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The Paradox of the Legislative Drafting Process in Tanzania

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ABSTRACT

This article provides a critical analysis of the procedure for drafting laws provided for under the legal framework of Tanzania. It is premised on the general perception that the law-making function in Tanzania, like other jurisdictions in the Commonwealth, is vested in Parliament, through the doctrine of supremacy of Parliament. The analysis focuses on the Standing Orders of the Parliament of the United Republic. The Orders provide for the main legal regulatory regime governing the conduct of business in the august House, including the drafting of legislation. In the process, the article brings to the fore other salient features of the provisions of the Standing Orders, previously unknown to many. The article's focus is on Tanzania Mainland. It does not address the legislative drafting process in Zanzibar, the other part of the Union. Under the framework of Constitution of the United Republic of Tanzania of 1977, Zanzibar has a separate and distinct regime governing legislative drafting. The main conclusions drawn from the analysis point out that contrary to popular belief, in practice, the overall framework law governing the legislative drafting process and its underlying policy vests the power of law making almost entirely in the Executive and not the Parliament.

THE DOCTRINE OF SUPREMACY OF PARLIAMENT IN THE LAW-MAKING PROCESS

The doctrine of supremacy of Parliament in making law is premised on the understanding that Parliament, which comprises of duly elected representatives of citizens, has the ultimate power to make law on their behalf. Indeed, this is the approach in almost all commonwealth jurisdictions. The origin of the doctrine of supremacy of Parliament is a constitutional law principle that is traced to Dicey.[1] It has been noted that it also has rudiments of the doctrine of separation of powers which has been linked to Montesquieu. Montesquieu's doctrine essentially posits that the three main branches of government, that is the Judiciary, Parliament, and the Executive, should operate separately and none should interfere in the functions of the other.[2] The doctrine has been

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1 AV Dicey *Introduction to the Law of the Constitution* (Macmillan & Co. Ltd New York 1889).

2 D Meyerson 'The Rule of Law and the Separation of Powers' [2004] Macquarie Law Journal 4.

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subjected to critical examination by a number of authorities in different disciplines. However, it is still reflected in Constitutions in a number of jurisdictions.[3]

In Tanzania, the doctrine of supremacy of Parliament in the law-making process is reflected in its Constitution. It is important to point out at the outset that the theme of this article focuses only on the position on Mainland Tanzania. It does not address issues in Zanzibar which has a separate legislative regime on matters related to the law-making process. This arrangement is provided for in the Constitution.[4] Article 4(3) provides for the allocation of power between governments of the United Republic and the Revolutionary Government of Zanzibar which are referred to as Union and Non-Union matters. This Article clearly states that the allocation of powers is outlined in the First Schedule of the Constitution of the United Republic of Tanzania. Article 34(1) and (3) which should be read with Article 4(3) (and the First Schedule) further provides that the Government of the United Republic has authority over all Union matters in the United Republic and over all other matters concerning Tanzania Mainland. References to the position in Zanzibar in the course of making comparisons in isolated instances should therefore be considered in this context.

The preamble to the Constitution makes reference to the doctrine of supremacy of Parliament in law making where it provides that the Executive is accountable to the Legislature. Preambles form part of the law Tanzania.[5] Article 34(2) of the Constitution further fortifies the doctrine of supremacy of Parliament in Tanzania as it provides for the power of Parliament to legislate. Other Articles of the Constitution that lay emphasis on the supremacy of Parliament in law making are Articles 63(1) (d). This vests in Parliament the power to enact law and Article 64(1) which provides for the legislative power of Parliament.

Article 34(5) (b) permits Parliament to delegate its law-making powers to other authorities including the Executive. However, such delegation should not lead to usurpation of this power. It is in this context that some Members of Parliament (MPs) have raised concern on the fear of the erosion of the power of Parliament's supremacy in the law-making process.[6]

Despite the Constitutional provisions, court decisions, and concerns raised, the doctrine of supremacy of Parliament in law making in Tanzania has not been critically analyzed in the context of the existing legislative enactments by Parliament itself. This article explores this relatively virgin area. It provides a critical analysis of the legislative drafting process, which is indispensable to law making. Hopefully, the analysis will provide insights for other jurisdictions in the Commonwealth and trigger more thoughts on contemporary issues raised. Before we embark on this analysis, a recap on the history of legislative drafting would suffice.

