Act of Parliament: The Role of Parliament in the Legislative Process

A Commonwealth Perspective

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Abstract

Whereas making law is one of the principal functions of Parliament, Parliament plays a very limited role in the legislative process. In Uganda, like in many commonwealth jurisdictions due to the role the Constitution has given to Parliament, the legislature should take a more active role in the legislative process. The paper examines the legislative authority of Parliament, the concept of Parliamentary supremacy, pre-legislative scrutiny and whether Parliament should be involved in the scrutiny of delegated legislation.

A. Introduction

It is common to refer to Parliament as the law-making body; the body that puts together the measures that form the law of the land. That laws are made by Parliament is not in dispute, indeed according to McGee "Whenever Parliament acts, its act has the force of law – as an Act of Parliament".[1] What is not very clear however, is how much of an input Parliament makes in the 'making' of any law. Parliament is often referred to as the law maker, but this statement is misleading, it shrouds the actual involvement of Parliament in the legislative process and much confusion results from it. This paper investigates the legislative function of Parliament with the aim of unmasking the actual role that is played by Parliament in the legislative process.

The premise of this paper is that although making law is one of the principal functions of Parliament, Parliament is not adequately engaged in the legislative process.

The law-making powers and the role of Parliament in the legislative process are approached in this paper from the perspective of Uganda as a commonwealth country not as a representative or case study but as a reflection of the similarities in the legislative function within the commonwealth.

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1 D. McGee, *Parliamentary Practice in New Zealand*, 3rd edn, Government Printer Wellington 2005, p. 2.

B. The Legislative Supremacy of Parliament

I. The Beginning of Parliament

The word 'parliament' from the French *parler*, to speak, was first used in England in the thirteenth century, where it meant an enlarged meeting of the King's council, attended by barons, bishops and courtiers, to advise the King on law making, administration and judicial decisions. By the 1560s it was accepted that matters of high constitutional importance could only properly be dealt with through the mechanism of a parliamentary statute.[2] The institution of a legislating Parliament therefore arose from the royal practice of seeking the consent of the realm to legislate or tax, with Parliament being the appropriate body representative of the realm. To this end, Rogers and Walters assert that the "gem of the modern institution" can be traced back to the Parliament summoned on King Henry III's behalf by Simon de Montefort in 1265[3] to assent to statutes and to grant taxes.
While there is no commonwealth law or legislature as such, the legal systems of the member states have many things in common.[4] All the member states adopted English law and modified it to suit their particular circumstances or needs.[5] In the case of Uganda, the legislature as we know it today first appeared in its governmental structure in 1962 when the country attained independence and was largely modelled on the Westminster House of Commons.

II. Authority to Legislate

Today, in various parts of the commonwealth, the legislature has been assigned the responsibility of making law through constitutional instruments. In Uganda, the 1995 Constitution provides that "Subject to the Constitution, Parliament shall have power to make laws on any matter for the peace order and good governance of Uganda."[6] This is the authority of Parliament to legislate in Uganda which is recognized, re-stated and emphasized as one of the fundamental functions of Parliament. According to Kyokunda, Parliament in Uganda is "clearly given prominence by the Constitution as the law-making organ."[7] This authority is further entrenched in the Constitution by providing that "no person or body other than Parliament shall have power to make provisions having the force of law in Uganda

2 However, as is the case today, Parliament was in no sense separate from the monarch, who had sole powers to summon, prorogue or dissolve it. Indeed Lyon asserts that Parliament only met when the monarch required it. A. Lyon, *Constitutional History of the UK*, Cavendish Publishing Ltd, London 2003, p. 188.

3 R. Rogers & R. Walters *How Parliament Works*, 5th edn, Pearson Longman, Harlow 2004, p. 2.

4 The Commonwealth is an association of independent countries that were formerly protectorates or colonies of Britain. Uganda became a member of the Commonwealth in 1962.

5 According to Brown and Allen, this common approach ensures that there are no significant differences in the law in Australia and Kenya or many of the member states. D. Brown & P.A.P.J Allen, *An Introduction to the Law of Uganda*, Sweet & Maxwell, London 1968, p. 5.

6 Art. 79 of the Constitution of Uganda, <www.ugandaonlinelawlibrary.com/file/constitution-1995.pdf>, accessed on 11/07/09.

7 C. Kyokunda, 'Parliamentary Legislative Procedure in Uganda', *Commonwealth Law Bulletin*, Vol. 31, No. 3, 2005, p. 17.

except under authority conferred by an Act of Parliament."[8] It's this reservation of a state's law-making power for Parliament, which is often referred to as the legislative supremacy of Parliament. The 'supremacy' lies in the fact that the legislature is obliged to show its approval to any measure of public policy that is put forward by the executive before that measure can be binding and applicable within society. According to Lord Norton,[9] what defines Parliament as a legislature is the fact that "its assent is required for a measure to become law." It is this unique ability of Parliament to make or unmake any law whatsoever that has earned Parliaments all over the world the name of 'law-makers'. An Act of Parliament is therefore valid simply because it has been enacted by Parliament.

The doctrine of legislative supremacy of parliament or parliamentary sovereignty as it is sometimes referred to, embodies ideals of unqualified legislative power deeply entrenched in the Westminster Parliament.[10] As understood and popularized by Dicey in 1885,[11] through his arguments on the sovereignty of Parliament, the legislative supremacy of Parliament represents the constitutional acceptance that "Parliament has the right to make or unmake any law whatsoever; and further, that no person or body is recognized by the law as having a right to override or set aside the legislation made by Parliament." The principle is often characterized by three main features, namely; the fact that one Parliament cannot bind its successor;[12] that courts are under a duty to apply legislation passed by Parliament even if that legislation appears to be morally or politically wrong;[13] and in some jurisdictions, the legislation cannot be challenged for unconstitutionality.[14]

III. Parliamentary Supremacy and Constitutionalism

The use of the phrase 'legislative supremacy' of Parliament seems to suggest that Parliament enjoys unfettered, unconditional and absolute legislative powers. And this in many ways begs the question; does Parliament in Uganda enjoy unqualified law-making powers? To understand what authority, if any, Parliament has in the legislative process, it is important to analyse how the Constitution devolves

8 Art. 79(2), *1995 Constitution,* Government of Uganda, Uganda Printing and Publishing Corporation, Entebbe 1995, p. 51.

9 Lord Norton of Louth, Parliament and Legislative Scrutiny: An Overview of Issues in the Legislative Process, in A. Brazier, *Parliament, Politics and Law-Making: Issues and Developments in the* Legislative *Process,* Hansard Society London, 2004, p. 5.

10 According to T.R.S. Allan, it conjures concepts like the rule of law which have emanated from Westminster for a long time. T.R.S. Allan 'Legislative Supremacy and Legislative Intention: Interpretation, Meaning and Authority' *Cambridge Law Journal,* Vol. 63, No. 3, November 2004, pp. 685-711.

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

12 Id.

13 This requirement for the courts to give effect to legislation is now "part of nascent constitutional jurisprudence that reaffirms the sovereignty of Parliament", D. Jenkins 'Common Law Declarations of Unconstitutionality' *IJCL,* p. 188.

14 In the UK, an Act of Parliament can only be challenged in the courts under the Human Rights Act if it is incompatible with the European Convention on Human Rights. D. Jenkins 'Common Law declarations of Unconstitutionality' *IJCL,* p. 183.

the law making powers of Uganda to Parliament. According to the Constitution of Uganda, all power and authority of Government and its organs is derived from the Constitution. The law-making powers which are vested in Parliament by Article 79 of the Constitution are therefore to be exercised in accordance with the Constitution. While Parliament is the body to which the people have entrusted the law making power, that power can only exercised by Parliament in accordance with the limitations that the people have imposed on Parliament through the Constitution. In *Bribery Commissioner v. Ranasinghe*[15] where the court was called upon to decide the restrictions imposed on the law making powers of commonwealth legislatures, the court observed that "a legislature has no power to ignore the conditions of law-making that are imposed by the instrument which itself regulates its power to make law."

Certainly, the expression used in the Constitution itself makes the power vested in Parliament "Subject to the Constitution." Whereas Morris and Read argued that this phrase is just a "political exhortation and is not a standard by which the courts would test the validity of legislation"[16], the phrase is in truth much more than that and it characterizes and discloses a condition on the legislative powers of Parliament that is inherent in the expression of the grant made by the Constitution. This opens the way for the Constitutional Court in Uganda to look at every Act of Parliament brought before it to ensure that it does not contravene any provision of the Constitution. The legislative test then for Parliament is whether its Act is foreseen by the Constitution, is made in furtherance of a provision of the Constitution or can legitimately be said to be in exercise of powers granted to Parliament by the Constitution.

Further support that Parliament's power to make law on any matter is not absolute can still be found in the Constitution itself which prohibits Parliament from passing any law which has the effect of adopting a state religion for Uganda[17] or passing laws to derogate from the rights guaranteed by Article 44 of the Constitution.[18] These limitations on the legislative powers of Parliament are recognized by Parliament itself in its Rules of Procedure.[19]

Elsewhere in the commonwealth, where the constitution does not expressly spell out the limitations on the legislative powers of the legislature, courts have implied this in the existence of fundamental rights and held as unconstitutional any attempts by the legislature to curtail any fundamental human rights. In Australia, in *Capital Television Proprietary Ltd. v. Commonwealth (A.C.T.V.)*[20], the Court invalidated a law restricting political advertising. The Supreme Court found that

15 [1965] A.C 172, p. 195.

16 H.F Morris & J.S Read, *Uganda: The Development of its Laws and Constitution*, