the Select Committee's work involves Post-Legislative Scrutiny work, even if Members do not explicitly refer to it as such. The regular Post-Legislative Scrutiny work by the Committees is supplemented by a system instigated and owned by the government for a semi-systematic approach by publishing a memorandum on the implementation of legislation. This is a formal requirement that concerns Acts of Parliament conducted three to five years after Royal Assent. Its primary audience is Parliament, specifically the departmental Select Committees of the House of Commons. A Post-Legislative Scrutiny Memorandum is published by the competent Department and is submitted to the relevant House of Commons Select Committee that decides whether further inquiry is needed. Other Committees may also take an interest.



⁴ This chapter is partly based on the document: DeVrieze, F., Policy Paper on Post-Legislative Scrutiny for the Parliament of Trinidad and Tobago, commissioned by UNDP, Port of Spain, 2015; and further reviewed in consultation with officials of the Westminster and Scottish Parliament in 2017.

Box 2: Outline of Departmental Memorandum in UK, for submission to Select Committees

The 2008 Memorandum process includes:

- information on when and how different provisions of the Act had been brought into operation;
- information highlighting any provisions which had not been brought into force, or enabling powers not used, and explaining why not;
- a brief description or list of the associated delegated legislation, guidance documents or other relevant material prepared or issued in connection with the Act;
- an indication of any specific legal or drafting difficulties which had been matters of public concern (e.g. issues which had been the subject of actual litigation or of comment from parliamentary committees) and had been addressed;
- a summary of any other known post-legislative reviews or assessments of the Act conducted in Government, by Parliament, or elsewhere;
- a short preliminary assessment of how the Act has worked out in practice, relative to objectives and benchmarks identified at the time of the passage of the Bill.

The system is selective to economize resources and considers the specificities of different acts. It does not re-run policy debates; it reflects the specific circumstances of each Act and it is complementary to the scrutiny which can already take place through existing Commons select committee activity.⁵

The semi-systematic approach to Post-Legislative Scrutiny involves both the Executive and the Parliament and combines internal departmental scrutiny with parliamentary scrutiny. The process includes two steps:

- *Step 1: post-enactment review.* It is conducted by the competent Government department three to five years from enactment. The department fleshes out a Memorandum with information on the operation of different provisions of the Act, provisions that have not been brought into force, material issued in relation to the act, matters of public concern, other reviews or assessments and a preliminary assessment of the working of the Act.

- *Step 2: parliamentary review.* The Memorandum is submitted to the relevant Commons departmental select Committee that reviews it and decides whether further scrutiny or inquiry is needed and determines the body that should carry it out. This procedure does not exclude other reviews or the involvement of external experts.

In this way, the Government collects existing data and the Parliament (the Commons committees) decides whether to conduct further Post-Legislative Scrutiny. Through this system, all Acts receive a preliminary scrutiny within Government and are considered for scrutiny within Parliament. This model combines departmental scrutiny with parliamentary scrutiny.

One example is the Memorandum from the Department of Health on the Mental Health Act 2007.⁶ Based on this Memorandum, the Health Committee conducted Post-Legislative Scrutiny, and published its report.⁷

Some other parliamentary bodies may choose to conduct Post-Legislative Scrutiny, and it is not for

⁵ Post-Legislative Scrutiny – The Government's Approach. Updating and improving the legislative process, Presented to Parliament By the Lord Privy Seal, Leader of the House of Commons and Minister for Women and Equality, March 2008, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/228516/7320.pdf

⁶ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/228522/8408.pdf

⁷ <http://www.parliament.uk/pa/cm201314/cmselect/cmhealth/584/584.pdf>

⁸ These figures are Government figures, which Parliament does not necessarily agree with. As it is not always easy to decide what is and what is not Post-Legislative Scrutiny, the Government seem to choose to give the lowest possible interpretation, according to the HoC Scrutiny Unit.

the competent Committee to determine any other body's agenda or work programme. In practice, there are usually informal negotiations with the competent Committee as no one wants to duplicate work, but there have been cases where a Parliamentary body has done Post-Legislative Scrutiny without the acquiescence of the relevant Department Committee. This happens a lot with the House of Lords post-leg Committees which are often decided upon months in advance of Commons Select Committee planning.

Since March 2008, the Cabinet Office has produced detailed guidance for departments on Post-Legislative Scrutiny. A system has also been put in place to ensure that all departments will produce Command Papers for Select Committees on the implementation of each Act passed in 2005, within three-to-five

years of Royal Assent. The Cabinet Office's *Guide to Making Legislation* was reissued in June 2012 and guidance on Post-Legislative Scrutiny was included.

Between December 2008 and April 2010 (the dissolution of the 2005 Parliament), seven Post-Legislative Scrutiny memorandums were published. Under the previous Coalition Government and up to January 2013, 58 government Post-Legislative Scrutiny memoranda have been published and only three have been the subject of dedicated reports by committees.⁸

Box 3: Case-study:

**Post-Legislative Scrutiny of the Freedom of Information Act (FOIA) 2000,
by the UK House of Commons Justice Committee - chaired by Hon Sir Alan Beith, MP**

Extracts from the Summary of the report (2012)⁹:

"The Freedom of Information Act has been a significant enhancement of our democracy. Overall our witnesses agreed the Act was working well. The Freedom of Information Act has achieved its three principal objectives, but its secondary objective of enhancing public confidence in Government has not been achieved, and was unlikely to be achieved. (...)

The cost of administering the Act has been described as its "Achilles heel". However, the cost to public authorities must be weighed against the greater accountability the right to access information brings. In addition, there is evidence of both direct cost savings, where a freedom of information request has revealed erroneous public spending, and an indirect impact whereby public authorities know that they will be exposed to scrutiny as a result of the Act and use resources accordingly. (...)

We do not recommend changing the system of 'requestor blindness' on which the Act operates. Requiring requestors to identify themselves could be circumvented by the use of another's name and policing such a system would be expensive and likely to have a limited effect. Equally, the focus of the Act is whether the disclosure of information is justified; if data should be released under the Act then it is irrelevant who is asking for publication. However, requestors must expect that the fact they have requested information to be in the public domain when authorities publish a disclosure log. (...)

We have considered the evidence of witnesses, particularly former senior civil servants and ministers, suggesting that policy discussions at senior levels and the recording of such discussions may have been inhibited by the Freedom of Information Act. Evidence of such an effect is difficult to find by its very nature, but there is clearly a perception in some quarters that there is no longer a sufficiently 'safe space' for policy discussions. Parliament clearly intended that there should be a safe space for policy formation and Cabinet discussion, and we remind everyone involved that section 35 was intended to protect high-level policy discussions. We recognise that the ministerial veto may need to be used from time to time to maintain that safe space. We believe that civil servants and others in public authorities should be aware of the significance of these provisions and the protection they afford."

⁹ <http://www.publications.parliament.uk/pa/cm201213/cmselect/cmjust/96/9602.htm>

¹⁰ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/217298/gov-resp-justice-comm-foi-act.pdf

Comments:

- Freedom of Information is a vital, and has been, an enormously important piece of legislation in the UK context as it has changed the way the Government and the public relate.
- The Post-Legislative Scrutiny of the Freedom of Information Act 2000 by the HoC Justice Committee is an extensive piece of work. There were 26 pieces of written evidence and 114 unprinted pieces of evidence; seven evidence sessions and over 30 witnesses.
- It is an example of how Post-Legislative Scrutiny can provide a platform for debating policy between Government and the Parliament. There was a sense of a real dialogue between the Government and the Committee rather than the demonstration of entrenched positions. The Government's response was available only 12 weeks after the Committee reported. Both Parliament and Government benefitted from the Post-Legislative Scrutiny exercise of the FOIA.
- The issues are exposed exhaustively through the Committee's Report (Volumes I, II and III), the Government Response to the Report¹⁰, and the Government's Investigative Study to inform the FOIA Post-Legislative Scrutiny "Costing Exercise".

The formal parliamentary process, whereby the Government produces a memorandum within three to five years of Royal Assent and the relevant Departmental Select Committee may decide to make further inquiries, is only one of the ways in which the House of Commons conducts Post-Legislative Scrutiny. As mentioned, the select committees often undertake Post-Legislative Scrutiny in other ways, perhaps in conjunction with a wider inquiry into related policy areas, even though they may not formally call it such.

One of the key outcomes of those inquiries can be recommendations to make changes to an existing statute, without any Government trigger for doing so. If it were to rely solely on a Government memorandum as a basis for Post-Legislative Scrutiny, the House would lose control over decisions of when to carry out Post-Legislative Scrutiny and which Acts should be subjected to it. Hence, several post-legislative reviews which have been conducted by the House of Commons were not prompted by the publication of a memorandum.

As far as the House of Lords is concerned, it initially agreed to establish one select committee to review adopted legislation in 2012-13. Following further discussion, it was then recommended to establish committees to undertake Post-Legislative Scrutiny of specific pieces of legislation. As an example: in May 2012, a committee had been appointed to conduct Post-Legislative Scrutiny of the legislation that sets out

adoption law and the adoption process in England and Wales. The Committee received 85 pieces of written evidence and took oral evidence from 52 witnesses over 14 sessions. The Committee published its final report in March 2013.¹¹ The House of Lords now reviews annually one act or one sector, such as was the case with the law on adoption or the sector of mental health; and this can be considered a significant step to put more resources into Post-Legislative Scrutiny.

In terms of Human Resources, the Westminster parliament has around 250 staff working for 25 committees, half of them are subject specialists. Because only some of them work on part-time basis on Post-Legislative Scrutiny, it is hard to give a precise estimate of the human resources dedicated specifically to Post-legislative Scrutiny.

3.2. Scottish Parliament: Public Audit and Post-Legislative Scrutiny Committee

The Scottish Parliament published its Guidance on Committees¹² and Guidance for Conveners¹³. The documents contain specific reference to Post-Legislative Scrutiny as being part of the functions of the committees. The reference is in the following terms: *"Committees will conduct inquiries and carry out the following functions in relation to competent matters: Consider and report on the policy and administration of the Scottish Administration, including Post-Legislative*

¹¹ House of Commons Library, Post-Legislative Scrutiny, Standard Note: SN/PC/05232; date: 23 May 2013, Authors: Richard Kelly and Michael Everett.

¹² <http://www.parliament.scot/parliamentarybusiness/20956.aspx>

¹³ <http://www.parliament.scot/parliamentarybusiness/20955.aspx>

¹⁴ <http://www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/56878.aspx>

Scrutiny ...” It is therefore clear that in the Scottish Parliament, the committees see Post-Legislative Scrutiny as part of their role in holding the Government to account. There are practical time constraints on the committees which can limit their ability to undertake a structured program of Post-Legislative Scrutiny. Even so, there are number of examples of Post-Legislative Scrutiny which provide some interesting insights into how the committees undertake this work. To all intents and purposes, Post-Legislative Scrutiny is indistinguishable from any other inquiry work undertaken by a Scottish Parliament committee.

Examples of Post-Legislative Scrutiny includes the work undertaken by the Local Government and Transport Committee (Inquiry into issues arising from Transport (Scotland) Act 2001), the Social Justice Committee (Post-Legislative Scrutiny of the Housing (Scotland) Act 2001), Justice Committee (Post-Legislative Scrutiny of the Protection from Abuse (Scotland) Act 2001), Rural Affairs, Climate Change and Environment Committee (review of the Scottish Government’s draft second Report on Proposals and Policies arising from the Climate Change (Scotland) Act 2009). Beyond these Post-Legislative Scrutiny reports, it is also important to note that much of the routine work undertaken by committees in the Scottish Parliament contains elements of Post-Legislative Scrutiny, even if it is not formally labelled as such. Most notably, many committee inquiries involve an element of Post-Legislative Scrutiny, since they often focus on improvements which could be made to the legislative framework in a particular policy area.

In 2012-2013, the Standards, Procedures and Public Appointments Committee of the Scottish Parliament conducted an inquiry into Post-Legislative Scrutiny.¹⁴ When developing a Post-Legislative Scrutiny policy for the Scottish Parliament, the Committee identified that, firstly, committees should take a flexible approach to Post-Legislative Scrutiny, given that scrutiny can vary from examining small technical provisions in secondary legislation to major policy reviews. Second, there was a consensus that committees should prioritise which legislation should be subject to review, rather than attempting to scrutinise large numbers of pieces of legislation. Third, it was suggested that Post-Legislative Scrutiny should include analysis of secondary as well as primary legislation.

It was also recognized that one of the main challenges for committees in the Scottish Parliament is to prioritise which legislation might be suitable for Post-Legislative Scrutiny. Prioritisation is needed because not all legislation warrants Post-Legislative Scrutiny. It is also needed because of the limitations in the time and resources which are available to committees to undertake this scrutiny work.

The Standards, Procedures and Public Appointments Committee considered several options for how committees might prioritise which legislation should be subject to review. One of the suggestions was to establish a dedicated Post-Legislative Scrutiny committee. The Standards, Procedures and Public Appointments Committee concluded that this may not be the best way forward. There could be a risk of duplication of effort if a dedicated committee took on matters within the remit of a subject committee. It also might lack the specialist expertise to do so. A dedicated committee might feel the need to re-open policy debates, given that it did not have a role during the passage of the original bill. The Committee also has doubts about an approach in which a dedicated Post-Legislative Scrutiny committee made recommendations to a subject committee on which pieces of legislation warrant Post-Legislative Scrutiny. Subject committees might not be particularly receptive to another committee seeking to determine their work priorities, and there is a risk that neither committee would end up taking proper responsibility for carrying out Post-Legislative Scrutiny.

Another suggestion considered by the Committee was that the Scottish Government could report to the Parliament routinely on how legislation had worked in practice. Such a report could be the result of a Scottish Government internal review or an independent research report. Committees could examine these reports and prioritise which legislation to scrutinise further.



¹⁵ <http://www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/69319.aspx>

At the time, the Committee stated that it was not persuaded of the merits of this suggestion; and that it is better for the Parliament to be in control of its own arrangements for Post-Legislative Scrutiny, than the Government being seen to take the lead.

As an alternative to these proposals, the Committee considers that it may be more useful to focus on identifying trigger points which might prompt committees to undertake Post-Legislative Scrutiny. The triggers for Post-Legislative Scrutiny and the timing of the decisions to undertake such scrutiny vary. In the case of the

Housing (Scotland) Act, it was identified during the passage of the Bill and research was commissioned to start the process off at that early stage. In the case of the Local Government and Transport Committee, the proposal arose when the committee was considering its work program. The topic was of concern to constituents and of interest to members.

An interesting and potentially useful approach in the Committee's conclusions is the principle of "trigger points" which might prompt committees to undertake Post-Legislative Scrutiny.¹⁵

Box 4: Possible trigger points to initiate Post-Legislative Scrutiny in the Scottish Parliament

- ✓ Representations being made to a committee from individuals or organisations that a piece of legislation needed reviewing due to a particular policy impact. As part of this review, committees could scrutinise how the Scottish Government had responded to any concerns.
- ✓ Publicity in the media indicating that Post-Legislative Scrutiny is required.
- ✓ Members of the judiciary commenting that a piece of legislation should be revisited.
- ✓ A petition being brought forward calling for a review of current legislation in a subject area.
- ✓ A committee inquiry being undertaken into an issue which includes an examination of current legislation.
- ✓ A sunset clause or a statutory review period being included in legislation requiring it to be revisited by the Parliament.
- ✓ A bill being passed containing a requirement that the Scottish Government must report to the Parliament on a particular provision.
- ✓ Committees deciding that they will undertake regular scrutiny of the implementation of a piece of legislation (for example the Climate Change Act).

In the view of the Standards, Procedures and Public Appointments Committee, trigger points such as these mentioned in the above box would help a committee to identify which pieces of legislation should be subject to Post-Legislative Scrutiny, amongst the many which have been enacted.

Hence, the Standards, Procedures and Public Appointments Committee recommended that committees consider how to use these trigger points in a structured way to prompt them to undertake Post-Legislative Scrutiny. One option would be for committees to include a regular item on their agendas or during work programme discussions to consider whether to undertake Post-Legislative Scrutiny. A paper could be prepared to accompany this discussion which identified any of the triggers (such as a petition or representations from a stakeholder)

which might prompt a committee to undertake Post-Legislative Scrutiny.

In practice, the trigger points are used informally. It remains a judgement call whether to trigger Post-Legislative Scrutiny or not. There is no automaticity of doing Post-Legislative Scrutiny when one trigger point has been reached.

The Standards, Procedures and Public Appointments Committee also suggested that committees could be pro-active in seeking views on what Post-Legislative Scrutiny to undertake. For example, committees could consult stakeholders on a regular basis regarding whether Post-Legislative Scrutiny was required and what areas should be reviewed. Another option would be for a committee to 'commission' a body with expertise in a particular area to report to it on possible options for Post-Legislative Scrutiny in its remit.

¹⁵ <http://www.parliament.scot/parliamentarybusiness/CurrentCommittees/101216.aspx#>

Interestingly, in 2016, the Standards, Procedures and Public Appointments Committee modified its position on the question of whether the Scottish Government should report to the Parliament routinely on how legislation had worked in practice. At the time, the Committee stated that it was not persuaded by the merits of this suggestion.

In its January 2016 Report on Committee Reform, the Committee nevertheless recommended that, within three to five years of Royal Assent, the Scottish Government should be required to publish a post-legislative report on the implementation of each Act of the Scottish Parliament. The Scottish Government has not yet responded to this recommendation.

In September 2016, the remit of the Public Audit Committee (PAC) was extended and it is now called the Public Audit and Post-Legislative Scrutiny Committee.¹⁶ The role of the Committee is to scrutinise the Scottish Government in relation to:

- Considering issues arising from audits of Scottish Government and public bodies' accounts;
- Scrutinizing the financial performance of the Scottish Government and public bodies;
- Examining the economy, efficiency and effectiveness of the public sector;
- Looking at other governance and financial issues raised in Auditor General for Scotland reports
- Post Legislative Scrutiny.

While other Committees continue to have the possibility to analyse the implementation of legislation, it is an important decision to move forward on the systematisation of Post-Legislative Scrutiny practice to assign the explicit responsibility to one of the Standing Committees.

The Public Audit and Post-Legislative Scrutiny Committee has taken a piloting approach, conducting an inquiry on the National Fraud Initiative, related to selected acts within the criminal justice system related to fraud issues. The piloting approach will inform the members of the Public Audit and Post-Legislative Scrutiny Committee on the policies to develop in future on Post-Legislative Scrutiny.

IV. CASE STUDIES OF POST-LEGISLATIVE SCRUTINY OF PRIMARY LEGISLATION WORLDWIDE

This chapter examines Post-Legislative Scrutiny in the parliaments of Belgium, Canada, India, Indonesia, Lebanon, Montenegro, Pakistan, South Africa and Switzerland. Countries are listed in alphabetical order. For each country, the text highlights one of the most relevant practices, which doesn't mean that such practice is non-existent in other countries. For instance, the chapter on Canada highlights the significant practice of sunset clauses in Canadian legislation, though this practice is not limited to Canada only.

4.1. Belgium: Post-Legislative Scrutiny triggered by petitions, Court of Arbitrage and General Prosecutor

In 2007, the Belgian Federal Parliament created a parliamentary committee for the ex-post evaluation of legislation. The legal basis for the functioning of the Committee is the 2007 law on the Committee as well as the Rules of Procedure of the Committee itself.

The Committee is established as a joint parliamentary committee composed of 22 members: eleven Members of the Chambers of Representatives and 11 Members of the Senate.¹⁷ There are three 'triggers' for the Committee to examine a piece of legislation.

Firstly, the Committee can receive a petition highlighting problems arising with the implementation of a specific law which has already been in force for a minimum of three years. These problems can be related to (A) the complexity of the text of the legislation, supposed gaps in legislation, lack of consistency in legislation, mistakes in legislation, un-clarity and lack of specificity of legislation and subsequent multiple interpretations emerging from the law, as well as the outdated or contradictory character of the law; (B) when the law is not long considered appropriate in addressing issues for which it was intended (though this is a rather vague provision).

Secondly, the rulings of the Court of Arbitrage/Constitutional Court on the application of specific legislation can have an impact on the system of Rule of Law, highlight specific issues. By consensus the Committee might propose amendments to the legislation in force.

Thirdly, the General Prosecutor submits an annual report

to the Parliament, which amongst others, highlights the problems related to the interpretation or enforcement of specific laws. By consensus the Committee might propose amendments to the legislation in force.

The review of the rulings of the Court of Arbitrage/Constitutional Court and of the annual report of the General Prosecutor often touch upon the competencies of the Standing Committee on Justice and Home Affairs. The Committee for legislative evaluation will thus be cautious to address these issues themselves. Moreover, few members of the Committee for legislative evaluation have the specialized knowledge on the justice system as have the members of the Standing Committees. In practice, the Committee for legislative evaluation will thus focus on the first area, the petitions received from external stakeholders.

Petitions can be submitted by any Ministry, Department or official office in the country, individual citizens, legal persons, and other Members of Parliament. In practice, most petitions come from citizens complaining about specific aspects of a law. No CSOs or NGOs have yet submitted petitions to the Committee on evaluation of legislation.

The 2007 Law establishing the Committee mentions that the Committee will give priority to petitions which address legislation related to the proper functioning of the system of rule of law and legislation, the application of which causes too heavy an administrative burden on citizens or companies.

The Administration of parliament analyses the content of the subject matter complained about by the author of the petition and makes a report for the Committee, including a recommendation for possible review of legislation, other follow-up actions, and notification of the author of the petition.

Based upon the analysis of the Committee, a review of legislation can be proposed, but only if recommended by consensus by all members of the Committee. This requirement takes most sensitive political issues out of the equation; as consensus between ruling parties and opposition parties is required.

Internal staff guidelines related to the work of the Committee: documents are saved on the common server of the Chamber and Senate; there are review

¹⁷ <http://www.comitewetsevaluatie.be/indexN.html>

tables of the petitions and the follow-up conducted; an analytical file per petition; standard form developed for petitions as foreseen in the legislation. Some of the issues mentioned in the petitions are not federal

competencies, but belong to the competencies of the regions and communities in Belgium. In such case, the petitioner is notified of this, or the petition is forwarded to the parliament(s) of the regions and communities.

Box 5: Rules of Procedure of the Belgian parliamentary committee for ex-post evaluation of legislation

The parliamentary committee for ex-post evaluation of legislation has its own RoP. Some of the relevant issues in the RoP are:

- The committee has two co-chairs and two deputy co-chairs, from each House of Parliament
- Meetings take place in public unless decided otherwise
- Quorum for valid decision is the presence of half of the members
- Decisions are taken by majority vote among each of the groups of Members of the Chambers and Senators
- The Committee can ask the opinion or advice of the Standing Committees of the Chamber or Senate
- The Committee can ask the opinion or advice of external experts, and the relevant Administrations and state institutions
- The committee appoints one or more 'rapporteurs' to report on its proceedings
- The Committee receives information on the follow-up to its findings and recommendations
- The Committee prepares an Annual Report, which will be a public document of the Parliament
- The minutes of the meetings are kept at the Secretariat of the Chamber and Senate
- The Chamber and Senate will make the (human and financial) resources required available for the proper functioning of the Committee.

From time to time legislation is adopted including an evaluation clause. This often happens for political reasons, to convince part of the ruling parties or opposition to support the approval of the legislation despite their reservations. Evaluation of legislation is sometimes foreseen when a substantial policy area is being reviewed, such as happened for the comprehensive review of criminal law.

Finally, it is worth noting that, following the most recent elections in 2014, no Committee on Evaluation of Legislation has been re-established, for several reasons.¹⁸ Firstly, the Chamber of Representatives no longer wishes to involve the Senate in the Committee and has prepared amendments to the 2007 law accordingly, though they have not yet been approved. Secondly, the Committee lacks a dedicated budget or additional human resources. There are no staff specialising in the evaluation of legislation. It remains to be seen if the Committee will be re-established in the next term of the parliament.



¹⁸ Interview with Mr. Alberik Goris, Legal Department of the Chamber of Representatives of Belgium; March 2016

4.2. Canada: sunset legislation to ensure Post-Legislative Scrutiny

While different countries adhere to varying statutory review provisions or ad hoc procedures for reviewing legislation, some countries have identified innovative methods to improve the scrutiny of legislation.

Statutory provisions that require legislation to be reviewed after a period of time seem to be fairly common in Canadian statutes at both the provincial and federal level.¹⁹ Hence, one approach to Post-Legislative Scrutiny is for a review of legislation to be written into the original legislation through a “sunset clause”. Sunset legislation is a modern example of a legislature expressing its power by restraining the authority of the state to act and subject it to increased legislative oversight.

In Canada, a sunset clause is generally expressed in a provision which may provide for the rendering of a federal statute, legislative provision, agency, activity, service, function, program, etc. temporary.²⁰ Alternately, a sunset clause may subject such provision, agency, activity, etc. to re-examination, with a view to rendering them temporary if their re-examination shows that they are no longer useful, or to continuing them, if the re-examination shows that they are still useful.

Review/Sunset clauses are used when the enacted provisions are clearly intended to be temporary (sunset) or when Parliament wants to revisit the legislative approach after a certain period of time in order to make any necessary changes. For example, sunset provisions are found in most of the financial institution Acts because it is generally considered that the rapid evolution of the financial sector and its different practices require that the legislation be regularly reviewed and updated.

They are also used when a completely new legislative scheme is designed and the effects of the new legislation are not entirely predictable. In cases like these, it is often specified in the Cabinet decision that the proposed legislation will include review provisions. Occasionally, such provisions are also added because of submissions made to the parliamentary committee where the clause-by-clause examination of the Bill takes place. For example, certain stakeholders may object to the legislation if there is no commitment to reassess its application over the years. Review provisions may then be added as a compromise for the adoption of the Bill.

Sunset legislation also exists in most other Westminster-type jurisdictions, including in the UK.



4.3. India: role for the Law Commission and Government Assurances Committee

India is a republic with a multi-party parliamentary system with a bicameral parliament based on the Westminster model. The Rajya Sabha (Council of States) has 245 seats while the Lok Sabha (House of the People) has 545 seats.

The House of the People holds exclusive responsibility for two areas. The Constitution specifies that the Council of Ministers is collectively responsible to the House. In addition, the House retains primacy in money matters. In other matters, both houses have equal rights. They can both propose bills and both may amend the bills of the other. Every bill apart from a money bill must pass First, Second and Third Readings in both houses and receive presidential assent.

The way in which the committee structure has evolved in the Indian Parliament is also different than in many others. Rather than each house having its own complete committee structure, most of the Standing Committee structure in India is shared. It spreads the workload and promotes understanding and collegiality between members of both houses.

The Committee on Estimates is composed entirely of members of House of the People. The Public Accounts Committee, however, has members of both houses and is, by rule, chaired by a member of the opposition. Its main job is to examine the report of the Comptroller and Auditor General. In addition, the two houses have divided responsibility over the Department-related Standing Committees. While the number of those committees varies according to the number of ministries

¹⁹ This is so despite the Privy Council Office’s “Guide to Making Federal Acts and Regulations” (2001) suggesting that sunset clauses and mandatory review provisions should be used sparingly, as it can potentially create gaps in legislative authority if the new legislative regime cannot be brought into force in time. See: Post Legislative Scrutiny: a Consultation paper, UK Law Commission, p. 24.

²⁰ Presentation by Pat Barlow, Director General – Senior Advisor, Policy and Strategic Direction, Indian and Northern Affairs, Canada prepared under the Canada-China Legislative Cooperation Program implemented by the Parliamentary Centre with the support of the Canadian International Development Agency, 2008

in the Council of Ministers the proportion that lies under the jurisdiction of the Chairman of the Council of States is about one third of the total, while the remainder fall under the jurisdiction of the Speaker of the House. Members of both houses sit on all of the Department-related Standing Committees committees, regardless of which house has jurisdiction.

There is no mandatory requirement for ex-post evaluation of laws in India. Hence, policy-makers and ministry officials have no systematic evidence about the efficacy of a law. Anecdotes and evidence provided by non-official sources such as corporates, NGOs and advocacy groups are used by MPs to argue for or against an amendment in a law.

However, various governments have taken small steps in the direction of designing better laws such as making pre-legislative scrutiny of bills mandatory through public feedback and identifying laws that need to be repealed.²¹

Mechanisms exist for undertaking review of laws. Various Commissions, such as the Law Commission, conduct reviews of legislation. Since its establishment in 1956, the Law Commission has submitted 236 reports. The Commission identifies laws that require amendments or repeal. In preparing its review of laws the Commission circulates its draft analysis amongst the public and invites comments. It organises seminars and workshops in different parts of the country to elicit opinion on proposed strategies. For instance, in 2011 the Commission released a questionnaire on its website for the public to send comments on 498A of the Indian Penal Code, 1860. In March 2011, the Ministry of Finance constituted the Financial Sector Legislative Reforms Commission for a review of Indian financial laws. The Commission is also empowered to take evidence. The National Human Rights Commission was established to review legal safeguards to human rights. It holds consultations with NGOs and experts on human rights issues. The Second Administrative Reforms Commission was established to revamp the public administration system. The Commission reviewed several laws and consulted various stakeholders in preparing its reports.

In addition, the Standing Committees of the Indian parliament consider many issues on their agenda, including policy oversight and post-legislative scrutiny.²² Recent Committee reports include reports on the review of the Medical Council Act and National Food Security Act.²³

India also has the Government Assurances Committee which does policy oversight (as compared to a PAC which

does financial oversight), which does work somehow related to follow-up on government commitments to implement legislation.²⁴

The PAC itself examines the reports of the Comptroller and Auditor General (CAG) of India. While PAC members often complain that its recommendations are not heeded by the ministries, the PAC itself has several features which do not contribute to institutional strength, such as membership of PAC for varying timespans (from one year to the full term of parliament), procedures of PAC are left to the chairperson to decide, and lack of consistency in following up on subject matters included in the agenda of the PAC.²⁵



4.4. Indonesia: Committee on Legislation and Centre for Post-Legislative Scrutiny

After decades of authoritarianism under its first two Presidents, Soekarno (1945-1966) and Soeharto (1967-1998), Indonesia went through a successful democratic reform from 1999. If previously free press and people's rights in politics were deprived, from 1999 onward, free press and freedom to establish political parties were restored. The general elections in 1999 saw the participation of 48 political parties, resulting a new House of Representatives (DPR) dominated by Members from new political parties founded and led by key reformist figures. The Constitution was amended four times from 1999-2002 with the aim to clearly separate power between the branches of government. The check and balance between the executive and legislative branches was clearly defined. The power of legislation, which used to be under the President, was given back to the DPR³⁰. To carry out its functions, the DPR was endowed with several powerful rights to inquire, investigate and declare motion. Individual MPs were given the rights of immunity which protects them from

²¹ <http://www.livemint.com/Opinion/odwaOwPmUBhuRY86rFXqI/Postlegislative-scrutiny-to-improve-quality-of-laws.html>

²² <http://www.prsindia.org/parliamenttrack/parliamentary-committees/subjects-selected-by-standing-committees-3451/>

²³ <http://www.prsindia.org/parliamenttrack/report-summaries/committee-on-the-reform-of-the-indian-medical-council-act-1956-4412/> <http://www.prsindia.org/parliamenttrack/report-summaries/cag-report-on-implementation-of-national-food-security-act-2013-4312/>

²⁴ http://164.100.47.193/lssccommittee/Government%20Assurances/16_Government_Assurances_37.pdf

²⁵ Amitabh Mukhopadhyay, *Fourgrounding Financial Accountability in Governance*, in: *Rethinking Public Institutions in India* (ed. Pratap Bhanu Mehta, Devesh Kapoor and Milan Vaishnav), Oxford University Press, March 2017, p. 295 – 336.

legal prosecution for the statements or actions he/she makes upon performing their duties³¹. This ends the era of rubber stamp legislature in Indonesia.

DPR Power of Legislation

To implement its power of legislation, DPR established a Standing Committee on Legislation called *Badan Legislasi* (BALEG) or The Legislation Council in 1999. The committee was first established through a DPR Regulation on its Rules and Procedures. Since 2004, however, all DPR Committees, including BALEG, were established and regulated under the Law on Parliament, which was reviewed and amended every five years by the new parliaments. This law not only regulates the national parliament but also local parliaments. Per the Law, the roles of BALEG are as follows³²:

1. Develop draft National Legislative Agenda, a five-year plan of legislations to be passed within the five-year term of DPR and plan the annual priority within the DPR;
2. Coordinate finalisation of National Legislative Agenda with the government and the House of Regional Representatives (DPD);
3. Review and refine concepts and wordings of draft Bills proposed by Committees and MPs for compliance with Law on Law-making processes and harmony with existing legislations and Constitution;
4. Provide consideration of go-or-no-go for draft Bills proposed by Committees and Members outside the national legislative agenda;
5. Debate, amend and refine Bills assigned by DPR Steering Committee;
6. Monitor and Evaluate Passed Legislations (Post-Legislative Scrutiny);
7. Draft, evaluate and improve all DPR Regulations;
8. In coordination with subject Committees/Special Committees, monitor and evaluate debates of all Bills between Committees and Government;
9. Conduct socialisation of National Legislative Agenda;
10. Produce BALEG performance report and inventory of legislations problems at the end of DPR term as inputs for the next DPR.

BALEG has a central role in the law-making process, particularly in planning the national legislative agenda, drafting Bills, and conducting Post-Legislative Scrutiny. To provide a context, the law-making process in Indonesia has five phases, consisting of: planning, drafting, debating, passing and promulgating³³. Within

those phases, BALEG plays key roles in planning and drafting. Whereas for debating and passing legislations, BALEG can only debate legislation upon receiving an assignment from DPR Steering Committee, which usually refers a Bill to be debated in BALEG because the relevant subject committee for that Bill is overloaded.

In the planning phase, BALEG represents the DPR to debate with the Ministry of Justice and Human Rights, which represents the President, to develop an agenda consisting of titles and rationales of legislations to be enacted by the DPR and President within their office terms. In addition, BALEG and the government also have to agree on annual legislation priority. The five-year legislative agenda has to be developed with reference of the Long-Term Development Plan and the President's Medium-Term Development Plan. The results of Post-Legislative Scrutiny are usually used by BALEG as inputs in this planning phase.

In the drafting phase, BALEG reviews and refines all draft Bills proposed by the Committees or Members. The refined draft Bill is reported to the Plenary session. The Steering Committee will then refer the refined draft Bill to relevant subject committees for debates. After the subject committees and their government counterparts reach agreements on all the debated issues in the Bills, the subject committees and relevant government ministries will present their final Bills to the Plenary Session for passing. Within a maximum of 30 days, the President must sign the passed Bills as Laws and the State Secretariat must promulgate them.

PLS Role in DPR

As described in the previous section, BALEG conducts PLS. In implementing the Post-Legislative Scrutiny, BALEG focuses on three things: (1.) monitoring whether the government enacts implementing regulations or not, (2.) monitoring if the Law is being challenged at the Constitutional Court, (3.) evaluating the applicability of the Law by the implementing agencies and the impacts of the Laws to the people.

BALEG uses the results of PLS for three things: (1.) as inputs for planning the national legislative agenda, (2.) as materials to defend Laws challenged at the Constitutional Court or to improve them as ruled by the Court, and (3.) as inputs for the subject committee oversights to relevant executive or judiciaries agencies.

Even though the main role of Post-Legislative Scrutiny lies in the hands of BALEG, this committee, however, cannot directly follow up its Post-Legislative Scrutiny findings to the executive or judiciary branches. BALEG has to refer the results of its Post-Legislative Scrutiny to relevant subject committees, which will then take further actions to government ministries/agencies or judiciary agencies within their jurisdictions. DPR subject committees have three functions, namely: (1.) propose and debate legislations with their government

counterparts within their jurisdictions, (2.) debate the budget proposed by their executive counterparts, and (3.) conduct oversight of their government counterparts³⁴. The oversight function of the subject committees covers three areas:

- Oversight of the implementation of the Laws, including Law on the National Budget and its implementing regulations in accordance with its jurisdiction (PLS);
- Following up the audit findings of the National Audit Board within their jurisdictions;
- Oversight of effectiveness of government policies.

In performing their functions including Post-Legislative Scrutiny, DPR subject committees and BALEG are authorised to use four avenues, consisting of: (1.) conducting working meetings with the government represented by Ministers or Heads of Agencies; (2.) holding a hearing with Government officials; (3.) holding a public hearing with experts, academics, or relevant stakeholders; (4.) conducting working/site visits.

Post-Legislative Scrutiny Support Staff

To support its committees and MPs in performing their functions, DPR has two supporting agencies: The Secretariat General which provides administrative and financial supports and the Parliamentary Expert Support Agency (Badan Keahlian Dewan or BKD) which provides professional and technical support. The BKD manages five centres which pool both civil servant and contract-based professional staff of the DPR. BKD staff comprise of researchers, budget analysts, legal analysts and legal drafters.

For Post-Legislative Scrutiny, BKD established the Centre for Post Legislative Scrutiny which is currently staffed by 17 legal analysts. The Centre for Post-Legislative Scrutiny produces its work in response to the request of BALEG and Subject Committees. In addition, the Centre for Post-Legislative Scrutiny also develops annual plans of Post-Legislative Scrutiny work, particularly to monitor and evaluate Laws which draw national attention, Law with a huge impact on the national budget, and Laws being challenged by the public at the constitutional court. In addition to obtaining data and analysis of scrutiny of certain Laws from the Centre for Post-Legislative Scrutiny, Chair of BALEG also often assigns its own expert staff to carry out the Post-Legislative Scrutiny analysis. Within the last 15 years, BALEG has been continuously supported by 10 to 15 Expert Staff.

Further work is needed in terms of establishing working relationships between Committees and the Centre of Post-Legislative Scrutiny and in terms of providing guidance to staff through a staff manual on Post-Legislative Scrutiny.

It is worth mentioning that in Indonesia only MPs have the right to send official requests for information to various other state institutions, unlike for instance the Swiss parliament where parliament staff can request information and send out letters to other state institutions.



4.5. Lebanon: special parliamentary Committee on Post-Legislative Scrutiny

The follow up to the implementation of legislation by the Lebanese Parliament is addressed, firstly, in the form of parliamentary oversight of the competent ministers, through questionings and interpellations, or through public hearing sessions. This is particularly relevant as the laws include the main provisions and general rules and leave the details or practical issues to the executive power, through regular decrees or decrees issued by the Council of ministers, or by virtue of ministerial decisions issued by one or more ministers depending on the competence.

Most laws stipulate in their final provisions that the details of the implementation of this law are defined by virtue of decrees issued by the Council of ministers. Some specific laws may foresee practical issues that are not part of the competence of the legislative power, or issues that require changes and consecutive additions that need to be amended continuously. Therefore, the Parliament grants the Government, or the competent minister, the right to undertake this by a decree or a decision.

The deadline for the implementation of the law in Lebanon

Most laws in Lebanon do not fix a deadline for the Government to issue regulatory texts and only indicates the issuance of the enforcement text, for example, Article 44 (para D) of the law on the rights of the persons with disabilities (No 220/2000) which stipulates that “a joint committee representing the public and private institutions concerned with transportation

shall be constituted, and this committee shall be called "Committee on the mobility of the disabled" and its task shall be to examine and decide everything that could facilitate the movement of the disabled, and shall be chaired by the Director General of the Ministry of transportation and include one member who is a person with disability, from the members of the national assembly."

Another text foresees that the Ministry of Public Health issues, as soon as possible after the promulgation of this law, a decision that defines these qualifications, and incorporates them as part of the terms and conditions for obtaining the permit from the Ministry of public health (Para b of Article 30 of the same law).

These texts do not fix any deadline for the issuance of the decrees or regulatory or enforcement decisions, therefore, the Government may take as a pretext the lack of legal binding articles for the adoption of these texts. This is also the case for the existence of a specific deadline in the core of the legislation, as foreseen by Article 16 of the Law on execution of sanctions (Article 463 dated 17/9/2002) which noted the following: "The mechanism for the execution of the sanction reduction is defined by virtue of a decree issued by the Council of ministers based on a proposal by the Minister of justice, within three months as of the date of entry into force of this law".

In spite of the clear and precise mention of this deadline, it has not been sufficiently binding for the Executive power, which considered it, wrongly, as deadline for simply urging the Government to abide by it, with no obligation for the latter as to any delay in the issuance of this decree.

The proof for that is that the decree mentioned in this article was only issued four years after the entry into force of this Law; on the 6/5/2006, Decree No 16910 aiming at defining an execution mechanism of Law No 463 date 17/9/2002 related to the execution of the sanctions.

The Executive power can be in a hurry as to the implementation of the provisions of a certain law because of the financial revenues or the benefits expected from the acceleration of its implementation. It thus prepares the enforcement decrees related to this law even before proceeding to the voting at the Parliament. As soon as this law is published, it issues the enforcement texts (decrees, decisions) in order to make use of the time factor. This is often what happens in the tax and financial laws. For example, the Parliament issued on the 14/12/2001 the VAT law (No 379) which is composed of 63 articles. The Government undertook immediately to issue a big number of enforcement decrees for this law, forty days after the date of entry into force (53 decrees and decisions).

The parliamentary committee in charge of following up the implementation of laws

The idea of establishing a follow up committee for the laws which do not have yet enforcement texts when they define clearly the non-execution of some of the laws, such as the law on the organization of the electricity sector, the law on the civil aviation administration, the law on airline safety and the law on the rights of the persons with disabilities, all these are laws that have been issued ten years ago or even before. A list of five laws to follow up was set.

Some members of parliament communicated with the Speaker of the Parliament Mr. Nabeeh Berri to suggest to him the constitution of a special committee. Mr. Berri approved the proposal and issued a decision for the constitution of the committee in September 2014.²⁶ At the first meeting of this Committee, some staff members were entrusted with the task to prepare a study of the non-executed laws and it appeared that the number is much bigger than expected; there are now 34 laws.

Since it is not a permanent committee, the PLS Committee doesn't have a full-time staff; two main staff help the committee to organize its meetings and work: Clerk: support in the preparations of the committee meetings including inviting MPs and ministries, communicate with ministries and departments and MPs, draft meeting minutes. General Director/ Senior Advisor at the parliament: he provides support to the committee by preparing the list of bills that are still not implemented and updating the list with new bills that were adopted/ dividing the bills under the relevant ministry (example: a list of bills related Health ministry; bills related to Public Works Ministry.).

It is worth mentioning in this regard that the parliamentary administration undertakes, after the holding of each legislative session, to set a list of the laws that require decrees or decisions for their implementation. In this list, texts of the legal articles that require the adoption of enforcement mechanisms are drafted, and this list is distributed to the MPs around two months after the date of adoption of these laws, so that they can be informed about them and ask the Government to execute what was foreseen by these legislations in terms of enforcement and execution issues.

The goal of establishing the Committee

The main aim of establishing a committee is to communicate directly with the ministers concerned with the implementation of the legislation.

The main goal of establishing this committee is to check on ministers, follow up their actions and urge them to apply the laws. This initiative has been crucial

²⁶ This Committee was constituted by virtue of a decision by the Speaker of the Parliament Mr Nabeeh Berri in September 2014, and included representatives of all blocks, as follows: MP Yaseen Jaber (coordinator), MPs: Marwan Hamadeh, Fareed Al Khazen, Mohammed Kabbano, Ali Fayyad, Joseph Al Maalouf, Samer Saaadeh.

for Parliament since accountability session has not been regularly and efficiently held due to the political circumstances, and there are no tools for sanctioning the shortcomings from the part of the Government in this regard, unless via the Parliament through questioning confidence or interrogating any minister who fails to apply the laws, which cannot be achieved currently, because of the critical political situation. Through this initiative, the Parliament sought to play its core role by remaining the safety net that is attuned to the reality of its society and work on preserving the interests of all citizens, taking into consideration all contradictions and reconcile all orientations. The Member of Parliament indeed represents the whole nation per the Lebanese Constitution, and thus shall preserve the interests of all citizens.

We must acknowledge that the work of this committee does not at all contradict the right of any Member of Parliament to exercise his/her oversight role by submitting questions and interrogations and asking for the constitution of parliamentary investigation committees. This committee is not bound by a deadline although it is not one of the permanent parliamentary committees, it is rather a committee that is usually constituted by virtue of a decision by the Speaker of the Parliament specifically to follow up a certain issue and it expires with the end of the mandate of the Parliament but can continue if the situation for which it was created continues.

The methodology of the work of the Committee

The Committee's ways of working are to communicate and hold meetings with the ministers concerned with the implementation of the laws related to their ministries, in addition to cooperating with the citizens as well as with the associations, civil society organizations and NGOs. the Committee follows up on laws for which enforcement texts have not been issued, or for which the enforcement texts have been issued but the members of the constituent bodies have not been appointed, such as the General assembly of the civil aviation, the regulatory committee of the electricity sector. Practically, these laws have not yet entered into force because their enforcement decrees have not been issued yet, or in other terms, some ministers are hindering them or blocking their execution.

The achievements of the Committee

There is no doubt that the follow up action undertaken by the Committee through successive meetings with the ministers have led practically to the adoption of some regulatory and enforcement texts for a limited number of laws which were still pending for political reasons or because of the routine and bureaucratic hindrances in the public administrations. Consequently, many enforcement texts were issued for a number of laws including: Decree No 4067 dated 26/9/2016 related to

the determination of the indemnities of the president and members of the Board of administration of the Lebanese association for food safety, the Decrees no 42 and 43 dated 19/1/2017, (the first concerning the partition of the seawater coming under the jurisdiction of the Lebanese State into blocks, and the second concerning the terms of reference for the offshore licensing round and the model for Exploration and Production Agreement (EPA)).