SYNOPSIS OF THE HISTORY OF LEGISLATIVE DRAFTING

The writing of law has been traced to a very ancient ancestry with the earliest roots in religious practices among the Romans and the Greeks. The Codes of Hammurabi

[3] FJ Matenge 'Parliamentary Supremacy: Rhetoric or Reality' [2012] Journal of Education and Human Sciences 1(1), 38–56; AE Gecer 'Principles of Parliamentary Supremacy in the UK Constitutional Law and Its Limitations' [2013] Ankara Bar Review 1.

[4] Constitution of the United Republic of Tanzania, Cap. 2 R.E. [2002] of the Laws of Tanzania.

[5] Section 25(1) of the Interpretation of Laws Act, Cap. 1 R.E. [2002].

[6] See Citizen on Sunday Newspaper, 15 May 2016, p. 3: 'Lawmakers Query Executive Interference in Bunge Issues'.

which were most prominent in the early 1750 B.C. in the statue books of Babylonia would also come to the fore in the course of tracing the history of writing the law across the globe.[7]

It is been noted that the first recorded legislative enactments in the world are actually traced to Africa, in the prehistoric societies of Egypt to resolutions and rulings issued by the Pharaohs. Other earliest rudiments of legislative drafting in other parts of the world have been traced to Mesopotamia and the Yellow River of China.[8]

Like most discoveries in the world, the legislative drafting process ultimately has been vested in the control of the sovereign (government) through legislative enactments. Tanzania's foundation of the history of legislative drafting is traceable to the British colonial era with its attendant tentacles. However, unlike other legal systems that were inherited from the Commonwealth jurisdictions, the set up of the key institutions charged with the legislative drafting process in Tanzania reveals a departure from the Commonwealth system. Whereas the Attorney General is vested with the power of drafting of Principle legislation in Tanzania, in England, the Attorney General deals primarily with subsidiary legislation. Also, whereas Private Members Bills in Tanzania are drafted by MPs with assistance from the Office of the Parliamentary Legal Counsel, in England, MPs are assisted by private counsel. The Office of the Parliamentary Legal Counsel (a colonial legacy) serves as the legal advisor of Parliament in Tanzania. MPs can also approach it for advice in order to understand Bills and the legal procedure in Parliament.

THE LEGISLATIVE DRAFTING PROCESS

The process of drafting and enacting principal legislation in Tanzania Mainland involves a multitude of institutions and stakeholders. It cuts across a number of disciplines in law. As noted above, under the framework of the Constitution of the United Republic of Tanzania, the legislative drafting process is not a Union matter.

The institutions involved in initiating a law could be many. These include legal training institutions, the legal fraternity (Bar Associations), Non-Governmental Organizations (NGOs), Civil Society Organizations (CSOs), Community-Based Organizations (CBOs), and Law Reform Commissions. Commission Reports and decisions of courts of record have also led to the enactment of amendments to legislation and in some cases enactment of new ones.

The legislative framework that regulates the legislative drafting process in Tanzania consists of the Constitution of the United Republic of Tanzania, Cap. 2, the Interpretation of Laws Act, Cap. 1, the Laws Revision Act, Cap. 4, and the Office of the Attorney General (Discharge of Duties) Act, Cap. 268. The Standing Orders of the Parliament of the United Republic of Tanzania, 2016 though subsidiary legislation (consisting of finer details), also form an integral part of the legislative framework that regulates the drafting of legislation in Tanzania. The Standing Orders are made by the Parliament under the authority of the Constitution.[9]

[7] See United Nations Institute for Training and Research (UNITAR) *The Role of Parliamentary Counsel in Legislative Drafting, Document Series No. 11* (Paper Written for a UNITAR Sub-regional Workshop on Legislative Drafting for African Lawyers, Kampala, Uganda 20–31 March 2000), Geneva.

[8] Ibid.

[9] The Standing Orders have been made under Art. 89(1) of the Constitution. Section 4 of the Interpretation of Laws Act, Cap. 1 R.E. [2002] recognizes the Orders as subsidiary legislation.

Sources of Bills

Regardless of the group that lobbies or advocates for the enactment of legislation, the process of initiating the enactment of the legislation commences with a Bill. A Bill is basically a proposal for a new enactment to be tabled before Parliament for deliberation before enactment into law. A Bill could also comprise of a proposed amendment to an existing law which is tabled before Parliament for consideration for adoption into a law after complying with all requisite processes. There are two types of Bills that could be introduced to the Parliament: Government Bills and Private Members Bills. This requirement is set out in the Standing Orders of the National Assembly, 2016.[10] Accordingly, it is only a Minister or the Attorney General who can introduce or table a Government Bill before Parliament. Private Members Bills, on the other hand, can be introduced to Parliament by the Chairperson of a Standing Committee or any MP (except a Minister or the Attorney General).[11] The most common Bills in Tanzania are Government Bills although a few abortive attempts have been made to table Private Members Bills.

