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Pre Legislative and Legislative scrutiny processes: the
contribution of Parliament to quality legislation

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**PRE LEGISLATIVE AND LEGISLATIVE SCRUTINY PROCESSES: THE
CONTRIBUTION OF PARLIAMENT TO QUALITY LEGISLATION**

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Dedication

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Chapter 1: Introduction

1.1 Overview

There is no denying that parliament plays a unique and fundamental role in any democracy. It is essentially the main vehicle through which the government is held accountable between elections on behalf of the public.¹ Parliament holds government accountable by scrutinising its policies, because as expressed by Olson, parliaments are poised between the executive on one hand and the electorate on the other, making it an intermediary institution between government and the citizens.² Olson further posits that the creation and activities of parliament grow out of this dual relationship.³

Although generally speaking parliament, or legislature is the law making body of any country, in reality the executive is the lawmaker and parliament merely approves. The executive comes up with policies, turns them into legislation and submits them to parliament for approval. So basically, the executive makes policy and parliament approves it, what Lord Norton refers to as ‘policy influencing rather than policy making legislature.’⁴ It is for this reason that most legislation comes from the executive, there is very few private members Bills, and even fewer of these see the light of day, unless it is a ruling party backbencher who then gets support of the party or government decides to take the Bill up. This was the case with the Domestic Violence Act of Botswana, which was brought was female ruling party backbencher who then got support of government and the government decided to take up the

¹ Report of the Hansard Society on Parliamentary Scrutiny, *The Challenge for Parliament: Making Government Accountable* (Vacher Dod Publishing 2001) 1.

² David M Olson, *The Legislative Process: A comparative Approach* (Harper & Row Publishers 1980) 16.

³ *ibid.*

⁴ Lord Norton of Louth, ‘Parliament and Legislative Scrutiny: An Overview of Issues in the Legislative Process’ in Alex Brazier (ed), *Parliament, Politics and Law Making: Issues and Developments in the Legislative Process* (Hansard Society 2004) 5.

drafting of the Bill. It is well accepted therefore that legislation is used by every government to govern, in fact as expressed by Lord Norton, Acts of Parliament affect and shape the society.⁵ This makes legislation of paramount importance, because government needs legislation to give effect to its policies so as to give them the force of law.⁶ Scrutiny by parliament of legislation proposed by the executive therefore serves as quality control measure for legislation that actually achieves its intended purposes. Parliament scrutinises legislation through the legislative process. The quality or effectiveness of legislation can therefore be measured by the effectiveness of the legislative process.

According to Johnson and Nakamura, if parliament is to be effective in performing its core functions, it must adapt and evolve over time.⁷ In the spirit of this, many parliaments have made some significant reforms in their legislative processes in order to adapt to the changes facing them in the modern times. The focus on quality of legislation is one such a fairly new concept, and if parliament is to scrutinise legislation with a view to produce quality legislation, then there is need to reform the legislative process to achieve this. It has in actual fact, been argued that the political debate on quality of legislation has been sparked by the increasing complexity and the volume of legislation produced by parliaments all over the world.⁸

In the United Kingdom (UK) for instance, the legislative process was reformed with the introduction of the Select Committee on the Modernisation of the House of Commons in

⁵ *ibid.*

⁶ David R Miers and Alan C Page, *Legislation* (Sweet & Maxwell 1982) 11.

⁷ Johnson K Johnson and Robert T Nakamura, 'A Concept Paper on Legislatures and Good Governance 1999' www.cid.suny.edu accessed 04 August 2016.

⁸ Edward Caldwell, 'Comments' in Alfred E Kellerman and others (eds), *Improving the Quality of Legislation in Europe* (Kluwer Law International 1998) 79.

1997. The committee was established to make the House of Commons a more effective legislature by strengthening, among other things, the quality of legislation they produce and scrutiny of delegated legislation.⁹ It was with the establishment of this committee that pre-legislative scrutiny was also introduced. Pre-legislative scrutiny is one of the ways in which parliament can allow members of the public to have a say in how they are governed.

In Botswana, like in most parliaments across the world, the legislative process can be traced to the Constitution. Botswana parliament is established under section 57 of the Constitution and is vested with legislative power under section 86. Parliament exercises legislative power by passing Bills and then the president assenting to them. In Botswana, the Standing Orders of the National Assembly provide for legislative process scrutiny. They provide for the procedures to be followed when a Bill is introduced to parliament. They however do not provide for pre-legislative scrutiny of legislation in draft form. While the legislative process has been reformed in other countries like the UK, for instance with the introduction of explanatory notes and others, in Botswana no reform aimed at improving the legislative process and quality of legislation has taken place, this is despite the increasing complexity of legislation and the number of bills that are passed in every year.

1.2 Hypothesis

It is against the above background that this dissertation hypothesis that deficiencies in the pre-legislative and legislative scrutiny processes harbours bad quality legislation.

⁹ Robert Blackburn and Andrew Kennon, *Griffith & Ryle on Parliament: Functions, Practice and Procedures* (2nd edn Sweet & Maxwell 2003) 750.

1.3 Methodology

In order to prove the hypothesis, an analysis will be made of the pre-legislative and legislative process in Botswana to highlight the deficiencies which may harbour bad quality legislation. The dissertation further uses the Report of the Select Committee on the Modernisation of the House of Commons of 1997¹⁰ as criteria of how pre-legislative scrutiny can benefit and enhance quality of legislation and assesses the system in Botswana against the said criteria. It must be made clear here that because pre-legislative scrutiny in the form proposed by the Modernisation Committee has not been carried out in Botswana, there are no cited examples from Botswana. To this end the dissertation relies on the views of the authors who have studied the process in the United Kingdom looking at bills that had undergone the process to establish the effect of the process on quality of those bills. They are therefore used as lessons for Botswana. The dissertation also relies on other relevant literature and materials on the subject matter.

1.3 Structure

Chapter One of the dissertation is the introduction which provides an overview of the subject matter, the hypothesis and the methodology used. Chapter Two provides an examination of the pre-legislative and legislative processes in Botswana in order to give an indication of how the pre-legislative and legislative scrutiny occurs and outlines the deficiencies in the two processes which may harbour bad quality legislation. Chapter Three is the analysis, it attempts to show how the deficiencies in the scrutiny process affects the quality of

¹⁰ Select Committee on Modernisation of the House of Commons, *The Legislative Process* (HC 1997-1998, 90).

legislation. The dissertation uses the criteria set out in the Modernisation Committee Report.¹¹

Chapter 4 will provide some conclusions showing that pre-legislative and legislative scrutiny processes can enhance the quality of legislation and some recommendations for improving the processes in Botswana.

¹¹ *ibid.*

Chapter 2: Pre- Legislative and Legislative Scrutiny in Botswana

2.1 Background

Legislation is a very broad activity, and many of the other activities of a parliament are accomplished through the legislative function of parliament.¹² Legislation is essentially a statement of governmental policy on some topic, a way of putting the policy into effect. It is an instrument of social guidance and control used to achieve political objectives. Therefore in order to achieve political objectives the government needs to legislate.¹³ The way that parliament can influence the government's policy making process is through scrutiny, which makes it essential to the legislative process. Ntaba argues that scrutiny of a Bill involves verifying whether it satisfies the necessary requirements and whether the rules have been followed in the drafting process.¹⁴

It has already been mentioned in this dissertation that parliament is the institution that is poised between the government and the governed. Following from the above, and that the most frequent way in which government governs is through legislation, then it cannot be overemphasised that this is the role that parliament as the representatives of the people must take more seriously. Parliament must ensure that government policies do not unnecessarily burden the citizens. Parliament does this when government policies are brought before it through the legislative process. The legislative process is the process by which legislative proposals change from mere policy ideas to binding law. The process therefore makes it clear the importance of parliament scrutiny of these policy ideas, as they become law that binds

¹² Olson (n2) 12.

¹³ VCRAC Crabbe, 'The Ethics of Legislative Drafting' (2010) Commonwealth Law Bulletin 11, 15.