Obstacles hindering the follow-up of the execution of legislation

Some of the obstacles hinder the follow up of the execution of the legislations, especially under the conflict of interests between many sectors concerned by the legislation, which results either in blocking the implementation of the law, or its bad implementation. This might lead to hindering its implementation in some cases, and this would undermine the credibility of the legislative process and prevent the achievement of a good Legislation.

In this regard, three examples can be given of as an example of these hindrances to the execution of the laws:

- 1- *The law on "tobacco control and regulation of tobacco products' manufacturing, packaging and advertising"* issued in 2011, and which led to a conflict between the associations and agencies defending smoking prohibition and the syndicates of owners of restaurants and cafés who considered that they were prejudiced by this law; which led to the suspension of its implementation until it is amended in a way that ensures the satisfaction of all parties to the conflict.
- 2- *The "Rent" Law* which raised many problems when its execution started; in fact, it exacerbated the historically existing problem between the owner and the lessee because of the lack of a clear housing policy from the part of the successive governments, in addition to the non-enforcement of the legal text that imposes on the Government to create a Fund which would contain a special account for assisting the limited-income lessees.
- 3- *The law on the "protection of women and family members against domestic violence"* which was adopted following the advocacy from many sectors of the civil society. Despite the noble goal sought by these organizations, they faced opposition from the part of the legislators when discussing this project before the committees; a one particular CSO was rigid about its opinion considering that what it had submitted represented an ideal text that should be adopted without discussion.

Things got complicated and reached the point of defamation against the members of the sub-committee emanating from the joint parliamentary committees and which worked with all parties to reach an integral project that could protect all the members of the family from violence without contradicting the principles and legislations in force. When the implementation started, many problems appeared especially with the personal status courts, which prevented the implementation of most of the articles of the law.



4.6. Montenegro: Committee and plenary debate on Post-Legislative Scrutiny

Due to obligations arising from the accession negotiations with the EU, the Parliament of Montenegro has been under pressure to effectively adopt laws - and the number of laws adopted has indeed been high. In the four-year mandate of the last convocation of the Parliament, a total of 509 laws have been adopted, nearly one fifth of which (91) were adopted under the Urgent Procedure.²⁷ This legislative effort consumed much of the Parliament's resources, leaving little for oversight functions or post-legislative scrutiny.

However, the motive for conducting more work on post-legislative scrutiny was also driven by the reforms demanded by the EU. Strengthening the Parliament's legislative and oversight role was one of the seven key priorities that the EU set out as the precondition for opening accession negotiations with

Montenegro,²⁸ as it was assessed that the parliament's overall capacity to ensure appropriate oversight of the government was limited. In response to the EU's requirement, in the period since the last mandate of the Montenegrin parliament (*25th convocation, from 2012 to 2016*), progress was made in the area of Post-Legislative Scrutiny.

In 2012, the Parliament adopted changes to its Rules of Procedure, which, among other things, introduced an additional competence requirement of some of the working bodies in the area of post-legislative scrutiny to "(...) based on Government reports, monitor and assess the implementation of the adopted laws, especially those which establish the obligations complied with the *Acquis Communautaire*".²⁹ This obligation was introduced for seven out of fourteen existing committees in the Parliament, those selected were deemed as having a more direct role in the EU-related legislation.³⁰

This general obligation has been prescribed more specifically in the Action Plan for Strengthening Legislative and Oversight Role, an annual planning document that the Parliament developed as a way of meeting the EU's requirements. One of the key activities in the section Oversight Activities stipulates that:

*The working bodies will continuously, and at least once in six months, hold a meeting where representatives of competent ministries will be invited and, where necessary, representatives of other state administration bodies, with the aim of considering implementation of policies and enforcement of laws within their competences.*³¹

This obligation has been implemented unevenly by the Committees - while some outperform, some lag behind. The front-runner is the *Committee for Economy, Budget and Finance*, which during 2016 inspected the implementation of the five following laws:

- Law on Energy Efficiency
- Law on Wages in the Public Sector
- Law on Conversion of Swiss Francs to Euro
- Law on Investment Funds
- Law on Settling Obligations towards the workers of the Aluminium Combine Podgorica.³²

²⁷ Monitoring and Evaluation of the Rule of Law in Montenegro, Institut alternativa, November 2016, see p. 10, available at: <http://media.institut-alternativa.org/2017/01/monitoring-and-evaluation-of-rule-of-law-in-montenegro.pdf>

²⁸ https://ec.europa.eu/neighbourhood-enlargement/sites/nea/files/pdf/key_documents/2010/package/mn_opinion_2010_en.pdf

²⁹ Rules of Procedure of the Parliament of Montenegro, Consolidated text, No 00-63-2/13-44, 28 November 2013, available at: http://www.skupstina.me/images/documents/rules_of_procedure_00-63-2.pdf

³⁰ These committees are: Committee for Political System, Judiciary and Administration, Committee for Economy, Finance and Budget, Committee for Human Rights and Freedoms, Committee for Gender Equality, Committee for Tourism, Agriculture, Ecology and Spatial Planning, Committee for Education, Science, Culture and Sport and the Committee for Health, Labour and Welfare.

The reason behind this volume of activity in Post-Legislative Scrutiny by this Committee, lies in the fact that it was a committee chaired by a representative of the opposition, which is, as expected, more interested in the scrutiny of the executive. This committee has been the most active in other indicators as well, such as the overall number of sessions, use of control mechanisms, follow-up of conclusions, etc. It is also a committee with a broad area of interest, covering the economy, finance and budget, which are in many other parliaments split between several working bodies. The second most active committee in this area is the Committee for Political System, Judiciary and Administration.

The scrutiny of the implementation of the law typically takes the form of a session that resembles a “consultative hearing”³³. The session is attended by the representatives of the Government, called upon to report on the implementation of the law, although other speakers may also be invited to take part. These might include non-governmental organisations, chambers of commerce, unions of employers or trade unions, experts, representatives of local authorities, etc. The discussion can sometimes be motivated by material received by the Committee. For example, in the case of the aforementioned Law on Wages in the Public Sector, the motive for convening was the information sent to the Committee by the Mayor of a municipality struggling with the implementation of this law.

After each session in which the implementation of a law was discussed, the Committee prepares official minutes that detail the discussion. In some cases, as a follow-up to such a session, Committees propose specific conclusions to the plenary, which can be adopted in order to emphasise the need to give greater attention to some provisions of the law that are not being implemented or that are causing problems. On occasion, these conclusions are rejected by the plenary.³⁴ If they are adopted, the Committee then engages in the monitoring of their implementation and may convene a new session to sum up their effects following a period of time. In certain cases, however, the discussions about the implementation of a law leads to proposing amendments to the law by way of corrective intervention to address the shortcomings of the initial provisions, or to take into account the events that transpired after its adoption.

Outside of these described practices, it is the *Committee for Gender Equality* that has implemented by far the most comprehensive and detailed examination of the implementation of legislation. With the support

of donors and the Government itself (UNDP, OSCE and the Ministry of Human and Minority Rights), it has inserted two rounds of Post-Legislative Scrutiny into its key piece of legislation- the Law on Gender Equality. The process was planned as a combination of awareness raising and research activities.

The process was not imposed as a condition of the donor, but by very Committee that initiated the project. Most of the research activities were outsourced to an external research agency, allowed for by the fact that the initiative was financially supported by donors. However, one of the goals of the project was to increase the capacities of the Committee itself in monitoring and evaluating the implementation and effects of the Law on Gender Equality. This meant that the Chair of the Committee was leading the process, while the parliamentary staff were engaged in the entire process. With the help of external experts and researchers parliamentary staff used the process to increase their own capacity for future work.

The goal of the research was to assess the degree to which the Law on Gender Equality (adopted in 2007) has been implemented by the public administration, as well as the staff’s level of knowledge within the relevant institutions about the general area that the Law covers. The research process included a survey organised in a number of institutions (in 61 institutions on the first occasion, and 70 on the second occasion), on the implementation of the Law on Gender Equality.

Two reports have been published by the Committee, one in 2010 and the other in 2014. They contain not only the findings of the research process, but also recommendations for future work of the Committee. These range from legislative changes to activities that can be fed into other strategic documents that outline the plan for implementing gender equality in Montenegro.

The first evaluation process was used to design the research method, formulate the indicators for measuring the implementation of the law and sample the institutions. Three years later, using much of the same methodology, the process was repeated, in order to track any changes that occurred and measure progress in the implementation of the Law.

The scope of the process was broader than simply tracking the implementation of the Law on Gender Equality, and comprised of more general research into the attitudes and level of knowledge in the public administration about the core principles of gender

³¹ All editions, except for the one for 2016 available at: <http://www.skupstina.me/index.php/en/akcioni-plan>

³² See: Report on the Work of the Committee for Economy, Budget and Finance in 2016, p. 11, available at: <http://www.skupstina.me/zakoni/web/dokumenta/sjednice-radnih-tijela/1633/4077-Broj:%2000-63-7-17-15.pdf>

³³ As opposed to control hearing, which is an oversight mechanism during which the committee questions the representatives of the executive, consultative hearing is more of a debate on a specific issue, that may or may not include representatives of the wider community of experts, NGOs, think tanks, associations, etc. See Article 73 of Rules of Procedure of the Parliament of Montenegro, Consolidated text, No 00-63-2/13-44, 28 November 2013, available at: http://www.skupstina.me/images/documents/rules_of_procedure_00-63-2.pdf

³⁴ For example, the Committee for Political System, Judiciary and Administration inspected the implementation of the Law on Civil Enforcement Officers, proposing five conclusions to the Plenary, that were then rejected.

equality. This approach was used because the Law on Gender Equality was the first of its kind in the Montenegrin legal system, and the broader basis for evaluation was used as an attempt to measure not only formal changes in the implementation of the law, but also the awareness about the topic within the administration.

Some of the activities in the area of Post-Legislative Scrutiny stem from the legal obligations of the Parliament regarding specific laws. This is the case with the *Law on Election of Councilors and Members of Parliament*, which prescribes the Parliament's obligation to monitor the application of electoral legislation, in part related to media coverage of political parties during the campaign.³⁵ This is achieved by establishing a special, temporary committee to monitor the application of electoral legislation related to media coverage. The committee has no sanctioning powers, and mainly forwards its findings to the relevant institutions, receives complaints and functions as a platform for parties and the media to raise concerns.³⁶



4.7. Pakistan: role of national Commissions in Post-Legislative Scrutiny

The statute book in Pakistan contains three types of laws; first the laws enacted during the colonial period (1836-1947) and inherited by the country, second the presidential ordinances promulgated during the four military regimes (1958-1971, 1977-1988, and 1999-2002) that the country had to endure since its creation in 1947.³⁷ The bulk of these ordinances had been indemnified without any proper parliamentary scrutiny. The third category of laws is comprised of Acts of Parliament passed after due debates, deliberations and adherence to parliamentary processes.

One can draw an inference that the legal software of Pakistan is not purely a parliamentary product and due to this very fact, on occasions questions are raised about its very compatibility with the democratic aspirations of the citizens of an independent state. The existence of multiple laws in the statute book makes

Pakistan an over-legislated country. The intent of the majority of the laws enacted during the colonial era was to control the subjects, the intent of ordinances promulgated during the military regimes was to circumvent the system and the laws passed during the legitimately elected parliamentary governments aimed at political, socio-economic and societal engineering. With democracy gaining the ground, the country has started adopting modern rights based laws.

Shockingly no authentic list and texts of all laws in force in the country are available on any official website or in hard form as a consolidated Code. This aspect was highlighted during the hearing of a *suo motto* case pertaining to incorrect versions of various laws in the Supreme Court of Pakistan since 2007. In its judgment, delivered on February 10, 2016 the Apex Court observed that in any civilized system of government, the first and foremost obligation of the government is to make sure that all applicable laws are easily available to citizens in easily understandable language.

The Apex Court found it to be quite extraordinary that there was no official publication whether in hard form or on the internet which can provide an accurate and error free version of the laws of Pakistan in one easily accessible compendium. Till 1966 compilation of the Pakistan Code was a tradition when the last compendium of 16 volumes of federal laws was published in a proper and user friendly form containing a chronological as well as alphabetical index of the laws on the statute book which included the amendments made from time to time. In 2010 the Pakistan Code was published but the Court found it 'unhelpful.' The situation of the provincial Codes was no different: the Sindh Code was last published in 1956, and the Balochistan Code was last published in 1990, the Khyber Pakhtunkhwa Code was last published in 2014 and laws passed from 1988 to 2013 are missing from it. The Punjab Code in 2016 was up to date but the provincial law ministry acknowledged in the Court that the Code contained errors and omissions and were being rectified.

The verdict of the Apex Court resulted in enactment of the Publication of Laws of Pakistan Act, 2016 by the Parliament and creation of a dedicated cell and a bi-lingual (English and Urdu) website³⁸ has been launched by the Federal Ministry of Law and Justice to provide authentic version of laws, subordinate legislation, and rules etc. Equally weak is the culture of weeding out the redundant or dormant laws from the statute book. For example the Federal Court Act of 1937 that had become redundant upon establishment of the Supreme Court of Pakistan was repealed in 2014.

³⁵ Article 64b of the Law on Election of Councilors and Members of Parliament (election law)

³⁶ See: Parliamentary Elections, 16 October 2016, OSCE/ODIHR Election Observation Mission Final Report, p.14, available at: <http://www.osce.org/odihr/elections/montenegro/295511?download=true>

³⁷ 18.5 % of laws are from the colonial period and 40.5 % of laws are the legacy of military regimes in Pakistan.

The power to make rules for the federal laws resides with the federal government that may by notification in the official Gazette, make rules for carrying out the purpose of the Act. However in the cases of many laws the government has failed to frame the rules in time therefore hampering the operationalisation of legislative leaps. Similar powers are with the provincial government's vis-à-vis the provincial laws and the situation is no different there. In 2016 the Supreme Court of Pakistan was informed that neither the Federation nor the provinces have undertaken the exercise of codifying the subordinate legislation made pursuant to rule-making powers given to the respective executives by legislation. Proper codification of notifications and other statutory instruments was also not available.

According to the Rules of Business, 1973 of the Federal Government the Ministry of Law and Justice is responsible for the publication and translation of federal laws.

Earlier, in 1979, the military regime created the Law and Justice Commission through an ordinance. The Commission was tasked with studying and reviewing on a continuing basis the statutes and other laws and making recommendations to the federal and provincial governments for their improvement, modernization and reforms. The eight assigned functions of the Commission included; making or bringing the laws into accordance with the changing needs of society, consistent with the ideology of Pakistan and the concept of Islamic social justice, adoption of simple and effective procedures for the administration of laws to ensure substantial, inexpensive and speedy justice, arranging the codification and unification of laws in order to eliminate multiplicity of laws on the same subject, removing anomalies in the laws, repealing obsolete or unnecessary provisions in the laws, simplifying laws for easy comprehension and devising steps to make society law-conscious, introduction of reforms in the administration of justice, and removing inconsistencies between the laws within the legislative competence of Parliament and those within the legislative competence of a Provincial Assembly. The Commission is housed in the building of the Supreme Court of Pakistan and rarely communicates with the Parliament.