The earliest process of initiating Bills in order to enact legislation commences at the level of the Executive branch of government with sector Ministries being required to prepare legislative plans for every five years based on government policy.[12] It is on the basis of these plans that Ministries prepare and forward Cabinet Papers containing legislative proposals to the Cabinet.[13] In the Commonwealth-based Parliamentary system of government adopted by Tanzania, it is the Cabinet which comprises predominantly of MPs that ultimately decides whether to send a Bill from a sector Ministry to Parliament.[14]

INITIATING BILLS

The process of drafting Government Bills essentially commences with a sponsoring Ministry engaging all stakeholders who are likely to be affected by the proposed enactment. The sponsoring Ministry then consults the Chief Parliamentary Draftsman (CPD) and discusses its intention to submit a Cabinet paper.[15] The draft Cabinet Paper (with the draft Bill attached to it) is circulated to all line Ministries for comments. After incorporating comments from other Ministries, if any, the sponsoring Ministry with the assistance of the CPD then prepares a Memorandum for the Minister to be accompanied by copies of the draft Bill to be submitted to the Cabinet Secretariat. Usually, this is done at least within seven days before the meeting of the Inter-Ministerial Technical

[10] Available at: www.parliament.go.tz/publication/orders (accessed on 27 April 2016). The Orders are in Kiswahili except for the Third, Fourth, and Fifth Schedules relating to the East African Legislative Assembly (for the 3rd and 4th Schedules) and the Pan-African Parliament (5th Schedule) which are in the English language.

[11] See, generally, Part 8 of the Standing Orders, January 2016.

[12] For procedure of policy-making process in Tanzania, see Economic and Social Research Foundation (ESRF) *The Role of ESRF in Policy Process in Tanzania* (ESRF Dar-es-Salaam 2004).

[13] Cabinet is established by Art. 54 of the Constitution of the United Republic of Tanzania, Cap. 2 R.E. [2002]. The need for a government legislative program is also required in the United Kingdom: see Cabinet Office *Guide to Making Legislation* (2015).

[14] See T Bates 'Legislative Drafting in the United Kingdom' paper presented at a *Workshop on Different Approaches to Legislative Drafting in the EU Members States*, held on 14 December 2009 at Tbilisi, Georgia, sponsored by OECD, SIGMA, and EU, available at: www://www.sigmaweb.org/publicationsdocuments/44577257 (accessed on 27 April 2016).

[15] This requirement is provided for in the Cabinet Circulars Directive of 2010 at p. 20.

Committee (IMTC). The IMTC is chaired by the Chief Secretary and comprises of all Permanent Secretaries. It provides technical input and collective advice on draft Cabinet Papers before they are submitted to the Cabinet.

The draft Cabinet Paper submitted to the IMTC is usually brief (at most three pages), with the details provided for in annexures and appendices. It contains the title, the name, and portfolio of the Minister responsible for the sector to be legislated. It also has a statement on the views of stakeholders consulted and recommendations. The Paper should also provide for the possible Sessions of the National Assembly in which the Bill is intended to be introduced in the House. A statement on consideration of environmental concerns is also required where a Bill is likely to have an impact on the environment or natural resources.[16]

The Cabinet Paper must clearly state the reasons why the proposed Bill is necessary. There must also be a clear explanation on the objectives of the law and its benefit to the public and the State. It should also contain an explanation on the financial implications and urgency of the Bill. The Paper must also clearly outline the Government policy, showing the relationship between the Policy and the proposed Bill.

If satisfied, the IMTC recommends the draft Cabinet Paper to the Cabinet. If not, it will provide comments which are to be addressed by the sponsoring Ministry before the Paper is forwarded to Cabinet. The IMTC may also reject the draft Cabinet Paper and return it back to the sponsoring Ministry and require re-submission. After the necessary adjustments, the Ministry will table the Cabinet Paper with comments from IMTC before the Cabinet.

Once tabled before the Cabinet and approved, the Cabinet Secretariat draws up a Memorandum with instructions to the CPD to draft the relevant Bill.[17] The CPD comprises one of the divisions at the Office of the Attorney General, whose mandate is provided for by the Office of the Attorney General (Discharge of Duties) Act [Cap. 268 R.E. 2002] and the Laws Revision Act, Cap. 4 [R.E. 2002]. The Division has three departments, namely, the drafting, translation, and law revision departments.

