Scrutiny of Legislation in Uganda: A Case for Reform

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Abstract

This article seeks to explain the significance of carrying out extensive legislative scrutiny in any jurisdiction, with emphasis being placed on the Ugandan experience as far as legislative scrutiny is done. As Parliaments all over the world continue to make laws that govern their citizens, it is only right that before any law is enacted, there must be adequate mechanism to ensure quality in the law in terms of substance and effect of the legislative proposal which ultimately impacts on good governance. Best practices and emerging trends in legislative scrutiny is drawn from the United Kingdom and Australia, which have put in place elaborate procedures and mechanism to ensure that all their legislative proposals are thoroughly scrutinized before they passed into law: and that even after the law has been enacted, it can be evaluated to see the effect of the law. Pre-legislative scrutiny and post-legislative scrutiny are thus important tools to ensure quality in legislation.

Keywords: legislative scrutiny, emerging trends.

A. Introduction

The importance of legislation in a State has grown significantly worldwide as governments are increasingly using legislation to govern their populace and to achieve their political agenda.[1] In relation to scrutiny of legislation, Ulrich Karpen states that good legislation is an important instrument to regulate the relation between the individual and State, on society and vital government in a democratic state.[2]

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1 V.C.R.A.C. Crabbe, *Legislative Drafting*, Cavendish, London 1991, p. 1, where the author stresses the fact that legislation is the framework by which governments achieve their purposes; *See* Report on Legislation Review – Australian Capital Territory, Canberra, 1992, p. ii, where it was stated that from the moment of birth even before legislation is enacted by various parliaments, it already has influence on almost every aspect of person's life.

2 U. Karpen, 'Improving Democratic Development by Better Regulation', *in* C. Stefanou & H. Xanthaki (Eds.), *Drafting Legislation: A Modern Approach*, Ashgate, Aldershot, 2008, p. 151.

The political history of Uganda after independence has been characterized by instability with elected governments being over thrown by the barrel of the gun.[3] This undemocratic change of executive power often affects the functioning of the State as legislation is used as a tool of oppression.[4] With the promulgation of the 1995 Constitution, the era of rule of law is hopefully beginning to take centre stage. The executive has initiated a number of policies that need to be implemented, usually by legislation. With this demand, legislative drafting, which essentially involves the art of translating government policy into legislative form, is no longer a discipline of a last resort for the legal practitioner.[5] Because legislation is very important, quality must be emphasized so as to ensure efficiency and effectiveness in the laws being enacted. This, therefore, makes it vital to have in place an elaborate well-established mechanism for legislative scrutiny so that the laws that affects each and every facet of the life of an individual is thoroughly scrutinized before it is enacted, and that even after it is enacted, there ought to be in place avenues to look at it again to see its relevancy, whether it has been effective or not.

Thornton lists the five stages of the drafting process as understanding the proposal, analysing the proposal, designing the law, composing and developing the draft and, lastly, scrutiny and testing the draft.[6] There is no doubt that each of the above five stages of the drafting process as listed by Thornton are very important in order to have in place an effective legislative measure.[7] But it is equally important to note that there are a number of written works on the first four stages of the drafting process,[8] hence this article explores the last stage of the drafting process – scrutiny and testing the draft. A perspective from Uganda as far as legislative scrutiny is carried out is the gist of this article. Further than that, the need to learn from best practices elsewhere is examined so as to set the platform as it where, for reform in this little known yet very key function of legislative scrutiny.

3 P.M. Walubiri, 'Towards a New Judicature in Uganda: From Reluctant Guards to Centurions of Justice', *in* P.M. Walubiri (Ed.), *Uganda: Constitutionalism at Cross Roads*, 1998, p. 135, where he observes that on 26 January 1986 the sovereignty of the people of Uganda was subverted as armed rebels took over the powers of the government of Uganda and vested those powers in the National Council by Legal Notice No. 1 of 1986; In 1971, Idi Amin also over threw an elected government and ruled from 1971 to 1979, when he too was overthrown.

4 During the period of unelected executive in Uganda, in the 1970s and early 1990s, Decrees and Legal Notices were issued by the Head of State.

5 The legislative drafter is barely known within the legal fraternity because of the nature of the task they do, which is usually hidden deep in government circles, unlike the lawyer in private practice who after having a good day in the court room can decide to address a press conference with all the pomp and is well known.

6 G.C. Thornton, *Legislative Drafting* (4th edn), Butterworths, London, 1996, p. 128, on the five stages of the drafting process, scrutiny and testing at pp. 173-174.

7 C. Nutting & R. Dickerson, *Cases and Materials on Legislation*, West Publishing Co., St. Paul, MN, 1978, p. 675, agree on the five stages of the drafting process as expounded by Thornton, by stating that there are about five separate steps in establishing the final form of a statute.

8 Thornton, 1996 and Crabbe, 1991 have extensively dwelt on the first four stages of the drafting process.

In this article, legislative scrutiny is used in its broadest sense to cover all levels of the legislative process, that is, before the proposed legislative measure is enacted in to law, or pre-legislative scrutiny, and after it has been enacted and tested within the existing corpus of the law, or post-legislative scrutiny.

The hypothesis of this article is that despite the fact that laws are being enacted in huge quantities by the legislature, there are no adequate, elaborate, uniform practices or standards known and used by all the actors involved in the process of legislative scrutiny in Uganda. Moreover, the different entities that do some form of scrutiny use internal practices, which are often unwritten and thus very informal, inconsistent and peculiar to that entity. This lack of consistency ultimately affects the outcome of the law in terms of quality of legislation. The research questions that this article seeks to address are:

1. Who are the stakeholders involved in legislative scrutiny in Uganda, and what role do they play in the process of legislative scrutiny?
2. What are the processes and challenges involved in legislative scrutiny in Uganda?
3. How effective are those processes?
4. How can the process of legislative scrutiny be improved in Uganda?

The objectives of this article are:

1. To identify the stakeholders involved in the process of legislative scrutiny in Uganda and to examine the role they play in the process of legislative scrutiny.
2. To identify the process and challenges in the process of legislative scrutiny in Uganda.
3. To establish the effectiveness of the process of legislative scrutiny in Uganda.
4. To suggest workable solutions for the purpose of improving legislative scrutiny in Uganda.

The methodology used in this article is that an investigation into the practice and process of legislative scrutiny in Uganda is premised on the fifth stage of the drafting process as laid down by Thornton, which is scrutiny and testing the proposed legislative measure.[9] According to Thornton, the following questions should be considered when carrying-out scrutiny and testing of legislative proposals:

1. Does the draft cover all the objects of the Bill?
2. Does the draft fit well in the existing body of the law?
3. Does the draft comply with basic principles of the legal and constitutional system?
4. Does the draft form a coherent well-structured whole?
5. Are the content and language of the draft clear?[10]

9 Thornton, 1996, p. 173.
10 *Ibid.*

Still on methodology, Uganda being a relatively small and transitioning jurisdiction as far as the rule of law and democratic governance is concerned, a comparison with scrutiny of legislation is done to look at the best practices in other jurisdictions. Therefore, perspectives and experiences from Australia and the United Kingdom are examined. These countries were chosen because of their commonwealth approaches to drafting legislation, which is akin to the Ugandan situation, secondly because both the United Kingdom and Australia do have in place elaborate procedures and avenues to ensure effective scrutiny of their legislation. Lastly much of the Ugandan legal system was set up by the British and modelled on the British system.

In order to collect data on the Ugandan perspectives and experiences, a questionnaire was designed and administered on targeted respondents. The key entities involved in legislative scrutiny in Uganda were identified as the Office of the First Parliamentary Counsel in Attorney General' Chambers, the Uganda Law Reform Commission and the Department of Legislative and Legal Services in Parliament. Premised on this, ten questionnaires were issued to the respondents in these key entities who were involved in actual scrutiny of legislation by virtue of their work as Law Advisors to the government or to the Legislature, for more than five years. It should be noted that Uganda is a small jurisdiction with few competent and trained drafters, which explains the number of questionnaires issued. An analysis of the questionnaires coupled with existing literature on scrutiny of legislation is used to prove my hypothesis.

B. Scrutiny of Legislation Generally

The need to carry out legislative scrutiny in any State cannot be overemphasized.[11] Indeed, ineffective legislative drafting, according to the Seidmans, reflects and does contribute to a broader social problem, which actually is the challenge that many governments face in an attempt to overcome poverty and vulnerability of most of their people.[12] This, therefore, calls for legislation to be properly scrutinized because it is one of the tools that governments use to achieve social transformation.