In March 2016 the Parliament of Pakistan passed the Publication of Laws of Pakistan Act, 2016 to ensure publication of the text of laws of Pakistan free from errors besides their updating and printing for easy availability to citizens. Through resolutions under Article 144 of the Constitution, the provincial assemblies of Balochistan, Khyber Pakhtunkhwa, Punjab and Sindh handed over the powers to the Federal Parliament to regulate the issue of publication of laws by private publishers. The law calls for stringent internal checks by the Federal and provincial governments, the Parliament and the

provincial assemblies to ensure accuracy of laws published by them.

Under the law, the Laws of Pakistan Cell has been established in the Federal Ministry of Law to register publishers and monitor publications of law books and documents. A publisher shall not publish any law of Pakistan unless, s/he is registered with the cell, and the proposed publication is reviewed by the cell and certifies that the proposed publication is accurate and up-to-date since the date of issuance of the certificate.

According to the law, the federal government would compile and maintain an updated and accurate version of the federal laws of Pakistan with translation in Urdu both in paper and electronic form. Besides other purposes, this repository would be used to determine the accuracy of the material submitted by a publisher for review under the Act. A similar task has been assigned to the provincial governments' vis-à-vis the provincial laws. The law also requires the federal government and all provincial governments to ensure the safe custody of the Gazettes of Pakistan and Gazettes of the respective province containing laws of Pakistan concerning the federation or the province and the publications of the updated and accurate versions of the respective laws of Pakistan.

Responding to the challenge, the Senate of Pakistan created a Committee on Delegated Legislation in 2016. This new parliamentary initiative to check all past and present delegated legislation will be scrutinising the delegated legislation of ministries/divisions and report to the Senate whether the powers to make rules, regulations, bye-laws, schemes or other statutory instruments conferred by the Constitution or delegated by the Parliament have been timely and properly exercised within such conferment or delegation, as the case may be.

The Committee's function includes examining the laws on eight benchmarks and is empowered to recommend annulment wholly or partially or suggest amendment in any respect. Up until March 2017 three quarterly reports submitted by the Committee indicate that it is facing teething problems because its task is huge and requires ample specialist human resources with legal backgrounds that are also well versed in the legislative field. The effectiveness of this Committee will usher in a new culture of post legislative scrutiny and parliamentary oversight.

Box 6: Pakistan Senate Committee on Delegated Legislation

According to the Rules of Procedure and Conduct of Business in the Senate of Pakistan, the Functions of the Committee on Delegated Legislation shall be the following or such other as may be assigned to it from time to time:

- (i) The Committee shall propose legislation and formulate policy for the laying of each rule, regulation, bye-law, scheme or other statutory instrument (hereinafter referred to as the Rules) framed in pursuance of the Constitution or the legislative functions delegated by the Parliament to a subordinate authority.
- (ii) When the rules are so laid the Committee shall, in particular consider:
 - (a) Whether the Rules are in accordance with the provisions of the Constitution or the Act of Parliament pursuant to which these are made;
 - (b) Whether the Rules contain matter which in the opinion of the Committee should be more properly dealt with in an Act of Parliament;
 - (c) Whether the Rules contain imposition of taxation;
 - (d) Whether the Rules directly or indirectly bar the jurisdiction of the Court;
 - (e) Whether the Rules give retrospective effect to any of the provisions in respect of which the Constitution or the Act does not expressly give any such power;
 - (f) Whether the rules appear to make some unusual or unexpected use of the power conferred by the Constitution or the Act pursuant to which these are made;
 - (g) Whether there appears to have been an unjustifiable delay in publication or laying the Rules; and
 - (h) Whether for any reason, the form or purport of the Rules require any elucidation.

Other than the formation of Committee, the Senate of Pakistan has also published an 'Alphabetical Catalogue of Federal Laws of Pakistan-1836 to 2014' compiled by Senator (R) Ch. Muhammad Anwar Bhinder in 2016.

Besides these procedural aspects, the constitutional commands are that no law in the country shall be repugnant to the injunctions of Islam - the State religion and that the State shall not make any law which takes away or abridges the fundamental rights guaranteed in the Chapter of Fundamental Rights and Principles of Policy of Constitution of Pakistan, 1973. To judge conformity with the principles of Islam there is a constitutional body namely; Islamic Ideology Council (IIC). The IIC often complains that their reports have not been discussed in the Parliament. Up until 2012 there was no institutional mechanism to ascertain conformity of laws to the constitutionally guaranteed fundamental rights. The only remedy available was recourse to the courts. In 2012 the Parliament established the National Commission for Human Rights (NCHR). The NCHR Act entrusts this task to the Commission operationalised in 2015. The efficacy of these mechanisms has yet to be put to any meaningful test. Secondly, the Parliament has no role in concluding, signing or in ratification

of the International Treaties. These treaties are not formally laid before the Parliament that has a logical role to synchronise domestic legislation with the country's international commitments and obligations. At least four unsuccessful attempts had been made through the private member bills to create the role of the Parliament vis-à-vis international treaties.

In the 21st century, Pakistan has embarked on rights-oriented modern legislation. For example, laws such as the National Commission for Human Rights, 2012, the National Commission on the Status of Women Act, 2012 and the Right to Information laws. These parliamentary measures aimed at civility face enormous resource challenges. Ostensibly, the laws make them independent statutory bodies and their mandate includes a sort of check on the executive. But for their budgetary allocations, invariably the executive reduces their legal worth to just another line or attached department. This resource dependence deprives these institutions of their bite.

One benefit is that these conversations have started appearing on parliamentary agendas. In order to achieve tangible results, the following recommendations might be worth consideration;

- The Parliament and the provincial assemblies shall undertake a democratic review of all laws enacted during the colonial era to indigenise them by incorporating the spirit of an independent/free nation. This is important because the intent of most of the colonial laws was to control the subjects
- The Parliament and the provincial assemblies shall also review the ordinances that were promulgated during military regimes and were later indemnified without parliamentary scrutiny of each ordinance. Most of these laws contain the vocabulary, idiom and glossary of authoritarian military regimes and talk about the Provisional Constitutional Orders/Martial law proclamations etc. It is possible that through reference to archived legislation the statutes book can be cleansed
- The work of the Senate's Functional Committee on Delegated Legislation shall be generously funded and strengthened to undertake its mandate as early as possible. The synchronisation of rules with the laws will impact the effectiveness of their implementation,
- The Parliament shall be given a role in ratification and implementation of international treaties,
- The ministries of law at the federal and provincial levels shall expedite their work to collect accurate versions of laws, translate them in Urdu and regional languages and explore possibilities of preparing authentic audio and video versions for illiterate citizens,
- Special campaigns shall be designed for legal socialisation of black letter laws among citizenry to promote a culture of Rule of Law,
- Special training shall be designed for institutional internalisation and subsequent effective operationalisation of laws in the country, and
- The communication vectors need to be improved within the tri-chotomy so that a system of constant feedback to improve the country's legal regime is established. There is one example from October 2010 in which the Supreme Court urged the Parliament to review some Articles of the 18th Constitutional Amendment pertaining to the appointment of judges in the superior judiciary. which the Parliament was obliged through the 19th Constitutional Amendment.

All this is important for the culture of Rule of Law in Pakistan and to harness the civility-based dividends of legislative inputs made by the parliamentary minds and institutions. To achieve this goal, a culture of post-legislative parliamentary scrutiny is pivotal.



4.8. South Africa: External expert panel reporting to parliament

In January 2016, the Parliament of South Africa commissioned a panel of experts to examine the effects of laws passed by the National Assembly since non-racialised majority-rule was established in 1994. The new constitution of South Africa, formally adopted in 1991, sought to eradicate poverty and eliminate racism in the provision of state services, and on that basis unify the country as a 'rainbow nation' after 40 years of a racially divided apartheid system.³⁹ Examining the role that legislation has or has not played in creating a unified and equal nation is the underlying aim of this expert panel.

Review Methodology

The National Assembly's Speaker's Forum, a body comprised of the Chief Whips of the three main parties in parliament and two MPs representing the interests of all other political parties, formally commissioned a 17-member 'High Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change'. The panel is chaired by a former President of the Parliament, Kgalema Motlanthe.

Over 1,000 laws have been promulgated since the start of South Africa's new democracy. The task of the panel is to investigate their impact in terms of four key policy areas: Poverty, unemployment and inequality; Creation and equitable distribution of wealth; Land reform, restitution, redistribution and security of tenure; Nation-building and social cohesion.

³⁹ 'Rainbow Nation' is the term given to South Africa by the first President of the new Republic of South Africa, Nelson Mandela, to convey the principle of all people being equal irrespective of race, gender, or sexuality

The panel is comprised of leading academics and policy specialists and has been divided into four working groups, with each group focusing on one policy area. These groups are currently holding public hearings in each of South Africa's nine provinces to solicit their views on the negative impact of certain laws. Each working group was required to report its findings to the House by the end of 2016, and a combined final report is set to be put before parliament in 2017.

Principle Mandate

The normative case for such a post-legislative review is grounded in South Africa's political history, and the determination of its four categories are supported by well-documented evidence. After 40 years of white-minority rule, the new National Assembly of South Africa was tasked with ensuring that the country's laws were not only non-racial in their scope of application, but also able to reverse the effects of the country's previously racialised system of government while upholding key principles of the new constitution. Repealing apartheid laws and reversing decades of their racialised effects in ways that are non-racial, and through a parliamentary process of considerable public participation, was a challenge that consumed the first two terms of the new National Assembly (1994-1999; 1999-2004) in particular. The laws passed during this period were hailed by international experts, academics and civil society as exemplary for upholding liberal values in ways that far exceeds most advanced nations, and the inclusive process that was followed by the legislature in making them. Since this time the National Assembly has been consumed in overseeing the government and overseeing the government's increasing number of requests to amend them but has yet to embark on any process of introspective review. The internal procedures of the National Assembly provide only for the scrutiny of delegated legislation, and which has, since the start of the new parliament, been ineffective in its work with endless lists of outstanding secondary legislation to review tabled before it. Conducting this post-legislative review is timely, 22 years since the new democracy started.

In addition, the identified four areas of legislative review are grounded in mounting evidence of the country moving backwards rather than forwards in key areas. The area of 'poverty, unemployment and inequality' as an identified area of review speaks to the need for policy-makers and parliament to understand why the numbers of individuals living below the poverty line in South Africa has increased since 2009 from 31.3% to 35.9%.

The category of laws affecting the creation of wealth are likely to have been identified for post-legislative review on the basis of South Africa's declining rate

of economic growth in recent years, as well as international reports suggesting that the country's governance structures are the root cause of the problem. The World Bank has ranked the country as 73rd in the world for its ease of doing business as certain laws of the country have been tightened to make it a harder place to start a business or invest in as an international organisation.

The two remaining categories of legislation under review as those relating to land reform and nation-building stem from evidence that the government's policy in both areas has yet to yield much effect. In the area of land redistribution, for example, only 7.5% of land has been redistributed to the black population which in 1994 held a white to non-white distribution of 87% to 13% respectively. Finally, while only 9.6% of South Africa's population regularly speak English it is still the dominant language of state institutions and the media.

Critical Reflections

While the normative and factual basis of this post-legislative review may be clear, the precise scope and mandate of the review is not. For example, it is not clear whether the quality of a legislation's technical construction will form any part of the panel's review process, or the extent to which the panel will focus on the link between a law's technical composition and social outcomes, although this is likely to only become apparent once the panel has received submissions. The composition of the panel to date, not being comprised of legal drafters or implementation experts, seem to suggest that the process is policy focused. Public commentary on the review also conveys this impression with NGO's and civil society making submissions that in essence focus on the principle aims of the legislation rather than the quality of their construction and the degree to which they have been applied. In addition, the approach taken by the review panel is to solicit broad-based public participation on the programme's identified themes. Soliciting these submissions, while important, will make it harder for the panel to grapple with the technical quality of relevant Acts not least because they are focused directly on the issues presenting critical challenges that are bitterly contested amongst politicians in everyday life.

Perhaps owing to the publicised nature of the process, it is also not clear who the referent object of the review is between government as policy-maker and parliament as legislator. On the one hand, what is being answered by this post-legislative review process is whether, and the degree to which post-apartheid legislation has assisted or is assisting the country to eradicate poverty and ensure equal access to basic provisions. By implication the review is a reflection on parliament's post-1994 constitutional

performance as it details the success with which certain laws passed by the National Assembly have redressed the injustices of the past and transformed people's lives. To this effect, the Chair of the panel commented that 'if people feel that their areas of interest are over-regulated we have to recommend an alignment (...) if ruled to be unconstitutional then it goes back to Parliament and they must tweak it accordingly'.

On the other hand, because the review is based on thematic areas rather than, in all cases, identified Acts or sections of legislation, it seems predominantly about the government's policy selection rather than a policy's legislative construction. Moreover, what is being reviewed is not a matter of technical construction, but the government's policy direction. For example, under the theme of Land Reform issues of land rights are being discussed with NGO's submitting that an individual should be able to make a land right's claim dating back to 1913, which is concretely not a question about the quality of a legislation but rather its disputed appropriateness. As a consequence, for the report's recommendations to speak to the cause of the problem and identify appropriate measures to take matters forward, it is essential that it identify where the boundary between policy directive and legislative construction lies. This is especially important considering that many of the laws once celebrated by experts for their quality and purpose, which will be hotly discussed as part of this process, have since been amended as result of the government's shift in policy, and by measures that were concretely non-participatory and authoritarian. A key example is the 2004 Labour Relations Act.

Comparative Conclusions

The process that is being followed in South Africa offers a useful comparative guide for other parliaments that can identify a similar check-point in time around which to examine the impact of legislation already passed. It is also a useful comparator for those parliaments who do not have the internal capacity to engage in such an extensive review, but in which there exists sufficient funding to employ the use of experts to evaluate a parliament's legislative output in a specified area. Even for reviews of a different substantive focus, or where no recent crack in a country's legislative landscape exists, the approach taken to reviewing the impact of laws in South Africa may be usefully considered. For example, the deliberative and reporting structures adopted to offer a model that can be replicated over many different contexts to demonstrate how to coordinate a review of this kind.

The case of South Africa also demonstrates that developing a solid normative aim and building public awareness can lend authority to, and fortify, the

strength and merit of the exercise of post-legislative review. A notable feature of South Africa's legislative review is that it is grounded in important current affairs issues that has enabled it to receive considerable public attention, which in turn is places limelight on a process that usually holds the attention of quite a limited public audience. This spot-light is reinforced by the appointment to the panel of a key leading figure in South Africa's political landscape.

Public participation, brought about by public awareness building, is critical to the legitimacy of any such process in South Africa given its historical transition out of a race-based system of exclusion. However, irrespective of the context the more that people are aware that a review is taking place the greater the chances of it obtaining useful insights into how well a law has been implemented, and the greater likelihood that parliament will be able to establish a solid understanding of the links between legislation and social reality. It also makes it easier for parliament to later address social issues more effectively and efficiently as an additional democratic output. However, as previously noted, a post-legislative review carried out in this way is not likely to make findings and recommendations of a technical nature, and an overly politicised process may ultimately undermine its ability to inform future legislative practices if issues of policy rather than the quality of legislation take over.

In general, in order for South Africa's process of post-legislative review to provide a more useful comparative model for outside application further information on the precise determination of the programme's scope and mandate; criteria of policy review and terms of reference; funding arrangements and payment structures for experts; and finally the role of political parties in its formation are important outstanding areas of critical reflection.



4.9. Switzerland: specialized parliamentary service conducting Post-Legislative Scrutiny

In continental Europe, Switzerland is a front-runner regarding legislative evaluation. Since 2000, evaluation is consolidated in Article 170 of its Federal Constitution and establishes a direct obligation for the Parliament and, indirectly, for the federal administration, to evaluate the effectiveness of the legislation adopted.

There is a great diversity of actors involved in evaluation. The federal agencies are responsible for carrying out evaluations based on an annual evaluation strategy considering the priority areas (and cross-departmental evaluations) determined by the Federal Council. Most of the evaluations are conducted by Ministries and other institutions, not by the Parliament itself. Individual MPs have, however, different instruments to request a ministry to provide information on, or analysis of a topic, which are more or less binding to the Federal Council (government). For instance, MPs can ask a question, launch an interpellation, a postulate or a motion. The Federal Council reports to the Parliament with the results of the evaluation. The reporting procedure is, however, not systematic. There is no obligation for the Federal Council to do so.

The Legislation Projects and Methodology Division at the Federal Office of Justice is the body responsible for developing methodological principles related to law drafting and providing assistance for their application and it is involved in legislative evaluation. In the area of evaluation, it collaborates with the Swiss Evaluation Society (SEVAL).

An evaluation network also exists within the federal administration. The network is the result of an initiative of members of the federal administration interested in evaluation and it is a forum for the exchange of experiences and information. It has no permanent structure and it is open to individuals involved in the management of all state bodies. The mission of the network aims, amongst others, to a) facilitate exchanges between specialists by proposing meetings on specialised themes related to evaluation b) contribute to quality assistance in the field of evaluation. The network has existed since 1995.

In accordance with the Federal Constitution, the Swiss Parliament may evaluate the effectiveness of measures adopted by federal authorities and these evaluations include monitoring the application of legislation. In 1991, the Federal Assembly set up the Parliamentary Control of the Administration (PCA), a specialised service that carries out evaluations on behalf of the Parliament.⁴⁰

The PCA is a specialised unit that conducts evaluations independently from the executive. It supports the

monitoring activities of the Parliament through scientific assessments and evaluates the concepts, implementation and impact of the measures taken by the federal authorities. The PCA works on the basis of mandates on behalf of parliamentary committees. Its methods are based on the standards set by the Swiss Evaluation Society and international associations.

As a Unit within the Parliamentary Service, the legal bases of the PCA are set out in the Parliament Act and the Parliamentary Administration Ordinance. In particular, Article 67 and 153 of the Parliament Act and Article 10 of the Parliamentary Administration Ordinance provide the PCA with substantial rights to information: a) the PCA deals directly with all federal authorities, public agencies and other bodies entrusted with tasks by the Confederation and may request from them all relevant documentation and information, b) the principle of professional confidentiality does not restrict the authorities' obligation to provide information, c) the PCA may call on the services of experts outside the federal administration, who are therefore granted the necessary rights. The independence of the Unit is also mentioned in the Ordinance. The recruitment and appointment of the head and staff of the Unit happens according to the parliamentary service recruitment rules.

Established in 1991, the Unit is now 25 years old and it was created at a time when there was public perception that the administration of Ministries did not share information as required. Parliament wanted to strengthen its oversight role.

The Unit was designed as an expert unit to provide studies to the Oversight Committees of parliament. The studies are developed based upon a mandate received by the Oversight Committees. The Unit cannot decide to conduct research on its own. The Unit has to make suggestions but it is for Committees to decide what is followed-up. PCA has a list of criteria that must be fulfilled for it to suggest an evaluation. One of the main criterion is a gap in available information or gap in analysis. Another criterion is the likelihood that the legal basis of the policy under investigation will not be changed in the next two or three years and, therefore, that the outcome of the research remains relevant when the study has been completed.

The Committees decide on basis of short descriptions of the topics that fulfil the criteria. Once the Committees decide which topics will be researched, the Unit drafts a project outline/ToR of the research, including the methodology which will be applied; and which options (on content) can be developed in the study.

From the drafting of the project outline until the final report takes approximately 14 to 16 months, or 150 to 220 person/workdays.⁴¹

⁴⁰ <http://www.parlament.ch/e/organe-mitglieder/kommissionen/parlamentarische-verwaltungskontrolle/Pages/default.aspx>

The Unit has a budget to hire experts and outsource part of the work. Outsourcing can take place in two ways: (1.) an expert provides coaching services to the Unit; giving hints and suggestions of where to search for analysis and data. The coaching type of outsourcing is applied when the Unit deals with a topic on which it lacks expertise or previous working experience; (2.) an expert or expert institution conducts parts of the analysis, which can be a survey, case study or statistical analysis. The ToR or research outline already includes information about, and what kind of outsourcing will take place. The Unit decides on outsourcing based upon the procurement legislation.

The Unit has fewer than five staff and issues approximately three (large) research reports per year. The Unit makes suggestions for the Committees (10-15 suggestions or 2-3 per sub-Committee); then the Committees need to decide on which three subject areas will be selected. They need to bear in mind that the resources and time available are limited. The issue is discussed at a Coordination Group, which brings together the chairpersons and vice-chairpersons of the Control Committees and the chairpersons of the sub-Committees of the Control Committees. Once the choices have been made, they must be approved by the plenary session of the Control Committees. The Committees try to make these decisions by consensus.

The Swiss evaluation standards follow closely the evaluation standards of the Joint Committee on Evaluation in the USA. There are four groups of standards: utility, feasibility, correctness/accuracy and propriety.

There is a close link between policy evaluation and legislative evaluation. The Unit usually starts from evaluation of a policy area, which might be affected by various laws, and verifies the legal basis of what the ministries are doing and whether the laws indeed have the desired effects.

The Unit has access to all information except the minutes of the meetings of the Federal Council and the classified information. Often, the issue is knowing what kind of information is available and can be requested. The federal administration must disclose the kind of information that is available and, given the rights of information in the law, usually readily provides the requested information.

Access to information at the international level is more complicated, depending on the information made available by other countries. Often there is useful comparative data accessible through public sources such as EUROSTAT.

The follow-up to evaluation reports are not conducted by the Unit itself. The Unit presents the findings to

the Committee, and the Committee decides on the recommendations it can deduct from the research. Committees draft their recommendations. The Unit does not interfere in the process of compiling the recommendations, since it is more of a political process. This contributes to the independence of the Unit. The Unit does carry out a fact check to verify that the recommendations are based on evidence in the research conducted.

Finally, it is important to mention the role of the Swiss Federal Audit Office as the supreme independent supervisory body that supports Parliament and the Federal Council. The Audit Office (Article 5 of the Federal Auditing Act) has the competence to perform audits and evaluations of federal policies that have significant financial implications. An evaluation unit is established within the Federal Audit Office.⁴²



⁴¹ Interview with Simone Ledermann of PCA, March 2016.

⁴² See the presentation "The Swiss Parliamentary Control of the Administration (PCA) and the NAO: Similarities and differences", 7th December 2015, NAO, London, by Simone Ledermann, 19 p.

	Legal basis for Post-Legislative Scrutiny	PLS Memorandum / Reports by the Executive	Point in time / frequency of review	Special PLS Committee in parliament	Standing committees' role in PLS in parliament	PLS support unit in parliament / government	Public availability of PLS reports
UK Westminster parliament	Government policy since 2008, Standing Orders	Yes, by the competent Department	3 to 5 years after Royal Assent	No	Yes	Better Regulation Unit in gov. Departments	Yes, on website of Department and parl.
UK Scottish parliament	Standings Orders	No	Recommendation for 3 to 5 year after Royal Assent	Yes	Yes	No	Yes
Belgium	Law on PLS Committee; RoP of Committee	No reports by Executive. Rulings by Court of Arbitrage or Report of General Prosecutor	3 years upon entry into force of legislation	Yes	No	No	Yes, annual report of PLS Committee is on parliament's website
Canada	Standings Orders	No info	Not fixed	Joint Committee for the Scrutiny of Regulations	Yes	Centre of Excellence for Evaluation	Yes, on website of Department
India	No info	No info	No info	No info	No info	No info	No info
Indonesia	Law on Parliament DPR	No	Not fixed	Committee on Legislation, BALEG	Yes	Centre for PLS in parliament DPR	Sometimes
Lebanon	Rules of Procedure	No	Not fixed	Special Committee on PLS	No	No	No
Montenegro	Rules of Procedure	Yes	Committees discuss on six-monthly basis	No	Yes, 7 out of 14 Committees	Regular Committee staff	Yes, on parliament's website
Pakistan	Rules of Procedure and Conduct of Business in Senate	No	Not fixed	Senate Committee on Delegated Legislation	No	No	No
South Africa	No info	No	Not fixed	Expert panel upon request of parliament	No	No	No info
Switzerland	Constitution; Parl. Act; Parl. Admin. Ordinance	No	Not fixed	No	Yes	Parl. Control of the Administration (PCA)	Yes, on website of Department and Parliament

V. POST-LEGISLATIVE SCRUTINY OF SECONDARY LEGISLATION

Delegated (or secondary) legislation is law made by Ministers under powers delegated to them by Parliament in primary legislation. Delegated legislation refers to law-making which takes place outside the legislature and it is expressed through rules, regulations, by-laws, order, schemes, etc. It can be used to amend, update or enforce existing primary legislation without Parliament having to pass a new Act.

The factors leading to the growth of delegated legislation may be summarised as below:

- **Parliamentary pressure:** The bulk of the business of the Parliament has increased and often it has no time for the consideration of complicated and technical matters.
- **Emergencies:** Certain emergency situations may arise which necessitate special measures.
- **Technicality of subject-matter:** certain matters covered by delegated legislation are of a technical nature which require handling by experts. In such cases, powers to deal with such matters are given to the appropriate administrative agencies to be exercised as per the requirements of the subject matter.
- **Expediency and flexibility:** The practice of delegated legislation introduces flexibility into the law. At the time of passing any legislative enactment, it is impossible to foresee all the contingencies.
- **Piloting:** The practice of delegated legislation enables the executive to experiment and pilot new approaches. This method permits rapid utilization of experience and implementation of necessary changes in application of the provisions in the light of such experience.

Despite its merits, there are also disadvantages to delegated legislation, for example: it is not well publicised, unlike parliamentary debates on bills; it is not reviewed by parliament properly; it reflects policy complexity and therefore it is impossible for anyone to keep abreast of all delegated legislation.

In Westminster-type parliaments, delegated

legislation is often described by the term 'Statutory Instruments'. Statutory instruments are subject to different degrees of parliamentary scrutiny.⁴³ In broadly ascending order of rigour these are:

- Those which have only to be made to come into effect;
- Those which should be laid before Parliament after being made;
- Those which should be laid before Parliament after being made and which are subject to the provision in their parent Act that if either House resolves within 40 sitting days that the instrument should be annulled they will not come into effect (the negative resolution procedure);
- Those which are required under the terms of their parent Act to be laid before Parliament in draft and to be approved by each House before being made and brought into effect (the affirmative resolution procedure);
- A small category of instruments which are laid before Parliament when made, rather than in draft, but which cease to be of effect if not approved by each House within a period specified in the parent Act;
- So-called 'super-affirmative' instruments which, except in certain urgent cases, should be preceded by 'proposals' which are subject to consultation. This procedure allows for amendments to be proposed by parliamentary committees or others, which the Minister may incorporate in the draft order.

Following the country examples on approaches to Post-Legislative Scrutiny of primary legislation, this chapter provides information on approaches to Post-Legislative Scrutiny of secondary legislation or regulations, in particular in Canada, Australia and India.

One of the interesting features of the Canadian Parliament is its Standing Committee on the Scrutiny of Regulations.⁴⁴ Its mandate is to scrutinise government regulations and other statutory instruments. It was noted that Parliament

⁴³ Hansard Society Briefing Paper, Issues in Law Making – Delegated legislation, London, 8 p.

⁴⁴ <http://www.parl.gc.ca/marleaumontpetit/DocumentViewer.aspx?Lang=E&Sec=Ch17&Seq=3>

increasingly delegates legislative authority to the Executive branch of government through enabling statutes that allow a government body to make rules and regulations. Parliamentary scrutiny of delegated legislation reflects the recognition that because of the scope of modern government, the power to establish rules has increasingly been turned over to the executive. If Parliament is not to be seen as

abdicating its legislative function to the executive, then adequate parliamentary scrutiny is a necessary accompaniment to the growth of delegated legislation. Thus, based on the Statutory Instruments Act (1970), the Standing Committee examines regulations made by the executive to make sure they are in conformity with the laws passed by the legislature.

Box 8: Criteria to review secondary legislation in Canada

The Canadian Standing Committee on the Scrutiny of Regulations has established a set of criteria to review secondary legislation. The Committee reviews whether any regulation or statutory instrument:

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

The scrutiny criteria in accordance with which the Committee reviews statutory instruments deal with matters of legality and the form of regulations, and not the merits of regulations or the policy they reflect.

There are two principal reasons why the Joint Committee has always tried to refrain from reviewing the merits or policy of regulations. The first is tied to the desire to maintain a non-partisan approach. It is easier to avoid excessive partisanship if the

review of regulations does not involve challenging the governmental policies they implement. This approach is shared by scrutiny committees in most Commonwealth jurisdictions. Secondly, policy review of regulations would require human resources which the Committee does not have. The making of policy choices requires professional expertise in the relevant subject area, and it would not be possible for the Committee to maintain a large staff of experts

capable of providing the required kind of advice in all regulated areas.

On the other hand, it must be recognised that some of the Committee's scrutiny criteria require consideration of the merits of a regulation to some extent. For example, in determining whether a regulation amounts to "an unusual or unexpected use of power", a preliminary inquiry into the policy which it implements may well be necessary. In addition, a decision that a regulation amounts to the exercise of a substantive legislative power which is properly the subject of direct parliamentary enactment will consider policy considerations.⁴⁵

The Committee has the "power of disallowance" (or "negative resolution procedure"). Disallowance is one of the traditional means at the disposal of Parliaments to control the making of delegated legislation. Generally, this term refers to any procedure whereby parliamentarians are given an opportunity to reject a subordinate law made by a delegate of Parliament. The power of disallowance applies to all regulations that are referred to the Committee.

The Canadian procedure is unique in that it can only be initiated by the Joint Committee for the Scrutiny of Regulations. In any case where the Committee considers that disallowance is appropriate, it can make a report to the Senate and the House of Commons containing a resolution to the effect that regulation "X" or any portion of regulation "X" should be revoked. Before doing so, however, the Joint Committee must give the regulation-making authority at least 30 days' notice of its intent to propose the disallowance of the regulation. For disallowance to take effect a disallowance resolution must be adopted by both the Senate and the House of Commons. It should be emphasised that a vote on a report is not to be treated as involving a question of confidence in the Government.

From 1986 to 2002 the general disallowance procedure was only set out in the Standing Orders of the House of Commons. During that period, there were nine disallowance reports. The 1986 procedure was seen by some to be flawed, or at least incomplete, because it had no basis in legislation (relying on the internal proceedings of the House) and did not involve the Senate. In 2002, the disallowance procedure was put on a statutory footing by entrenching it in the Statutory Instruments Act. As well as providing a legislative basis for disallowance, the new procedure requires a disallowance report to be adopted in both Houses

of Parliament. There have been two disallowance reports tabled under this new procedure.⁴⁶

The Standing Joint Committee for the Scrutiny of Regulations is assisted by four staff, which are employees of the Library of Parliament who are seconded to the Committee on a full-time basis.

