

Efficiency of the Legislative Process in Uganda

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A. Introduction

From the moment of birth, perhaps even before, legislation enacted by various parliaments has a major influence on almost every aspect of an individual's life.¹ Governments the world over need legislation to govern,² the citizens need the laws to regulate their social, political or even economical relationships. Seidman *et al.* relate the law-making process to development.³ In order for the law to be able to meet the aspirations of the different facets of society that it serves, time, effort and thought are dedicated to its making.⁴ It has been claimed that, "...as far as the science of government is concerned, the important part of legislation is not only the regulatory aspect but the law-making process itself."⁵ The need to have a holistic understanding of law is well encapsulated by the aims of Legisprudence.⁶

The legislative process of a country can be described as covering the different procedures from the conception of the need for a law, whether in the form of an

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¹ See Australian Capital Territory, Attorney General's Department, Report on Legislation Review, September 1992, at (ii).

² Crabbe argues that, "in the modern world today, the government cannot effectively govern if that government does not have the ability to pass legislation. Legislation is thus the framework by which governments of whatever persuasion seek to achieve their purposes..." V.C.R.A.C. Crabbe, *The Role of Parliamentary Counsel in Legislative Drafting* 3 (2000). See also V.C.R.A.C. Crabbe, *Legislative Drafting* 1 (1993).

³ They state that, "[a]t least in part, deteriorating trends in development and governance reflects governments' difficulties in formulating and implementing appropriate laws. To that extent, they reflect underlying weaknesses in the law-making process" A. Seidman, B.R. Seidman, & N. Abeysekere, *Legislative Drafting for Democratic Social Change, A Manual for Drafters* 10 (2001).

⁴ According to Mayer, "that governments need legislation cannot be gainsaid. That the governed need well-drafted readable, understandable legislation is equally important." M. Mayer, *The Lawyers* 12 (1967).

⁵ Crabbe, *supra* note 2 (1993), at 4.

⁶ According to Mader, "[l]egisprudence aims at furthering the theoretical understanding as well as the technical handling of legislation; it combines elements of science, art and craftsmanship; it concerns both the content of legislation and its form." L. Mader, *Evaluating the Effects: A Contribution to the Quality of Legislation* (2001).

amendment or a nascent law, to the time when that conceptualization is crystallized as a gazetted Act of a legislative body of that particular jurisdiction. This definition is however not clear-cut, as some authors prefer to explain the legislative process as those procedures that a bill goes through in parliament or legislative body.⁷ The preceding processes or procedures are then referred to as the drafting process.⁸ This description of the process seems to fall short for increasingly, it is clear that the life of the law begins right from when consideration for a law is made to when it is finally passed.⁹ This position gains credence from the stand adopted by Hart *et al.* when they aver that, “historically, the law begins and has to begin at the grassroots. Currently and continuously in the continuous current of time the same thing is true.”¹⁰ Yet others have described it as “the process of formulating and implementing legislation as a response to a public policy issue, and which would hopefully contain sufficient consultation with affected stakeholders.”¹¹ For the purposes of this paper, the legislative process will be divided in three parts as the phases generally accepted as forming the process through which laws, especially in common law jurisdictions are made: the pre-drafting process, drafting process and the parliamentary process. These are not necessarily distinctive as there are several overlaps.

At the opening of parliamentary sessions, government announces its legislative plans, which involve proposals for new legislation whether as amendments to existing legislation or as new legislation. Indeed a fundamental sociological characteristic of modern society is that the bulk of legislation is enacted to modify existing legislation.¹² The efficiency of the process by which legislation is passed is important not least because of the scale of input in terms of time and resources but also on how it is managed. The argument advanced by Keith Patchett becomes relevant. He states that, “as with any product that is to be acceptable to the producer and the public, the process by which legislation is developed and produced by the

⁷ Subhash Jain seems to imply that it is the parliamentary process, which is the legislative process, though he makes reference to the record of parliament, which will often have the preparatory documents of the legislation in issue. Subhash C. Jain, *Indian Trends in the Interpretative Use of Legislative History* (2003).

⁸ Thornton states that, “the process of drafting legislation maybe said to begin with the receipt of drafting instructions and end with completion of an agreed draft.” G.C. Thornton, *Legislative Drafting* 124 (1996).

⁹ In an attempt at defining what the legislative process is, Thornton states that, “...process of legislation, whereby an idea or concept concerning the social framework of society becomes government policy, is transformed to legislative shape by means of the drafting process, and eventually passes through the legislative machinery to reach the statute book as law.” *Id.* See also Crabbe about the conception of an Act of Parliament, Crabbe, *supra* note 2 (1993), at 8. See also Mader, *supra* note 6, at 120. According to Zander, “Professor Page distinguished three distinct tasks involved in putting a bill onto the statute book—deciding the policy; producing the clauses of the bill; and handling the parliamentary process.” E. Page, *The Civil Servant as Legislator: Law Making in British Administration*, quoted in M. Zander, *The Law-Making Process* 7 (2004).

¹⁰ M.H.Jr. Hart & M.A. Sacks, *The Legal Process*, Basic Problems in the Making and Application of Law. Edited by Eskridge Philip P. Frickey 158 (1994).

¹¹ Interview by author with Mr. Malcolm Toland, July 2005.

¹² H. Schaffer, *Evaluation and Assessment of Legal Effects Procedures: Towards a more Rational and Responsible Law Making Process*, 22 (2) *Statute Law Review* 132-153 (2001).

state institutions have to be efficiently planned and managed.”¹³ This position echoes that made earlier by the Statute Law Society.¹⁴ In Uganda, as opposed to the United Kingdom,¹⁵ this process has not previously received scholarly scrutiny.¹⁶ With the heightened¹⁷ awareness of issues of good governance and democracy,¹⁸ society has increasingly scrutinised governance issues, especially in as far as they relate to the rule of law. This could arise from the fact that the people to whom the legislation is addressed cannot understand the legislation due to the style in which it is drafted,¹⁹ it may also be due to the fact that the policy as a result of which legislation is drafted and later enacted was not well thought out by its makers or indeed that the law was not properly scrutinised by the relevant committee of parliament.²⁰ Indeed Bennion rightly argues that, “...it is difficult to understand an Act without some knowledge of how it comes to be the way it is.”²¹ The justification of the study of any country’s legislative process and by necessary implication the intrinsic procedures of such a process cannot be overstated.²²

¹³ K. Patchett, *Preparation, Drafting and Management of Legislative Projects* (2003).

¹⁴ They stated that, “we consider that the reform of the substantive law of the United Kingdom which is being carried out...can be made more effective and useful if it is accompanied by a reform of the methods of preparation, drafting, presentation, passing...of the Statutes of the UK.” Statute Law Society, *Statute Law Deficiencies: A Radical Simplification 1* (1974).

¹⁵ *See, for example*, the 1975 Renton Committee Report whose terms of reference were “with a view to achieving greater simplicity, and clarity in statute law to review the form in which public bills are drafted, excluding consideration of matters relating to policy formulation and legislative programme; and to consider any consequential implications for parliamentary procedure.”

¹⁶ The author did not come across any literature or from the interviews that he held that suggested otherwise. An attempt has been made to examine some aspects of the legislative policy making process by the Deregulation Project though this has been limited to business related legislation. For more on the project, *see* <http://www.finance.go.ug/Deregproject/BrochureFeb13th%2003Dereg%20Process.final%20doc.pdf>. Also, Tumwine-Mukubwa focuses primarily on Parliament and democracy. *See* G. Tumwine-Mukubwa, *Parliament as an Instrument of Democracy*, in P.W. Mukidi (Ed.), *Uganda: Constitutionalism at Cross Roads* 209-265 (1998).

¹⁷ This has been fairly recent with the promulgation of the 1995 Constitution of Uganda.

¹⁸ The relevance to democracy is well articulated by Bennion, he states that, “...the legislative drafter’s function is basic to democracy. Though merely a technician, he should not be an unaware technician...” F.A.R Bennion, *Bennion on Statute Law* 21 (1990).

¹⁹ *See* the contrary opinion of Bennion who states that, “[d]espite Lord Diplock, Sir Thomas More, and the many others who think law should be comprehensible by all; I fear the answer is plain. Whether we like it or not, law is an expertise...” F.A.R. Bennion, *Understanding Common Law Legislation. Drafting and Interpretation* 75 (2001).

²⁰ Australian Capital Territory, Attorney General’s Department, *Report on Legislation Review*, September 1992, especially at (ii).

²¹ Bennion, *supra* note 18, at 20.

²² An analogy can be drawn from the view of Hart and Sacks. They state that, “... any law student or practitioner can reasonably set himself the goal of mastering the main outlines and the respective functions and interrelationships, of the various procedures of official and private settlement, and the principal doctrines and practices will come to be seen as the most significant and ending part of the whole legal system, because they are a matrix for everything else.” Hart & Sacks, *supra* note 10, at 6.

The issue then arises as to what would be the benchmarks in ascertaining the efficiency of the legislative process. The term efficiency is habitually applied to economic analysis of what and how much input is required for an optimal output.²³ However in this case it is used to reflect the extent to which perceived best practices are utilised in the process of the development of legislation.²⁴ Indeed it has been argued that, “systematic social cost-benefit analyses may be most important ... for their power to transcend accounting and include consideration of factors not apparent on balance sheets.”²⁵ To this end, then, it would not be merely asking about the ability of the system supporting the legislative process to produce legislation that is at least able to withstand technical and procedural challenge as to its validity, but the wider issue of how the rule of law is understood²⁶ and applied in terms of the making of legislation and its connection with the constitution. Mader argues that, “the analytical model underlying the methodical approach to the preparation of legislation considers the legislative process as a reiterative learning process.”²⁷ If we hypothesize that it is possible to assess the efficiency of a legislative process, an examination of Uganda’s legislative process would then be feasible, as it would better inform the legislative branch of government of other issues to consider in enacting legislation other than the socio-political motives.²⁸ In addition, the exercise would inform the public or those who are governed by a given piece of the law of the genesis and mechanics of law making.

The objective of the paper is to examine the optimal method of assessing the efficiency of the legislative process and to explore the efficiency of the legislative process in Uganda by reviewing literature on the subject of legislation, particularly the law-making process. Uganda, as a commonwealth country adopted several of its processes in governance from the United Kingdom. According to Julio Faundez, “indeed, the importation, transplantation or imposition of laws and legal institutions has been a permanent feature in world history, both ancient and modern.”²⁹ A normative approach was adopted and it was assumed that the United Kingdom had the most efficient drafting process. This was complemented with the accepted as the best practices in law making.³⁰ These are then juxtaposed

²³ Government of United Kingdom, Efficiency and Effectiveness in the Civil Service, Government Observations on the Third Report from the Treasury and Civil Service Committee, Session 1981-1982 (1984).

²⁴ Arguments have been made that law in itself is about economics and the two cannot be divorced from each other. R.A. Posner, *Economic Analysis of Law* (2003). Contrast with V. Aubert, *Methods of Legal Influence*, in S. B. Burman & B. E. Harrell-Bond (Eds.), *The Imposition of Law* 28 (1979).

²⁵ M. Robert Cover & M. Owen Fiss, *The Structure of Procedure* 2 (1979).