According to Thornton,[13] legislative scrutiny requires a great deal of self-discipline, and the task itself is not an easy one. It is very important therefore that any person involved in the legislative process whether as elected representatives

11 Z. Ntaba, 'Pre-legislative Scrutiny', *in* C. Stefanou & H. Xanthaki (Eds.), *Legislative Drafting: A Modern Approach*, Ashgate, Aldershot, 2008, p. 120, where she emphasizes that the use of legislation is, among others, a desire to effect change in the social setting of a country, which desire does carry with it a huge burden before it actually attains that desired stage of achieving social change.

12 A. Seidman, R.B. Seidman & N. Abeysekere, *Legislative Drafting for Democratic Social Change: A Manual for Drafters*, Kluwer Law International, London, 2001, pp. 6-8, they emphasize that government's contribution to good governance and development is entirely made through law, and therefore, law making, in general, and legislative drafting, in particular, facilitate the development process.

13 Thornton, 1996, p. 173.

in Parliament, the Law Advisors who often are the technocrats or any interested member of the public ought to take the business of law making seriously, which involves a great deal of self-discipline. The Seidmans correctly note that, as elected representatives, the legislator's principal task requires them to assess proposed legislation usually originating from Ministries and that they should do so against criteria of good governance and development. Further, they need sufficient information to determine the likelihood that Bills that come before them will help achieve those objectives.[14] Therefore, legislative scrutiny must be done if efficiency and effectiveness in legislation is to be achieved, which has a direct impact on the quality of legislation and safe guarding the rule of law. It is on this basis that an examination of how legislative scrutiny impacts the quality of law is next dealt with.

I. Scrutiny and Quality in Legislation

There is no doubt that the pursuit of quality in legislation can be enhanced when legislative measures are effectively analysed, preferably against established criteria that suits a country's need. Xanthaki argues that there is no magic formula for achieving quality in legislation because of the peculiar nature of a country's rules that are often affected by its legal system and the main aim of its legislators.[15] What is not in dispute is that the quality of legislation is of paramount importance, and drafters strive to achieve it. This is because bad laws create uncertainty and unpredictability, which is bad for social legislation. Vague, conflicting, inaccurate provisions coupled with under or over regulation damage the credibility of the legislator and the public support is also greatly affected.[16] Therefore, legislative scrutiny is just one way in which quality in legislation can be ensured.

Literally, the term 'scrutiny' means to thoroughly examine something to check for mistakes.[17] However legislative scrutiny is done to not only examine the weakness of the proposals or law as the case may be, but it should be done to examine the laws that have been effective so that lessons can be learned from it.

Ntaba rightly observes that scrutiny of a legislative measure is synonymous with good practices, adherence to standard, regulations, the rule of law and aims to improve effectiveness and efficiency in legislation.[18] Quality of legislation is indeed related to effectiveness rather than efficacy,[19] and drafters aim at being effective and efficient. Xanthaki[20] rightly observes that effectiveness reflects the relationship between the effects produced by legislation and the purpose of the statute passed. On the other hand, Edmund Burke has observed that 'bad laws are

14 Seidman, Seidman & Abeysekere, 2001, p. 5.
15 H. Xanthaki, 'Standards for Quality in Legislation: The European Union as a Case Study'.
16 *Ibid.*
17 *See* <www.wordreference.com>, 16 May 2011.
18 Ntaba, 2008, p. 122.
19 H. Schaffer, 'Evaluation and Assessment of Legal Effects Procedures: Towards a More Rational and Responsible Lawmaking Process', 22 *SLR* 2001, p. 132.
20 C. Stefano & H. Xanthaki, *Drafting Legislation: A Modern Approach*, Ashgate, Aldershot, 2008, p. 6.

the worst sort of tyranny'.[21] When laws are drafted in an unintelligible manner, it will ultimately result in deeper social and economic costs to the communities.[22] Thus, the quality of the laws that a drafter produces is very important to ensure good governance and the rule of law in any country. Besides, Xanthaki echoing the concern for accessibility of laws to the reader noted that the ever increasing volumes of legislation being produced by European Union legislatures, coupled with complexities in the use of language, led to the call for drafters to draft laws bearing in mind the readership and audience which is no longer a domain for the lawyers only.[23] This is very important in relation to quality of the law being drafted, because laws are meant to regulate behaviour of society, so the citizens ought to comprehend the laws that bind then. The Seidmans agree that drafting in a way that bears the reader at mind enables the law to be accessible, and this impacts on the quality of the law as people easily get to know what is expected of them in the laws, while at the same time they are aware of their rights therein.[24]

However, it is important to note that there is no universally accepted definition of quality in legislation, nevertheless, the notion has been used in national legislatures and in the European Union Parliament much more recently, and it basically covers two concepts.[25] First, quality legislation primarily should be appropriate, adequate and precise in solving the problem it is intended to solve; secondly, it should do so in a language and structure that is readily understandable to those who are affected by it and those charged with the responsibility of administering the law. Jean Piris rightly notes that quality in legislation includes

21 Despite the importance of the law in a person's normal daily life, by its very nature, the law is not easily communicated to the lay person as any other form of writing.

22 Law Reform Commission of Victoria (Australia), Report No. 33 Access to the Law: the Structure and Format of Legislation May 1990, at 4. In this report, it was observed that the greatest cost stems from the risk of laws being enacted without them being properly understood.

23 H. Xanthaki, 'The Slim Initiative', 22 *SLR* 2001, p. 108, Xanthaki points out categorically that the concern for quality in EU legislative text was influenced by two factors, namely, the increase in volume of legislation that placed extensive rights and duties on EU citizens, which culminated in the quest for greater accessibility of legislation for the wider and less technical audience. Secondly, premised on the principle of direct effect that makes EU legislative text to be deemed directly applicable to Member States, even when not transposed into national law, it is vital that the original texts be drafted in a clear, simple and unambiguous manner so that interpretation by and application to a Member State should not be difficult at all.

24 Seidman, Seidman & Abeysekere, 2001, p. 187, where they observe that no matter how extensive or cogent their logic, unless drafters write in a form that facilitates understanding, their research reports will not readily persuade their readers of the bill's desirability.

25 C.W.A. Timmermans, 'How to Improve the Quality of Community Legislation: The Viewpoint of the European Commission', *in* A. Kellermann (Eds.), *Improving the Quality of Legislation in Europe*, Kluwer Law International, The Hague, 1998, p. 39, at 44.

both quality in the substance of the law and quality in the form of the law.[26] Thus, the discourse on quality of legislation is premised on the fact that legislation is of high quality when it attains its true function.[27] As stated earlier, legislation is intended to govern and impact upon wider audiences, and thus it ought to be drafted in a simple easy to comprehend manner, precise and unambiguous yet accessible while also achieving the desired intention of the instructing authority. This can be achieved by having legislative proposal scrutinized by all the stakeholders involved in the law-making process, including the general public.

Like Xanthaki,[28] Ulrich Karpen[29] therefore states that the test for quality of legislation depends on the legal environment of drafting and implementing the law. He goes on to list five criteria that may be applied to a piece of legislation to measure the quality of the legislation as:

1. Level of legislation
2. Procedural quality of the law
3. Formal quality
4. Substantive quality
5. The cost of the law

The drafter may not have control over some of the criteria listed by Ulrich Karpen to measure quality in a law, such as safe guarding against the high cost burden that the law may cause, but the drafter can ensure procedural and substantive quality of a legislative proposal to some extent. Formal quality may also be examined in the process of the drafter interfacing with the instructing department or ministry as the case may be. Usually, the follow-up meetings that are scheduled between the drafters of a proposed legislative measure and the instructing entities who are the sponsors of the Bill or any Statutory Instrument avail the parties with the opportunity to look at the proposals again and, to sort out questions or queries that may have been identified post the instruction period. Ulrich Karpen's criteria for measuring quality in legislation can be followed, where all the stakeholders in the legislative process are actively involved, which is not always the

26 J.C. Piris, 'The Quality of Community Legislation: The Viewpoint of the Council Legal Service', *in* A. Kellermann (Eds.), *Improving the Quality of Legislation in Europe*, Kluwer Law International, The Hague, 1998, pp. 25-38, where he notes that quality in the substance of the law refers mainly to issues of legislative policy and covers tests of subsidiary and proportionality, choice of the appropriate instrument, duration and intensity of the intended instrument, consistency with previous measures, cost-benefit analysis and analysis of the impact of the proposed instrument on other areas of governmental policy. That quality in the form of the law, on the other hand, concerns issues of accessibility like transparency in the decision-making process, and dissemination of the law.