Finally, it is worth mentioning that several Australian jurisdictions, as well as New Zealand and the United Kingdom, have parliamentary committees whose mandate includes scrutinizing bills specifically to identify provisions that may constitute overly broad delegations of power. Sometimes this is part of a broader mandate to focus on the effect of proposed legislation on individual rights and liberties.⁴⁷

In discussing Post-Legislative Scrutiny of secondary legislation it is worth taking note of the innovations of the Australian Parliament.⁴⁸ The Regulations and Ordinances Committee of the Senate examines "all regulations, ordinances and other instruments made under the authority of Acts of the Parliament, which are subject to disallowance or disapproval by the Senate and which are of a legislative character".⁴⁹ Senate Standing Orders require the Regulations and Ordinances Committee to examine each regulation, etc. to ensure: (a) that it is in accordance with the statute; (b) that it does not trespass unduly on personal rights and liberties; (c) that it does not unduly make the rights and liberties of citizens dependent upon administrative decisions which are not subject to review of their merits by a judicial or other independent tribunal; and (d) that it does not contain matter more appropriate for parliamentary enactment.

Another Australian innovation in legislative scrutiny is the concept of "regulatory impact assessment". In various Australian jurisdictions, legislative scrutiny committees have an oversight role in relation to requirements that subordinate legislation be subject to a regulatory impact assessment prior to being made. This involves, in relation to each piece of subordinate legislation, an assessment (usually demonstrated by way of a "regulatory impact statement" or "RIS") being made as to:

- what is the problem being addressed?
- how significant is the problem?
- why is (new) government action required to address the problem?

⁴⁵ Bernhardt, Peter, Parliamentary scrutiny of regulations: an overview. Paper Prepared for members of the Standing Joint Committee for the Scrutiny of Regulations, Ottawa, January 2016, p. 8-9

⁴⁶ KIRKBY, Cynthia. The Standing Joint Committee for the Scrutiny of Regulations, Library of Parliament Research Publications, April 2014, p. 4; available at <http://www.parl.gc.ca/Content/LOP/ResearchPublications/2014-18-e.pdf>.

⁴⁷ Bernhardt, Peter, Parliamentary Scrutiny of Delegated Legislation in Canada: Too Late and Too Little? in: The Loophole—Journal of the Commonwealth Association of Legislative Counsel, Issue No. 3 of 2014, p. 73-84.

⁴⁸ Argument, Stephen, 'Legislative Scrutiny in Australia: Wisdom to Export?', 2011 32(2) Statute Law Review, p. 116-148. <http://slr.oxfordjournals.org/content/32/2/116.short>

⁴⁹ http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances

- is government intervention the best way of correcting the problem?
- is there relevant regulation already in place?
- why is additional action needed?
- what other courses of action might achieve the desired outcome?
- what are the costs and benefits associated with each of the choices?
- what effect will each of the options have on business and on individuals?

Another innovation with ramifications for legislative scrutiny is the staged repeal of subordinate legislation. In various Australian jurisdictions, subordinate legislation is automatically repealed after it has been in force for a certain amount of time. This process is sometimes referred to as “sun-setting”. Though legislative scrutiny committees do not necessarily have a hands-on role in the process. Sun-setting of subordinate legislation is important because it requires the makers of subordinate legislation to consider, as the “sunset” date approaches, whether the subordinate legislation is still required and, if so, whether it should be re-made in the same form or in an amended form.

It should be noted that the value and effectiveness of sun-setting is not unquestioned. In the view of the legal adviser to legislative scrutiny committees of both the Australian Senate and the Australian Capital Territory (ACT) Legislative Assembly, any process that forces the bureaucracy to consider, on a regular basis, whether legislation is, in fact, necessary, can be considered a good thing.⁵⁰

In India, parliamentary control over secondary or delegated legislation is considered part of the constitutional role of parliament in overseeing the executive. There are three types of oversight.⁵¹

Firstly, there is direct but general control over delegated legislation. This can be exercised through the debate on the Act which contains delegation, through questions and notices, and by moving resolutions and notices in the house.

Secondly, there is direct special control over delegated legislation through the technique of “laying” on the table of the House rules and regulations framed by the administrative authority. In the UK, the technique of laying is extensively used, based on the Statutory Instruments Act (1946). The most common form of laying in the House provides that the delegated legislation comes into immediate effect but is subject to annulment by an adverse resolution of the House. In almost all the Commonwealth countries, the

procedure of ‘Laying on the Table’ of the Legislature is followed. It serves two purposes: firstly, it helps in informing the legislature as to all rules that have been made by the executive authorities in exercise of delegated legislation and, secondly, it provides a forum for the legislators to question or challenge the rules made or proposed to be made. In India, there is no statutory provision requiring ‘laying of’ all delegated legislation. Therefore, the Scrutiny Committee of the Indian Parliament recommended that all Acts of Parliament should uniformly require that rules be laid on the table of the House ‘as soon as possible’, and that the laying period should uniformly be thirty days from the date of final publication of rules.

Thirdly, there is indirect control exercised by Parliament through its Scrutiny Committees. In the UK and India, there are Standing Committees of Parliament to scrutinise delegated legislation. The UK House of Commons has a Select Committee on Statutory Instruments. Such a committee, known as the Committee on Subordinate Legislation of Lok Sabha, was appointed in 1953. The main functions of the Committee are to examine: (1.) whether the rules are in accordance with the general object of the Act, (2.) whether the rules contain any matter which could more properly be dealt with in the Act, (3.) whether it is retrospective, (4.) whether it directly or indirectly bars the jurisdiction of the court, and questions alike.

The Parliamentary Research Service (PRS) of the Lok Sabha counted that, of the 1515 subordinate legislations laid before the Lok Sabha between 2008 and 2010, a total of 44 were considered by the Committee on Subordinate Legislation. There is also a similar Committee of the Rajya Sabha which was constituted in 1964. It discharges functions like the Lok Sabha Committee.

⁵⁰ Argument, Stephen, Legislative scrutiny: exporting wisdom to Westminster (revisited), paper for conference at UK Parliament, 2010, p. 4

⁵¹ Shreeta Nath and Bharat Kumar Singh, Effectiveness of Parliamentary Control over Delegated Legislation, National University of Study and Research in Law, Ranchi, India, <http://www.legalservicesindia.com/article/article/effectiveness-of-parliamentary-control-over-delegated-legislation-1894-1.html>

VI. INTEGRATING GENDER ANALYSIS INTO POST-LEGISLATIVE SCRUTINY

Gender mainstreaming in policy and legislation is based on the understanding that government actions and interventions can, and frequently do, affect men and women differently. Therefore, systematic analysis and evaluation of law and policy, based on how they impact women, men and other relevant demographic groups, are necessary to: 1) identify and avert any potential disadvantages they may create; 2) ensure women and men have access to the same opportunities and legal protections; and, 3) safeguard value for money and promote government efficiency by ensuring policy is appropriately designed to meet the circumstances and needs of affected groups.

The concept of gender mainstreaming emerged from the United Nations' 1995 Beijing Platform for Action as a policy mechanism to address persistent and enduring gender inequalities worldwide. The approach has since been formally adopted by numerous governments, but there are significant differences in how gender mainstreaming is interpreted as well as in the specific tools used by different societies to fulfil this commitment.

Where gender mainstreaming is incorporated into legislative processes, this is most frequently done through the application of gender analysis. Gender analysis is an approach in which evidence, such as sex-disaggregated data or consultation findings from stakeholder groups, is collected to ensure that the final product does not create otherwise unforeseen disadvantages for one group over another, particularly for women and girls. Gender analysis also requires policy makers to challenge assumptions about how a government programme or service should be structured, and to ask detailed questions about who is affected by a problem or issue and how they would be impacted by proposed solutions. A frequently cited example of where this has made a difference is the design and funding of public transportation systems, which were traditionally constructed to accommodate male work patterns until greater research and analysis revealed that women are more likely to use public transportation, that they have different travel patterns related to employment, and that they use it for many more purposes than getting to and from work.

6.1. Gender mainstreaming and Post-Legislative Scrutiny

When gender mainstreaming and post-legislative scrutiny occur in the same space, one of the following formations is typically employed: 1) a systematic obligation on all institutions in the policy development process to apply gender analysis throughout; and/or, 2) the establishment of dedicated parliamentary gender equality committees. Both have their advantages. Gender analysis programmes offer a comprehensive approach to applying a gender lens to policy, but dedicated equality committees can often go deeper and spend more time exploring specific issues and processes. Some systems use a combination of both methods.

Canada offers a leading example of the universal application of gender analysis. Canada's GBA+ (Gender Based Assessment+) policy⁵², requires all government departments and agencies to assess policy and regulatory decisions around a framework that starts with gender and then pulls in factors related to multiple social, economic and cultural categories, referred to as 'identities.' This process compliments Canada's 'sunset' approach to post-legislative scrutiny by ensuring that issues related to gender are identified and measured from the outset, and can therefore be reassessed when the relevant timeframe has elapsed.

New Zealand created a similar model, compelling policy makers to develop options based on consideration of gender-specific information and to, ex post facto, scrutinize the quality of these recommendations.⁵³ Guidelines state that policy implementation should be monitored and evaluated for its contribution towards achieving better outcomes for women, and modified if this is not being realised, but there is no formal mechanism to trigger these actions.

Gender equality committees also offer a means through which parliament can apply a gender lens to the legislative process. These are typically select committees with specific remits that involve scrutinizing government initiatives for their contribution

⁵² Status of Women in Canada is the government department charged with implementation of GBA+. Details can be found at <http://www.swc-cfc.gc.ca/gba-acis/index-en.html>, accessed April 2017.

⁵³ The Full Picture: Guidelines for Gender Analysis, a toolkit developed to assist government departments and agencies in New Zealand, www.ircwash.org/sites/default/files/MWA-1989-Full.doc

towards gender equality and human rights. The Gender Equality Committee in Croatia, for example, is tasked with monitoring the implementation of gender equality in legislation, including execution of the National Gender Equality Policy. The Equality and Human Rights Committee in the Scottish parliament examines the government's compliance with human rights and equality commitments, including through scrutiny of legislation. Similarly, the Committee on Gender Equality in South Korea conducts an annual audit of the relevant government ministry.⁵⁴

There are muted versions of these methods in operation as well. Some systems employ gender analysis, but only on specific pieces of legislation, or only at the inception or consultation phases of policy development. This can lead to specific gender-based indicators and targets by which the subsequent law or policy are assessed and evaluated but, as the approach tends to be more ad hoc, the presence of gender-based measurements to accommodate post-legislative scrutiny is not guaranteed.

And while there are more than 150 parliamentary committees worldwide with remits involving gender-related issues⁵⁵, only about 30 have the dedicated authority required for proper oversight of legislation and policy obligations. Most are positioned only to offer observations, recommendations or thematic reports. Some parliaments may even leave this function entirely to informal women's caucuses, which frequently lack the necessary resources and official status within standing orders. As such, their contributions tend to be piecemeal and easily overlooked.

6.2. Gender budgeting

While there may be a multiplicity of approaches to gender analysis in other aspects of parliamentary work, a more standardised method is emerging when it comes to the budget process. Gender analysis of budgets, or gender budgeting, is a means to assess how and where government is spending its money, which societal groups are being invested in and what this means in terms of economic opportunity and social welfare from a gender perspective. Proponents argue that there is no such thing as a gender-neutral budget⁵⁶ and that a government's economic policies reflect not the cold reality of finances but a society's very values and principles⁵⁷.

Because gender budgeting involves tracking and analysing government spending and/or taxation plans, it can be as readily applied in the ex post phases of policy decision-making as it is in the ex ante stages – i.e., how much and where government is planning to spend money or take in revenue as well as where government has actually spent money or generated revenue. Additionally, because gender budgeting can more readily tie gender equality with better economic outcomes, there is growing support for its application.⁵⁸

How gender budgeting is approached in practice depends on the budget process itself, but it is widely a process of tracking where the money goes and what social policy obligations and statements are made through commitment of resources or tax relief. What tends to vary more among countries is who leads the process. There are broadly three models in use: government-led, government and civil society partnerships, and civil society-led.

Australia⁵⁹ and South Korea offer examples of government-led gender budgeting. In these countries, the responsibility for producing gender budget statements falls on government. These statements are often produced at the same time as the budget itself and offer insights into the extent to which government has backed its policy vision with financial commitments. Both countries, for example, currently seek to increase women's participation in the paid labour force. Gender budget statements offer evidence and analysis of where investments are being made, such as childcare and initiatives to foster flexible working conditions, to support that outcome.

The South African Women's Budget Initiative (WBI) is a model of the partnership approach. It was set up in 1995 by the parliamentary Standing Committee on Finance (now the the Committee on the Status and Quality of Life of Women) in collaboration with two CSOs in order to both share the workload and ensure a degree of technical expertise. The WBI assesses national, provincial, and local budgets from a gender perspective. The WBI has also examined a number of government initiatives in retrospect as part of an effort to measure the costs of apartheid on women and girls.

Budgets in the United Kingdom receive scrutiny on gender terms as well, but the more robust efforts are led by civil society. The UK parliament and the devolved assemblies in Scotland, Wales and Northern

⁵⁴ Palmieri, Dr S., (2011), 'Gender Sensitive Parliaments: A Global Review of Good Practice,' Inter-Parliamentary Union, <http://www.ipu.org/pdf/publications/gsp11-e.pdf>, accessed April 2017.

⁵⁵ See the Inter-Parliamentary Union's database on specialized parliamentary committees, <http://www.ipu.org/parline-e/Instancelist.asp>, accessed April 2017.

⁵⁶ See <http://theconversation.com/gender-neutral-policies-are-a-myth-why-we-need-a-womens-budget-55231> for analysis of the Australian budget process.

⁵⁷ The Wales Budget Group offers an interesting overview and explanation of gender budgeting, http://www.assembly.wales/NAFW%20Documents/cyp_3_-03-09_ade_01b_what_is_gender_budgeting_-_save_the_children_-_additional_information-2.pdf%20-%2006022009/cyp_3_-03-09_ade_01b_what_is_gender_budgeting_-_save_the_children_-_additional_information-2-English.pdf, accessed April 2017.

⁵⁸ 'Making Women Count,' *The Economist*, 23 February 2017, <http://www.economist.com/news/leaders/21717375-sexual-equality-makes-economic-sense-governments-should-measure-it-and-budgets-promote-it-why>, accessed April 2017.

⁵⁹ The Liberal/National coalition government in Australia terminated the government's commitment to producing a gender budget statement in 2014.

Ireland have equality protections in place when it comes to government revenue and spending plans⁶⁰, but a more thorough gender analysis of government financial statements is offered by each nation's respective women's budget group, which assesses the relevant budget process both at the time of its delivery and in its application. These budget groups are coalitions of academics, researchers and experts from the community and voluntary sector engaged in issues affecting women and girls, as well as social and economic welfare policy. They also act as advocates for gender budgeting as a formal process within government and have set a global standard for gender analysis of government finances.

6.3. Options for parliamentary professionals

Like post-legislative scrutiny, parliamentary integration of gender mainstreaming is an area still under development. Its application is affected by the legislative and regulatory processes it seeks to enhance, the capacity of parliamentary staff and parliamentarians to employ it, the resources available to put it into practice, and, significantly, the degree of political will to not just talk about gender equality but to actively seek to attain it.