²⁶ Bennion argues that “[l]egal effectiveness – the draftsman must express the government’s intentions in such a way that the statute will have its desired effect.” F. Bennion, *Statute Law Obscurity and Drafting Parameters*, 5 *British Journal of Law and Society* 235 (1978); in M. Zander, *The Law-Making Process* 20 (2004).

²⁷ Mader, *supra* note 6, at 122.

²⁸ *Id.*

²⁹ J. Faundez (Ed.), *Good Government and Law. Legal Institutional Reform in Developing Countries* 1 (1997).

³⁰ Mader argues that, “...the process of elaborating, enacting and implementing legislation follows procedural rules of various kinds: these rules may influence to some extent the formal and the

with Uganda's situation and discussed. This approach is supported by Cover and Fiss who argue that, "... simply enumerating abstractly formulated 'values' or 'ends' of procedure is an unsatisfying exercise. An important consideration is the precise implications that flow from taking a particular value seriously or pursuing a certain end."³¹ In that regard, the comparative aspect of the paper was continuous as the issues were raised. Six interviews with individuals who are involved in the legislative process were conducted. This was especially so in the case of information on Uganda's legislative process given the dearth of technical information relating to the paper topic.³² Among the interviewees were the First Parliamentary Counsel,³³ a Senior Parliamentary Counsel,³⁴ a private legal practitioner,³⁵ a member of Uganda's Deregulation project,³⁶ Executive Director of the Uganda Law Reform Commission³⁷ a Commissioner in the Law Revision Department,³⁸ a Government of Uganda draftsman³⁹ with extensive drafting experience and a draftsman/academic with a practical experience of law-making and drafting at the European Union.⁴⁰ An interview guide was prepared and used by the author to conduct the interviews.

Given the breadth of the legislative process,⁴¹ the author narrowed down the research topic by focusing on three broad components of the legislative process. These were further narrowed down to target the principal actors and how they influence or should influence the legislative process. In particular, in the

material quality of legislation; they may further or hinder the methodical approach of the legists." Mader, *supra* note 6, at 120. See also Salembier's Meta rules: J.P. Salembier, *Designing Regulatory Systems: A Template for Regulatory Rule-Making – Part I*, 23(3) Statute Law Review 165-190, at 169 (2002).

³¹ Cover & Fiss, *supra* note 25, at 2.

³² Mader advises when carrying out an examination of such a topic that, "the best and most reliable retrospective evaluations use the different qualitative and quantitative methods and techniques familiar in the field of social sciences" and gives interviews as an example of such methods. He also discusses the limitations of the methods. Mader, *supra* note 6, at 128.

³³ Ms. Lwabi Harriet, Uganda conducted on 10 August 2005. This is the Uganda equivalent to the head of the PCO in the United Kingdom.

³⁴ Ms. Kyokunda Catherine, Legal and Legislative Services Department, Parliamentary Commission, Parliament of Uganda, Kampala, Uganda, 20 July 2005.

³⁵ Mr. Ssekaana Musa, Partner and Legislative Drafting Consultant, Bakkidde, Hannan & Ssekaana Advocates, Kampala, Uganda, 25 July 2005. He has trained as a draftsman and brings a different perspective from that of the government.

³⁶ Mr. Malcolm Toland, Consultant, Regulatory Best Practice Programme Ministry of Finance & Economic Planning Kampala, Uganda, 19 July 2005. Under the Ministry of Finance to bolster the author's information on the policy making aspect of the legislative process.

³⁷ Ms. Vastina Rukimirana Nsanze, Executive Secretary, Uganda Law Reform Commission, Kampala, Uganda, 5 September 2005. She is also one of the two Commissioners of Law Revision of the 6th Revised Edition of the Laws of Uganda and an accomplished draftsman.

³⁸ Ms. Alexandra Nkonge, Commissioner Law Revision, Uganda Law Reform Commission, Kampala, Uganda, 15 August 2005.

³⁹ Mr. Joseph Ssonko, Legislative Draftsman with the Uganda Law Reform Commission, Kampala, Uganda, 5 September 2005.

⁴⁰ Dr. Helen Xanthaki, Academic Director, Sir William Dale Centre for Legislative Studies, Senior Lecturer, IALS, London, 8 August 2005.

⁴¹ See Schaffer, *supra* note 12, at 132.

parliamentary stage, the author exclusively focused on the impact of multiparty politics on the parliament's role of legislative scrutiny at the committee stage of the parliamentary process. Moreover, not all aspects that affect efficiency have been discussed due to word limitations. The choice of those aspects examined is explained in the discussion. The paper therefore focuses more on the theoretical aspect of the topic while giving examples of Uganda's experience. To narrow the topic yet further, the paper focuses on primary legislation and completely ignores secondary legislation. Furthermore, the work is on the assumption that there is no controversy over the content of legislation.

B. The Policy Making Process

The efficiency of the policy-making process plays a big role in the overall efficiency of the legislative process.⁴² Most legislation is from the executive branch of government. The decision to legislate has its genesis in policy. It is therefore plausible to conclude that the drafting of a bill puts into effect that reflection of policy.⁴³ Indeed Seidman *et al.* argue that, "policy statements alone do not convey to officials or role occupants an imperative that they feel obliged to obey. Enactments of policy into law endows it legitimacy."⁴⁴ The thinking or policy behind legislation thus dictates the content, timing and pace of the legislative process.⁴⁵ It is from the policy that the departmental official or whoever is instructing the drafter draws the instructions to the drafter. It is because of this huge influence on legislation that any study of the process of legislation should commence at the policy making level. Policy can be drawn or informed by various considerations including from a party manifesto, in a multiparty democracy or a pressure group, or international obligations, law reform commission reports, social circumstances among others. According to Zander, writing about the experience in the United Kingdom, "the belief that most government bills derive from it's manifesto commitments is mistaken The great majority of bills originated within government departments, with the remainder being responses to particular

⁴² Keith Patchett argues that, "[s]ound legislation is more likely to emerge if adequate time and resources are allocated for preparation and drafting." K. Patchett, *Preparation, Drafting and Management of Legislative Projects* (2003). See also Mader, *supra* note 6, at 126.

⁴³ Crabbe states, "for purposes of government, legislation in the narrow sense is the main form of translating policies into enforceable laws", Crabbe, *supra* note 2 (1993), at 2. Seidman posits that, "sooner or later, when government publicly proposes a policy and seriously undertakes to implement it, government officials must translate that policy into rules which other state officials must implement. Ultimately a government has small choice except to try to implement policies through laws." Seidman *et al.*, *supra* note 3, at 12.

⁴⁴ *Id.*, at 14.

⁴⁵ Specifically, the manner in which the policy is developed has a direct effect on the quality of the drafters work. According to the Select Committee of the House of Commons on legislation in the UK, they observed that, "legislation is often criticised as obscure or in any even difficult to read. There are many factors, apart from the fallibility of the drafters..." House of Commons, Select Committee on Modernisation of the House of Commons, First Report, *The Legislative Process* 3 (1997).

and unexpected events...”.⁴⁶ Crabbe echoes this view when he opines that since it is the government departments that essentially administer the law, “they thus become a source of legislative policy.”⁴⁷ Indeed, a close look at the composition of technical committees of the Uganda Law Reform Commission policy research and development process lays credence to Crabbe’s observation.⁴⁸

That notwithstanding, the legislative policy of government is controlled by Cabinet in both Uganda and in the UK.⁴⁹ Indeed Crabbe argues that it is the norm in most commonwealth countries.⁵⁰ The importance of this control is to establish a well thought out and organised legislative programme. This is of particular importance, especially to the main actors in the legislative process and the efficiency of the process hinges on the way the programme is organised. It is in this area perhaps that Uganda needs to learn from the practice in the UK. Thornton postulates the importance of how a well thought out procedure would benefit the drafter.⁵¹ One of his arguments is that a well thought out programme or process, “... provides some assurance that the drafter will not be obliged to waste time working on proposals that are later shown to be unacceptable...”⁵²

However, whereas this argument is valid, it does not portray the complete picture of the dynamics of policy formulation. According to Ms. Nkonge, policies have a high rate of mutation depending on the prevailing social circumstances and one is never completely sure, even when the draft is nearly complete that the policy to legislate will hold. Indeed the debacle of Uganda’s Domestic Relations Bill, 2003, lays credence to this observation.⁵³

In deciding policy, the interests of the proverbial common man need to be kept in mind. What the end users of legislation want is a clear and precise law that will effectively enable them attain their aspirations.⁵⁴ In order to achieve this result, Hart *et al.* propose three main conditions which that law should achieve, the main one being the relevancy to the individual’s circumstances.⁵⁵

In the United Kingdom, the practice was to consult the public after the bill was presented to parliament. This was later deemed to be unsound and the Hansard Society report on law making recommended that, “government should

⁴⁶ Zander, *supra* note 26, at 2, 7.

⁴⁷ Crabbe, *supra* note 2 (2000), at 13.

⁴⁸ See the composition of the Commission’s task forces on the several projects it worked on in the Uganda Law Reform Commission, Annual Report 2002, Kampala, Uganda, July 2003, at 33-34.

⁴⁹ On Cabinet control of the legislative process in the United Kingdom, see Zander, *supra* note 26, and in Uganda, Chapter 1 of the Uganda Government Standing Orders, in Parts Y-a and Y-b headed ‘Legal Advise’ and ‘Legislation’ (1991 Edition).

⁵⁰ Crabbe, *supra* note 2 (2000), at 12.

⁵¹ See Thornton, *supra* note 8, at 125.

⁵² *Id.*

⁵³ This bill has been in the making since the late sixties. Consultations have been extensive but the solutions never satisfactory to all. For the first time it made it to parliament but the Moslem community rejected it and demonstrated on the streets. The executive has since withdrawn the bill.

⁵⁴ See the comments of Mr. Justice Connor, a former President of the Australian Law Reform Commission (until 1987), quoted in Australian Capital Territory, Attorney General’s Department, Report on Legislation Review, September 1992.

⁵⁵ Hart & Sacks, *supra* note 10, at 119.

as far as possible consult those with relevant interests or experience at the policy formulation stage.”⁵⁶ A hybrid has now been proposed by several authors under the umbrella of the Hansard society. The Parliament begins its scrutiny and consultation on the publication of the bill but before the first reading of the bill actually takes place in Parliament.⁵⁷

Uganda has made remarkable strides in the involvement of the public or end users of the law in the policy making process.⁵⁸ However this requirement has not been institutionalised in the mainstream⁵⁹ policy making process.⁶⁰ Additionally, Parliament has recently insisted on proof of public consultations before it can consider a government legislative proposal. However the dangers that are latent in consultation cannot be overlooked. There is a possibility of a stalemate where consultations are too prolonged.⁶¹ After all, as Vilhelm Aubert points out, “... it is clear that many laws lack solid backing in popular opinion but are nevertheless enforced with varying degrees of success.” Aubert goes on to pose the question that, in consultations to get the opinion of the public, “how do we establish the real objective interests of a population or segment within it?”⁶² The challenge is in deciding where to draw the line.⁶³ It is often the case that the time frame with in which a piece of legislation is required by the government will not allow for a protracted consultation process. In acknowledging this fact the select committee of the House of Commons in the UK stated that, “many bills are produced too

⁵⁶ Zander, *supra* note 26, at 9. Contrast this with Seidman *et al.*, *supra* note 3, at 21.