27 V. Vanterpool, 'A Critical Look at Achieving Quality in Legislation', *EJLR*, Vol. 9, No. 2, 2007, p. 167.

28 H. Xanthaki, 'Standards for Quality in Legislation: The European Union as a Case Study'.

29 *Ibid.*, p. 156.

case especially for third world countries such as Uganda.[30] Indeed, the cost of the proposed legislative measure in some countries is measured by carrying out regulatory impact assessment (RIA) or impact assessment (IA), as it is currently known. However, in Uganda like most African countries RIA or IA is barely done.

In addition, the pressure to get a Bill introduced and enacted can be intense. Bigwood correctly observes that this pressure is often political that reflects the political nature of the drafting process.[31] Legislative proposals of a political nature or Finance Bills for supplementary budgets are often fast tracked through the legislative process.[32] This inevitably affects the quality of the law, which can be cured by having in place an elaborate mechanism for legislative scrutiny.

A strong proponent of having in place a set standard for drafters, especially in transitioning States, is Keith Patchett.[33] Patchett states that:

> 13. Common standards and uniform practices for preparing and drafting legislation are set most effective through the provision of a single set of directives, which have behind them the authority of Government and, as needed, Parliament ... not only is this the most powerful means by which reforms can be effected, but for the time being it may be the only way by which a single set of standards can be set to bind both the Government and the Parliament

Therefore, Patchett lists three essential aspects of the drafting process that ought to be regulated so as to ensure uniform standards in the laws and ultimately improve quality as:

1. Procedures to be followed at different stages in the drafting process
2. Uniform rules as to the application and operation of particular kinds of legislative provisions
3. Standard requirements as to the form, terminology and style in which legislation is to be drafted

30 M. Zander, *A Matter of Justice: The Legal System in Ferment*, Oxford University Press, Oxford, 1989, p. 237, where he correctly notes that, for most people, legislation is what happens in Parliament. In Uganda, the low-literacy level among greater number of the population is an impediment to constructive participation in matters of governance and law making itself.

31 R. Bigwood, *The Statute Making and Meaning*, LexisNexis, Wellington, 2004, p. 90, where he notes that drafters tell of horror stories about the timeframes with which they have been told to come up with a Bill or to draft amendments to the Bill before a Select Committee or the House itself. This is often a result of not getting the policy or the drafting right in the first place as there is no time to do a 'perfect job'.

32 In Uganda, for instance, when the executive has ran broke because of reasons not known or not properly explained to the citizens, the practice is for them to rush Budget supplementary Bills through parliament, which Bills are not often well scrutinized, but they do go through because the members vote on party interests as opposed to national interest, and the ruling party that has the majority in the House wins the crucial vote.

33 K. Patchett, 'Setting and Maintaining Law Drafting Standards: A Background Paper on Legislative Drafting', *in* C. Stefanou & H. Xanthaki (Eds.), *Manual in Legislative Drafting*, DFID/University Press, Cambridge, 2005, p. 47, where he emphasizes the need to have in place a single source for all directives related to the preparation of legislation, which source should be used by all who prepare legislation.

He further states that legislative scrutiny should be done continuously through the legislative process so that issues of clarity and practicability of the proposed legislative measure are adequately dealt with at an earlier stage and throughout the drafting process.[34] That is, each version of the draft should be subjected to a specific scrutiny as a matter of practice to verify the legal form, clarity and comprehensibility, and the final draft should be subjected to another level of scrutiny to verify a wider range of matter including a series of legal verifications. It is important that this is done because as the policy is translated into precise norms, new features could be introduced into the text.[35]

II. Pre-Legislative Scrutiny

The practice of pre-legislative scrutiny, which is increasingly gaining momentum in the legislative cycle and processes worldwide, has been hailed as one of the most significant and positive developments in legislative reforms recently.[36] In some jurisdictions, a semblance of pre-legislative scrutiny is done in the early stage of drafting to verify whether the legislative proposals reflected in the draft has been done in a manner that achieves the intended purpose, and that the law when enacted will sit well within the existing legal framework.[37] In the United Kingdom, however, pre-legislative scrutiny involves a general inquiry or, more recently, the issuing of a draft Bill to be considered in advance of its introduction, and it includes examining consultative documents, Green Papers and White Papers.[38]

The main argument of the proponents of pre-legislative scrutiny is that, provided that the Bill is still described as a 'Bill' and it does not in any way purport to be an advanced copy of that which Parliament will publish as a Bill, there should be no breach of privilege or propriety in making a draft available either for consultation well in advance of introduction or for more limited exposure shortly before introduction.[39] The Hansard Society has been one of the strong advocates for pre-legislative scrutiny, and in one of its reports it recommended that:

34 *Ibid.*, p. 47.

35 *Ibid.*, p. 56.

36 A. Brazier, 'Pre-legislative Scrutiny: A Positive Innovation', *in* A. Brazier (Ed.), *Parliament, Politics and Law Making: Issues and Developments in the Legislative Process*, Hansard Society, London, 2004, p. 31. Brazier lists the advantages of pre-legislative scrutiny as allowing for more measured consideration of a Bill's principle, questioning of new policy initiatives contained within it and that it also aids the consideration of any practical or technical issues that might arise from the proposed provisions. Further, he rightly observes that pre-legislative scrutiny can utilize expert evidence and thus provide a forum for a wide range of interested parties to influence legislation at an earlier stage. Lastly, pre-legislative scrutiny does provide an important mechanism for collaboration among the executive, legislature and the electorate.

37 In Uganda, *e.g.* verifying that drafting instructions have been followed and that the legislative proposal will harmoniously fit in the existing legal regime are some of the key ways that drafters carry out pre-legislative scrutiny.

38 Daniel Greenberg (ed.), *Craies on Legislation* (9th edn), Sweet & Maxwell, London, 2008, p. 128.

39 *Ibid.*, p. 233.

> There should be as full consideration as is practicable on draft bills and clause ... we therefore recommend that departments should offer more consultations on draft texts, especially in so far as they relate to practical questions of the implementation and enforcement of legislation ... Parliament could play a greater part by pre-legislative inquiry in the preparation of legislation.[40]

Some other positive aspects of pre-legislative scrutiny are that when conducted in a meaningful and purposive manner, it can commence public and media debate on a subject of national importance. Civil society and lobby groups can also take up issues to the legislature and adduce evidence to the committee and the House as a whole. The opportunity to interface with different stakeholders on the subject matter does avail Members of Parliament with enormous information, including data from subject matter experts. This aids them to be in a position of giving informed contributions when the Bill is formally introduced, whether in standing committee or in the chamber, thus raising the quality of the debate and ultimately scrutiny.[41]

Pre-legislative scrutiny being a relatively new approach for ensuring properly drafted law are enacted and safeguarding quality in legislation has been embraced by several jurisdictions. However, there are no established uniform standards for scrutiny of legislative proposals, although some jurisdictions such as the United Kingdom and Australia do have in place an elaborate procedure that has aided scrutiny of their legislation against established benchmarks. Experiences and good practices from some countries will therefore be examined to compare and learn what can be done to help Uganda scrutinize her legislation better. The criteria set down by Thornton[42] could be used as a starting point and adopted to fit a country's need. Thornton rightly observes that a drafter should first read the draft and consider it as a whole, and then the drafter should consider the following questions:

1. Does the draft achieve the intended objects of the proposal?
2. Does the draft fit harmoniously into the existing body of the law?
3. Is the draft coherent in terms of structure and content?
4. Are the language and content clear and comprehensible as the drafter can make them?

The effectiveness of pre-legislative scrutiny will to a large extend depend on the role of Parliamentary Committees, when the Bill has been introduced in the House. In the United Kingdom, for instance, a government Bill may be published in draft even before it is formally published in final form. Most draft Bills are referred to the Commons departmental select committee or to a joint committee

40 *Making the Law: The Report of the Hansard Society Commission on the Legislative Process,* Hansard Society, London, 1992.