¹⁴ Zione Ntaba, 'Pre-Legislative Scrutiny' in C Stefanou and H Xanthaki (eds) *Drafting Legislation: A Modern Approach* (Ashgate 2008) 119.

and regulates the behaviour of citizens. Lord Goldsmith observed the following about the legislative process

The legislative process is not the end in itself, merely the means to an end. The end to which it is directed is the enactment of laws which are clear, concise and accessible, and the legislative process exists to assist parliament to achieve that end.¹⁵

Greg Power has noted that although both parliament and the executive both aim for better legislation, their interests are not the same, and their means of achieving better legislation are likely to differ.¹⁶ He further expresses that whereas a departmental consultation will focus on the Bill's technical detail, parliament's scrutiny is a more political process.¹⁷ It is the contention of this dissertation therefore that consultations carried out by parliament will not produce the same results as consultation carried out by the government before and during the drafting process, but are both equally important for improving the quality of legislation.

Parliament requires procedures to scrutinise legislation. As expressed by Blackburn and Kennon, all institutions, especially a political assembly such as parliament embodying conflicting elements, combating parties and competing individuals, need clearly recognised processes for the transaction of their business in an orderly fashion¹⁸, and Botswana parliament like most around the world, employs the use of Standing Orders for this purpose. The Standing Orders are used to ensure that there is consistency in the proceedings because as noted by Blackburn and Kennon, good procedures and their consistent and correct

¹⁵ Lord Goldsmith, 'Parliament for Lawyers: An Overview of the Legislative Process' (2003) 45 *Amicus Curiae* 3, 4.

¹⁶ Greg Power, 'Parliamentary Scrutiny of Draft Legislation 1997-1999' Constitution Unit 3.

¹⁷ *Ibid.*

¹⁸ Blackburn and Kennon (n9) 247.

application are essential for the protection of citizens against improper adoption of laws that affect them.¹⁹ Although this was stated in reference to the House of Commons which because there is no comprehensive written constitution by which to protect and safeguard the rights and interests of citizens, it is also true for Botswana. This is because despite having a written constitution, the adoption of laws is done in accordance with the procedures laid out in the Standing Orders. There is nonetheless need for legislative reform to improve the legislative process. It is against this background that the legislative process of Botswana is going to be considered.

2.2 Pre-Legislative Scrutiny

In a complex and interdependent society, almost no government action affects only one agency or one segment of society, to consult widely with all affected groups and entities is the usual practice in a twin effort to obtain proposals that are workable and also acceptable.²⁰ This has been done for the longest time through consultations on proposed policy by government departments. Parliament only had an opportunity to consult when the bill was formally before it for passage through the legislative process. Kennon observes that the origins of pre-legislative scrutiny therefore lie partly with dissatisfaction with the quality of scrutiny of bills through the existing parliamentary procedures.²¹ He further argues that it was the dissatisfaction with the quality of legislation that the Hansard Society reported that many bodies interviewed were concerned that most Bills were being presented to parliament when

¹⁹ Ibid.

²⁰ Olson (n2) 176.

²¹ Andrew Kennon, 'Pre-Legislative Scrutiny of Draft Bills' [2004] Public Law 447, 491.

they were not ready and still had details remaining to be worked out which often brought about subsequent amendments.²²

Pre-legislative scrutiny is arguably one of the most and significant developments in the legislative reform, as it allows for more measured consideration of a Bill's principles, questioning of new policy initiatives and consideration of any practical or technical issues that might arise from the proposed provisions.²³ In fact Ntaba posits that pre-legislative scrutiny is a pre-requisite in liberal democracies with constitutional values, that is transparency and accountability in the draft legislation must fulfil democratic principles.²⁴

Pre-legislative scrutiny occurs prior to the Bill being published in its final form. The process of pre-legislative scrutiny can take different form depending on each jurisdiction. In the UK a special committee of parliament carries out pre-legislative scrutiny before a Bill is introduced formally before parliament. In Botswana pre-legislative scrutiny takes place before and during the drafting process. This will be explained further in the passages that follow.

Pre-legislative scrutiny within parliament should be seen within the wider context of public consultation.²⁵ In the UK, although not for all Bills, parliament then gets an opportunity to consult interested parties on the draft Bill before it comes for formal legislative scrutiny. A Bill is referred to a parliamentary committee for pre-legislative scrutiny. The government, at its discretion, publishes a list of Bills that will go through the process at the beginning of each parliamentary session. There are no formal guidelines for carrying out pre-legislative scrutiny

²² Ibid.

²³ Alex Brazier, 'Pre-Legislative Scrutiny: A Positive Innovation' in A Brazier (ed) *Parliament, Politics and Law Making: Issues in the Legislative Process* (Hansard Society 2004) 31.

²⁴ Ntaba (n 14) 121.

²⁵ Kennon (n21) 477, 483.

although the government has made an undertaking that they would do it unless there are good reasons for not doing so.²⁶ This is the form of pre-legislative scrutiny that was envisaged by the Modernisation Committee and the one referred to in this dissertation.

2.2.1 Benefits of pre-legislative scrutiny

Nsereko posits that consultations and pre-parliamentary procedures in respect of a Bill are extremely important because once a Bill is introduced before parliament; it is invariably enacted into law with little to no modification.²⁷ Consultations before the formal stages therefore ensure that issues are ironed out when there is an opportunity to amend or modify the bill. The process of pre-legislative scrutiny ultimately ensures the full and effective participation of citizens which will in turn make people to assume both the right and the responsibility to be involved in charting their own national goals, values, policies and legislation that aim to sustain and improve their wellbeing.

When citizens are able to participate in the decision making processes of their country, they are in essence empowered to actively and effectively involve themselves in creating the structures and systems and in turn to support the policies and laws intended to support those structures and systems. Participation in this sense involves consultation and involvement of the citizens. Consulting citizens requires that they should be asked what they think about proposed decisions or actions taken and be allowed some kind of influence over the decision making processes. Pre-legislative scrutiny offers these benefits, and more importantly on legislation, the tool most used for governance.

²⁶ Brazier (n23) 31.

²⁷ Ntanda DD Nsereko, *Constitutional Law In Botswana* (Pula Press 2001) 171-172.

Pre-legislative scrutiny can help improve the scrutiny of legislation and can ensure the wider public is involved in the legislative process. This is because as observed by Brazier, pre-legislative scrutiny can stimulate and assist public and media debates on a Bill and can also provide mechanism for lobbying and pressure groups to campaign and submit evidence.²⁸ This is crucial for participatory governance and can therefore equally benefit both the government and the governed. The government benefits from expert knowledge of its citizens, which may ensure that the policy will work and make the resulting legislation effective, in that it will achieve its intended purposes. This is because as expressed by Xanthaki, it is through consultation at the early stages of the legislative process that issues of acceptance of the proposed legislation may be examined early.²⁹

For the citizens, public bodies and interest groups, being consulted gives them a guarantee that their views will be given a hearing if not included in the proposals.³⁰ It therefore provides a mechanism for direct engagement with the parliamentary and political process.³¹ Greg Power argues that the use of draft Bills for consultation is an effective way of improving the quality of legislation.³² The relationship between quality of legislation and pre-legislative scrutiny will be considered in chapter 3. In the end as observed by Archibold, pre-legislative scrutiny is a worthy cause as it forms a key part of modern policy-making and legislation

²⁸ Brazier (n23) 34.

²⁹ Helen Xanthaki, 'The Slim Initiative' (2001) 22 (1) Statute Law Review 108.

³⁰ Miers and Page (n6) 58.

³¹ Alex Brazier, Susanna Kalitowski & Gemma Rosenblatt with Matt Korris (eds), *Law in the Making: Influence and Change in the Legislative Process* (Hansard Society 2008) 173.

³² Greg power (n16).

because when it works well, it builds democracy and makes for open, accountable and effective legislation.³³

2.3 The legislation Approval Process in Botswana

Pre-legislative scrutiny in draft, as proposed by the Modernisation Committee is not part of the legislative process in Botswana. However all government legislation passes through several legislation approval processes before it can become law. Once a policy is developed, it goes through clearance by the minister involved in that portfolio. The Ministry would have in coming up with policy consulted all stakeholders and sometimes members of the public, depending on how much of the public attention the law is likely to attract, through formal meetings and working groups.

When a policy has been formulated and legislation is identified as the means of putting the policy into effect, the minister responsible for the portfolio authorises drafting process to begin. Before drafting commences, the minister responsible for that portfolio will issue and circulate a memorandum on the policy to other ministries who will make their comments and forward back to the responsible ministry. The responsible ministry then seeks approval in principle of the policy, which they seek to turn into legislation. It is only when Cabinet has issued a Cabinet Directive on the policy that instructions will be sent to the Attorney General's Office for drafting to commence. In Botswana, Bills are drawn up by government, and drafted by the legislative drafting division in the Attorney-General's Chambers. It is

³³ Claire Archibold, 'The Pre-Legislative Consultation Process, Equality, Human Rights and Social Need Division' in C Stefanou and H Xanthaki (eds), *Manual in Legislative Drafting* (University Press 2005) 22, 24.

when the consultations have been carried out an drafting instructions prepared that they are forwarded to the Drafting Division of the Attorney General's Chambers for drafting to begin.