⁵⁷ A. Brazier, Parliament, Politics and Law Making, Issues & Developments in the Legislative Process 31 (2004) and Lord Norton of Louth, *Parliament and Legislative Scrutiny: An Overview of Issues in the Legislative Process*, in A. Brazier, Parliament, Politics and Law Making, Issues & Developments in the Legislative Process 5-13 (2004).

⁵⁸ The genesis of this can be traced back to the process of the making of Uganda’s 1995 constitution where an unprecedented public consultation process was undertaken. *See generally*, B. J. Odoki, The Search for a National Consensus, The Making of the 1995 Uganda Constitution (2005). *See also* Government of Uganda, The Report of the Uganda Constitutional Commission, Analysis and Recommendations (1993).

⁵⁹ ULRC has since 1999 adopted a well-structured consultation process and has sought recently to improve on its consultation process. *See* Uganda Law Reform Commission, Baseline Survey Report for a Programme to Promote Public Participation in and Awareness about the Law Making Process and the Law in Action, Kampala, Uganda, September 2004 (2004), however the findings show there is much more to be done. It is observed that there is a, “low level of public participation in the law making and reform process” (*id.*, at 18).

⁶⁰ An attempt to do so is being piloted by the Ministry of Finance and Economic Development under the Deregulation. This is, however, limited in scope as it targets business laws and what additional costs affect small businesses by way of regulation. *See* Ministry of Finance, Planning and Economic Development (MFPED) of the Government of Uganda, *The Deregulation Process in Uganda*, at <http://www.finance.go.ug/Deregproject/BrochureFeb13th%2003Dereg%20Process.final%20doc.pdf>.

⁶¹ *See supra* note 51. One of such disagreements can be read from Advocates International, *UJCC and EFU Briefing Document on the Domestic Relations Bill 2003*, at http://www.advocatesinternational.org/pages/global/africa/issueDocs/UJCC_DRB.php.

⁶² Aubert, *supra* note 24, at 28-29.

⁶³ Burman *et al.* argue that, “... law is not the exclusive result of either consent or conflict in society but is a product of both.” S.B. Burman & B.E. Harrell-Bond (Eds.), *The Imposition of Law* (1979), at 3.

quickly to get the policy and drafting right to allow time for public consultation before they are introduced in Parliament.”⁶⁴ Moreover, at times, the decision to legislate may be dictated by issues that are exogenous to the local politics thus necessitating a law that is devoid of a process to come up with what Thomas Waelde and L. James Gunderson have referred to as an organic home-made legislation.⁶⁵ Additionally, consultation is a very expensive exercise, more so for a developing country like Uganda. Perhaps in order to reconcile the benefits and the expense is to agree to a minimal or acceptable consultation process both in terms of time and scope.⁶⁶ Yet it would be impossible to escape from the general consultation on those laws that have a considerable effect on society.

In deciding whether a policy should be reduced to legislative text, a generally accepted checklist has been adopted in several countries or communities that the policy maker should take into consideration before a decision to commence the legislative process is commenced. This position has been informed by several factors including economic considerations, social obligations but above all by the universally accepted standards of good governance.⁶⁷

The immediate consideration as with all well thought out decisions is that of necessity.⁶⁸ The policy maker should clearly consider whether legislation is the best option to take. However it is not always clear as to what the standard of necessity should be. It is not reasonable to assume that legislation is ever made without necessity. It could be *inter alia*, a political or economic necessity albeit a misinformed one. It is thus necessary to agree on what necessity amounts to.

It is not possible to consider comprehensively the issue on necessity without making a cost benefit analysis. However this can always end up being problematic given that some of the benefits are not easily converted into monetary gain. Some of the gains are of a social benefit though they may adversely affect the economy. An interesting example of this in Uganda is the provision in the Land Act⁶⁹ which requires that before any dealings in land that is the usual dwelling place and from which a spouse or children ordinarily gain their sustenance are to be completed, the permission of those members of the family is to be sought. The social benefits of this legislation are sound since the press was inundated with stories of families being rendered homeless by unscrupulous spouses selling off the family home

⁶⁴ House of Commons, Select Committee on Modernisation of the House of Commons, First Report, The Legislative Process 3 (1997).

⁶⁵ T. Waelde and L. J. Gunderson, *Legislative Reform in Transition Economies: Western Transplants-A short-cut to Social Market Economy Status*, 43 International and Comparative Law Quarterly 368 (1994). An example of such a case was the passing of the Uganda Marine Insurance Act 2002.

⁶⁶ Keith Patchett advises that, to be effective, consultation for the purpose of policy making has to be specifically designed to produce useful information, rather than as a device for arriving at a consensus with affected parties. Patchett, *supra* note 42, at 10.

⁶⁷ See OECD, The OECD Report on Regulatory Reform: Synpaper (1997); see also Patchett, *supra* note 42, at 4; Cabinet Office, UK, Guide to Legislative Procedures, October 2004 (2004); J. Massot, *Legislative Drafting in France: The Role of the Conseil D’Etat*, 22(2) Statute Law Review 96-107, at 97 (2001); and Uganda Government Standing Orders, in Parts Y-a and Y-b headed ‘Legal Advise’ and ‘Legislation’, Ministry of Public Service, Kampala, Uganda (1991 Edition).

⁶⁸ See the several tests as outlined by Schaffer, *supra* note 12, at 136.

⁶⁹ See s. 39 of the Land Act, Chapter 227, Volume IX, Laws of Uganda, at 5018-5019.

without getting alternative accommodation for the family. However, due to the extra cost that was imposed on those seeking to deal in the land, in this case, mainly the banks that took land titles as securities before advancing loans, the general interest rates of loans issued by banks increased exponentially. This affected the general economy⁷⁰ and calls were made to review that law. Perhaps a thorough perspective evaluation⁷¹ of the policy would have foreseen this effect.

Another example of where more input in the policy could have been beneficial is the provisions of the law on defilement in Uganda.⁷² In that law, the age of consent to sex was increased from sixteen years to eighteen years. Among the main arguments were that a child below eighteen was neither physically nor mentally fit to start a family and that the policy would additionally decrease on the prevalence of HIV/AIDS in children.⁷³ However, what was not thoroughly considered were the other attendant and resultant social factors. As can be seen from Evelyn Kiapi's report and the police statistics,⁷⁴ since the change in the law, the incidences of defilement seem to have become even more common. Whereas this could be on account of increased awareness in society, it can also be evidence of a legislation that is perhaps ahead of the social norms.⁷⁵ Thomas Waelde *et al.*'s views are relevant in such a situation.⁷⁶

Policymaking can greatly benefit from consulting the public and more so those who are to be specifically affected by the proposed legislation. This is not only desirable but also one of the demands of good governance; especially in as far as it is regarded as an example of public accountability. According to Heinz Schaffer, "... the structure and purpose of an open democratic system is to provide rational political analysis of policy, evaluate the results and possibly to change law in consequence."⁷⁷

The argument that the legislative drafter should not be involved in the policy making process is supported by many.⁷⁸ This argument can and I dare suggest should be critically analysed and possibly revised. The involvement of the drafter at the earliest opportunity during the formation of the legislative policy would help the policy makers save valuable time since the drafter would have come on

⁷⁰ ULRC, Study Report On The Reform Of Laws Related To Secured Transactions, Kampala, Uganda, August 2002 (2002).

⁷¹ Mader, *supra* note 6, at 124.

⁷² See s.129 of the Penal Code Act, Chapter 120, Volume VI, Laws of Uganda, at 2784.

⁷³ E. Kiapi Matsamura, Health-Uganda: High Incidence of Rape Exposes Girls to HIV/AIDS Infection, 25 June 2003 (2003).

⁷⁴ According to the Uganda Police, Provisional Annual Crime Report, December 2004, at 5: "Defilement cases continued to soar over the years with 9,821 cases reported in this period as compared to 6,906 in the previous period. This was an increase of 42% which more than doubles last year's increment in defilement of 15.3%."

⁷⁵ Culturally, marriage in Uganda is accepted at the age of 16. See Kiapi Matsamura, *supra* note 73.

⁷⁶ Waelde & Gunderson, *supra* note 65, at 368.

⁷⁷ Schaffer, *supra* note 12, at 132.

⁷⁸ Thornton argues against the idea of the drafter being involved in the formation of policy though he takes note the advantages. Thornton, *supra* note 8, at 125. See also R. Dickerson, The Fundamentals of Legal Drafting (1965); A.E. Driedger, The Composition of Legislation (1976).

board early enough.⁷⁹ Hart *et al.* argue that, “the lawyer’s (draftsman) job is not only to put the plan (of legislation-policy) into words but to help in making it.”⁸⁰ However, as Salembier moderates, a policy is simply a guideline and not set in stone.⁸¹

The above discussion shows the importance of the consultation process as a mark of a democratic system and also in contributing to the purposes of access to justice in the sense that if the interested stakeholders are involved at an earlier stage in the legislative process, they will have a sense of ownership of the process and thereby improving on the implementation aspect. In addition, this will ease the draftsman’s efforts to achieve clarity since the public will have a general idea of the legislation proposed. The importance of evaluating the efficiency of the policy making process is clear in as far as it strives to better inform the legislative motivation of the policy makers. Whereas Uganda has endeavoured to include the public and other stakeholders in the policy making process, it is clear that much more can be done. This is due to the fact that it is from the policy that the instructions to the drafter are borne and as a result, influence the efficiency in drawing up comprehensive instructions to the drafter, another important phase in the legislative process.

C. Instructing the Draftsman

When government has completed or greatly advanced a policy whose recommendation is for legislation to be drafted, the next stage is to instruct the drafter whose responsibility it is to reduce the policy into a bill.⁸² As has been discussed,⁸³ the efficiency of this part of the legislative process hugely relies on the efficiency in which the policy is made. This stage, as with the preceding stage, is dominated by the executive arm of government, especially Cabinet. The decision to instruct the drafter is almost always taken by Cabinet after considering and approving the policy behind legislation.⁸⁴ The relevant departmental official then passes on the instructions to the drafter. In the UK⁸⁵ the instructions are usually prepared by departmental lawyers together with the technocrats as opposed to the case in Uganda where the job of instructing the drafter is left to the technocrat.⁸⁶ This has an impact on the sufficiency and of the instructions given to the drafter. Unfortunately, it is common that the drafter will always find instructions lacking fundamentally as they will at times be extremely brief. This is different from the

⁷⁹ This view was supported by Uganda’s FPC.

⁸⁰ They state, “a lawyer who is presented with a supposedly completed plan and asked to go to work on the last problem will be forced, it is evident, to write backward in some degree...” Hart & Sacks, *supra* note 10, at 176.

⁸¹ Salembier, *supra* note 30, at 188.

⁸² Crabbe states that, “transferring government policy into law is thus the prime function of parliamentary counsel”, *see* Crabbe *supra* note 2 (2002), at 13.

⁸³ *See* section B at pp 140-145 above.