41 *See* Brazier, 2004, p. 34.

42 Thornton, 1996, p. 173. Thornton elaborates on what a drafter should look out for having received drafting instructions and drafted the proposal. These are vetting techniques that help drafter in the absence of a well-known established scrutiny guideline or benchmarks.

of both the Commons and the Lords. The advantage is that, when considering the legislation in draft form, the select committees are able to call witnesses for oral evidence and also take written evidence from external sources.[43] The disadvantage is that, unlike standing committees that have powers to change a Bill, committees looking at a draft Bill can only make recommendations that the government has the discretion to accept or reject.[44]

III. Post-Legislative Scrutiny

The practice of post-legislative scrutiny is one of the new reforms being introduced in the legislative processes, and it has been used more of recently in the developed countries.[45] Post-legislative scrutiny involves an analysis of the impact of a legislative measure, which Miers and Page emphasize.[46] Mader, however, states that evaluation of legislation is premised on its normative contents and their impacts as far as social reality is concerned. He therefore outlined the following steps, which he notes that when religiously followed would lead to proper evaluation:

1. The analysis and definition of the problem that legislative action presumes to solve.
2. The determination or clarification of the goals of legislation.
3. The examination of legal instruments or means that can be used to solve the problem and the choice of such instruments.
4. The drafting of the normative content.
5. The formal enactment.
6. The implementation.
7. The retrospective evaluation.
8. Where appropriate, the adaptation of legislation on the basis of the retrospective evaluation.[47]

According to Mader, these eight are reiterative learning processes in which evaluation of effects is important in ensuring the legislator's responsiveness to social reality and the social adequacy of legislative action.[48]

Where it is done, post-legislative scrutiny involves the evaluation of the effectiveness of a piece of legislation. Post-legislative scrutiny is said to introduce a

43 *See* Brazier, 2004.

44 *Ibid.*, p. 33.

45 For instance, in the United Kingdom, the discourse in support for post-legislative scrutiny has been ongoing for the last 35 years, with changes being witnessed in the shift of the 1970s attitudes that tended to emphasize that post-legislative review be done selectively to examine specific pieces of legislation. The emphasis now is for post-legislative scrutiny to be conducted more systematically for the most new Acts.

46 D.R. Miers & A.C. Page, *Legislation*, Sweet & Maxwell, London, 1982, p. 213, where they note that the impact of legislation is more than the degree of obedience, but is the total effect of the legislation on behaviour and attitudes, positive and negative.

47 L. Mader, 'Evaluating the Effects: A Contribution to the Quality of Legislation', 22 *SLR* 2001, p. 119, quoted in L. Clapinska, 'Post-legislative Scrutiny of Legislation Derived from the European Union'.

48 *Ibid.*, p. 122.

systematic approach for strengthening the scrutiny of laws after they have been enacted by Parliament, with the aim of complementing government's internal departmental scrutiny and parliamentary scrutiny, by providing a 'reality check' of new laws after three to five years.[49] However, what is meant by post-legislative scrutiny is not clear to many people. This can be seen from the observations made by Harriet Harman, in her response to the Law Commission's 2006 report, as the Leader of House of Commons:

> ... What is meant by "post-legislative scrutiny" is often ill-defined. It could range from a wide ranging policy review to a quite limited and technical evaluation of the effectiveness of the drafting ...[50]

Post-legislative scrutiny, therefore, is the process of reviewing the law post-enactment after it has been in force for a period of time set by the reviewers. This scrutiny is meant to address questions that may have come up post-enactment, such as whether the policies applied are still relevant or not and what problems have arisen in the implementation stage.[51] Post-legislative scrutiny could also be used to clean the Statue book of sunset clauses or time-limited legislation. The advantages that accrue as a result of post-legislative scrutiny as far as improving the quality of legislation is concerned is not in dispute. Robin Cook[52] in his memorandum to the Modernisation Committee observed that:

> A key weakness in Parliamentary Scrutiny of legislation is that there is no consistent arrangement to monitor the implementation of our laws once they have been passed ... Yet Members of Parliament with their extensive constituency experience are well placed to monitor how legislation would be identified and rectified, and that such scrutiny might lead to improvements to the legislation in the first place, reducing the need for amending the legislation

In addition, the Hansard Society in support of post-legislative scrutiny has emphasized that post-legislative review would increase the likelihood that defective legislation would be identified and rectified, and that such a scrutiny might lead to improvements to legislation in the first place, reducing the need for

49 Office of the Leader of the House of Commons, Post-legislative Scrutiny-The Government's Approach, March 2005, CM 7320. This report was the Government's response to the Law Commission's Report on Post-legislative Scrutiny. The Government practically identified and agreed with the 2004 Lord's Constitution Committee report that had recommended that government departments should be responsible for producing memoranda of the efficiency of an Act on which basis, a Select Committee could then conduct inquiry into. The Governments' response was that government departments should first conduct any post-legislative reviews and then submit memoranda to the appropriate Select Committee. It should be noted that the Law Commission had recommended the setting up of a Joint Committee for post-legislative scrutiny.

50 The Rt. Hon. Harriet Herman QC MP, Leader of the House of Commons response tilted, 'Post Legislative Scrutiny: The Government's Approach', para. 5, p. 7.

51 *See* Brazier, 2004, p. 12.

52 *See Modernisation of House of Commons: A Reform Programme*, HC 440, Second Report of 2001-02.

amending legislation.[53] This is a practical choice when examined from the angle of initiating amendments and the cost implications usually involved up to the time the amendments are finally passed by the Parliament.[54]

It has also been rightly observed that when the government knows that there will be post-legislative reviews of their actions reflected in their choice of policy, this might make the policy makers and implementers think again as they opt for certain policy choices, and therefore, enhance the quality of legislation.[55]

To sum up the discourse on the advantages of post-legislative scrutiny, it is important to note that increased post-legislative scrutiny ultimately results to better regulation in any jurisdiction. This is so because it would encourage the identification and dissemination of best practices. In support of this argument, the House of Lords Constitution Committee pointed out that the practice of post-legislative review should to be used in its broadest sense to include the review of legislations that have been effective as far as its expected outcomes and implementation are concerned so that lessons learnt can be got from it.[56]

C. Uganda's Experience

Scrutiny of legislation in Uganda is done by the key actors in the legislative process, namely the government technocrats, committees of Parliament, drafters in government service and interested members of the public. How each of these actors carry out legislative scrutiny will be analysed to establish whether is it effective or not, and to see whether there is avenue for reform. This analysis will then be used to prove the hypothesis that the lack of an adequate, elaborate and uniform standard for legislative scrutiny in Uganda has affected the quality of legislation. This is so because different entities involved in the practice of legislative scrutiny use their own criteria, which often is unwritten and thus prone to inconsistency and abuse.

I. The Process of Legislative Scrutiny in Uganda

The conceptual framework above illustrates the stakeholders involved in legislative scrutiny in Uganda and identifies their participation level. As illustrated in Figure 1, the legislative process begins with the receipt of drafting instructions from Ministries, government departments or the Uganda Law Reform Commission as the case may be. These instructions should be forwarded to the office of