A policy also goes through party clearance stage, which involves caucus by the ruling party members, or sometimes all party caucus or General Assembly.³⁴ The object being to explain and justify what goes to parliament. The proposed legislation must of course be in line with the party manifesto. The Speaker or ministry may by request to the Speaker, initiate or direct that a Bill, particularly a complex one be referred to caucus so members can better understand the Bill. This happened with the Electronic Commerce and Transaction Bill in 2015. After the Bill had been introduced to parliament, it became apparent that members did not understand the Bill, the subject-matter was too complex for them. The Bill was put on hold and referred back to caucus. The system has the potential to be of good use but it is not clear on how or when it should work, it therefore lacks structure.

2.4 Pre-Legislative Scrutiny in Botswana

In Botswana the consultative process does not begin with parliament, it is a more generic process that occurs within the government itself. Pre- legislative scrutiny occurs at different stages in Botswana. During the passage of the Bill through the drafting process, all the people involved can help shape the Bill before it is taken to parliament. The drafting office scrutinises the policy, then produces a draft Bill. The draft Bill goes through at least two to three levels of vetting. The process of vetting is thorough, it goes from the drafter, their supervisor and their supervisor's supervisor. This process ensures that all ground has been covered and that indeed the policy is workable.

³⁴ Standing Order 117 (F).1

When the Bill has gone through internal clearance in the drafting office, it is forwarded to client ministry who also get to scrutinise it to ensure that all aspects of the policy have been covered and the Bill meets their specifications. When the ministry is satisfied with the Bill, the Bill is then presented to Cabinet by the responsible minister for approval. The Bill is then extensively discussed clause by clause by Cabinet. The Attorney General and the drafter attends this meeting to provide clarifications and sometimes legal advice on some of the provisions. Amendments are or maybe proposed during this stage, which if agreed to are then referred back to the drafting office for incorporation into the draft. The Bill is then published and is ready for introduction to parliament.

Pre-legislative scrutiny therefore does take place in Botswana, as illustrated above, but just not in the form suggested by the Modernisation Committee. It is more focused in the drafting office, client ministry and subsequently Cabinet. This in my view excludes the lawmakers, from the process, who are the direct representatives of the people. They only get to see the Bill when it is published and introduced to parliament. There is a requirement that a Bill once published should at least stay a period of thirty days after publication before it is debated by parliament.³⁵ This is to allow members of parliament to consult their constituents on the Bill before they debate it in parliament. This is the only form of pre-legislative scrutiny that occurs at the level of parliament. It is not structured and formal as the one proposed by the Modernisation Committee. The other difficulty with this is that there is no use of explanatory notes in Botswana so basically there is no additional information that is provided to members to allow them to understand the Bill better which can in turn help them to consult better. The only information members have is what is provided in the memorandum, which just basically just states the object of the Bill.

³⁵ Section 89 of the Constitution.

There are also instances where a Bill can be referred to a special committee of parliament to scrutinise the Bill before it is fully debated by parliament.³⁶ The committee then presents a report to parliament to parliament for adoption, if adopted the amendments proposed in the report becomes part of the Bill as amended. This process rarely, almost never takes place in Botswana.³⁷

In terms of section 88(2) of the Constitution, parliament cannot proceed to debate a Bill if in the opinion of the Speaker, would if enacted affect the powers of customary leaders (*Dikgosi* and *dikgosana*) or affect customary law unless the *Ntlo ya Dikgosi* (House of Chiefs) has had thirty days within which to debate it. The resolution of the *Ntlo ya Dikgosi* is not binding on Parliament but it is taken cognisance of.³⁸ This is another way in which pre-legislative scrutiny can be said to occur in Botswana. As with the others, it does not have proper structure, and it depends on the opinion of the Speaker.

2.3 Legislative Scrutiny

When the draft Bill has been approved having gone through the processes stated above, and Cabinet has approved, then it is published in the Government Gazette and is ready for introduction to parliament for the legislative procedures. According to Blackburn and Kennon, legislative procedures are the procedures used for passing Bills and other subordinate legislation into law and for Bills to be examined, criticised and sometimes

³⁶ Standing Order No. 75.

³⁷ Since independence in 1966, only one Bill was committed to a Select Committee, The Botswana Tourism Board Bill in 2003.

³⁸ Standing Order 34 only provides that the resolution shall be ordered to lie upon the Table without question put to it.

amended before they become law.³⁹ The procedures for bringing a Bill before parliament in Botswana are provided for by the Constitution and the Standing Orders of the National Assembly of Botswana adopted in 1966 and as currently amended.⁴⁰ The Standing Orders give specific powers to the Speaker for the control of the debates and other proceedings such as legislative procedures in the House.

Like most countries, in Botswana once a Bill is introduced to parliament it goes through the all the normal stages in parliament. Botswana parliament is unicameral, but as already indicated, there are instances where a Bill may be referred to *Ntlo Ya Dikgosi*. When the Bill is first presented, or what we call first reading only the short title is read out, and the minister responsible proposes a date for second reading, which can be forthwith, or a later date. There are no debate entertained on the Bill at this point. There is requirement that, unless there is urgency, a Bill will not proceed to second reading unless a period of thirty days has lapsed after its publication.⁴¹

Under the Constitution, parliament cannot proceed upon any Bill, or motion except upon the recommendation of the president, if in the opinion of the presiding person, the Bill imposes a tax, a charge upon the revenues or funds of Botswana, withdrawal from any public funds, makes provision for composition or remission of any debt to the Government.⁴² The section also creates a restriction in regard to a Bill that in the opinion of the presiding person affects the powers of the *Dikgosi* or *Dikgosana* or affects customary law unless the Bill has first been

³⁹ Blackburn and Kennon (n9) 318.

⁴⁰ The latest amendment to the Standing Orders was in August 2014.

⁴¹ Standing Order 72.3.

⁴² Section 88(1) of the Constitution.

referred to *Ntlo ya Dikgosi*.⁴³ When the Bill has satisfied the requirement and a period of thirty days has lapsed, the minister responsible moves that the Bill be read a second time. This is the second reading.

Second reading is concerned with debates on the broad principles of a Bill.⁴⁴ No details of the Bill are debated at this point in time, only general merits and principles and no amendments can be moved. As correctly argued by Blackburn and Kennon, as an exercise in parliamentary scrutiny, second reading debates achieve very little as the published Bill has already told the story and the minister needs only to emphasize its main characteristics.⁴⁵ However according to Erskine May, second reading is the most important stage that a Bill will pass, because its whole principle is then at issue and is either affirmed or denied by vote of the House.⁴⁶ Second reading debates are therefore the most important scrutiny that a Bill receives. In Botswana, a vote is then taken to decide whether the Bill should proceed. If the vote is such that the Bill should not proceed then no further action will be taken on the Bill.⁴⁷ This however rarely happens in Botswana because the government has the majority in parliament, this is so because as expressed by Power, the legislative process is adversarial and so the government has the right to get its way.⁴⁸

After the Bill is read a second time, it then proceeds to committee stage. This is the stage where most detailed scrutiny is given to a Bill. In committee, a Bill is considered clause by clause, amendments are proposed, debated and voted upon. Generally, opposition members

⁴³ Section 88(2) of the Constitution.

⁴⁴ Standing Order No. 74.1.

⁴⁵ Blackburn and Kennon (n9) 441.

⁴⁶ Erskine May, *Parliamentary Practice* (19th edn, Butterworths 1976) 497.

⁴⁷ Standing Order 74.2.