⁸⁴ *See* Zander, *supra* note 26, at 11.

⁸⁵ *Id.*, at 7.

⁸⁶ Interview with FPC.

norm where the drafter will seek for clarification of some unclear points.⁸⁷ It may be as grave as getting a paragraph as instructions to draft.⁸⁸ However, Seidman points out “that instructions to drafters typically remain general demonstrates the links between the drafters’ substantive and technical functions. In practice, originating ministries’ instructions seldom include enough specifics to guide drafters in writing out their proposed bills’ details.”⁸⁹

There is a wealth of literature on what amounts to good practice in issuing instructions to the drafter.⁹⁰ Thornton likens the instructions to “... an essay in communication and it is not difficult to see that unless that communication is successful, the draft is unlikely to achieve its purposes.”⁹¹ However, one of the cardinal caveats in drafting instructions is that the instructions should not be in the form of a draft bill.⁹² This position, though it may have credence, cannot have a universal application. One of the major reasons why this does especially happen in Uganda can be attributed to the demand on the drafter’s time in relation to the number of drafters available to do the drafting. Uganda operates the centralised system of drafting whereby all drafting for bills is done at by one office.⁹³ This lack of personnel has many times meant that in order for a department to have its bill fast tracked, it will attempt to avoid the queue at the drafting office. Coupled with this is the fact that, in Uganda, unlike the UK and several other jurisdictions, the same central office is responsible for drafting of statutory instruments.⁹⁴ There is no clear legislative programme and the services of the drafting office are demand driven. The FPC, for example will not know, at the beginning of the year which bills the office will be called upon to draft. This clearly a disadvantage and does negatively affect the efficiency of the drafting process. This is in addition to the situation obtaining where as a result of foreign technical assistance, usually in the form of consultants,⁹⁵ the terms of reference for such studies will almost always include a clause to draft a bill.⁹⁶ This has caused problems in the past

⁸⁷ Seidman *et al.*, *supra* note 3, at 23; Crabbe, *supra* note 2 (2000), at 15. On the UK process, Zander states that, “on receipt of drafting instructions, the draftsman’s first task is to study them and make sure that he fully understands what those instructing him wish to achieve. To arrive at this understanding he may need to discuss particular aspects of the instructions with the department concerned...” Zander, *supra* note 26, at 24.

⁸⁸ According to Lenfestey, this is especially so in small states. E. J. T. L. Lenfestey, *Legislative Drafting in a Mini State* (1983), referred to in T. W. Cain, *The Legislative Draftsman in a Small Jurisdiction*, 19 (3) *Commonwealth Law Bulletin* 1237, at 1238 (1993).

⁸⁹ Seidman *et al.*, *supra* note 3, at 27.

⁹⁰ Crabbe, *supra* note 2 (1993), at 14, 15. *See also* E. C. David, *Preparing Drafting Instructions for Legislation* (1997).

⁹¹ Thornton, *supra* note 8, at 129.

⁹² *Id.* Thornton justifies this position by stating that, “a draft law is an artificial creation that is likely to be less successful as communication than straight prose...”, at 130.

⁹³ Ministry of Justice and Constitutional Affairs, Directorate of First Parliamentary Counsel, at <http://www.justice.go.ug/fpc.htm>.

⁹⁴ *See* the details in the mandate of Uganda’s drafting office at Ministry of Justice and Constitutional Affairs, Directorate of Legal Advisory Services, Mandate of the Directory, at http://www.justice.go.ug/legal_advisory.htm.

⁹⁵ Faundez, *supra* note 29, at 4.

⁹⁶ This is very common for projects under the ULRC.

whereby draft bills developed were later rejected for being incompatible with situation obtaining in Uganda.⁹⁷ However, such drafts can be accepted, especially where the drafter of the bill enjoys the confidence of the central drafting office, as is the case with drafters of the UK Law Commission.⁹⁸ Following on this issue is the influence played by the geopolitical⁹⁹ and economic forces in terms of model laws. However, these transplants have a positive side to them.¹⁰⁰

Another aspect that has influenced the efficiency of the instruction phase of the legislative process in Uganda is the lack of a guidelines to departmental staff.¹⁰¹ This aspect is very important for many, especially in Uganda, do not appreciate the whole concept and technicality of legislative drafting.¹⁰² Indeed Heinz Schaffer states that, "...such guidelines are undoubtedly important for improving and maintaining the technical quality of legislative drafting."¹⁰³ There is need to raise awareness on this front. It should be appreciated that the efficiency of the drafting process will depend mainly on how efficiently the drafter is instructed. Indeed Thornton states that, "good instructions are a pearl beyond price and not only improve the quality of the bill but also reduce drafting time. Bad instructions are the bane of a drafters life."¹⁰⁴

In this area of the legislative process, Uganda needs to make a lot of improvement if the drafter is to be assisted in drafting laws that clearly capture the policy. Due to the fine-tuning of policy in the process of instructing the drafter, this improves on the ultimate efficiency of the entire process given that legislation will be as a result of a well-considered and critical thought process. It improves clarity and greatly benefits the aspirations to the rule of law and good governance. It is important to briefly examine the quality of the departmental officials who instruct the drafter for, as is discussed, they have a profound impact on the drafting outcome.

⁹⁷ Several bills drafted under the commercial justice capacity building programme in 1996 had to be redrafted under the commercial justice reform programme as they did not reflect the policy agreed.

⁹⁸ Usually seconded there by the PCO's office.

⁹⁹ The global war on terror has in many countries dictated the content of the anti-terror laws.

¹⁰⁰ Waelde *et al.* argue that "[p]articularly with regard to legislation of a more technical, less political character, it makes sense not to try to re-invent the wheel...", Waelde & Gunderson, *supra* note 66, at 368.

¹⁰¹ The FPC has tried in some instances to give guidelines though these are not in the form of an official document but personal notes that she shares with the departmental officials who ask for guidance.

¹⁰² As told to the author by an administrator at the International Law Institute-African Centre for Legal Excellence (ILI-Uganda) who have had little interest from Ugandans in the Institute's legislative drafting courses.

¹⁰³ Schaffer, *supra* note 12, at 133.

¹⁰⁴ Thornton, *supra* note 8, at 129.

D. Departmental Officials / Instructing Officers

In order for the drafting instructions to achieve their purpose efficiently, they need to be issued by competent and authoritative departmental officials.¹⁰⁵ They should have a clear and complete understanding of what the policy aims to achieve, the background information to the policy. They should be well skilled in making instructions and they should have guidelines.¹⁰⁶ According to Sir Harold Kent, it is they who have the final word on matters of policy. An observation appreciated by several authors.¹⁰⁷ In this area, Uganda has done well. Commenting on the instructing officials, Uganda's current FPC stated that, "on the whole they are senior enough and well acquainted with the issues under deliberation."¹⁰⁸ In contrast, the UK has evolved a practice where a team of officials of the responsible government ministry or department performs the function of instructing the draftsman.¹⁰⁹ The composition takes into account both the legal and technical requirements to accentuate the policy requirements. This notwithstanding Crabbe's opposition to lawyers on the instructing team when he says, "but those who instruct parliamentary counsel should not attempt to be lawyers"¹¹⁰ cannot be without fault, unless the statement is interpreted to mean that non lawyer departmental officials should not assume the role of lawyers simply because they are dealing with legislative matters. The creation of a team assures the drafter that the instructions are well thought out and little time will be spent on conferences and polishing up of the policy behind legislation.¹¹¹ However, the challenge that is inherent in this proposal for Uganda is the inability to have a departmental lawyer for each of the ministries/departments.¹¹² This is an idea worth exploring and at the very least, whenever a government department or other organ intends to propose legislation, a member from the legal advisory services should be seconded to that department.¹¹³

¹⁰⁵ *Id.* See Thornton's comments on the qualities and duties of the instructing officers, at 126-127.

¹⁰⁶ *Id.*, this position is supported by Thornton, where he states that, "[...] guidance must be available to those who prepare drafting instructions." He goes on to say that "[...] it is desirable that every drafting office should have information available for distribution to prospective instructing bodies", at 129.

¹⁰⁷ H. Kent, *In on the Act: Memoirs of a Law Maker* 45 (1979); see also comments by Bennion, *supra* note 18, at 34. Patchett, *supra* note 13, at 4.

¹⁰⁸ In an interview with the author.

¹⁰⁹ According to Zander this is referred to as the 'bill team'. See Zander, *supra* note 26, at 7.

¹¹⁰ Crabbe, *supra* note 2 (1993), at 14.

¹¹¹ Crabbe, *supra* note 2 (2000), at 15.

¹¹² As with the drafting office, the legal support for government ministries and departments is centralised in the Ministry of Justice and Constitutional Affairs under the Directorate of Legal Advisory Services. See Ministry of Justice and Constitutional Affairs, Directorate of Legal Advisory Services, Mandate of the Directory, available at http://www.justice.go.ug/legal_advisory.htm (accessed on 12.08.2005).

¹¹³ The temptation to come up with a draft bill though could be heightened.

E. The Drafting Stage

I. Draftspersons

In the legislative process, when the instructions to draft have been completed, they are then passed on to the head of the drafting office, who then assigns the duty to draft to draftspersons in the office.¹¹⁴ Perhaps the most important part of the legislative process is the drafting stage.¹¹⁵ Bennion has stated that, “the work of the drafter is crucial to statute processing, but is little understood outside the drafting office.”¹¹⁶ The drafting stage commences from when instructions are received by the drafter, those instructions are thoroughly reviewed and the drafter through conferencing with the instructions giver and personal research¹¹⁷ gets a firm understanding of the policy behind the proposed law.¹¹⁸ This stage is important in determining the efficiency of the legislative process. It is from understanding well the instructions that will help the drafter in his or her quest for precision and clarity.¹¹⁹ This contributes immensely to the efficiency and therefore effectiveness of this stage. In addition, by continuously probing the policy behind the proposed law, the drafter assists the policy maker in looking at all the possible effects of the law¹²⁰ and by so doing, contributes to good governance practices.¹²¹ After understanding the instructions, the drafter is then in a position to communicate in a clear and concise language the policy in form of the draft. According to Jan Broekman, “the life of the law is the life of words, of written and verbal expressions.”¹²² The role played by the drafters makes

¹¹⁴This is the practice in both the UK and Uganda. As told to the author by Ms. Alexandra Nkonge. See comments by Sir Granville Ram, *The Improvement of the Statute Book*, 1951 Journal of the Society of Public Teachers of Law 422; in Zander, *supra* note 26, at 4.

¹¹⁵According to Thornton, this stage includes “understanding; analysis; design; composition and development; and scrutiny and testing”, Thornton, *supra* note 8, at 128.

¹¹⁶Bennion’s drafting parameters in Bennion, *supra* note 18, at 21. See also Thornton, *supra* note 8, at 124.

¹¹⁷L. J. Chinery-Hesse, *Manual for Guidance of Legislative Draftspersons in Uganda*, June 1996 (1996), at 6.

¹¹⁸Crabbe, *supra* note 2 (1993), at 16. However, as Zander rightly points out, the drafter may be called upon to commence the drafting even before the policy has been fully determined. Zander, *supra* note 26, at 23.