The overall objective of parliamentary and democracy professionals is to work with partners to integrate this approach throughout all parliamentary processes, not just to inject it in limited areas. The Inter-Parliamentary Union offers the following description of gender mainstreaming:

Gender mainstreaming involves, in part, the following activities: obtaining gender-disaggregated data and qualitative information on the situation of men and women; conducting a gender analysis which highlights the differences between and among women, men, girls and boys in terms of their relative distribution of resources, opportunities, constraints and power in a given context; and instituting gender-sensitive monitoring and evaluation mechanisms, including the establishment of indicators to gauge the extent to which gender equality objectives are met and changes in gender relations are achieved.⁶¹

As this catalogue of activities demonstrates, the practices associated with gender mainstreaming mirror those required for a 'good parliament,' i.e., robust and thorough policy development, higher levels of accountability, rigorous approaches to transparency and oversight, and a demonstrated

commitment to value for money. As such, they complement the workload associated with high-performing and effective parliaments; they do not add to it.

The diversity of approaches to gender mainstreaming also means that there is a spectrum of choices for how to approach this, all of which offer benefits. Identifying which of these to pursue starts with a baseline assessment of where a parliament is now and where it hopes to be in the near term.

Practitioners seeking to assist parliaments in achieving better gender outcomes can pursue or adapt some of the options outlined below. These suggestions are based on areas where parliamentary professionals are likely to already be working, and where gender mainstreaming can (and should) be readily integrated. They are offered in no particular order of priority and none are meant to be rigidly interpreted as what will work best is likely to be situational.

1. Start with evidence-based policy development

and access to data. Parliaments that practice evidence-based policy development use a standard that integrates with and easily accommodates the type of data and detail necessary to introduce gender analysis. As a core component of working on evidence-based policy development, ensure that parliamentarians and professional staff have access to regular, reliable sex-disaggregated data, that they understand the importance of seeking out and analysing this type of information to inform all types of policy development, and that they either have the skills or access to the necessary technical expertise to interpret this data (and other forms of social and behavioural research), and to construct measurable indicators around its application in policy.

2. Assess internal capacities for gender analysis and provide support to strengthen these.

As suggested in the previous point, it is not possible to cultivate sound processes for gender analysis if the internal capacity is not present and the necessary resources are not committed. Rwanda offers a pertinent example. Despite leading the world in women parliamentarians, a 2009 gender audit of Rwanda's Senate found that staff knew the terminology around gender mainstreaming but did not know how to conduct gender analysis.⁶² It is vital to ensure that all professional staff within the legislature have the necessary technical abilities; that research, committee staff, legislative drafters and those supporting the Speaker's office are equipped

⁶⁰ The Equality Impact Statement that accompanies the budget, for example. From a parliamentary perspective, the Human Rights Committee of the Scottish Parliament issued a statement on the government's draft budget in January 2017. The Women and Equality Committee of the UK parliament recommended that Equality Impact Statement that accompanied the government's autumn spending review be "independently evaluated" as it was considered, "insubstantial and lacking in detail." <https://www.parliament.uk/business/committees/committees-a-z/commons-select/women-and-equalities-committee/news-parliament-2015/hm-treasury-equality-analysis-report-16-17/> accessed April 2017.

⁶¹ 'Plan of Action for Gender Sensitive Parliaments,' (2012) Inter-Parliamentary Union, <http://www.ipu.org/pdf/publications/action-gender-e.pdf>, accessed April 2017

with the capacities and information necessary to ensure legislation is equality-proofed and that standing orders accommodate these processes. Programmes seeking to support staff in these areas should first audit current resources, capacities and procedures to identify key gaps and then design supportive programming, including access to learning resources, to address these.

- 3. Identify which mechanism would best serve this parliament.** What would be the best fit for the realities of the relevant parliamentary environment? Is a comprehensive application of gender analysis the best approach? Should standing orders be modified to established a dedicated gender equality committee with the authority to scrutinise relevant legislation? Or, is there scope to fully integrate gender analysis into existing or emerging structures for post-legislative scrutiny? The options are limitless and can all adapt to the dynamics at play, as long as there is a genuine commitment to use these mechanisms as a means to effectively tackle gender inequality.
- 4. Consider gender budgeting as a possible starting point for gender analysis.** Gender budgeting is a form of gender analysis and, when done well, it can be quite powerful. Because it adapts to the existing budget process, it can also offer a more direct route to practicing gender analysis and to revealing some of the implications of policy decisions. It also compliments efforts to improve financial oversight and accountability. If the parliament you are seeking to support would struggle with application of a more comprehensive approach to gender analysis, consider whether gender budgeting would be an accessible and valuable starting point to begin to integrate these types of systems and behaviours.

⁶² Ibid., IPU Gender Sensitive Parliaments, pg. 56.

VII. CONCLUSION: THE CASE FOR POST-LEGISLATIVE SCRUTINY IN DEMOCRACY ASSISTANCE

This comparative study has provided an overview of different practices of Post-Legislative Scrutiny, for primary legislation, and to a limited extent secondary legislation. The study serves two main purposes: first, the study provides parliaments of any kind with comparative examples of how legislative evaluation takes place in different parliaments across the globe. It is hoped this will support the consideration of whether and how to develop such practices within their own parliaments. Second, these insights are drawn together to provide a platform for the Westminster Foundation for Democracy to further discuss and consider how to support parliaments develop this practice where requested.

The experiences shared by the various parliaments of have helped us to identify three different types of democracy-building frameworks within which support for post-legislative scrutiny can take place. These frameworks, [outlined in 7.1 to 7.4 below as Reformatational Post-Legislative Scrutiny, Instructive Post-Legislative Scrutiny and Public-Post Legislative Scrutiny], provide an interesting starting point for our consideration of how to approach developing a democracy-building programme in this area. It has also helped us to identify the possible ways in which WFD could programme in this area [as outlined in section 7.5 below].

7.1. Reformatational Post-Legislative Scrutiny - investing in the democratic foundations of a country

When the change in a country's ruling authority reflects a fundamental shift in the norms and values

that underpin the country's governance system, such as in the case of South Africa, Tunisia and Myanmar, parliaments operate in the context of broken, outdated or inappropriate legal frameworks. The retracing of existing governance structures requires much more than the replacement of certain laws or amendments to others. Within this context, the practice of Post-Legislative Scrutiny is a practice that can support a parliament to situate each existing law on such a scale of unsatisfactory to obsolete, and thereafter provide parliament with a legislative agenda that seeks to (re) build the democratic foundations of a country. This type of review can be referred to as reformatational Post-Legislative Scrutiny.

A clear advantage to countries conducting a reformatational post-legislative review is that it helps to reset the clock on outdated governance systems in ways that ought to give new momentum to the realisation of current social needs. It can also help to re-set the terms of a country's governance structure to one that places the principle of popular sovereignty at its centre, by which the link between citizens' needs and popular governance is upheld by parliament. Democracy assistance providers may support a reformatational post-legislative review in many ways. Some suggestions of which are outlined in the table below.

The Parliament of Myanmar is currently reviewing many pieces of old legislation, including repealing of colonial legislation. One particular challenge is the fact that the old legislation is not available in the Myanmar language (it is in old English). Hence, the laws need to be translated into the national language to be able to conduct a process of Post-Legislative Scrutiny.

Box 9: Reformatational Post-Legislative Scrutiny		
The Challenge	Normative Offer	Practical Solutions
Limited, inappropriate or no legislative foundations on which to assure and coordinate democratic governance	PLS used to promote and justify a review of a country's legislative landscape	Support the establishment and work of a legal review commission, including terms of reference, time-frames, deliberative procedures and referential links with parliament (where necessary).
		Develop a snap-shot and summary of a country's statute book
		Training and capacitating MPs and Staff on Statute book contents
		Support the development of PLS procedures within the legislative process, including any requisite rule changes for second-stage legislative review.

7.2. Instructive Post-Legislative Scrutiny - shaping and consolidating a parliament's democratic place

A second type of Post-Legislative Scrutiny is instructive Post-Legislative Scrutiny. A lack of institutional memory, education and skills places extreme limitations on a parliament's ability to review and write laws that meet, often urgent, social needs on a contemporary basis, let alone consolidate sufficient resources to tackle retrospective legislative review. Within many developing countries, the foundation of knowledge required to produce context-appropriate legislation is often not held by a parliament, that also often struggles to maintain up to date records of debates on bills past and their normative justification. For a parliament to conduct legislative evaluation, it needs a historical handle of how a country has been, and is being governed. Conducting legislative mapping should equip parliament to respond to immediate

social needs through legislative amendments. Instructive Post-Legislative Scrutiny has the potential to develop the knowledge and skills of a legislature, and can do so in a way that enables it to circumvent the constraints of Executive interference.

As the turn-over of MPs and the knowledge dominance of the Executive can pose a challenge to the ability of parliament to evaluate legislation, it is important for parliament to establish, carry out and consolidate legislative mapping as the foundation on which existing as well as proposed laws may be assessed. This is because this sort of activity, like investing in its research and systems of legislative support, is free from executive control. As such it also makes for a long-term investment in the institution and represents an additional form of support that may be provided to an emergent parliament or one operating in a developing context. The following are suggestions of what this may look like from a programme point of view.

Box 10: Instructive Post-Legislative Scrutiny		
The Challenge	Normative Offer	Practical Solutions
Parliament's legislative technical capacity is undermined by Executive dominance and broader governance challenges	PLS practices and procedures to develop holistic law-making skills that support both ends of the law process	Training and capacitating for MPs and Staff on legislative evaluation
		Support the development of PLS feedback mechanisms for findings established by other parliamentary processes
		Advice and training on conducting a legislative mapping

7.3. Public Post-Legislative Scrutiny - Rebuilding a democratic contract

Many developing parliaments operate in a democratic vacuum in that there has been little recent history of a parliament successfully meeting the legislative needs of a people. The process of Post-Legislative Scrutiny offers a way of (re)building a parliament's democratic contract if it establishes visible and legitimate feedback mechanisms with its citizens in ways that strengthen a parliament's representative performance. This aspect of Post-Legislative Scrutiny may be usefully referred to as public post-legislative-scrutiny.

The potential democratic offer of public Post-Legislative Scrutiny is all that an institution would gain from the ordinary implementation of a post legislative

system, plus those gains that would come from opening these procedures and proceedings to the public. For example, a parliament that has established a committee that is tasked with evaluating particular laws may open its proceedings or even procedures to the public.

From the position of an international assistance provider, in order for effective public Post-Legislative Scrutiny to take place, a parliament must seek to proceduralise Post-Legislative Scrutiny in ways that are grounded in forms of public outreach on an inclusive, participatory and equal basis. In essence, public post-legislative review as herein termed entails supporting a parliament to conduct legislative evaluation with additional support being provided to enable public participation and public relations on its content. Some options for what this may look like are listed in the table below.

Box 11: Public Post-Legislative Scrutiny

The Challenge	Normative Offer	Practical Solutions
Lack of effective or established relationships between a parliament and its citizens	PLS processes to redress previous injustices, promote reconciliation and ensure parliament's future role is legitimated	Facilitate public hearings within the review process
		Publication of parliamentary findings and recommendations
		Support practices or community engagement

7.4. Post-Legislative Scrutiny of the legislative process

A fourth type of Post-Legislative Scrutiny can look at the legislative process itself: what lessons can be learned from the process of reviewing and adopting legislation. In some countries in transition, parliament is often under pressure to fast-track or rubber-stamp legislation, due to an emergency or because of a supra-national policy agenda (for instance the European integration agenda in the candidate countries). One of the potential lessons learned could be that the fast-tracking of legislation constitutes an argument in favour of inserting sunset or review clauses, guaranteeing that the newly adopted legislation only remains valid for a limited period of time (sunset clauses), or that it needs to be reviewed mandatory after an established time frame.

When the UK House of Lords Select Committee on the Constitution, Parliament and the Legislative Process debated the policy framework on Post-Legislative Scrutiny, one member advocated post-legislative review "in order to illuminate and see what lessons can be learnt for the future handling of the legislative process."⁶³

7.5. WFD programming on Post-Legislative Scrutiny

As this comparative Study indicates, legislative evaluation may be a constitutional obligation allocated to the Parliament and/or forms part of the oversight function of parliament. To comply with the obligation, Parliaments can establish specialised committees and conduct their own analysis and/or they can rely on the information and reports provided by the Government. Government and the Parliament have distinct roles and contribute to different steps of the evaluation process. The Government, being responsible for the execution of the law, has the means to collect and compile information on how the law is being implemented. On the other hand, the Parliament has the responsibility to exercise oversight of this work.

In its policy advice and capacity building support to parliaments, WFD could suggest various options on how to introduce Post-Legislative Scrutiny:

- (1.) Ministries could be asked to provide regular reporting to parliament on the implementation of laws, possibly

⁶³ Margaret Beckett MP was member of the House of Lords Select Committee on the Constitution, Parliament and the Legislative Process in 2003-2004.

based upon the UK model where the ministries develop a Memorandum on implementation of laws - three to five years after their enactment.

- (2.) Parliament could outsource or commission research on law implementation to external institutions, either autonomous official institutions (such as the Auditor General's Office) or external independent institutions such as Universities.
- (3.) Parliament could conduct its own inquiries on the implementation of selected laws by holding public hearings, collecting evidence and conducting in-house research by staff of the Parliament, such as through a Research Unit or Legislative Unit.

The evident and practical questions arising out of these potential avenues of support that any parliament seeking to develop this area of its work include:

- (1.) What form it should take?
- (2.) What priority should it have?
- (3.) When should it be used?

In answering these questions, parliament may consider the experiences of parliaments as captured within this comparative study as well as others. To do so formally may entail assigning the task to an ad-hoc, special or existing Standing Committee. It may also consider the merits of creating additional layers of post-legislative support by establishing the framework for setting sunset clauses in legislation to prompt mandatory legislative evaluations, or establishing 'trigger' points in which a parliament is prompted to conduct specific review⁶⁴ A final area of consideration may also be to consider whether and how to evaluate the application of secondary legislation (i.e. regulations), which may also be supported through the development of a framework of 'trigger points' to initiate such an exercise.

In contexts in which a parliament has limited resources to sustain a fully integrated system of Post-Legislative Review, WFD may suggest developing a pilot project approach by which the Parliament examines the implementation of a limited set of laws (two to three) over a period of, for example, two years. After this two-year period, the pilot project can be evaluated, and lessons learned identified for a more generalised and institutionalised approach. The pilot project could take the form of a Committee review of Ministry reports on the implementation of selected law(s), Committee review of outsourcing research by

external institutions or Committee-led inquiries and in-house research on implementation of selected legislation.

A crucial factor when considering the monitoring and the results of legislation is to ensure that there is a clear link between the preparation and the evaluation of legislation. Ex-ante impact assessments or other explanatory material accompanying the law should set clear benchmarks and timeframes for its review and evaluation. These benchmarks and criteria should be followed for the ex-post review.

Finally, the post legislative scrutiny work needs to show its relevance to the public and needs to be conducted in a way that citizens can contribute to evaluation of legislation.

⁶⁴ Sunset legislation are laws where parliament has included a clause that requires that the law or a section of it need to be reviewed by parliament after a certain period of time with the purpose of terminating/amending it if it is no longer useful or continuing it in the case that it has proven to work well. A sunset law provides for automatic referral to parliament without intervention or discretion of the executive branch.



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