⁴⁸ Greg Power (n16).

of parliament rarely propose amendments that are agreed to, they are disadvantaged by the vote. In Botswana when a Bill is read a second time, it stands as being committed to a Committee of the Whole Assembly, unless a motion is made by any member immediately after the second reading to refer the Bill to a special committee or the Speaker commits the Bill to a Select Committee because he or she is of the opinion that the Bill will specially benefit or specially affect some particular person, or association or corporate body.⁴⁹ When a Bill has been referred to a Select Committee, the Committee is confined to the Bill and to matters relevant to the Bill and may propose amendments that are relevant to the subject matter of the Bill in their report.⁵⁰

The main function of the Committee is to discuss the details of the Bill, and not its principles. In scrutinising the Bill, the committee has powers to call in witnesses, ask for papers and records relevant to its mandate.⁵¹ Where a Bill has been amended in Select Committee, the whole text of the Bill may if practicable, be printed as part of the report of the Select Committee, if not then only amended clauses will be printed.⁵² When the Committee has completed its work, it presents a report to the Assembly, which is considered paragraph by paragraph as if it were a Bill.⁵³ When the report is agreed to, the Bill is recommitted to the Committee of the Whole House for consideration.⁵⁴ The Bill is considered as amended and a vote is taken. The next after committee is the third reading. In third reading, a motion that the Bill be read a third time and do pass is moved, no amendments can be moved at this point. When the Bill has been passed, the long title and short title of the Bill are read. Then the Bill is prepared for assent, Government Printers prepares the Bill as amended and passed by

⁴⁹ Standing Order No 75.

⁵⁰ Standing Order 76.

⁵¹ Standing Order 124.

⁵² Standing Order 81.2.

⁵³ Standing order 123.6.

⁵⁴ Standing Order 82.3.

parliament and prints parchment copies for presidential assent. The clerk confirms that the Bill is as passed by parliament by appending a signature then the Attorney-General appends the public seal and the Bill is sent to the president for assent.

The committal of a Bill to Select Committee is another way in which pre-legislative scrutiny could be carried out in Botswana. However this procedure is rarely followed, as stated above, since independence to date only one bill has been referred to a Select Committee for consideration. Most of the detailed scrutiny of legislation happens at committee of the Whole House. Most debate on the Bill and what impact it will have on the citizens and generally members' views on the Bill, happens at second reading where the members are not allowed to move amendments. The disadvantage with this system is that unlike in the UK where explanatory notes are published with every government Bill and updated when a Bill becomes an Act, in Botswana members of parliament are left to fend for themselves.

Explanatory notes explain the change that the Bill is going to produce in the law, and therefore better equips the members for debates. The use of explanatory notes was extended and made standard in 1998 on the recommendation of the Select Committee on Modernisation of the House of Commons.⁵⁵ Explanatory notes are prepared in consultation with the parliamentary Counsel who draft each Bill and set out the provisions of the Bill and explain each section including any financial and staffing consequences.⁵⁶ Explanatory notes assist the members to understand what the provisions of the Bill are intended to achieve.⁵⁷ This is because as noted by Giovanni Piccirilli and Paolo Zuddas, making information

⁵⁵ Blackburn and Kennon (n9) 320.

⁵⁶ *ibid.*

⁵⁷ Lord Norton (n4) 10.

available to members of parliament to assist them in making legislative decisions is an essential pre-requisite of all democratic legislatures.⁵⁸ In fact John Garret argues that whatever the background, training and interests of a member of parliament, he or she could probably do a better job if they were better resourced and empowered.⁵⁹

If members are to scrutinise a Bill and ensure its quality, then they need to understand what the Bill is about and have more information. In Botswana members are not provided with any other information except for the Bill and its memorandum, which only states the objects of the Bill. It is for this reason that our system can better benefit from a more structured system of pre-legislative scrutiny. Currently members get to consult their constituents during the thirty days period between first reading and second reading. However there has been an increase in the number of legislation that proceeds on certificate of urgency which effectively robs the members of the opportunity for pre-legislative scrutiny of legislation in draft form. There is hurried examination of Bills which harbours bad quality legislation as the policy is not thoroughly scrutinised, technical and practical matters that may arise are not properly thrashed out. The members even when they have an opportunity to do so, they rarely use it unless the legislation has attracted a lot of media attention. They use the time to consult on other issues affecting their constituents.

As indicated elsewhere in this paper, Botswana operates a unicameral system of parliament, therefore does not have the benefit of a second chamber for scrutiny of legislation. The UK has an added advantage in the form of the second chamber of parliament, the House of Lords.

⁵⁸ Giovanni Piccirilli and Paolo Zuddas, 'Assisting Italian MP'S in Pre-Legislative Scrutiny: The Role Played by Chambers' Counsellors and Legislative Advisors in Enhancing the Knowledge and Skills Development of Italian MP'S' (2012) 65 (3) Parliamentary Affairs, 672.

⁵⁹ John Garret, *Does Parliament Work?* (Victor Gollancz 1992) 13.

The House of Lords provide added scrutiny to Bills, such that if the House of Commons misses something when scrutinising a Bill, then it will be picked by the House of Lords. In Botswana the *Ntlo ya Dikgosi* (House of Chiefs) could provide the same added scrutiny but a Bill only goes to them if there are provisions in it that affect or touch on customary law.⁶⁰ It is for this reason that it is important that the legislative process is reformed to ensure that scrutiny by parliament is improved to better serve the quality of legislation.

Having considered the pre-legislative and legislative scrutiny processes in Botswana, and some of the deficiencies in these systems, we now consider how these deficiencies affect the quality of legislation.

⁶⁰ See (n43).

Chapter 3: ANALYSIS

3.1 The Role of Scrutiny to quality of Legislation

As already alluded to in this dissertation, legislation is of utmost importance. According to the Seidmans today's societies define themselves through legislation, no place more than in the developing world,⁶¹ which makes legislation an essential tool for accomplishing development that serves popular needs. If one agrees with the Seidmans, then it will not be an exaggeration to state that legislation is the cornerstone of society. To paraphrase Miers and Page's observation,

Legislation constitute the single most important source of law, most central government activity is carried on within a statutory framework. The affairs of the government as whole and private individuals are directed by legislation. There is hardly any aspect of public conduct of the citizen that is not regulated by statute. The preparation, enactment, interpretation and implementation of legislation are therefore matters of utmost importance, not just for those whose behaviour is affected by the law but also for those who are professionally involved in those matters.⁶²

It goes without saying therefore that quality of legislation should be of equal importance. Mousmouti notes that the fundamental role of legislation has triggered a fairly new burning

⁶¹ Ann Seidman and Robert Seidman, 'Instrumentalism 2.0: Legislative Drafting for Democratic Social Change' (2011) 5 (1) *Legisprudence* 95.

⁶² Miers and Page (n6).

debate on ways of improving its quality.⁶³ In order to define or measure quality of legislation the first question is, what is the purpose of legislation, why legislate? The aim cannot be clutter the statute book with useless legislation. Xanthaki opines that the ultimate goal of regulation is efficacy, efficacy being the extent to which regulators achieve their intended purposes.⁶⁴ She argues that efficacy is not a goal that can be achieved by one party to the legislative process. This dissertation agrees, it is for this reason that the dissertation proposes that members of parliament have a role to play in quality of the legislation through scrutiny of the legislation. The Clearer Commonwealth Law Committee received some submissions on consultations and quality of legislation and most people who submitted were of the view that parliamentarians are ultimately responsible for the quality of legislation,⁶⁵ which makes scrutiny processes of parliament vital to the overall quality of legislation.

It has been established that policy making is the domain of the government. It is the way in which government achieves its purposes; to put its political vision into achievable objectives. Laws expresses that government policy depends on the legislation enacted as the policy will not be well executed if the legislation is not properly and effectively drafted.⁶⁶ This begs the question, what is effectively drafted legislation? This brings into play quality of legislation. Xanthaki posits that quality of legislation is tied to effectiveness. She argues that effectiveness that means the norm does not become dead letter.⁶⁷ Ziegler on the other hand posits that legislation is considered to be effective if it is capable of satisfying the legislative

⁶³ Maria Mousmouti, 'Operationalising Quality of Legislation Through the Effectiveness Test' (2012) 6 (2) *Legisprudence* 191, 192.

⁶⁴ Helen Xanthaki, 'Drafting Manuals and Quality in Legislation: Positive Contribution Towards Certainty in the Law or Impediment to the Necessity for Dynamism of Rules' (2010) 4 (2) *Legisprudence* 111,114.

⁶⁵ House of Representatives Standing Committee on Legal and Constitutional Affairs, '*Clearer Commonwealth Law*' (September 1993) 167.

⁶⁶ Stephen Laws, 'Giving Effect to Policy In Legislation: How to Avoid Missing the Point' (2011) 32 (1) *Statute Law Review* 1.