¹¹⁹Indeed it has been noted that, “[...] it is important to recognise that the way in which legislation is crafted will depend largely, and rightly so, on government policy.” Australian Capital Territory, Attorney General’s Department, *Report on Legislation Review*, September 1992 (1992), at 3. On Clarity, see also J.P. Salembier, *Designing Regulatory Systems: A Template for Regulatory Rule-Making – Part II*, 24 (1) *Statute Law Review* 1-37, at 4 (2004).

¹²⁰Sir Courtney Ilbert stated that, “... the parliamentary counsel can often, from his knowledge of the history and intention of an enactment, give a clue to its construction.” Sir Courtenay Ilbert, *The Mechanics of Law Making* (1914); Bennion’s drafting parameters in Bennion, *supra* note 18, at 21.

¹²¹Seidman *et al.*, *supra* note 3, at 28.

¹²²M. J. Broekman, *Communicating Law*, in D. Nelken (Ed.), *Law as Communication* 47 (1996). See also J.P. Salembier, *Designing Regulatory Systems: A Template for Regulatory Rule-Making – Part I*, 23 (3) *Statute Law Review* 165-199, at 172 (2002).

them, perhaps, the vanguards of the process.¹²³ Indeed Mr. Ssekaana has argued that the efficiency of the whole legislative process can be determined once the draftsman has taken the necessary steps that are required of him or her or those steps established at the legislative counsel's office along with the standards of that office.¹²⁴ Moreover, as pointed out above, the drafter may have to commence the drafting with very limited or unclear or often incomplete instructions.¹²⁵ It is this transformative role of the drafter and his or her qualities or competencies that he or she should possess that this part will focus on.

In order to achieve that precision and clarity in the draft, the drafter employs unique abilities, which have been extensively written about.¹²⁶ It is the proper and ethical¹²⁷ use of these techniques that contributes to the effectiveness of the draft law and thereby contributing to the efficiency of the legislative process as a whole. Indeed Sir Granville Ram has stated that, "...only men and women of first-class ability can do the work."¹²⁸ Bennion states that, "the task of making legislative proposals understood by non-lawyer politicians while securing their legal effectiveness is one of the most formidable faced by the parliamentary drafter."¹²⁹ In Uganda, this requirement is emphasized.¹³⁰ However, this is not always easy to achieve. In Australia for example, it was noted that, "the difficult solution that they strive for, but sometimes fail to reach, is a delicate balance between relative simplicity of style and language and comprehensive coverage of complex subject matter."¹³¹ Moreover, as has been argued it is not always possible that everyone will understand the law in the same way as drafted.¹³² This does not take away the burden to strive for clarity from the drafter. The manual

¹²³F. Bennion, *Statute Law Obscurity and Drafting Parameters*, 5 British Journal of Law and Society 235 (1978); M. Zander, *The Law-Making Process* 20 (2004).

¹²⁴In an interview with the author.

¹²⁵Even where the policy may have been finalised at the instructing stage, there may be need for the executive to change the policy. The drafter will have to keep this in mind as he or she proceeds with his her draft.

¹²⁶Lord Thring, KCB, *Practical Legislation, The Composition and Language of Acts of Parliament and Business Documents* (1902); D. Mac Nair, *Legislative Drafters: A Discussion of Ethical Standards from a Canadian Perspective*, 24(2) *Statute Law Review* 125-156 (2003); Crabbe, *supra* note 2 (2000); Crabbe, *supra* note 2 (1993), at 16. See also Bennion's drafting parameters in Bennion, *supra* note 18, at 28. Those techniques have been defined by Seidman as "... denoting the linguistic and other techniques that drafters employ to produce clear, unambiguous bills." Seidman *et al.*, *supra* note 3, at 5.

¹²⁷On the ethical standard demanded of legislative drafters, see the Canadian experience in Mac Nair, *supra* note 126.

¹²⁸He went on to describe them as '*Corps d'elite*'. Sir Granville Ram, *supra* note 114, at 422; Zander, *supra* note 123, at 16.

¹²⁹Bennion, *supra* note 18, at 33.

¹³⁰According to Chinery-Hesse, a Legislative Drafting Consultant and formerly Ag. First Parliamentary Counsel, "the task of the draftsman is to communicate in such a way as to avoid being misunderstood, government or ministry policy decisions that have legal consequences to the community." J. L. Chinery-Hesse, *Manual for Guidance of Legislative Draftsman in Uganda* 5 (1996).

¹³¹See Australian Capital Territory, Attorney General's Department, *Report on Legislation Review*, September 1992 (1992), at (iii).

¹³²Chinery-Hesse, *supra* note 130, at 5.

on drafting in Uganda emphasises this point by stating that, “as much as possible, the draftsman must draft in the usage of the language of the community or jurisdiction in which he or she operates.”¹³³ The situation is compounded by the very limited time within which the drafter always finds he or she has to operate.¹³⁴ This is especially so when the legislation to be drafted is voluminous and of a technical nature.¹³⁵ It must be noted that though the perceived good practice is to attain clarity, the executive can sometimes deliberately seek to cloud the meaning of a provision as a tool especially if they intend to avoid acrimonious debate with the opposition. Indeed this could be with the subtle understanding of the opposition so as not to be viewed by the voting public as giving in too easily to the government. That notwithstanding, it is not the duty of the drafter to assume that to be the case. Where there is no clarity in the instructions, he or she should bring this to the attention of the executive.¹³⁶ The drafting of the Land Act¹³⁷ in Uganda for example, was drafted at a time when government needed to respond to a growing crisis. The Act *inter alia* provided that all land matters were to be determined by land tribunals, which were established in the same Act. However, two years after the enactment of the legislation, the tribunals had not been set up while land matters were piling up. Government had to pass an amendment stating that, in the interim, those cases that were pending in the different courts could continue to be heard. This confusion could have been foreseen and interim provisions included in the draft.

The training of draftspersons contributes to their efficiency in the legislative process. This point is emphasised by Keith Patchett when he lists the conditions which contribute to effective drafting standards to include, availability of specialist drafters; training arrangements for drafters and separate allocation of funds for drafting.¹³⁸ He goes on to say that, “a country that wishes to improve the quality of its legislative drafting ... should pursue a strategy for selecting adequate numbers of persons to be engaged in law drafting for their systematic training and acquisition of essential experience.”¹³⁹ This view has long been held in the UK and acted upon.¹⁴⁰ Sir Geoffrey Bowman stated that the office (PCO)

¹³³ *Id.*, at 6.

¹³⁴ See comments of Sir Anthony Stanton, in The Renton Committee, Report on the Preparation of Legislation, Cmnd 6053 as quoted in Bennion, *supra* note 18, at 31. See Crabbe, *supra* note 2 (2000), at 9.

¹³⁵ Lord Halsbury is quoted to have stated that, “[t]he more words there are, the more words are there about which doubts maybe entertained.” Sir William Dale added that, “... the more words there are, the greater the possibility of some *casus omissus* and ... consequentially the more will words grow in number.” *Id.*, however, Zander points out that, “[...] it is impossible in the nature of things to avoid a *casus omissus* [...]” Zander, *supra* note 123, at 31.

¹³⁶ G. Kolts, *Observations on the Proposed New Approach to Legislative Drafting in Common Law Countries*, 1 Statute Law Review 144-150 (1980). He says that, “[i]f it is not clear how the stated principle will apply in particular cases, it is the duty of the draftsman to draw this fact to the attention of his instructors.”

¹³⁷ Cap. 227 was enacted in 1998.

¹³⁸ K. Patchett, *Preparation, Drafting and Management of Legislative Projects*, February 2003 (2003), at 12.

¹³⁹ *Id.*

¹⁴⁰ According to the Statute Law Society, “An increase of drafting staff is required and recruitment

seeks to recruit lawyers of the highest quality, as the work is very demanding. Even so it takes about seven years from the time a drafter is recruited to the time when he or she can be put in charge of drafting a bill.¹⁴¹

The need for the drafting office to keep abreast with the evolving practices and drafting techniques adds to the quest for clarity.¹⁴² The need to train drafters was identified some years back by the Commonwealth Secretariat. It observed that, "... the picture that has consistently emerged is that the acute shortage of trained and experienced legislative draftsmen which prompted the initiative to establish the training programme would continue for sometime to come, particularly for the smaller developing countries."¹⁴³ In Uganda, according to the FPC, there is a training policy whereby a drafter will be sent on training courses within two years of joining the office. This is a laudable development. However, it is a widely held view that in-service training is the best way to train a draftsman.¹⁴⁴ Additionally, Crabbe argues that, "... it must be emphasised that the acquisition of the requisite technical and professional proficiency does not depend upon the mere addition of legal officers to the legal staff."¹⁴⁵

The other factor closely related to training is the computerisation of the drafting office. Whereas the UK has adopted software to assist in the efficiency of the drafting office, Uganda is still lagging behind. According to Ms. Alexandra Nkonge, the availability and active use of computer programs and software to aid drafting is urgently required if Uganda's drafting office is to improve on its efficiency. She argues that, "technological advancement in Uganda is still lacking yet there is modern equipment and software that can be used to effect changes in a draft to speed up the process in the preparation of legislation."¹⁴⁶

It is argued that time taken in drafting can be used as a gauge of the efficiency of the drafting process. Alexandra Nkonge argues that, "time limits must be imposed so that a law is prepared in time." The author does not agree that strict time limits on time taken to draft a piece of legislation necessarily reflect on the drafter's efficiency. Time can be used collectively with other indicators however to rely on it does not take into consideration other factors such as the sufficiency of the drafting instructions, time taken for departmental or other officials to respond to the drafter's queries and the subject matter of the draft. For instance it is unclear how time would apply in drafting a companies' bill as opposed to drafting a commencement bill. Indeed Sir Geoffrey Bowman argues that in drafting, "if

could be assisted by the judicious employment of academics." Statute Law Society, *Statute Law Deficiencies: A Radical Simplification 3* (1974).

¹⁴¹Sir Geoffrey Bowman, KCB, First Parliamentary Council, the Parliamentary Counsel Office, *Memorandum to Select Committee on the Constitution*, at <http://www.publications.parliament.uk/pa/ld200304/ldselect/ldconst/173/4062302.htm>.

¹⁴²For an extended discussion on the different legislative techniques, see Australian Capital Territory, Attorney General's Department, *Report on Legislation Review*, September 1992 (1992), at 39-48.

¹⁴³See Commonwealth Secretariat, Legal Division, *Evaluation of the CFTC Legislative Drafting Programme 1978-1984*, 13(2) Commonwealth Law Bulletin 694-695 (1987).

¹⁴⁴See T. W. Cain, *The Legislative Draftsman in a Small Jurisdiction*, 19(3) Commonwealth Law Bulletin 1242 (1993).

¹⁴⁵Crabbe, *supra* note 2 (2000), at 22.