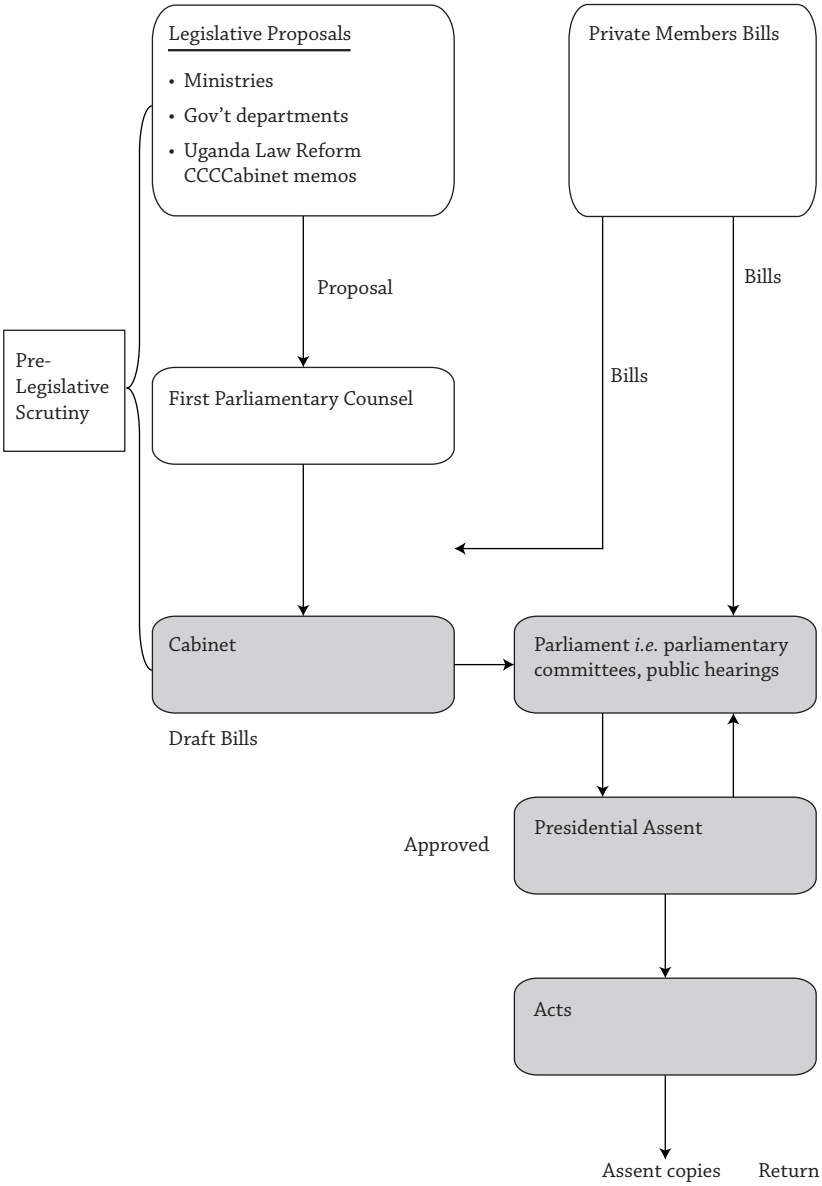
53 Hansard Society, *Briefing Paper: Issues in Law Making 6, Post Legislative Scrutiny*, May 2005, p. 2.

54 In Uganda, *e.g.* the proposals for amending existing law and the process itself, for amending legislation that are not of a political nature or not a matter of priority in the legislative agenda can be so protracted, with research, consultations and workshops to get stakeholder's view being done.

55 This is contained in a briefing note to the Scrutiny Unit Committee Office, House of Commons, p. 2.

56 *See* House of Lords Select Committee on the Constitution, Fourth Report of 2003-04, Parliament and the Legislative Process, HL 173-1, para. 168, where it was emphasized that post-legislative review should not only focus on legislation that has not worked well.

Figure 1 Post-Legislative Scrutiny (Amendments Basically)



the First Parliamentary Counsel, which is the office in charge of drafting government Bills and Statutory Instrument. The First Parliamentary Counsel will then look at the legislative proposals and come up with a draft Bill.[57]

57 Crabbe, 1991, notes that transferring government's policy into law is the prime function of parliamentary counsel.

The First Parliamentary Counsel and the department of government whose area is affected by a Private Member's Bill are obliged to offer professional and reasonable assistance to a Member of Parliament moving a private member's Bill.[58] This provision ensures that even a Bill being moved by a Private member is accorded technical and professional assistance as a government Bill. Indeed drafters from the First Parliamentary counsel have been often instrumental in drafting Private Member's Bill, therefore determining the form and content of such a Bill.[59] This makes scrutiny of legislation to be a continuous process in Uganda because the drafter who worked on a Bill in the Attorney General's Chamber can be called again later on when the Bill is being scrutinized in the committee stage. Such a drafter has a lot of information concerning the Bill because the drafter has been interfacing with policy makers in government departments and ministries at the initial stage of drafting the Bill, receiving drafting instructions and seeking for further clarifications on the Bill.

Pre-legislative scrutiny is therefore done in the following manner:

1. Parliamentary Counsel will ensure that all instructions to draft any Bill are accompanied by a Cabinet Memorandum for it is on the basis of what is contained in that memorandum that a Bill be drafted.
2. After drafting the Bill, the First Parliamentary Counsel must issue a certificate of compliance stating that the Bill was indeed drafted in accordance with the Cabinet Memorandum before it can be tabled in Parliament.
3. Where any proposal in a Bill will involve the amendment of the Constitution, the First Parliamentary Counsel must draw the attention of the Law Officers[60] to that fact.

It is important to note that the First Parliamentary Counsel in Uganda drafts both primary and subordinate legislation. Therefore, the scrutiny of delegated legislation is also done by this office to ensure that is sits well within in the existing body of laws and that more importantly it is not ultra vires.[61]

When the Bill is introduced in Parliament, scrutiny of the Bill continues in the Parliamentary committees. As stated above, often the drafter who has been working on the Bill from the Directorate of First Parliamentary Counsel will be involved together with the drafters in the Department of Legislative and Legal Services of Parliament.

Dicey notes that Parliament has the right to make or unmake any law whatsoever and that no person or body is recognized by law as having a right to over-

58 Art. 94(2)(c) Constitution of the Republic of Uganda.

59 For example, I had the benefit of being part of the team of drafters who worked on the Anti-Female Mutilation Act, 2010 (when I was a senior State Attorney in First Parliamentary Counsel), which was a Private Member's Bill. The information I got in this exercise enabled me to easily draft an Ordinance later on, prohibiting female circumcision on Kapchorwa district.

60 Law Officers in this case is the Attorney General and the Solicitor General, as provided in Uganda Government Standing Orders, Chapter 1 YB.

61 Thornton, 1996, p. 429, states that an attack on the content of subordinate legislation is usually premised on the fact that it is ultra vires and therefore void because it does not fall within the scope of what is authorized by the enabling power.

ride or set aside legislation made by Parliament.[62] This statement relates to the doctrine of legislative supremacy of parliament which applies to the Ugandan situation. However, Parliament often delegates some of its legislative authorities to other entities to exercise such authority within clearly stated mandate. The functions of the Parliamentary Committees Uganda are provided for in the Rules of Procedure of Parliament of Uganda.[63] In carrying out its function, the committee can hear petition from any person or organization interested on the Bill; consultations are also done.[64] Kibirige[65] rightly observes that committee is not just a debating forum, but it can take oral and written evidence from the public, thus, involving people in a formal process of consultations. This argument makes the legislative process more accessible to those outside parliament. It is vital to categorically state that consultation just for the sake of it without having proper accountability is not effective. In Uganda, there is no framework or follow-up done post-consultation to see whether the views solicited have been taken into account or not, and the reasons for not taking them into consideration is never known.

II. Best Practices

Having examined how legislative scrutiny is done in Uganda, it is important that an analysis of best practices in other jurisdiction is done. Xanthaki, in support of this position, rightly observes that irrespective of the characteristics and intricacies of a country's legal system, there is always something to learn from the experience of others.[66] Indeed some countries have put in place mechanisms and procedures for legislative scrutiny, which has served this purpose and, thus, an analysis of these mechanisms is necessary to examine how it works and what lessons can be learnt to improve legislative scrutiny in Uganda. As stated earlier in the methodology that experiences and perspectives from the United Kingdom and Australia will be used to establish how legislative scrutiny is done in these counties, and the effectiveness of those methods used will be analysed.

To begin with, Australia which is said to be the pioneer and expert jurisdiction in the British Commonwealth in as far as legislative scrutiny is concerned has Scrutiny Committees at the central government level that were established as

62 A.V. Dicey, *The Law of the Constitution*, cited in A. Bradley, 'The Sovereignty of Parliament-Form or Substance', *in* J. Jowell & D. Oliver (Eds.), *The Changing Constitution*, Oxford University Press, Oxford, 2007, p. 29.

63 Rules of Procedure of Parliament of Uganda, Rule 133, on the general functions of parliamentary committees, which is among others to discuss and make recommendations on Bills laid before Parliament; R. 116 is very specific on the functions of a committee on a Bill, that the committee of the House to which a Bill is committed shall discuss not the principles of the Bill, but the details, and it may propose any amendment and also accept proposed amendments to the Bill as it deems fit. At this stage, the committee may accept proposals to correct misprints, punctuations errors and instruct the clerk to make the necessary corrections.

64 *See* Rule 27 *Ibid*.