⁶⁷ Helen Xanthaki, 'On Transferability of Legal Solutions: The Functionality Test' in C Stefanou and H Xanthaki, *Drafting Legislation: A Modern Approach* (Ashgate 2008) 1, 6.

policy.⁶⁸ In the end an effective law is a good law that is capable of leading to efficacy of regulation, and ultimately quality in legislation is effectiveness.⁶⁹

On the question of measuring quality, Mousmouti is of the view that quality of legislation differs depending on the functions and purposes of legislation, on the priorities in specific, historical political and social contexts, on views of different actors and other factors.⁷⁰ She correctly observed that quality of legislation depends on both the process of rulemaking and its real impact on society.⁷¹ In assessing quality in legislation, the process of making it is equally important as its actual impact. Xanthaki opines that effectiveness is the real measure of quality of legislation and addresses the extent to which a piece of legislation produces mechanisms capable of giving the desired regulatory effects.⁷² Ntaba agrees with this proposition and notes that in order for legislation to be effective, it must have the desired effect of achieving social change.⁷³ In this regard quality reflects the relationship between the purpose and the effects of legislation.⁷⁴ If this is acceptable, then pre-legislative and legislative scrutiny will link directly with quality of legislation in that by consulting and scrutinising, it is ensured that the legislation is necessary and will achieve the intended purposes.

It is put forward that the processes of pre-legislative scrutiny in the form of consultation and the legislative process scrutiny by parliament contribute significantly to the quality of the end

⁶⁸ Peter Ziegler, 'Information Collection Techniques for the Evaluation of Legislative Process' (1988) *Statute Law Review* 160.

⁶⁹ Helen Xanthaki, 'Duncan Berry: A Visionary of Training in Legislative Drafting' (2011) *Loophole* 18, 21.

⁷⁰ Mousmouti (n63) 192.

⁷¹ *ibid.*

⁷² Xanthaki (n64) 115.

⁷³ Ntaba (n14) 121.

⁷⁴ Xanthaki (n67) 6.

product. According to Blackburn and Kennon, consultation is widely regarded as an effective way of improving the quality of legislation as it allows outside experts to comment on the detail of a proposed legislation.⁷⁵ The Hansard Society notes that parliamentary scrutiny does make a difference to the final shape of an act⁷⁶ meaning therefore that parliament does have an opportunity to influence the quality of legislation. They further argue that their research indicates that consultation has a real impact on legislation that improves the legislation.⁷⁷ The general view is therefore that consultation improves legislation,⁷⁸ and this dissertation agrees.

Having established that scrutiny benefits quality of legislation, and having highlighted some of the deficiencies that exist in our system that could be said to harbour bad quality legislation, we now consider how the criteria proposed by the Select Committee on Modernisation of the House of Commons for pre-legislative scrutiny can improve the quality of legislation. We consider the benefits of pre-legislative scrutiny as suggested by the Committee against what obtains in Botswana.

3.2 Criteria

In every democratic society members of that society need to understand and participate in the decision-making processes of that society. In fact the rule of law requires it. Where the rule of law prevails, citizens have a right to be represented by a responsible government which is answerable and accountable to the people. Procedure tells us that there must be scrutiny of government decisions and that all people must be involved in governance and development

⁷⁵ Blackburn and Kennon (n9) 727.

⁷⁶ Brazier (n31) 197.

⁷⁷ *ibid* 178.

⁷⁸ See (n65).

processes of their country. Participation of citizens in governance is in actual fact one of the hallmarks of a democratic society. It is the assertion of this dissertation therefore that pre-legislative scrutiny is one of the ways that an ordinary citizen can have a say on how they are governed. The House of Commons Select Committee views pre-legislative scrutiny as one of the most successful innovations in the legislative process in the recent times.⁷⁹ Lord Norton argues that with the introduction of pre-legislative scrutiny of legislation in draft form, parliament is no longer a total outsider, a body waiting until a Bill is laid before it.⁸⁰ In Botswana parliament waits for bills to be introduced before it, before they can have any say in it.

It has been already been established that pre-legislative does occur in Botswana although it lacks proper structure and has no systematic approach. This dissertation uses the criteria set out by the Select Committee on Modernisation of the House of Commons in order to highlight how effective scrutiny can benefit both parliament and the citizens and ultimately quality legislation. This dissertation therefore focuses on the benefits of pre-legislative scrutiny as criteria for carrying out pre-legislative scrutiny and legislative scrutiny. The Committee had this to say about pre-legislative scrutiny

There is almost universal agreement that pre-legislative scrutiny is right in principle, subject to the circumstances and nature of the legislation. It provides an opportunity for the House as a whole, for individual backbenchers, and for the Opposition to have a real input into the form of the actual legislation which subsequently emerges, not

⁷⁹ Select Committee on Modernisation of the House of Commons, *The Legislative Process*, First Report of Session (HC 2005-2006, 1097), para 9.

⁸⁰ Lord Norton (n4) 7.

least because ministries are likely to be far more receptive to suggestions for change before the Bill is actually published. It opens parliament to those outside affected by the legislation. At the same time such pre-legislative scrutiny can be of real benefit to the Government. It could, and indeed it should, lead to less time being needed at later stages of the legislative process, the use of Chair's powers of selection would naturally reflect the extent and nature of the previous scrutiny and debate. Above all it should lead to better legislation and less likelihood of subsequent amending legislation.⁸¹

For the purposes of this dissertation, the benefits of pre-legislative scrutiny and scrutiny in general that will be utilised as criteria are

- a. allow Members of Parliament real input into the form of the final legislation;
- b. ministers will be more receptive to suggestions for change;
- c. open parliament to those affected by legislation;
- d. save time at later stages in the parliamentary process; and
- e. overall it should lead to better legislation.

Botswana inherited the Westminster model from the UK as a former colony of Britain. UK has in fact influenced a lot of the system in Botswana, the system of government including the operation of parliament was modelled along the Westminster system of government. The influence of the UK is such that even the Standing Orders provide that where there is no specific provision in parliamentary procedure in Botswana, or there where there is doubt in

⁸¹ Select Committee on Modernisation of the House of Commons (n10).

about a matter not provided for in the Standing Orders of Botswana, reference will be made to the practice and procedures of the House of Commons of Parliament of Great Britain, and other Commonwealth countries⁸² (with a similar system of course) It makes sense therefore that if one was to look elsewhere for effective legislative scrutiny mechanisms, then the UK should be one of the starting points. They have had their system as far back as 1997 and it has according to a number of authors,⁸³ shown to work and has improved the overall quality of legislation in the UK. If Botswana parliament is to improve its legislative scrutiny effectiveness, then drawing from the experience of the UK, as the system from which it was originally modelled upon is sensible.

3.2.1 Allow members of Parliament to have a real input into the form of the final legislation

The Modernisation Committee proposed that pre-legislative scrutiny should ideally provide an opportunity for the whole House, for individual backbenchers, and for the Opposition to have a real input into the form of the actual legislation which subsequently emerges. It has already been stated that in Botswana, pre-legislative scrutiny occurs at Cabinet, which excludes the backbenchers and members of the opposition. Ntaba has criticised relying on this form of pre-legislative scrutiny on the basis that Cabinet is a political body whose agenda is first and foremost to ensure that the policy has been properly translated into law as opposed to quality of the bill.⁸⁴ This is true of the system in Botswana.

Although the pre-legislative process that takes place in Botswana contributes to the overall quality of the end product, parliament as the legitimate lawmaker has the highest

⁸² Standing Order No. 131.1.

⁸³ See Brazier (n 23), Archibold (n33), Kennon (n 21) and Smookler (n121).

⁸⁴ Ntaba (n14) 125.

responsibility to ensure that there is quality in legislation. Although scrutiny by the Attorney-General's Chambers, and other ministries and cabinet are essential and necessary and can at the end of the day improve the quality of legislation, more importance should be placed on scrutiny by parliament as the representatives of the people. It is through parliament that members of the public can have a say in government policies which are in the form of legislation. To paraphrase Lord Norton, other bodies may study and comment on proposals for legislation, but only parliament has the constitutional authority for scrutiny to ensure that measures are desirable in principle and are effective.⁸⁵ The argument is that although government draws up Bills, it is the responsibility of parliament to ensure that they are appropriate and fit for the purpose.⁸⁶

Pre-legislative scrutiny allows members of parliament who are not in Cabinet, especially members of the opposition to make contributions to the Bill in draft before it is formally before parliament for consideration. As already alluded to, one of the ways that pre-legislative scrutiny in Botswana occurs is at Cabinet. The system of collective responsibility requires that Cabinet should always present a united front. It is essential therefore that before a Bill is laid before parliament, members of cabinet are all on board with the policy that is being legislated on. This however leaves members who are not ministers out as they do not get to benefit from discussions that take place at this stage. In this sense therefore pre-legislative scrutiny gives backbench members a voice as by its nature it allows members to work in a no party discipline environment, at least theoretically, and therefore they can be more committed to their work at the committee than to their party.⁸⁷

⁸⁵ Lord Norton (n4) 6.