¹⁴⁶Interview with Ms. Alexandra Nkonge.

you go too quickly, you risk producing a faulty product. If you go too slowly you risk getting nothing done. But any bill needs a certain time to mature.”¹⁴⁷ In order to address this issue in Uganda, the FPC has developed some guidelines for purposes of effecting the Results Oriented Management programme established by the public service ministry.¹⁴⁸

In order to further improve on clarity, several jurisdictions have seen the need to have a drafting manual.¹⁴⁹ This is directional, though in some jurisdictions, the requirement as to form is strict. Uganda for a long time followed the UK tradition where it is considered that the use of a drafting manual takes away the creativity of the draftsman. Mr. Ssekaana argues that, “they [manuals] hinder innovativeness in an office as the draftsman is bound to the Manual and established guidelines.”¹⁵⁰ It is viewed as akin to giving a draftsman a bill in terms of instructions. However the role that a manual plays cannot be overlooked. According to Ms. Kyokunda, “they are crucial. In Uganda, sometimes the drafting is dependant on the draftsman. As a result, different drafters at different levels of the legislative process may do things differently which sometimes causes disharmony and conflicts.”¹⁵¹ Though the UK may not need to have a drafting manual, the same reasons they advance cannot have currency in Uganda. This is due to the approach in the UK where drafting is organised in pairs or trios and indeed according to seniority. They can afford then to do away with manuals since the junior staff will always have close supervision and guidance from the more experienced seniors. In Uganda where there is a dearth of drafters, this cannot be easily emulated as discussed below. Indeed Mr. Ssekaana does admit that this could be a factor that necessitates the manuals.¹⁵² The attempt by Uganda to write one in 1996 is therefore commendable, but though a good guide, in my opinion it is limited in both breadth and depth.¹⁵³ Moreover, from the interviews that the author conducted, most did not even know about its existence.¹⁵⁴ It is the case that the guidelines for the drafter in Uganda are scattered in different places and the attempt by Chinery-Hesse to bring them under one document is helpful.¹⁵⁵ It is not clear though, to what extent, even though it is a guide; the drafters are bound to follow its directions. On the importance of the authority required behind such directives, Patchett states that, “common standard and uniform practices for preparing and drafting legislation can be advanced if contained in official

¹⁴⁷Bowman, *supra* note 141.

¹⁴⁸These have included a two week deadline to at least get back to the instructing department with either a first draft or call for more information.

¹⁴⁹Thornton, *supra* note 8, at 54. The content of the manual as used here is not very dissimilar from the standardised clauses as proposed by Bennion, *supra* note 18, at 26.

¹⁵⁰In interview with the author.

¹⁵¹*Id.*

¹⁵²He states that, a manual “assists persons who are new in the drafting department as it guides them on the best practices the office uses and also for valuable references”

¹⁵³See Chinery-Hesse, *supra* note 130.

¹⁵⁴In response to whether Uganda has a legislative drafting manual, Ms. Alexandra Nkonge; Ms. Kyokunda Catherine did not know that one existed. Indeed the author only got to know of its existence when he contacted Mr. Chinery-Hesse for this paper.

¹⁵⁵*Supra* note 130. Indeed until then, the only guide was the Commonwealth Manual.

directives that are backed by the authority of Government or Parliament.”¹⁵⁶ A manual, by providing guidance brings about uniformity, which then contributes to clarity and ultimately to the efficiency of the drafting process. According to Uganda’s FPC, the manual would be especially helpful to the young drafters who would have just joined the department.

Another practice that is used in the UK¹⁵⁷ that Uganda can benefit from is the arrangement where parliamentary counsel draft in pairs. This is usually done in such a manner that a senior drafter is paired with a junior. This encourages the junior to learn from and be guided by the senior.¹⁵⁸ Drafting is a practical exercise, which, though it would benefit a drafter to have a theoretical understanding of the issues involved in the drafting of legislation,¹⁵⁹ can only be perfected from practice.¹⁶⁰ Indeed, Sir Geoffrey Bowman observes that this practice, “forms the backbone of their training system.”¹⁶¹ The possible snag in this for Uganda is that it has very few senior drafters in the FPC’s office.¹⁶² This is due in part to insufficient remuneration of drafters who have opted to go into private practice or try their luck in other, better paying jurisdictions,¹⁶³ a trend not unique to Uganda.¹⁶⁴ In comparison, the PCO’s office in the UK has a total of 56 lawyers 36 of whom are senior. An attempt has been made in Uganda to try whenever possible to have the junior drafters work together with the seniors. However, in order to maintain quality, it is a requirement in that office that no draft is permitted to leave the office before it has been approved by a senior drafter.¹⁶⁵

¹⁵⁶*Supra* note 130, at 24. Compare with Uganda’s Acts of Parliament Act, Chapter 2, Volume I, Laws of Uganda, at 7-27; and Uganda Government Standing Orders, in Parts Y-a and Y-b headed ‘Legal Advise’ and ‘Legislation’, Ministry of Public Service, Kampala, Uganda.

¹⁵⁷See Zander, *supra* note 123.

¹⁵⁸Bowman, *supra* note 141.

¹⁵⁹Seidman *et al.*, state that, “drafters need a legislative theory and methodology likely to guide them in writing bills that, when enacted, actually resolve the social problems at which they aim.” Seidman, *supra* note 3, at 39.

¹⁶⁰According to Kolts, “experience has shown that general legal ability by itself is not sufficient and that a competent lawyer without practical experience in legislative draftsmanship cannot perform the craft satisfactorily.” Kolts, *supra* note 136, at 144-150.

¹⁶¹*Id.*

¹⁶²The FPC’s office has a total of 15 drafters with six senior drafters.

¹⁶³Perhaps they can find support in Bennion’s words when he says that, “[m]y own belief is that, while legislative drafting is a difficult art requiring a lengthy apprenticeship, it is not the best arrangement to make it what Sir Noel Hutton has called a life engagement.” Bennion, *supra* note 18, at 23.

¹⁶⁴This issue was emphasised in the interview between the author and Ms. Alexandra Nkonge. See also, Commonwealth Secretariat, Legal Division, *Evaluation of the CFTC Legislative Drafting Programme 1978-1984*, 13(2) Commonwealth Law Bulletin 695 (1987).

¹⁶⁵This positioned was clarified in an interview with the FPC.

II. Offices of the First Parliamentary Counsel & Parliamentary Counsel

A director under the Ministry of Justice controls the drafting of legislation in Uganda.¹⁶⁶ This section discusses the Office of the Parliamentary Counsel in relation to the Department of Legislative Counsel and how the possible clash of the roles of the two offices, especially in as far as the handling of amendments to bills in parliament, could negatively impact on the efficiency of the legislative process in Uganda. Indeed Seidman *et al.* pointed out that, “a...reason for the frequent ineffective implementation of proposed transformational law lies in the structure and process of drafting institutions.”¹⁶⁷

The need for a central drafting office in the common law jurisdictions is attributed to the detail required in the written law with the emphasis being laid on precision and certainty.¹⁶⁸ Indeed in the UK it has been argued that, “the Parliamentary Counsel’s Office has raised the technical efficiency of legislative drafting to a standard far superior to that prevailing when it was set up in 1869.”¹⁶⁹ This position is different from the civil law jurisdictions where provisions in the law are more general and as such, it is considered that any lawyer in position to draft law.¹⁷⁰

In Uganda, the responsibility for drafting legislation is wholly centralised in the Directorate of the First Parliamentary Counsel (FPC) in the Ministry of Justice and Constitutional Affairs.¹⁷¹ It is directly responsible to the Attorney General. Its specific role is to draft all legislative instruments of the Government before they are debated and passed by Parliament.¹⁷² Additionally, the Constitution provides that the “office of the Attorney General shall afford the member moving the private member’s bill professional assistance in the drafting of the bill.”¹⁷³ Under the drafting manual,¹⁷⁴ the FPC is mandated with the duty to draft amendments at

¹⁶⁶J.L. Chinery-Hesse, *Manual for Guidance of Legislative Draftspersons in Uganda* (1996).

¹⁶⁷Seidman *et al.*, *supra* note 3, at 34.

¹⁶⁸On the merits and demerits of a centralised drafting office, see Patchett, *supra* note 13, at 13. See a contrary opinion of Sir William Dale as discussed by G. Kolts, *Observations on the Proposed New Approach to Legislative Drafting in Common Law Countries*, 1 *Statute Law Review* 144-150 (1980), under the heading, ‘Dispersion of Draftsmen’.

¹⁶⁹Bennion, *supra* note 18, at 22.

¹⁷⁰See generally J. Massot, *Legislative Drafting in France: The Role of the Conseil D’Etat*, 22(2) *Statute Law Review* 96-107 (2001).

¹⁷¹A similar office in the UK is the Parliamentary Counsel’s Office. See Chapter IV titled ‘Origin and Functions of Parliamentary Counsel’s Office in England’ in C. Ilbert, *The Mechanics of Law Making* (1914); see also the comments of Professor Clarence Smith in Zander, *supra* note 123, at 33. See also Bennion, *supra* note 18, at 21-26.

¹⁷²For a detailed description of its specific functions, see Ministry of Justice and Constitutional Affairs, Directorate of First Parliamentary Counsel, <http://www.justice.go.ug/fpc.htm>. Compare these roles with those of the Australian Government, Office of Parliamentary Counsel, at <http://www.opc.gov.au/about/index.htm> (accessed on 17.08.2005).

¹⁷³Article 94 (4) (b) and (d) of the Constitution of the Republic of Uganda, Volume I, *Laws of Uganda*, at cxcix.

¹⁷⁴L. J. Chinery-Hesse, *Manual for Guidance of Legislative Draftspersons in Uganda*, June 1996 (1996). It is important to note that the Manual was prepared in 1996 prior to the passing of the

the committee stage of parliament and to draft motions of parliament, *inter alia*.¹⁷⁵ The justification for the FPC's involvement in Parliament is that since he or she has an intimate knowledge of bill, he or she is in a better position to advise on how amendments to it can be successfully done and advise the members of parliament on the possible effects that the proposed amendments will have on the bill. The counter argument is that since the FPC is under the control of the executive branch of government, there is an issue of separation of powers and parliament should be able to carry out its duties unencumbered. This view is similar to that obtaining in the UK. Bennion describing the PCO states that, although answerable to the law officers on technical matters of drafting, it is in practice an adjunct of the Cabinet Office. This is a view echoed by Sir Geoffrey Bowman who states that, "the PCO is part of the Cabinet office."¹⁷⁶ This is because its primary function is to serve the government of the day.¹⁷⁷ Moreover, the FPC could be best utilised in drafting substantive bills other than seating in on parliamentary debates. This is a weak argument given that the FPC would in any case have to be present to advise the line minister responsible for the bill on how the amendments proposed by the members of parliament would affect the general operation of the law as drafted.

A recent development in Uganda has been the establishment of the Department of Legal and Legislative Services (DLLS).¹⁷⁸ The Act creating this department is silent on the specific functions of the department though the parliamentary website gives an insight.¹⁷⁹ Among the functions listed include, drafting private members Bills on instructions being given by any committee or member of Parliament; draft, on request by members of Parliament, motions, resolutions and questions to be moved in Parliament and drafting proposed amendments to Bills to be proposed to the Plenary by committees or individual Members of Parliament when passing the Bill. According to Ms. Kyokunda, whereas the FPC translates policy into legislation to produce bills for the executive, the DLLS drafts private members bills for members of Parliament and follows up the bills after the first reading through to advising the Committees, drafting amendments to bills, preparing assent copies on behalf of the Clerk to Parliament and following up publication after assent.¹⁸⁰ Clearly there is need to streamline the functions especially having regard of the constitutional mandate given to the Attorney General. The two

Acts of Parliament Act, Cap 257 and the author has not come across any updated version of the manual.