The powers of the office of the CPD are provided for by section 12 of the Office of the Attorney General (Discharge of Duties) Act, Cap. 268. Among its functions is to draft instructions and has the exclusive mandate of drafting Government Bills to be presented to Parliament for deliberation and consideration for enactment into law. The Officials at the drafting department at the CPD work on the draft Bill ensuring that it complies with, *inter alia*, other laws and the existing drafting instructions and directions.[18] After satisfying itself that the draft Bill is in order, the CPD submits it to the Cabinet Committee on Parliamentary, Legal and Constitutional Affairs for scrutiny. If satisfied, the Committee returns it to the CPD who will forward it to the Government Printer for further processing and publication in the Government Gazette.[19]

[16] See section 104 of the Environmental Management Act, Cap. 191 R.E. [2002].

[17] Section 12(2) of Cap. 268 R.E. [2002]. The use of Memorandum is a practice that is common in most commonwealth jurisdictions. See Friedrich Ebert-Stiftung Ghana 'The Law Making Process in Ghana: Structures and Procedures' (2011), available at: http://library.fes.de/pdf-files/bueros/ghana/10506.pdf (accessed on 5 May 2016).

[18] Section 8(4) of the Laws Revision Act, Cap. 4 R.E. [2002].

[19] Section 12(3) of Cap. 268 R.E. [2002].

PUBLICATION OF BILLS

The Bill must be published by the CPD in at least two issues of the Gazette at intervals of not less than seven clear days.[20] The first publication of the Bill must be sent to the Clerk of the National Assembly in a period of not less than 21 days before it is read in Parliament for the first time. Also, the first publication of the Bill must contain the full text of the Bill. The published Bill must contain a statement of its objectives and reasons and must be signed by the Minister or the Attorney General.[21] In the second publication, the Bill need not be published in its entirety. It is deemed to have been published by the insertion of a Notice in the Gazette providing for the name of the Bill and the number of the Gazette in which the Bill was first published.[22]

The main rationale for publishing draft Bills before being introduced into Parliament is basically to enable citizens to be in a position to know what laws are being contemplated and provide input and comments. This is especially true in view of the presumption that ignorance of the law is not a defense. Also, there is a need for objective scrutiny of the draft Bill from stakeholders who may be more knowledgeable and therefore be better placed to provide better insights from hands on experience, especially on technical aspects of the Bill.[23]

The Standing Orders, however, provide for fast tracking Bills in Parliament and in the process bypassing the requirement for publication of such Bills. Order 80(5) provides that a Bill for deliberation under a certificate of urgency signed by the President would go straight to the Parliamentary Standing Committee on Leadership.[24] It should be noted that this Committee comprises mainly of government officials: these are the Speaker and Deputy Speaker of the National Assembly,[25] the Leader of Government Business in the National Assembly (the Prime Minister)[26] or his/her representative, the Attorney General, the official representative of the opposition Parties in the National Assembly, and Chairpersons of Standing Committees of the National Assembly or their representatives. The Clerk of the National Assembly serves as the Secretariat to this Committee.[27] There is no requirement (at least as far as the Standing Orders are concerned) for a Bill under a certificate of urgency to be subjected to public scrutiny as is the case with others. Such a Bill is to read three times in one sitting/session.[28] The practice has been to give such Bills to Standing Committees for deliberation in a relatively shorter span of time, where possible. Stakeholders, who are usually invited by the Standing Committees to attend Public Hearings after the First Reading, are therefore

[20] Order 80(1) of the Standing Orders.

[21] Order 80(2) of the Standing Orders. The office of the Clerk of the National Assembly is established by Art. 87(1) of the Constitution of the United Republic of Tanzania. By virtue of Order 17(2) of the Standing Orders, the Clerk is the custodian of all Bills that are submitted to Parliament.

[22] Order 80(3) of the Standing Orders.

[23] See House of Lords *Parliament and the Legislative Process* (Vol. I Report, 14th Report of Session 2003–04 London 2004) at pp. 5, 15, and 16.

[24] Standing Committees of the National Assembly are provided for by Order 118 and the lists of all these Committees are provided for in the 8th Schedule to the Standing Orders.

[25] These have always been drawn from the ruling Party.

[26] Art. 52(2) of the Constitution of the United Republic of Tanzania provides that the Prime Minister shall be the leader of government business in the Parliament.

[27] See Item 2(1) and (2) of the 8th Schedule to the Standing Orders.