65 D.K. Kibirige, 'Act of Parliament: The Role of Parliament in the Legislative Process', *EJLR*, Vol. 12, Nos. 1-2, 2010, pp. 32-57.

66 H. Xanthaki, 'On Transferability of Legislative Solutions: The Functionality Test', *in* Stefano & Xanthaki, 2008.

early as 1932. Both Houses of Parliament scrutinize Bills at the central level.[67] The key scrutiny committees are the Legal and Constitutional Affairs Committee of the House of Representatives, the Regulations and Ordinances Standing Committee in the Senate, established in 1932, and the Standing Committee for Scrutiny of Bills, established in 1981.[68] Hugh Corder points out that the Senate committees are more critical and vigilant because of its composition and powers.[69] The effectiveness of the Australian system of legislative scrutiny is, therefore, based on the scrutiny committees and basically how they carry out their mandates. For instance, these committees do use a draft Alert Digest written by the legal officer clearly pointing out the content, analysis and recommendations in the draft.[70] All legislative proposals are scrutinized to make sure that human rights concerns are taken into account.[71]

In the United Kingdom, legislative scrutiny is done more in the House of Commons than in the House of Lords. This is so because the two houses of parliament are not equal in legislative powers as the 'upper' House can only delay legislation as the case may be. The House of Lords has the powers to refuse a Bill adopted by the Commons and can also propose amendments to it. However, where the House of Commons vote for a Bill the second time in its original form, then the Bill will become law of the land only after one year. The lord's version will then be removed.

Nevertheless, the House of Commons can be bogged down by towing party lines as far as legislative proposals are concerned. This is so because the House of Commons are elected politicians, while the House of Lords in practice are more interested in the substance of the Bill. However, in the British parliamentary system, floor time is required to debate and vote upon the Bill a second time in its amended form.[72] The United Kingdom being a member of the European Union, all its legislative proposals must be scrutinized to make sure that it does not contravene the Human Rights Act 1998.[73] The Joint Human Rights Committee is

67 At the state level, scrutiny is done by a committee in each of the states of South Australia, Victoria, Queensland and in the Australian Capital Territory; these committees essentially review Bills and Regulations, while in the states of New South Wales, Western Australia and Tasmania and, in the Northern Territory, the committees review only delegated legislation.

68 *See* The Final Report on 'Methods of Scrutiny of Legislation' by Professor H. Corder, 2 March 1999, pp. 8-9.

69 *Ibid.*, p. 9, where he observes the work ethos of the Senate committee, which meets weekly at a fixed time while Parliament is in session to review all Bills and Regulations published in the previous week; and it is assisted by an outstanding research and library capacity.

70 The draft digest contains a very brief summary of the proposed legislation and all the necessary documents that further explains the legislative proposals.

71 H. Evans (Ed.), *Odgers' Australian Senate Practice*(8th edn), AGPS, Canberra, 1997 and 'Ten Years of Scrutiny', 1991, the proceedings a seminar to mark the tenth anniversary of the Senate Standing Committee for Scrutiny of Bills, quoted in Professor H. Corder's Report, 1999.

72 D.M. Olson, *The Legislative Process: A Comparative Approach*, Harper & Row, New York, p. 349.

73 The Human Rights Act received Royal Assent in November1998, and it came into force in October 2000. The effect of the Act is to make it possible to bring proceedings in the United Kingdom courts regarding alleged breaches by public authorities of the European Convention on Human Rights. Before that, such proceedings could only be brought in Strasbourg.

specifically charged with this mandate.[74] This committee considers and reports on Bills that involve issues of human rights not necessarily restricted to issues arising under the European Convention on Human Rights.[75]

As seen from the above, it is the practice in the legislative process in the United Kingdom for committees of the House or a Joint Committee of both Houses to scrutinize legislative proposals together. The advantage is that it does avail to the different stakeholders in legislative process, such as the members of the public, the government and parliament itself, the opportunity to give their views on the Bill with comparative ease.

The United Kingdom, according to Craies,[76] therefore carries out actual pre-legislative scrutiny in the following ways:

1. A Bill can be sent to one of the permanent Select Committees of the House mandated to monitor the activities of the government department that has the main responsibility for the substance of the Bill.
2. A Select Committee of the House can be set up purposely to scrutinize the legislative proposal in the Bill.
3. A Joint Committee of both Houses of parliament may be constituted specifically to analyse a Bill.

Following from the above, it is important to note that the effectiveness of the committee system in the United Kingdom as far as pre-legislative scrutiny is concerned can be seen how they carry out this mandate. For instance, the committee has powers to call to any witness they deem necessary and hear evidence from them. This illustrates how flexible these committees can be in pursuit of their mandate, and only goes to support the preference for pre-legislative scrutiny to other methods often used to scrutinize Bills once introduced in the United Kingdom parliament.[77]

Notwithstanding the above observation, practice in the United Kingdom parliamentary system shows that the scrutiny of Bills by a Joint Committee of both Houses of parliament is the most preferred.[78] The advantage is that as members from the two Houses work together on the Bill, they are interfacing and thus able to learn from each other's experience and expertise. In addition, it provides a single, efficient avenue for critical analysis of the Bill, and Members get to know the genesis of the policy behind the Bill. This information and background it is argued is important because once the Bill is introduced there will be more informed and constructive debate on the Bill.[79]

74 Zander, 1989, p. 88, this Joint Committee was established in 2001 and much of its work consists of preparing reports on pending Bills.
75 Zander, 1989, p. 88.
76 *Craies*, 2008, p. 233.
77 *Ibid.*
78 *Ibid.*
79 *Ibid.*

D. Analysis and Evaluation of Data

The preceding parts of this article essentially explored the existing literature and best practices on legislative scrutiny as the last stage of the drafting process, as laid down by Thornton. The importance of legislative scrutiny in the law-making process, and later on, when the law is being implemented in relation to the quality of legislation was dealt with.

The focus of this part, therefore, is to analyse the questionnaires to establish whether the key entities involved in legislative scrutiny in Uganda do follow the guidelines as laid down by Thornton or, whether they have in place any established procedure that they follow as benchmarks when scrutinizing legislative proposal or legislation as the case may be. What they have in place as parameters for scrutiny of legislation in their day-to-day work will also be examined for it will be on that basis that the quality of the law will be determined. This approach will then answer the research question that seeks to establish the stakeholders in the legislative process in Uganda and what role they do play.

The questionnaires were issued to Law Advisors in the three key government departments in Uganda that are involved in the process of law making, and they do scrutinize legislative proposals and review some laws in action. An analysis and evaluation of the questionnaires will be done to establish what exactly is on the ground in Uganda as far as the legislative scrutiny is carried out. The process and challenges in legislative scrutiny is the main aim here. The effectiveness of the methods of legislative scrutiny is also dealt with. Lastly, what should be done to improve scrutiny of legislation in Uganda based on respondent's response is also analysed.

The hypothesis being tested in this article is that notwithstanding the huge numbers of the laws being enacted by Parliament, the absence of an elaborate, known and well established mechanism for legislative scrutiny affects the quality of the laws being enacted. The lack of consistency in terms of parameters to be followed does affect the outcome of the law and ultimately impacts greatly on the quality of the law.

As previously stated, these data were collected by designing a questionnaire on the key components of legislative scrutiny, which questionnaire was then administered to ten respondents actively involved in the process of legislative scrutiny in Uganda. The respondents were sampled from the three key government departments that carry out legislative scrutiny in their capacity as drafters or Law Advisors and therefore technocrats in the public service. The departments represented by these respondents are:

1. The Uganda Law Reform Commission
2. The First Parliamentary Counsel (Attorney General's Chamber's)
3. The Department of Legal & Legislative Services, Parliament of Uganda

The following were the parameters for gathering the sought information on the practice of legislative scrutiny in Uganda, and it formed the basis of the questionnaires issued:

First, there was a need to establish whether the respondent has been involved in any form of legislative scrutiny, and if so, the length of their involvement was important. Of the ten questionnaires issued, nine of the respondents had been involved in some form of legislative scrutiny for more than five years in their various capacities as drafters and Law Advisors. One respondent never returned the questionnaire. Therefore, it can be said that 90% of the respondents were involved in some form of legislative scrutiny for a long period.