¹⁷⁵*Id.* He states at 25, "once a bill is published it is in connection with the committee stage that the draftsman has his greatest role."

¹⁷⁶Bowman, *supra* note 141.

¹⁷⁷Bennion, *supra* note 18, at 22. See also Seidman *et al.*, *supra* note 3, at 45 on the perceived notion of the independence of the drafting office.

¹⁷⁸It was established under section 24 (e) of the Administration of Parliament Act, Chapter 257, Volume X, Laws of Uganda, at 5628. Interestingly though, the author was informed that it is the Department of Legal and Legislative Services (DLLS) in an interview with Ms. Kyokunda Catherine.

¹⁷⁹Parliament of the Republic of Uganda, Administration of the Parliament, Department of Legislative Counsel, available at <http://www.parliament.go.ug/legislative7.htm#Administration5> (accessed on 10 July 2005).

¹⁸⁰Interview with Ms. Kyokunda Catherine.

offices can exist concurrently and both can have an important role to play. Indeed Keith Patchett has argued that, "... drafting services should not be confined to governments. Legislatures are equally reliant upon these specialist skills ...". He goes on to state that, "... the benefits to members of the legislature in having a cadre of appropriately qualified drafters permanently available both to undertake drafting tasks and to provide expert advise on legislation needs no illustration."¹⁸¹ The role of the Department of Legislative Counsel should be advisory to the MPs in as far as the actual drafting of amendments to bills that have originated from the executive.¹⁸² They can retain the duty to draft the private member's bill for this has been used as a tool to force the hand of the executive where there has been foot dragging. The FPC would then be responsible for drafting amendments suggested by the executive to 'their own' bill as is the practice in the UK. According to Sir Geoffrey, "the main task of the office is to draft all government bills and oversee their passage through parliament."¹⁸³ However there is need to amend the Constitutional article that requires the Attorney General to assist a private member in drafting his or her bill. Indeed the drafting of Parliamentary motions should also be the preserve of the same department. The defining of clear of parameters for the two offices will promote parliamentary independence, improve on clarity in the sphere of roles and release the FPC and his or her staff to engage in substantive drafting of government bills. In this way, the efficiency of the legislative process could be enhanced.

III. Parliamentary Scrutiny: The Committee Stage

The stage at which parliament will scrutinise a bill clause by clause is mainly at the committee stage of the parliamentary process of the overall legislative process.¹⁸⁴ The committee stage is perhaps the most important in the legislative process. There is a debate as to whether a multiparty system strengthens the role and influence of the committees in relation to towing the party line.¹⁸⁵ With the advent of the multiparty system of government in Uganda, it maybe necessary to review this process if it is to continue to effectively contribute to the overall efficiency of the legislative process. It is however true that many of the decrees that were made under the dictatorial regime of Idi Amin,¹⁸⁶ where there was no functioning

¹⁸¹ *Supra* note 138, at 13-14.

¹⁸² Indeed according to the empirical research conducted by Dr. Tumwine-Mukubwa, a majority of MPs stated that, "attendance in Parliament would improve if MPs were given research assistants to help them clarify the bills presented in Parliament." G. Tumwine-Mukubwa, *Parliament as an Instrument of Democracy*, in P. W. Mukidi (Ed.), Uganda: Constitutionalism at Cross Road 209-265, at 246 (1998).

¹⁸³ Bowman, *supra* note 141.

¹⁸⁴ For a detailed discussion of Uganda's Parliament and its legislative role, see Tumwine-Mukubwa, *supra* note 182, at 216.

¹⁸⁵ See generally, The House of Commons, Select Committee on Modernisation of the House of Commons, First Report, The Legislative Process (1997) on the UK experience.

¹⁸⁶ 1971-1979.

parliament, have stood the test of time,¹⁸⁷ which furthers my hypothesis, that Parliament's role in the quality of legislation is minimal.¹⁸⁸ Indeed in the UK it has been observed that there has been a distinct culture prevalent throughout Whitehall that the standing and reputation of Ministers have been on their bills getting through largely unchanged. As a result there has been an inevitable disposition to resist alteration, not only on the main issues of substance but also on matters of detail.¹⁸⁹

The question is, how partisanship in the parliamentary committees affects the efficiency of the legislative process. Suffice it to note that the efficiency of the DLLS could play a big role in promoting the efficiency of the committees if only the internal politics would permit them to do so.¹⁹⁰ The importance of parliamentary committees in the legislative process was well expressed by Lees in the phrase, "... A legislature is known by the committees it keeps."¹⁹¹ Indeed, according to Shaw, "whether in America or elsewhere, it is widely agreed that the impact a legislature has is crucially dependent on its committee arrangements."¹⁹² The process, as in most legislatures involves the formal introduction of a Bill in parliament or first reading, after the Bill has been read the second time, it is then referred to a relevant committee¹⁹³ where it is closely scrutinised and a report is written about the committee's views and recommendations of the bill.¹⁹⁴

In Uganda the 1995 Constitution¹⁹⁵ revolutionised the role of parliamentary committees in the legislative process.¹⁹⁶ Most significantly, there was a move away from the Westminster model that Uganda had adopted at independence towards

¹⁸⁷ See Part IV of the Chronological Table of enactments, Volume I, Revised Edition of the Laws of Uganda, 2000, at lxxxviii-xcvi

¹⁸⁸ For a different discussion on this, see Patchett, *supra* note 13, at 24.

¹⁸⁹ The House of Commons, *supra* note 185, at iii.

¹⁹⁰ For a detailed discussion of how this could be achieved, see Bennion, *supra* note 18, at 33.

¹⁹¹ J. D. Lees & M. Shaw (Eds.), *Committees in Legislatures: A Comparative Analysis* 321 (1979). See also J. Hatchard, M. Ndulo & P. Slinn, *Comparative Constitutionalism and Good Governance in the Commonwealth. An Eastern and Southern African Perspective* 132 (2004) where he states that, "some of parliament's most effective work is done in committees."

¹⁹² M. Shaw, *Parliamentary Committees, A Global Perspective*, 4 (1) *The Journal of Legislative Studies* 229 (1998).

¹⁹³ Depending on its subject matter. According to Popkin, "[p]assage of legislation often depends on which committee considers a Bill and that in turn, may depend in part on what the preamble or purpose clause states." W. Popkin, *Materials on Legislation. Political Language and the Political Process* (1993).

¹⁹⁴ See R. Nakamura & J. Johnson, *Rising Legislative Assertiveness in Uganda and Kenya 1999-2002* (Paper prepared for delivery at the 19th International Political Science Association World Congress Durban, South Africa, 2003). See also P. Musekwa, *A Hand Book For New Members Of Parliament*, available at www.parliament.go.tz/bunge/docs/membershandbook.pdf visited on 10.07.05.

¹⁹⁵ Article 90(1) of Uganda's Constitution provides that Parliament shall appoint standing committees and other committees necessary for the efficient discharge of its functions.

¹⁹⁶ The Report of the Uganda Constitutional Commission, *Analysis and Recommendations* 1993, at 309 provided that: "one of the most important ways of fully involving Parliament in its work is to make sure there is a vital system of parliamentary committees." In its recommendations it proposed that committees should be set up by parliament to inter alia discuss Bills and also make proposals for private members Bills.

the American congressional committee system. According to the Member of the Constituency Assembly who moved the above motion, "... a committee system specified to consider legislation was based on the observation of American legislatures including those in the states, and the authors hoped that it would develop into a similar system."¹⁹⁷ This stage of the process is mandatory and if not followed the resultant law can be successfully challenged as having been passed unconstitutionally.¹⁹⁸ Several factors have been identified as affecting the effectiveness of parliamentary committees in their role of scrutinising legislation.¹⁹⁹

There is a general observation among scholars that political parties greatly curtail the independence of a parliamentary committee in its legislative role. According to Lees, "... the impact of political parties on the working of committees in legislation is clearly a matter of crucial importance. As a factor that conditions committee behaviour, party is probably more important than any other single conditioning influence that can be isolated."²⁰⁰ This stems from the fact that in many instances, parliaments scrutinise Bills that have emanated from the executive whose supporters take it as a duty of loyalty to make sure that their party's legislative proposals pass through with a minimum of amendment.²⁰¹ Indeed, even in instances where amendments are made, it is normally those amendments, which are suggested by the executive.²⁰² Brazier reinforces this observation by stating that, "[a]s the composition of an STC reflects the balance of parties in the House of Commons and, as the governing party usually has a majority, government amendments will most certainly get passed whereas most opposition amendments will fail."²⁰³

In Uganda, party discipline in Parliament will have to be restored and enforced, especially in the parliamentary committees. This is how the Westminster model works.²⁰⁴ According to an assessment by UNDP²⁰⁵ in the Westminster system,

¹⁹⁷Quoted from Nakamura & Johnson, *supra* note 194, at 5.

¹⁹⁸Indeed in a recent court case concerning the method of passing an amendment, court held *inter alia* that "... Article 90(3) goes further to detail the functions of the standing committees, which among others include to discuss and make recommendations on all Bills laid before Parliament." 2 Uganda Living Law Journal 143-149 (2004).

¹⁹⁹These include technical support to the committee including resources, rules of procedure, and training of the members in parliamentary roles.

²⁰⁰Lees & Shaw, *supra* note 191, at 391.

²⁰¹R. D. Miers & A. C. Page, *Legislation* (1982) states that, "... it should be emphasised that the lack of impact of committee proceedings flows from the government's possession of a majority and the domination of voting behaviours by party loyalty."

²⁰²Miers & Page, *supra* note 201, at 121. Quoting from J. A. Griffith, *Standing Committees in the House of Commons*, Miers states that, "it has been rare for ministerial amendments to be rejected as for other members amendments to be successfully moved against government opposition."

²⁰³Brazier, *supra* note 57, at 17.

²⁰⁴According to the UNDP assessment of the Legislative Committee system they state that, "Ad hoc committees are formed for the purpose of reviewing particular bills or groups of bills.... They are typical of the British Westminster... system." <http://magnet.undp.org/Docs/parliaments/Legislative%20Committee%20System.htm>, at 3. For a detailed discussion of the Westminster stage of the legislative process, see Chapter 2 of M. Zander, *The Law-Making Process* 53 (2004).