[28] Order 93(3) of the Standing Orders.

not guaranteed an opportunity to provide adequate input to such a Bill as is the case with other Bills.[29]

The dispensation of the requirement of fast tracking Bills under a certificate of urgency in Parliament has faced criticism from a cross-section of stakeholders. These feel that the process fails to take into account the rights of citizens to scrutinize and give comments/views on a proposed law that targets them. One critic is on record of stating that the procedure:

> …is undemocratic and it can only be justified in the case of the actual urgency. The laws enacted through this procedure lack political legitimacy because of non participation of Members of Parliament and other stakeholders… [It] ignores the parliamentary role of law making and [turns it]…to be a rubber stamp of Government decisions.[30]

On the other hand, there are those who have maintained that the dispensation is a necessary evil. This camp argues that the procedure provided for in the law (the Standing Orders) is necessary in times of emergencies and that in any event it provides for a checks and balancing mechanism that will ensure that the interests of citizens are not placed in jeopardy.

One of the 'checks and balance' mechanisms that is usually referred to is ostensibly that which is provided for under Order 80(5) and (6). This Order provides that where the Leadership Committee (that scrutinizes Bills under certificate of urgency) is of the view that a Bill need not be brought under the certificate of urgency, it would advise the Government accordingly. There is no provision in the Standing Orders which compels the Government to comply with the advice of this Committee. This leaves room for the Government to ignore the advice of the Committee.

The procedure for processing Private Members Bills is slightly different.[31] In such cases, the MP or Chairperson of a Standing Committee initiates a Bill by informing the Clerk of the National Assembly of the intention of preparing a Private Members Bill and reasons thereof. The Clerk would then request the Chief Parliamentary Legal Counsel (CPLC)[32] to prepare a Bill, if satisfied that the proposal is not in conflict with National Policy or existing law. The functions of the CPLC are provided for by Order 21(1) of the Standing Orders. Accordingly, in relation to Bills, the CPLC is required to scrutinize and provide advice on all Bills presented to Parliament. The CPLC is also required to assist MPs to prepare amendments to Bills presented to Parliament. Once ready, the Private Members Bill is published in the Gazette and other processes similar to the Government Bill follow.

After publication of the Government Bill, the sponsoring Minister submits it to the Office of the Clerk at the National Assembly. The Clerk is required to issue copies of

[29] See Order 84(2) of the Standing Orders.

[30] Hon. Tundu Lisssu, while submitting the opinion of the Opposition Camp in Parliament on the Written Laws (Miscellaneous Amendments) Bill, No. 2 of 2011 on the 9th day of February 2012 [cited from NP Chuwa *Legislative Drafting in Tanzania Mainland: Problems and Challenges* (LL.M Dissertation, University of Dar-es-Salaam 2012), p.46].

[31] This procedure is provided for under Order81(1)–(6) of the Standing Orders.

[32] The Chief Parliamentary Legal Counsel is established under Order 21 of the Standing Orders and is appointed by the Parliamentary Service Commission by virtue of Order 21(3).

every Bill, as printed and published in the Gazette, to each MP.[33] It should be pointed out here that Bills which seek to introduce or add taxes, increase amount of money to be drawn from the Treasury, or alter any loan payable by the Government or adjust salaries or conditions for civil servants can only be tabled before Parliament with the sanction of the Attorney General.[34]

The process that follows after the Bill is presented to the Clerk of the National Assembly is regulated by the Parliamentary Standing Orders. Ideally, the Government Bill, once presented to Parliament, becomes a Parliament Bill which ought to be regulated and controlled by the Office of the CPLC. Once formally submitted to Parliament, the draft Bill goes through a number of stages before it becomes law. The stages that a Bill is to undergo, once presented to Parliament must be one after the other. The stages cannot be merged or combined in a single Parliamentary Session except where the Bill proposed relates to financial matters or as noted, a Bill brought under certificate of urgency.[35] The stages that other Bills must undergo can be summarized as follows.