⁸⁶ Ibid.

⁸⁷ Greg Power (n16) 34

Once a Bill is published, members of parliament including those from opposition get to see the Bill for the first time. The Standing Orders allows the members thirty days⁸⁸ within which to read, internalise and consult if they so wish on the Bill. This system lacks proper structure and now with most Bills coming in on certificate of urgency the members of parliament who are not in Cabinet are deprived of the benefit of pre-legislative scrutiny, which is having a real input into the form of the final legislation. The intention of pre-legislative scrutiny as envisioned by the Modernisation Committee is therefore not met as it does not benefit the whole House. The current dispensation does not benefit opposition members and sometimes government backbenchers where there was no party caucus on the Bill.

The Modernisation Committee is of the view that scrutiny of draft Bills enable the bills to be considered by the Departmental Select Committee thus allowing members who are specialised in the subject to have early influence on the Bill.⁸⁹ One way in which the House could benefit from the use of pre-legislative scrutiny is through the use of Select Committees. The way that parliament is structured can if used properly ensure that the Bills that leave it are of the highest quality possible. This is because as observed by Olson, the two major means by which parliaments are organised are parties and committees, it is mainly through committees and parties that parliament fulfils its functions in relationship to its external environment.⁹⁰ His argument is that parties bridge the gaps among parliaments, executives and electorates as well as being an important component of parliament's internal organization.⁹¹ Dingake expresses a view that political parties are the lifeblood of the political system and play a central role in both theory and practice of modern liberal democracies by

⁸⁸ Standing Order 72.3.

⁸⁹ Select Committee on the Modernisation of the House of Commons, *Modernisation of the House of Commons: A Reform Programme for Consultation*, (HC 2001-2002) para 18.

⁹⁰ Olson (n2) 23.

⁹¹ *Ibid.*

representing the link between the citizens and the politicians who exercise control over the affairs of the state.⁹² It is for this reason that it is necessary for the parties especially the opposition to have a say into the form of the final legislation.

The Standing Orders of Botswana permits the use of Select Committee to consider the details of a Bill after it has gone through second reading, but this is not taken advantage of. The Speaker and the members have not made use of this system although it is provided for in the Standing Orders. This is one of the deficiencies in our system that can harbour bad quality legislation as it does not receive the best scrutiny afforded by the Standing Orders. Scrutiny by a Select Committee can provide the advantages intended by the Modernisation Committee. Olson expressed that committees that receive most of the introduced Bills, that can and do amend them, and that prepare reports that are accepted on the floor are considered effective, and further points out that if the appointment of members is relatively decentralised and not concentrated in the hands of the speaker or the party leadership, the committees tend to be more effective.⁹³ The use of committees benefits government, parliament and indeed the citizens. Government benefit from expert knowledge of its citizens, parliament gets to influence legislation at its formative stage and citizens through being consulted by parliament get to have a say in government policies.

The way that most scrutiny takes place in parliament is through debates. Garret observes that parliament essentially provides a forum for debates.⁹⁴ Debates could be better informed if members of are well informed about what they are debating. This requires that members

⁹² Oagile Bethuel Key Dingake, *Constitutionalism and the Rule of Law in Botswana* (Mmegi Publishing House 2011) 29-30.

⁹³ Olson (n3) 329.

⁹⁴ Garret (n59) 13.

should be given as much information as possible so that they can engage in better informed debates. Muylle is of the view that to ensure quality legislation, it is necessary to provide members of parliament with additional information in order to improve their understanding of Bills they debate.⁹⁵

In relation to legislative scrutiny, it has already been stated that Bills in Botswana are published with only the memorandum stating the objects.⁹⁶ This is not enough to explain the change in the law or exactly what policy the government is attempting to implement. The memorandum does not provide a clear explanation of the provision nor what their effect is. The only explanation that members get is when the minister presents the Bill for second reading. The minister's presentation speech attempts to explain why the Bill is necessary and all the other details of the Bill. This author has observed that some ministers provide detailed explanations while some provide only a brief introduction which does not allow for proper scrutiny by members.

In the end, allowing members and indeed empowering them with information can ensure effective scrutiny, for if members are well informed then as observed by Garret, the legislative process will do away with the inconsistent and erratic examination of legislation.⁹⁷ Therefore the lack of formal mechanisms for pre-legislative scrutiny and not taking full advantage of the procedures already provided for effective legislative scrutiny harbours bad quality legislation.

⁹⁵ Koen J Muylle, 'Improving the Effectiveness of Parliamentary Legislative Procedures' (2003) 24 (3) Statute Law Review 169, 175.

⁹⁶ According to Standing Order 70, Bill must have attached to it a memorandum stating the objects of the Bill

⁹⁷ Garret (n59) 13.

3.2.2 Ministers will be more receptive to suggestions for change

Pre-legislative scrutiny allows for refining and amending legislation before it is presented to parliament. The Modernisation Committee's proposal that Bills be subjected to pre-legislative scrutiny in draft is on the basis that when Bills are still in draft ministers will not object violently to them being changed or amended. It gives parliament and stakeholders in the wider society an opportunity to influence the Bill's content when the government views have not been firmly set, or set in stone.⁹⁸ Pre-legislative scrutiny therefore enables parliament to have an input at early stages, when ministers have not have finally committed themselves to the text, thus making it easier to agree to change.⁹⁹ Greg Power agrees with this proposition and notes that the main advantage of pre-legislative scrutiny is that it allows ministers to amend legislation in a less confrontational setting¹⁰⁰ plus governments find it easier to adapt the Bill in response to comments at this stage than after ministers have published the official terms of the final draft.¹⁰¹ Roger and Walters argue that it is because at this stage ministers have invested less political capital in a draft bill as it has not begun its formal parliamentary progress, and therefore changes in it will not necessarily be seen as defeats.¹⁰²

Pre-legislative scrutiny therefore makes it easier for government to amend the legislation at an early stage when objections, particularly by the opposition will not set it back. This is benefits the process of consultation in that ideally it should happen at the stage when one can

⁹⁸ Kennon (n21) 477.

⁹⁹ Brazier and others (n31) 197.

¹⁰⁰ Greg Power (n 16) 37.

¹⁰¹ Modernisation Committee Report (n89).

¹⁰² Robert Rogers and Rhodri Walters, *How Parliament Works* (5th edn, Pearson Longman 2004) 182.

still influence the outcome, so it makes sense that this should happen before the Bill is published in its final ready for the formal legislative process.

In Botswana, pre-legislative scrutiny takes place at Cabinet level and rarely at parliament. The opportunity that parliament can have to conduct pre-legislative scrutiny, although not in the true sense, is if a Bill is committed to a Select Committee. The problem with this is that ministers at this stage are not more receptive to changing their Bill's content. This is when ideas have crystallised and are now anxious to see their Bill pass without amendments. Although the Select Committee has power to propose amendments it is only empowered to do so as long as they are relevant and do not change the principles of the Bill. However as already alluded to, this is rarely done in Botswana, although there are instances where departments on their own volition can decide to consult on draft bills. This was the case with the Insurance Industry Bill, where the department carried out consultations with stakeholders when the Bill was ready for parliament. So although the industry had some valuable suggestions, they had to be reminded that the Bill was not going to be changed, only by parliament in committee stage.