²⁰⁵*Id.*, at 3.

the ad hoc committees have very little power. They tend to make only those amendments introduced by cabinet ministers, who exert party discipline at the committee level. Indeed sentiments of disillusionment with the parliamentary scrutiny of legislation have been expressed in Tanzania. Reacting to comments that Parliament was not effective in checking the executive, the Speaker of Parliament, who is from the ruling party said that this was a lack of understanding of the multiparty system of democracy.²⁰⁶

Uganda has made great strides in the parliamentary scrutiny of bills.²⁰⁷ Describing the parliamentary success in Uganda, Nakamura *et al.* have observed that this is unusual given Uganda's political system.²⁰⁸ Several bills, where the executive has expressed great interest, have been turned down by the committees and forced government to amend some provisions. Where government has failed to do so, Parliament has gone on to pass the Bill and the President has referred back the Bill to Parliament.²⁰⁹ The executive has been forced to renegotiate.²¹⁰ According to Lees and Nakamura, this is due to the lack of a strict parliamentary control by the party with a majority. Lees states that, "[w]here single-party control of committees is absent, the circumstances are right for the development of a strong committee system."²¹¹ The situation in Uganda too is fast changing. In most Parliaments, whether they are based on the American Congressional committee system or indeed the Westminster system,²¹² membership to a parliamentary committee and its activities are dictated by the proportionality of party membership in parliament.

Uganda however uses a different system. According to the Parliamentary Standing Orders, membership to a committee is on a first come basis where a

²⁰⁶Musekwa, *supra* note 194, at 61.

²⁰⁷Nakamura & Johnson, *supra* note 194, at 8.

²⁰⁸Often, in one party states, parliamentary bodies become rubber stamps for decisions made at the top. In Uganda, NRM supported candidates are an overwhelming majority of Parliament ... NRM dominance and President Museveni's popularity, and parliament's own weaknesses of inexperienced members and scant resources, seemed to promise a familiar outcome: a rubber stamp legislature. The frequency of such outcomes is cited in this World Bank report on parliamentary development in Africa: "Under single party regimes, the parliament was in effect an extension of the executive and the role of parliaments was in many cases reduced to 'rubber stamping' policy developed by the government and party. Even when not taken to such extremes, parliaments enjoyed little independence and exercised no real authority."

What was unusual is that this result did not occur... . So despite the NRM's dominance in the governmental and political systems, that dominance has not smothered parliamentary opposition and indeed it may have perversely encouraged it by channeling criticism into one highly public arena.

²⁰⁹A recent example is the Financial Institutions (Amendment) Bill, which sought to *inter alia* prevent one person or family owned banks.

²¹⁰Art. 91 of Uganda's Constitution provides for a Bill passed with a two thirds majority to become law without the President's assent.

²¹¹Lees & Shaw, *supra* note 191, at 395.

²¹²According to The House of Commons, Select Committee on Modernisation of the House of Commons, First Report, The Legislative Process (1997), "the committee stage of a bill, which is meant to be the occasion when details of the legislation are scrutinised, have often tended to be devoted to political partisan debate rather than constructive and systematic scrutiny," at (vi).

member who is interested in being a member of a given committee registers with the Speaker's office. All subsequent members so interested will write their names until the list is complete.²¹³ This process is bound to change soon because the country is now in transition to the multi-party system of governance²¹⁴ and the call to party discipline is evident.²¹⁵

From the foregoing, it is clear that the multiparty system weakens parliamentary independence in the scrutiny of legislative proposals hence affecting the efficiency of the legislative process. This then begs the question, why has the American congressional committee system been successful yet there is a vibrant multiparty system.²¹⁶ Lees associates the success of the American system with several factors. Cardinal above them is the ability of the members of these committees to rise above party interests.²¹⁷ This however has taken time to develop. To expect a party to legislate itself out of power would be futile and indeed, as Musekwa has stated, naïve.²¹⁸

According to Lord Norton²¹⁹ the idea that parliaments make law is misunderstood. He states that "Parliament is not a law making body. Law is generally 'made', that is formulated in a coherent form, by the executive, initially the Crown and now, in practice, the government."²²⁰ This view echoes those of several writers on the legislative role of parliament.²²¹ Commenting on the shortcomings of the parliamentary committee in the legislative process, Brazier states that "[a]t the heart of criticisms about STCs is the limited extent to which their scrutiny results in any significant changes to a bill. . . . The government usually controls STCs through its in-built majority and exercises this control to resist all but the most innocuous amendments proposed by opposition parties."²²² The Pre-Legislative scrutiny method as used in the UK needs closer attention. It appears to have improved the quality of parliamentary participation in the legislative process. Describing its probable success, Brazier states that, "[o]ne of the most significant and positive developments in legislative reform in recent years has been the marked increase in pre-legislative scrutiny."²²³ This is because it avoids

²¹³The Parliaments rules of procedure provide that, "153. (1) Each Sessional Committee shall consist of not less than fifteen and not more than twenty-five members who have deposited with the Clerk a written notice indicating the Sessional Committee on which they wish to serve."

²¹⁴See Nakamura & Johnson, *supra* note 194, at 4-6.

²¹⁵The recent voting pattern to amend the Constitution was on party basis.

²¹⁶UNDP states that "[f]ew countries, even those that also have a presidential system, have a committee system that approaches the power of the US congressional committees to initiate, amend or bury legislation." <http://magnet.undp.org/Docs/parliaments/Legislative%20Committee%20System.htm>, at 1.

²¹⁷He states that "... the decisions of the committees are determined more by the attitude and norms of individual legislators and the nature of legislative responsibilities than by the demands of the party." (Lees & Shaw, *supra* note 192, at 13).

²¹⁸Musekwa, *supra* note 194, at 61.

²¹⁹Brazier, *supra* note 57, at 1.

²²⁰*Id.*

²²¹See Miers *et al.*, *supra* note 201; J. A. Griffith, *Legislation in the Commons in Transition 22-23 (1970)*.

²²²Brazier, *supra* note 57, at 16-17.

²²³Brazier, *supra* note 57, at 32.

the adversarial atmosphere that characterises the committee stage.²²⁴ This process involves the publication of a draft Bill by government and seeking the views of the members of parliament as part of the consultation process before the Bill is tabled in parliament. This may indeed be useful to Uganda as Parliament endeavours to improve on its contribution to the efficiency of the legislative process.

F. Conclusions

The need to focus and highlight the importance of the legislative process and specifically its efficiency cannot be ignored. It is through an efficient legislative process that effective and democratic laws can be introduced and well administered. It impacts on the general well being of a people encompassing their social, political and economic wellbeing. From the foregoing, the efficiency of a legislative process can be determined by checking the current practices not only against internationally accepted standards but also by engaging the end users of the laws to gauge their opinion on how the process is conducted.²²⁵

Whereas some effort has been put in the involvement of the public in the policy making process, there is need to set out clear instructions/guidelines on how such consultations should be carried out.²²⁶ Indeed what makes good policy is understanding the scope and magnitude of the problem being addressed; consideration of non legislative intervention options. An efficient legislative policy, would be able to determine the need for legislation, notwithstanding the observation that policy can change at any time to reflect a change in societal circumstances. There is need to rely on statistical data where applicable rather than purely political exigencies. The examples of the UK system where regulatory impact assessments are mandatory are worth considering.²²⁷ The government in Uganda should institutionalise the requirement to get a comment from the Uganda Law Reform Commission on all proposed bills.²²⁸ Additionally, as a requirement of the law, the Commission in all its projects leading to proposals for law reform establishes taskforces consisting of key stakeholders drawn from various sections of the public according to the subject matter of the project.²²⁹ With strict time lines, this will ensure a non-partisan approach to legislative proposals.

²²⁴*Id.* He states that, “[m]ost crucially, as ministers tend to commit less political capital to draft legislation than to formal legislation, they do not necessarily regard making changes to a draft Bill as a defeat.”

²²⁵However, as Mader suggests, “...even sophisticated methodological tools have their limits: they can rarely provide absolute certainty about causal connections, but they undoubtedly sharpen the legist’s and the law maker’s sensibility to this crucial aspect of legislative activity.” *Supra* note 6, at 128.

²²⁶A point emphasized in the interview with Ms. Kyokunda Catherine.

²²⁷Costs involved notwithstanding. Better to have a well thought out law than a bad one.

²²⁸This is because under the Commissions rules, all bills drafted are accompanied with a well structured report demonstrating the facts and logic that under pi it, not unlike that recommended by Seidman *et al.*, *supra* note 3, at 33-34.

²²⁹*See* s. 11(g) of the Uganda Law Reform Commission Act, Chapter 25, Volume II, Laws of Uganda, 584-596, at 589.

The need to prepare and provide all government department and ministries with guidelines on preparing instructions for the drafter is evident. The Cabinet Office could prepare these, to give them the necessary authoritative backing, in consultation with the FPC's office. This will not only improve on the policy making process, as clear answers will be required in the instructions, but will also save on the time a drafter is expected to spend on a bill as the conferences with departmental officials will be reduced. Indeed, according to Sir Geoffrey Bowman, in the UK, "the PCO has produced guidance for departments on the preparation of legislation, and departments have welcomed this."²³⁰ Furthermore, there should be a requirement that sufficient back ground material is well documented and passed on to the drafter. This enables him or her to have a better-rounded perception of the policy behind the proposed legislation. The UK example whereby a bill is drafted by teams of two or three needs serious consideration. For its application in Uganda, the limitation would be the cost in terms of getting numbers of drafters required but as Crabbe stresses, the most advanced form of the system of apprenticeship is where Parliamentary Counsel work in pairs. "A senior Counsel and a Junior Counsel working together on a bill..... is a sound technique which ensures continuity, it allows for guidance and advise."²³¹

Government should consider improving on the training given to its drafters, the example of the Ukraine Legislative Drafting programme should be considered and funding sourced. This is due to the fact that the drafters are the backbone of the legislative process. They need to be well trained and remunerated to improve their efficiency.²³² Additionally, emphasis should be placed on membership to and active participation in international legislative drafting conferences.²³³ These will enable the drafters in comparing notes with other drafters and be able to gain from experiences of other jurisdictions. Of course there is a need to streamline the activities of the two offices of the FPC and the DLLS. The two can exist concurrently but with defined and complementary roles.²³⁴ In this way, the role of the committees in scrutinising legislation would be enhanced, notwithstanding the partisan nature of parliamentary democracies. The example of the American Congress System needs to be given more detailed scrutiny in Uganda with the intention of learning from them.

A closer study should be made of Britain's pre-legislative scrutiny process and possibly sensitise the public on the role political parties play in the legislative process to avoid them being termed, 'rubber stamp' assemblies. The house of Lord's role in scrutinising legislation is also worth a closer study. Party politics

²³⁰ Bowman, *supra* note 141.

²³¹ Crabbe, *supra* note 2 (1993), at 1.

²³² The need for training was emphasised by almost all the officials that the author interviewed. In Canada for example, "[t]he Department of Justice has established internal standards as well as legal education and training programmes to ensure ongoing awareness of the issues." D. MacNair, *Legislative Drafters: A Discussion of Ethical Standards from a Canadian Perspective*, 24 (2) *Statute Law Review* 125-156, at 126 (2003).

²³³ Indeed Ms. Kyokunda observed that there is "need for staff to attend meaningful courses and attend other assemblies to obtain more insight on how to improve the efficiency."

²³⁴ Indeed Ms. Alexandra Nkonge argued that one of the hallmarks of an efficient legislative process is to have in place "institutions whose roles are well streamlined."

there is very limited if not absent. With the above in place, it will be possible to greatly enhance the efficiency of the legislative process in Uganda. Although a more detailed empirical study needs to be undertaken in order to get a clearer picture, from the foregoing discussion, the legislative process in Uganda appears to be more than averagely efficient.