FIRST READING

Any Bill that has been published in the Government Gazette may be tabled in Parliament in line with the schedule (Order Paper) so that it could be read for the first time. This stage is usually referred to as the First Reading Stage. At this stage, the Clerk of the National Assembly would only read the long title of the Bill. No discussions take place at this stage.[36] The Speaker would then forward the Bill to the appropriate Standing Committee which is required to analyze the Bill as soon as possible. The Committee would issue a notice inviting members of the public (or an individual person) to appear before it to give their views on the Bill to the Committee.[37] The Hearings of these Committees are usually public. This Committee has power to alter or amend the Bill and it may advise the Minister to introduce amendments that it recommends in the National Assembly before the Bill is tabled for the Second Reading.[38] When the appropriate Standing Committee has completed discussing and analyzing the Bill, the Chairperson of the Committee is required to inform the Speaker accordingly. The Speaker then directs that the Bill be placed in the Order Paper for purposes of the next stage: the Second Reading.[39]

SECOND READING

After the Bill has been placed in the Order Paper, the Minister sponsoring the Bill, the Attorney General, the Chairperson of the Standing Committee who deliberated the Bill, or an MP (in the case of a Private Members Bill) would move a motion that the Bill be read for the second time. The mover of the motion would only refer to the Bill by its name without providing any detailed explanations of the proposed Bill.[40] At this stage, no motion for amendments to the Bill would be entertained unless the House votes otherwise upon the Speaker's guidance.

33 Order 80(8) of the Standing Orders.

34 See Order 95 of the Standing Orders.

35 Order 93 of the Standing Orders. See also Order 108(3).

36 Order 83(1) and (2) of the Standing Orders.

37 Order 84(2) of the Standing Orders.

38 Order 84(3) and (4) of the Standing Orders.

39 Order 85 of the Standing Orders.

40 Order 86(1) and (2) of the Standing Orders.

Where there are no proposals for amendments at this stage, the Chairperson of the Committee who deliberated the Bill (or a member designated to do so) would give the Committee's views. Thereafter, the shadow Minister of the sector which the Bill relates from the Opposition camp in Parliament would give the views of the Opposition. This is where the Bill is a government Bill. Where it is a Private Members Bill, the Representative of the government would give the views of the government.[41]

The MPs would then engage in a general debate regarding the Bill. It is at this stage where MPs may make recommendations for amendments. Where the person moving the motion wants to take on board the advice given by an MP on amendments to the Bill the mover of the motion is required to inform the CPD (in case of a Government Bill). This is necessary to allow the Clerk to incorporate recommendations, if any and issue a revised version to all MPs.[42]

Where there are no proposals for amendments to the Bill but an MP feels that there are new issues that have arisen necessitating the Bill to be returned to the Committee that deliberated it, the Member may request the Speaker to return the Bill to the Committee.[43] It should be noted that the mover of a motion on a Bill may at any time during the proceedings withdraw the Bill with the permission of the Speaker.[44]

The deliberations of the Bill may take a number of days depending on the Members contributions. Incidentally, the debates are conducted in Kiswahili, which is one of the official languages of Parliament. The other is English. The proceedings are also recorded in Kiswahili although the Bill is drafted in English. MPs may use either of the Languages but is not supposed to mix them, except where quoting from a text. The Standing Orders prohibit translation from one language to another.[45] When the debate is over, the sponsoring Minister or the MP (in case of a Private Members Bill) would wind up with a closing speech. In the process, there will be attempts to clarify areas which appeared controversial and address issues raised and ultimately move a motion requesting approval of the Bill by the august House.[46]

DELIBERATIONS AT THE COMMITTEE OF THE WHOLE HOUSE

Once the general debate is completed, the Assembly resolves itself into a Committee of the whole House and the Speaker de-robes and joins the Committee under a Chairperson. The Speaker now gets an opportunity to contribute to the Bill, like any other MP. There has been a false impression that the Speaker does not contribute to deliberations on Bills. The Bill is tabled before this Committee which deliberates and approves the Bill section by section at the prompting of the Clerk. However, the Chairperson of the Committee may permit the deliberation of a whole part with sections.[47] The time allocated for any MP to recommend amendments to the Bill or pass a motion to support it at this stage is only three minutes.[48]

41 Order 86(6) of the Standing Orders.
42 Order 86(9) and (10) of the Standing Orders.
43 Orders 87 of the Standing Orders.
44 Order 90 of the Standing Orders.
45 Order 147(1) and (2) of the Standing Orders.
46 Order 89 of the Standing Orders.
47 Order 88(10) of the Standing Orders.
48 Order 88(9) of the Standing Orders.