Although in Botswana consultation on legislation takes place before and sometimes during the drafting process, it does not usually happen when the Bill is in draft. On consulting on draft legislation, the Committee received evidence to the effect that it is not useful to consult before legislation is drafted, in fact one of the witnesses was recorded as saying

The problem is that you want input from experts and you never get it until you have a text. It is no good saying that you want them to come in at policy stage unless you

have a committee of experts that actually produces the policy. No matter how you try, they will never produce their comments until there is piece of legislation for them to look at, and the more that happens the better, of course.¹⁰³

It has already been established that in Botswana scrutiny occurs during the debates in the floor of the House. The flaw with this as noted by Oliver is that such kind of scrutiny is overshadowed by the politics and partisanship as they are raised in an atmosphere in which it is difficult for the government to give ground.¹⁰⁴ This is what obtains in Botswana, where the system is adversarial, as pointed out by Harvey, where the system is adversarial, change during the legislative process is perceived as undesirable.¹⁰⁵

3.2.3 Open parliament to those affected by legislation

Parliament connects people with government. They are the people's representatives and therefore need to have open communication channels with them. Pre-legislative scrutiny was necessitated by the need to consult experts and practitioners in a policy area on the detail of legislation that parliamentary counsel or members of parliament did not have expertise in.¹⁰⁶

An important way of generating acceptance of a policy is to consult widely about the policy when it is being formulated.¹⁰⁷ The value of consultation is that as observed by Archibold, it ensures that everyone concerned feels they have had their say and that it improves the

¹⁰³ Clearer Commonwealth, evidence submitted by Mr Geoffrey Kolts 21.

¹⁰⁴ Dawn Oliver, 'Improving the Scrutiny of Bills: The Case for Standards and Checklists' [2006] Public Law 219, 224.

¹⁰⁵ Allison Harvey, 'Law in the Making: Influence and Change in the Legislative Process' (2008) 22 Immigration, Asylum and Nationality Law, 395.

¹⁰⁶ Greg Power (n16) 10.

¹⁰⁷ Clearer Commonwealth (n65) 13.

openness and accountability of government.¹⁰⁸ Moreover, the people whose lives will be affected by the policy are the one who knows best what will work and what will cause problems.¹⁰⁹ It makes consultation important to the legislative process. Just as it is important to consult during the policy formulation stage, it is equally important to consult on the draft Bill, this is because more often than not policy changes during the drafting process, issues that were not initially anticipated crop up. At the end of the day, what comes out as a draft might be not what was initially in the policy.

Greg Power has noted that the traditional forms of government consultations do not concentrate enough on the detail, which can prove problematic when the legislation is introduced to parliament.¹¹⁰ This is what obtains in Botswana. Consultations often take place in the form of public debates prior to the preparation of the Bill but do not usually take place once the Bill is in draft. The clearer commonwealth law committee has put forward a proposition that consultation should take place at more than one stage in the development of legislation, as consultation before and after preparation of a draft would not only help clarify the policy but it would also improve drafting.¹¹¹

In Botswana, immediately after publication, the Bill is ready for introduction in parliament. If parliament does not exercise its privilege to commit the Bill to a Select Committee then no further debates take place on the Bill. The debates that occur at second reading and Committee reading achieve very little in terms of proper scrutiny. This is particularly because of the system of government we have, the government of the day has the majority in

¹⁰⁸ Archibold (n33) 24.

¹⁰⁹ *ibid.*

¹¹⁰ Greg Power (n16) 7- 8.

¹¹¹ Clearer Commonwealth (n65) 21.

parliament which inevitably means that where there is division on the bill, it will go favour of the government as no member will disagree with their party. So although opposition members may have a valid point, or proposes an amendment that would actually improve the Bill, if the government does not agree with the proposals then the point or amendment will be lost, whereas if the Select Committee was utilised it would improve the Bill as they work in private and with no divisions, and where they are not clear on any issue, then they can call in expert witnesses.

Consultations are an extremely useful process as it allows parliamentary committee to call in experts outside government to consider the legislation and make considered suggestions and observations.¹¹² If well structured, and persons and experts outside parliament taken on board, there is a real possibility that the quality of legislation will be improved. In Botswana consultations can take place at the formal legislative process if the bill is committed to a Select Committee. Select committee is not just a debating forum, but can take oral and written evidence, involving more people in a formal process of consultation and making the legislative process more accessible to those outside parliament.¹¹³ The process if utilised well could connect parliament with those that are affected by the Bill thereby improving their relationship.

3.2.4 Save time at later stages in the parliamentary process

A committee of parliament, either a special committee or a departmental committee, carries out pre-legislative scrutiny as envisaged by the Modernisation Committee. In Botswana a

¹¹² Goldsmith (n15) 8.

¹¹³ Rogers and Walters (n101).

system that closely resembles this is the use of a Select Committee under Standing Order 75. While in the UK this is done before the Bill is formally brought before parliament, in Botswana the process occurs, if it is opted for, immediately after the second reading motion has been agreed to, during the formal legislative process. This can still be considered to be pre-legislative scrutiny and therefore can help achieve consensus so that the Bill completes its passage through the House more smoothly. The Select Committee can iron out whatever issues may arise, call expert witnesses, and by the time they bring their report, the issues will be easily explained hence smoother transition of the Bill thereafter.

The other factor that will ensure smoother transition is the fact that a Select Committee has members from both the ruling party and the opposition, which invariably means that there will be consensus achieved between the government and the opposition as issues that may be the of cause disagreements will be dealt with earlier at the Select Committee stage. As noted by Greg Power, evidence submitted to the Hansard Society pointed out that there is a general consensus that time in parliament could be used more effectively if some of the potential problems were ironed out at an earlier stage.¹¹⁴ However as already stated, the use of the Select Committee is almost non-existent in Botswana. It is presumed that the reluctance or failure to use the Select Committee may be time issues, as in the Bill will delay in passing and becoming the law. The Modernisation Committee has observed that if a Bill takes longer to pass through the House, but in the end it comes out a better Act, then that is a good thing.¹¹⁵ The emphasis should therefore be on effective scrutiny that will produce good quality legislation as opposed the amount of time spent on the Bill or how fast the

¹¹⁴ Greg Power (n16) 7.

¹¹⁵ *ibid* (n79).

government can legislate. Svetlana Pisarenko opines, and this dissertation agrees, that establishing a well-functioning process involves spending much time to save time.¹¹⁶

According to Kennon, in theory a Bill that has been considered in draft should go through its subsequent stages more smoothly, both because the creases will have been ironed out and because its aims will be better understood in parliament.¹¹⁷ Although some have argued that it has not been proven that pre-legislative scrutiny has resulted in less time spent in the legislative scrutiny process, there are instances where this has been true.¹¹⁸ The Clearer Commonwealth Committee is of the view that legislation that has been subject of consultation is less likely to consume valuable parliamentary time in debate of contentious matters.¹¹⁹ Alex Brazier on the other hand argues that the use of experts and wider range of stakeholders that are part of the pre-legislative scrutiny process can influence legislation at an early stage which may in turn allow for smoother passage of the Bill in the formal legislative process.

Pre-legislative scrutiny benefits debates during the more formal legislative scrutiny process, as members of the committee become better informed and can therefore help improve the quality of scrutiny and debate during the more formal legislative scrutiny, in the end ensuring that the Bill transmits smoothly in this stage of its approval. The Hansard Society expressed a view that when Bills are in draft, government can revise them before they are presented to parliament which will minimise the need for extensive amendments during their passage in the formal legislative process, which improves the quality of legislation. This is something

¹¹⁶ Svetlana Pisarenko, *The Drafting of Laws* (Canadian International Development Agency 1999) 10.

¹¹⁷ Kennon (n21) 491.

¹¹⁸ See Greg Power, (n16) he notes that there is evidence that parliamentary debates was informed by the content of the committee reports, meaning therefore that parliament relied on pre-legislative scrutiny debates.

¹¹⁹ Clearer Commonwealth (n65) 13.

that Botswana could benefit from, if the Standing Orders were used as intended, and bills committed to Select Committees.

3.2.5 Overall it should lead to better legislation

Geoffrey Bowman, then Chief Parliamentary Counsel of the UK Parliamentary Counsel's Office made a bold assertion that Bills that have gone through pre-legislative scrutiny and the normal parliamentary processes end up as better Bills and better Acts.¹²⁰ This benefit has already been explained in this chapter under the heading 'The Role of Scrutiny to Quality of Legislation. It is however emphasised that pre-legislative and legislative scrutiny ensures quality legislation. They ensure that all possible angles of a policy are explored to ensure that it will at the end of the day achieve its intended results. By involving citizens through their representatives before a Bill is finalised is important, it benefits both the government and the citizens. The government is able to take on board the views of the people early in the process while changes or amendments will not set it back and get a sense of whether the people are ready for the proposed changes or not, and thus build consensus. When there is consensus implementation becomes easier and the legislation becomes effective.