Next, how the respondents perform legislative scrutiny in their daily routine needed to be established to know what exactly is done and to establish whether what Thornton lists as guidelines for scrutiny is being followed. The responses were varied depending on where the respondent works. Generally, respondents from the Uganda Law Reform Commission said that they perform scrutiny of legislative proposal when they consult the public and stakeholder' views on a particular proposal.

While the respondents from First Parliamentary Counsel on the other hand seem to follow the guidelines laid down by Thornton in scrutinizing their Bills, although not in a chronological manner. Two of them said that they perform scrutiny by examining the proposals to check out matters of constitutionality, legal and procedural aspects. While one respondent stated that the use of the Cabinet Memorandum and other policy documents as a tool to verify whether the objects of the Bill has been adequately taken care of is what they use in the Directorate of the First Parliamentary Counsel.

Two respondents from the department of Legislative and Legal Services noted that they perform legislative scrutiny by carrying out research on the Bills before the committees in Parliament, while one respondent said that by studying the Bills before the committees they actually scrutinize the Bills and advise Members of Parliament accordingly. It can be deduced that in Uganda the criteria listed by Thornton for scrutiny and testing of proposed legislative measures are being followed to a large extent especially by the Directorate of the First Parliamentary Counsel. Legislative drafts are scrutinized to see whether it complies with legal and constitutional requirements. By ensuring that drafts are made based on what is contained in the Cabinet Memorandum, the objects of the Bill are fully catered for.

The respondents were also asked whether they knew of any uniform mechanism for legislative scrutiny or bench marks upon which they base the scrutiny of the legislative proposals or the law in action. Seven respondents said that there are no uniform standards or mechanism for legislative scrutiny; one was unsure, and the other said yes – there is a uniform mechanism for legislative scrutiny. The three respondents from the office of the First Parliamentary Counsel alluded to the fact that they perform scrutiny of legislation based on a checklist used within the department. Adherence to the principal of legality, constitutionality and reference to the Cabinet Memorandum are some of the key points in the checklist. As observed earlier on, this is in line with the questions that Thornton argues drafters to bear in mind when scrutinizing legislation. The respondent who noted that there is a uniform mechanism for ensuring legislative scrutiny, however, referred to the use of long-held practices such as referring to Acts of

Parliaments Acts,[80] the Constitution,[81] the government Standing Orders and the Rules of Procedure of Parliament as parameters upon which scrutiny is carried out in the department of Legislative and Legal Services. Therefore, it can be adduced that there is no uniform mechanism or parameters for legislative scrutiny in Uganda. Different entities involved in legislative scrutiny in Uganda have in place their own internal bench marks upon which they carry out scrutiny of legislative proposals.

The respondent's knowledge of what is pre-legislative scrutiny was also tested, and whether they used any form of pre-legislative scrutiny in their work. Five of them had sound or better understanding of what is pre-legislative scrutiny. It was observed that the respondents from First Parliamentary Counsel actually had in-depth knowledge of what is pre-legislative scrutiny, followed by those in the department of Legislative and Legal Services in Parliament. All the respondents said that they do carry out pre-legislative scrutiny in their work as drafters and Law Advisors, respectively. From the findings, it can be seen that in Uganda not all the drafters have in-depth knowledge of what exactly is pre-legislative scrutiny; yet in reality, they do carry out some form of pre-legislative scrutiny in their day-to-day work.

The effectiveness of pre-legislative scrutiny based on their knowledge and experience was also inquired, and it was established that five respondents mainly from First Parliamentary Counsel and the department of Legislative and Legal Services of Parliament noted that pre-legislative scrutiny the way it is currently performed in Uganda is effective. Three respondents said it was very effective, whereas one stated that it was ineffective. It can therefore be safely said that pre-legislative scrutiny is effectively carried out in Uganda especially in as far as matters of legal, constitutionality, objects, form and content of the legislative proposal is concerned.

The respondent's knowledge of what is post-legislative scrutiny was inquired, and whether the respondent is involved in any form of post-legislative scrutiny was examined. Eight of the respondents said they had been involved in post-legislative scrutiny while one stated that her work does not involve any form of post-legislative scrutiny. It was thus established based on their responses of what is post-legislative scrutiny that, four respondents had sound knowledge or a good understanding of what is post-legislative scrutiny, three had some understanding though not in-depth, one had a vague idea and one respondent did know what post-legislative scrutiny was. From the findings, it can be deduced that the level of knowledge of what post-legislative scrutiny entails is limited. In fact, only three respondents alluded to Regulatory Impact Assessment or Impact Assessment as aspects of post-legislative scrutiny that are not done presently in Uganda.

The respondents were required to give their experiences in post-legislative scrutiny so to further probe their knowledge on the practice, and it was established that four respondents performed some form of post-legislative scrutiny

80 Act of Parliaments Act, Cap. 2, Laws of Uganda.
81 The Constitution of the Republic of Uganda.

only when amending legislation. One of the respondent actually alluded to this fact when he said that post-legislative scrutiny is done to assess conflict and uncertainty created by a law. Three respondents stated that Regulatory Impact Assessment or Impact Assessment is not done when they carry out post-legislative scrutiny. Lastly, one respondent had no idea of what is post-legislative scrutiny, while one also stated that it does not apply to her job description.

The role of Parliament as the sole law-making body in Uganda is recognized, and thus, the role of the parliamentary committees in the scrutiny of legislation was the subject of inquiry. Respondents were asked what they thought about the performance of the parliamentary committees and their effectiveness as far as legislative scrutiny was concerned. Describing the performance of parliamentary committees, it was noted that they do provide checks and balances on the executive, but issues of poor attendance and lack of technical skills on the part of members of parliament affect their performance ratings. Therefore, five of the respondents stated that the performance of parliamentary committees as far as legislative scrutiny is concerned is very wanting and thus ineffective. One respondent stated that scrutiny of legislation in parliamentary committees is highly politicized.

Suggestions for reform of the parliamentary committee to enable them better carry out their scrutiny functions was sought. The following were some of the recommendations that the respondents gave for the better functioning of parliamentary committees:

- There is a need for legal representation, especially when Bill are being analysed.
- Attendance of members of parliament should be encouraged so that scrutiny should not be deferred.
- There is a need to increase number of scrutiny committees.
- More advocacy, patriotism, self-drive and commitment should be instilled in members of parliament.
- There is a need to build capacity of the legal team that advise the members.
- Members with particular skills and knowledge should be encouraged to join committees in such areas for better participation and scrutiny.
- Need to use people with technical expertise in committee.
- Avoid towing party lines and affiliations in scrutiny of legislation.

Lastly, the respondents were asked what suggestions they had that would help improve on legislative scrutiny generally in Uganda, and the following were some of the recommendations:

- The need to learn from what others are doing, best practices such as RIA/IA.
- Encourage participation and consultation by the public and stakeholders in matters of law making.
- Standardize and document procedures for legislative scrutiny.
- Training in research skills for those involve in scrutiny of laws.
- Need for adequate funding for the entities involved in legislative scrutiny.

- Pre-legislative scrutiny should be applied uniformly to all legislative proposals.
- Library, text books for entities carrying out scrutiny of legislation.
- Private Member's Bills should be well scrutinized.
- Once elected as Speaker of Parliament, such a person should resign their parliamentary seat.
- Issue departmental guideline.
- Return presidential term limits to the Constitution.

I. Validity, Generalizability and Transparency

The validity of this article is established by the credibility of the primary data source because respondents were highly experienced in legislative scrutiny, although the secondary data posed a challenge because there is insufficient literature in scrutiny of legislation generally, and post-legislative scrutiny in particular.

Generalizability is limited because of the research design and differences in processes, proceedings and best practice across the sampling case. Being a case study design, it is difficult to generalize findings for Uganda or indeed their experience to those of other nations; however, valuable lessons can still be learned from them to encourage improving legislative scrutiny generally.

Every effort was made to ensure transparency in this article; although respondents were purposively sampled, the researcher had no prior knowledge or acquaintance with them, and furthermore questionnaires were self-administered to ensure the researcher had little influence over their responses. The secondary data were primarily used for informative and comparison purposes only and not as a yardstick of measurement of the Ugandan experience. This ensures that the Ugandan experience was independent of the other sampling cases although processes and proceedings from both provided a valuable insight on the practice of legislative scrutiny. Again the findings of this study will be available to all interested parties to ensure transparency as it does not seek to conceal anything but rather generate knowledge for future benefit to legislative scrutiny.

II. Limitations

Although attempts are made to streamline responses in this study, in doing so, this study is limited by a lack of control over the continuous nature of legislative scrutiny, which in a way means that perceptions and practices keep changing; hence, responses derived today may not be the same tomorrow. This makes it very difficult to generalize and quantify findings, especially this being a case study project.

In trying to establish homogeneity within the sampling cases for comparison, this research actually restricts the scope of study, hence rendering it not wholly inclusive of other entities. However, because legislative scrutiny is such a varied practice, it is only logical that one focuses on homogeneous cases if processes and proceedings are to be streamlined to provide any valuable insight on the practice of legislative scrutiny.

E. Conclusion and Recommendations

This article sets out to examine how legislative scrutiny is carried out in Uganda premised on the last stage of the drafting process, which is scrutiny and testing of legislation according to Thornton.[82]

The hypothesis being tested in this study is that the lack of an adequate, elaborate and uniform practice or standards known and applied by all the actors involved in the process of legislative scrutiny affects the quality of the law in Uganda. This is because different entities use different internal mechanism peculiar to that entity, which is not consistent and often very informal in nature. To gather information to prove this hypothesis, literature review on existing works was examined coupled with an analysis of best practices from Australia and the United Kingdom. In addition, primary data on how legislative scrutiny is done in Uganda were collected by issuing questionnaires to key informers who have extensive knowledge and experience in the law-making process by virtue of being drafters and Law Advisors to entities that are involved in scrutiny of laws in Uganda. Therefore, having analysed the primary data and carried out literature review on legislative scrutiny coupled with an examination of best practices, the following are some of the recommendations that this study generated.

To begin with, it was noted that the consultation process to get views from the public is not well established so that one cannot tell whether their inputs were taken into considerations or not, and if not why. Some of the respondents stated that they do carry out consultation from the public and stakeholders, especially those from Uganda Law Reform Commission and produced reports of such study. However, the executive is not bound to take up the recommendations of such reports and consultations. Therefore, the significance of consultation in the law-making process is emphasized in this article so that the citizens for whom the law is being made can own the process and be part of it.[83] This can be seen from the comments of one of the respondents who stated that, "... the idea of involving members of the public in the law making process renders the law to be a more readily acceptable tool for the society ... law making is a very political tool".[84]

The fact that pre-legislative scrutiny is carried out largely by parliamentary committees in Uganda is not in question. However, the analysis of the questionnaire shows that scrutiny is done hurriedly because of the bulk of work of parliament, shortage of time brought about by poor attendance rates and sheer lack of competence of some of the Members of parliament to effectively analyse and scrutinize Bills. Indeed, Kibirige observes that "... committees need to be constituted on competency in order for Bills to be effectively scrutinised ...".[85] Thus, much as pre-legislative scrutiny is a step in the right direction, and it is the main mode of scrutiny in Uganda but members of parliament need to be empowered to

82 *See* Thornton, 1996, p. 173.

83 *See* Zander, 1989, p. 237.

84 According to F. Ochago, Assistant Commissioner, Uganda Law Reform Commission interviewed on 29 July 2011.

85 D. Kibirige, Senior State Attorney in Ministry of Justice Uganda interviewed on 25 July 2011.

effectively scrutinize Bills. By providing more information and further research on the Bill, members can carry out scrutiny.

There is a need to do some advocacy work with the hope of transforming the work ethos of Members of Parliament in Uganda, so that the issue of attending parliamentary sessions, and in particular, committees is addressed. As can be seen from the analysis of data collected, seven out of nine respondents observed that the parliamentary committee systems is ineffective and wanting in nature as far as legislative scrutiny is concerned. One respondent sadly noted that members of parliament in Uganda do their best but more often than not their attendance rates are wanting.[86] Indeed, most of respondents suggested that if the members could improve on their attendance of the committees, take time to read and analyse the Bills before their committees, their effectiveness could improve significantly.

A study of best practices from Australia and the United Kingdom both illustrated the benefit of having a Joint of two Houses of Parliament analysing a Bill. Based on this, it could be argued that in a unicameral parliament scrutiny of legislation is generally not given much time and attention it deserves. That parliament has other duties to perform such as ensuring that the executive is accountable to parliament in the performance of its functions. Practice from the United Kingdom shows that much of the legislative work and scrutiny of legislation is done by the lower chamber – the Commons. This only goes to show that scrutiny has nothing to do with the structure of parliament, but everything to do with the work ethos of Members of Parliament and other partners in the legislative process.[87]

Further on pre-legislative scrutiny, how it is performed in Uganda today faces a lot of challenges; however, where pre-legislative scrutiny is done constructively, it does contribute to quality of legislation. Thus, the role of the drafters, Law Advisors and government technocrats who are involved in the scrutiny process at an earlier stage, that is, from the point of receipt of drafting instructions and the on-going consultations between government officials, needs to be appreciated and enhanced. Indeed, it is at this early stage of the law making that many issues of legality, constitutionality and best practices are dealt with.[88]

The findings from primary data noted that in Uganda the different entities involved in the process of scrutiny of legislation used their own methods for scrutiny of legislative proposals. First, Parliamentary Counsel has a checklist that is internally used within its Directorate, whereas Uganda Law Reform Commission

86 This observation was made by Chinery-Hesse; Legislative Drafting Consultant for more than 25 years in Uganda, on 25 July 2011. He further suggested that members of parliament need technical assistance like judges get in Uganda so that they can do their work better.

87 Observation – it is not difficult to form a committee in the Ugandan parliament to work on scrutiny of Bills before their introduction in the House. This committee can be a forum for drafters to interface with Members of Parliament, government technocrats and the public to discuss the Bill.

88 D.K. Kawooya, 'Act of Parliament: The Role of Parliament in the Legislative Process', 12 *EJLR* 2010, p. 32, the advantages of pre-legislative scrutiny notes that for Parliament its main use is to influence the government's legislative policy before it is firmly entrenched.

and the department of Legal and Legislative Services use informal parameters for scrutiny. As these key entities are all working together for the common good, it is important that they have a harmonized position in matters of legislative scrutiny so as to produce high-quality laws. This can be achieved by having in place a uniform code on legislative scrutiny, which featured as one of the recommendations for reform from the respondents.[89]

Post-legislative scrutiny is a recent development in the legislative process globally.[90] Findings from research carried out in Uganda showed a lack of clear understanding of what it entails basically. Many of the respondents alluded to the fact that the only thing they do that is akin to post-legislative scrutiny is amending legislation.[91] It is when amending legislation that the effects of the law, usually the negative ones are identified. Yet existing literature shows that post-legislative scrutiny involves much more than merely looking at existing law for purposes of amendments.[92] It is not in question the enormous benefits that post-legislative scrutiny does to the existing law and more so to quality of the law. It is therefore recommended that drafters and technocrats be trained in the first place on what exactly is involved in post-legislative scrutiny, and members of parliament can follow.

In addition to the above scrutiny committees' mandate should be widen to cover also post-legislative scrutiny.

To conclude, the absence of a standardized uniform code for legislative scrutiny in Uganda has led to the process of scrutiny being done haphazardly, hence affecting the quality of legislation. The fact that the law making in Uganda is a process involving different entities and actors, it is pertinent that a uniform code for scrutiny is developed so that the law that is finally enacted by the Legislature is of high quality in terms of substance and form.[93]

89 K. Denis, Senior State Attorney interviewed on 25 July 2011 also reiterated the need to develop a uniform code for scrutiny of legislation in Uganda to ensure coordination in scrutiny.

90 *See* Hansard Society, 2005, where in comparison to pre-legislative scrutiny, post-legislative scrutiny has been described as 'virtually non-existent as it attracts relatively little attention'.

91 E. Majambere, Senior Legal Officer, Uganda Law Reform Commission interviewed on 26 July 2011, while commenting on her experience as far as post-legislative scrutiny is concerned noted that it involves studying the existing law to look out for gaps and errors in the law and propose amendments. She further states that there is no RIA or IA for it is not done.

92 Hansard Society, 2005, where it was noted that Parliamentarians could make use of RIAs stated in the explanatory notes that looks at implications of the proposals for businesses, to later on call the government to account by monitoring and evaluating the assessments and report to Parliament, pp. 5-6.

93 *See* Piris, 1998, where he emphasizes that quality in legislation includes both quality in substance of the law and quality in the form of the law.