THIRD READING AND PASSING OF THE BILL

When all the sections of the Bill have been approved, with or without amendments, the Assembly resumes. The Speaker returns to the Chair. The Minister who sponsored the Bill would then move a motion to concur with the deliberations of the Committee of the whole House and approve the Bill by simple majority.[49] A Bill proposing to amend the Constitution would have to be approved in accordance with Article 98 of the Constitution of the United Republic of Tanzania where the voting will entail each MP being called by name, one by one, at the Second Reading stage of such Bill.[50]

Once a Bill has been read and approved at the third reading stage, it is taken to have been passed by the Parliament.[51]

ASSENT TO BILLS

Once passed by Parliament, the Bill is prepared by inserting all approved amendments under the watch of the Clerk. The Clerk then submits one copy of the Bill to the President of the United Republic of Tanzania for assent as required by Article 97(1) of the Constitution of the United Republic of Tanzania. The Clerk is also required to submit one copy of the Bill to the Speaker, for information. The Copy that has been signed by the President would be placed under the custody of the Clerk.[52]

In the event the President does not sign the Bill he must provide a statement containing reasons for refusing to do so and send the Bill back to Parliament. No time frame is provided for the President to stay with a Bill where assent is withheld.[53] This leaves room for the President to stay with a Bill indefinitely, with a possibility of leaving Parliament in a limbo and citizens in an array of confusion. Of course, it is not envisaged that the President would veto or put on hold a Bill under certificate of urgency signed by him. The President can also exercise the veto power over a Bill where it relates to a Constitutional Amendment.

The practice of President's veto of Bills is common in the Westminster system. In Tanzania, where a Bill is returned to Parliament by the President, it will not be presented to Parliament until at least after the lapse of six months since it was returned. After the lapse of this period, where there is disagreement between the President and Parliament on the acceptability of the Bill, the President is required to dissolve Parliament.[54] The position in other jurisdictions is different. In the United States, the House and Senate may override the President's veto.[55] Similarly, India, South Africa, and Kenya have constitutional safeguards to ensure some checks and balance system limiting the President's discretion to assent to Bills. In India, the President may consult the Supreme Court for its opinion to resolve the impasse.[56] The same is the case for South Africa where the President can refer a Bill to the Constitutional Court.[57]

[49] Order 89 of the Standing Orders (see also Order 79, which provides for the procedure of decision-making in the Parliament).

[50] Order 89(2) of the Standing Orders.

[51] Order 91 of the Standing Orders.

[52] Order 92(1) and (2) of the Standing Orders.

[53] Art. 97(2) of the Constitution of the United Republic of Tanzania, Cap. 2 R.E. [2002].

[54] Ibid., Art. 97(3) and (4).

[55] This can be done under Art. 1, section 7 cl. 2 of the Constitution of the United States of America.

[56] See *In Re The Kerala Education Bill*, 1957, (1959) SCR 995 and Art. 143 of the Constitution of India, 1950.

[57] See *Ex parte the President of the Republic of South Africa in re: Constitutionality of the Liquor Bill*, Case No. CCT 12/99.

The Constitution of Kenya also places limits on the power of the President to hold onto Bills sent for assent.[58]

From the procedure outlined above, it is quite evident that the Executive has an upper hand in the legislative drafting process in Tanzania. The Executive initiates Government Bills (which are the most common) and is represented in all the processes—from drafting, enacting, deliberating, and approving them in Parliament. The Bills are initiated by sector Ministries, deliberated, and approved for tabling before Parliament by the Cabinet, drawn up by the CPD and controlled by institutions in Parliament who are aligned to and have total allegiance to the Government. The role played by the Attorney General in the entire process of drafting legislation provides a striking example of the Executive's domination of the process. This role deserves a more thorough scrutiny, to which we now turn.

Role of the Attorney General

The Attorney General is in all aspects a part of the Executive. His role in the entire process of legislative drafting is certainly striking. In some cases, although legally recognized by the process, the Attorney General's role remains controversial. As noted above, the Attorney General is established by the Article 59(1) of the Constitution to advise the government of the United Republic on legal matters. This Article should be read together with the Office of the Attorney General (Discharge of Duties) Act which further elaborates the duties of the office of the Attorney General.[59] The Attorney General is also an MP and is an ex-officio member of the Cabinet, the two main organs that deliberate Bills, with all rights save for voting.[60] Further, as noted above, the Attorney General features prominently in all key stages of processing and deliberating Bills in Parliament. By virtue of the Standing Orders, the Attorney General is required to attend all meetings of every Committee of Parliament tasked with deliberating Bills.[61] In Zanzibar, the Attorney General only attends to Committees of the Zanzibar House of Representative (the equivalent of Parliament on the Mainland) which deliberate Government Bills. There is no restriction placed on the Legal Counsel of the House of Representatives.[62]

Due to the nature of the responsibilities given to the Attorney General, it is not surprising that there have been claims in certain quarters that there is an overlap on the roles of the Attorney General and that of the CPLC in the course of Parliamentary deliberations relating to drafting laws. These claims have further been amplified where the Speaker usually calls upon the Attorney General to clarify legal issues in Parliament. Although some have alleged that it is not proper for the Speaker to seek views of the Attorney General in the course of deliberating Bills in Parliament, the Attorney General is on record to have implied that this procedure is proper.[63]

[58] See *Coalition for Kenya and Democracy (CORD) vs. Attorney General*, Petition No. 476/2015, High Court of Kenya at Nairobi.