Although it would be difficult to prove that pre-legislative scrutiny leads to better legislation, Smookler has asserted that the process appears to punch well above its weight although its influence varies from bill to bill.¹²¹ The Modernisation Committee opined that pre-legislative scrutiny should lead to less likelihood of subsequent amending legislation.¹²² This is because when issues are thrashed out at earlier stages and subsequently in the legislative process, the need for the legislation will be established lessening the chances for amendments. In

¹²⁰ Constitution Committee, *Parliament and the Legislative Process* (HL 2003-2004, 106).

¹²¹ Jennifer Smookler, 'Making a Difference? The Effectiveness of Pre-Legislative Scrutiny' (2006) 59 (3) *Parliamentary Affairs* 522, 533.

¹²² Modernisation Committee 1997-1998 (n 10).

Botswana, although the drafting office is concerned about quality and has come up with standard documents towards achieving quality, the same cannot be said of parliament. In fact although the Standing Orders make provision for Committees of Parliament to consider and examine Government policies and Legislation under its portfolio, and to make such recommendations to the Government for their review or amendment from time to time, there is no focus on quality of legislation.

The Committee responsible for reforming and modernise the procedures and practices of parliament is the Standing Orders and Reforms Committee. The Committee is mandated to carry out a review of the Standing Orders, and all aspects of Parliamentary procedure and practices, and recommend necessary or desired amendments and changes. To date there has been no recommendation to reform the legislative process to improve the quality of legislation. This coupled with the fact that the process of Select Committee is rarely or not used at all means that quality of legislation in Botswana is not enhanced. The focus is on passing legislation as opposed to its quality, as already indicated Cabinet also focuses on ensuring that the bill will have a majority of the vote. The system of scrutiny in Botswana is best captured by the words of Garrett, when he stated that

The process is on the whole unsystematic in that there is usually little prior examination by parliament of the purposes of a bill, insufficient expert analysis of its content and likely consequences during its progress through the system, and no formal arrangements for considering what its implementation achieved when put into practice.¹²³

¹²³ Garrett (n59) 47.

Chapter IV: Conclusions and Recommendations

Parliament connects the governed with the governors, and governments mostly use legislation to govern. If Crabbe is right in observing that, legislation is the framework by which government seek to achieve its political objectives and policies,¹²⁴ then it makes sense that people should be able to have an input in this important governing tool. As observed by

¹²⁴ Crabbe (n13) 16.

Patricia Leopold, the introduction of new legislation is primarily a function of government, and the main function of parliament is to legitimise and scrutinise government's proposal for new legislation.¹²⁵ In order to effectively do so, citizens should be involved in the legislative process through consultations. The importance of this has already been illustrated in this dissertation; suffice to state that if the legislation is to reflect society and maintain order, participation of the citizens is a means to an end. It is an instrument of democratic governance and development. It has been asserted by this dissertation that pre-legislative scrutiny can be an effective tool for achieving this.

If parliament is to be effective in scrutinising and legitimising legislation, the legislative process needs to keep with the developments to assist parliament to do so. Lord Goldsmith notes that the legislative process need to be effective if it is to be able to help parliament achieve its goal of clear, concise and accessible legislation.¹²⁶ The need to reform of parliament and the legislative process is necessitated by the fact that government has become more complex. This is also necessary as the continual growth in the power of government further distances the government from scrutiny by parliament making the re-examination of what parliament is for, what it does and important.¹²⁷ Parliament is currently faced with a number of problems that affect effective scrutiny of legislation, time being a major one. There has been a significant increase in the number of bills being brought to parliament, which adds to the burden of time and limits the extent to which a Bill is scrutinised. The challenge for parliament is therefore to ensure that innovations and reforms are made to ensure that parliament in the face of growing complexity continues to be able to discharge its duty to the public.

¹²⁵ Patricia M Leopold, 'Changes and Developments in the United Kingdom Parliament Since 1970' in A Pizzorusso (ed) *Developing Trends of Parliamentarism* (Kluwer Law International 1996) 226 .

¹²⁶ Lord Goldsmith (n 15).

¹²⁷ Garret (n59) 14

This dissertation notes and acknowledges that time, as expressed by Olson, is one of the main constraints on legislative bodies, by the reason that they are not in session every day, there is limit on speaking time depending on the size of the parliament,¹²⁸ which invariably affect scrutiny of Bills. However it is my view that if MP's were better equipped with knowledge then it could fast track the process and ease the pressure of time. The use of explanatory notes is recommended. This would better equip members to make meaningful debates and contributions on the Bill, which will in turn improve the quality of legislation.

As expressed by Lord Norton, time is a necessary but not a sufficient condition for parliament to engage in effective scrutiny, structures, resources and political will are all necessary to ensure good quality legislation.¹²⁹ Xanthaki proposes that quality in legislation is affected directly by legislative techniques, which can be learned and taught which can break down common prejudices, among other things, between developing and developed countries.¹³⁰ It is submitted therefore that developments in the legislative process, such as to improve the scrutiny of Bills are such techniques that Botswana can learn from other countries such as the UK to help improve the quality of our legislation. In order to do this, Botswana needs to develop a more structured scrutiny process aimed at ensuring quality of legislation.

Pre-legislative scrutiny in the form proposed by the Modernisation Committee is one way in which our system can be improved. Although pre-legislative scrutiny in the UK where the system works, does not always leads to amendments being accepted nor does it guarantee that the Bill will pass smoothly in parliament, it nonetheless provide, as its best bet that the

¹²⁸ Olson (n3)17.

¹²⁹ Lord Norton (n5) 6.

¹³⁰ Xanthaki (n66).

government is listening.¹³¹ Smookler on the other hand asserts that whilst government is under no obligation to accept recommendations, by merely committing a bill to pre-legislative scrutiny it shows government's willingness to improve the bill.¹³² This is an achievement in itself; it says the government is willing to involve its citizens, making them feel like they are part of the process, even though at the end of the day it is government that makes the final decision. It therefore accepted that pre-legislative scrutiny improves the democratic process and should not be seen as a new weapon with which to beat government.¹³³

The Standing Orders regulate the legislative process in Botswana, however it has been indicated that some procedures are not followed, procedures which could lead to better legislation. One such procedure is the use of a Select Committee. This dissertation recommends more use of Select Committees, which in any case is provided for and would not require an amendment of the Standing Orders. This is because as rightly observe by Olson, committees are more likely to produce unanimous decisions, whereas proceedings on the floor are more likely to lead to partisan strife because for one committees work on details and practical matters whereas floor debate is more concerned with principles, and secondly committees in most parliaments work in private thus permitting a more open and frank discussion than if they were in public, and lastly the small size of committees permits more informal and flexible procedures than does the large membership in formal floor sessions.¹³⁴

¹³¹ Brazier and Others (n31) 198.

¹³² Smookler (n121).

¹³³ Brazier and others (n31) 198.

¹³⁴ Olson (n2) 331.

As already alluded to in this dissertation, good procedures in the form of standing orders and their consistent and correct use are essential in any governing system. However as correctly observed by Blackburn and Kennon, procedures are essential but not sacrosanct, once adopted they must be followed, but if they do not work well, or produce undesired results, they can and should be formally and collectively changed.¹³⁵ Lord Goldsmith posits that even where procedures are effective parliament should be ready to adopt new procedures if they will assist in the goal of enacting quality legislation.¹³⁶ It is on this basis that it is put forward that the time for changing the standing orders to better serve quality of legislation in Botswana has come.

The need for quality in legislation cannot be overemphasised. According to Benson, bad quality legislation leads to vague and conflicting provisions and over regulation of citizens, which result in the loss of interest on the part of citizens, and when citizens lose interest in the law, there will not be wilful compliance.¹³⁷ In the end ensuring quality benefits government, citizens and parliament. For Botswana to ensure that there is no harbouring of bad quality legislation, first we need to make use of the good procedures provided for in the system we have in place to improve the quality of legislation and a reform our legislative process to ensure effective scrutiny of legislation by parliament in the form of pre-legislative scrutiny.

Having established that consulting the people on legislation helps ensure that the legislation will work and that thorough scrutiny of legislation all contribute to effective legislation, and

¹³⁵ Blackburn and Kennon (n9) 247-248.

¹³⁶ Lord Goldsmith (n15) 9.

¹³⁷ Jemina Benson, 'Delegated Legislation in Nigeria: The Challenge of Control' (2015) 17(3) European Journal of Law Reform 403, 419.

having highlighted some of the deficiencies that are currently there in the legislative process of Botswana, it is submitted that the hypothesis that deficiencies in the pre-legislative and legislative scrutiny processes harbours bad quality legislation has been proved.

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