[59] Cap. 268 R.E. [2002].

[60] Art. 59(5) and 54(4) of the Constitution, respectively.

[61] Order 117(13) of the Standing Orders.

[62] See Order 108(11) (a) and (b) of the Standing Orders of the House of Representatives of Zanzibar, 2012.

[63] See A Mwakyusa 'Tanzania: AG Asks for Time to Study Contracts' *Daily News*, 6 January 2015, available at: allafrica.com/stories/201501060307.htm (accessed on 19 May 2016).

The law on the roles of the two entities is, in our considered view, clear. As noted above, the Standing Orders provide that the advisor of Parliament in all legal matters inside and outside Parliament is the CPLC. We should also point out that aside from his role in advising the Government outside Parliament, the Standing Orders permit the Attorney General to provide supplementary answers to answers given by a Minister in the course of responding to questions from MPs, including those related to Bills.[64] The criticism that has been leveled against the Attorney General, by some Parliamentarians, for his role in this regard is therefore unfounded, as far as the Standing Orders are concerned.

It is submitted, however, that the Standing Orders presume that all Bills presented to the august House are Government Bills, and therefore the Attorney General, the initiator of the Bills, knows the background of the Bills. However, in the case of Private Member Bills, then it would be improper to request the Attorney General to provide supplementary answers to Bills which he was not privy to. This docket falls squarely in the office of the CPLC. The Standing Orders need to reflect this seemingly diminutive but extremely important distinction to reflect the supremacy of Parliament in this regard.

It should be noted further that the legislative framework gives the Executive power, through the Attorney General, to alter, amend, and in some cases change laws that have been passed by Parliament. This is the underlying theme of the Laws Revision Act of 1994.[65] This law gives power to the CPD, an affiliate of the Attorney General, to amend and in some cases change legislation that has been duly approved by Parliament in the course of revising them. This power, which is in some cases discretionary, permits the CPD to omit certain laws, edit some, alter others (including the substance), and rectify errors.[66]

CONCLUSION

The article has revealed that despite the Constitution vesting in Parliament the power to make laws, the legislative drafting process which is the main part of law making is not fully under its control. The analysis of the Standing Orders has coherently established that to a great extent there is undermining of the Parliamentary powers of legislative drafting by the Executive in Tanzania. The process of undermining commences with initiating Bills, deliberating them in Parliament, assenting, and even amending them after being approved by Parliament. There is no iota of doubt therefore that Parliament in Tanzania operates under the shadow of the Executive in the entire process of drafting legislation, putting into question the supremacy of Parliament in this realm.

Recommendations

The role of the CPLC in the legislative drafting process should be given more prominence and emphasis in the Standing Orders, especially where Bills have been formally handed over to the Parliament. The practice of requesting guidance on provisions of Bills from the Attorney General in the august House assumes that Bills are all from the

[64] See Order 46(3) of the Standing Orders.

[65] Cap. 4 R.E. [2002].

[66] See sections 6–9 and 13 of Cap. 4, Cap. 2 R.E. [2002].

Government. Even where one concedes that it is okay for the Attorney General to play this role, being the legal advisor of the government, the role in providing advice on Bills should be limited only to Government Bills. Queries relating to Private Members' Bills should be the preserve of CPLC. This is the scenario that was most likely contemplated by the drafters of the Standing Orders in Zanzibar, especially with the introduction of the multiparty system. The approach adopted by the House of Representative therefore provides good food for thought.[67]

The powers given to the President to veto Bills under the current legislative framework should be reviewed in the context of Parliamentary supremacy. The approach used in the United States, India, Kenya, and South Africa where the Presidential veto is subjected to a checks and balancing mechanism is an example to emulate. Also, the powers given to the CPD by the Laws Revision Act should be reviewed and the discretion removed to ensure that laws that have already been approved by Parliament are not changed by the Executive as it pleases.

An amendment of the Standing Orders to clearly give sufficient time for stakeholders to provide input to Bills under the certificate of urgency would also improve transparency in the legislative drafting process.

[67] See Order 108(11) (a) and (b) of the Standing Orders of the House of Representatives of Zanzibar, 2012.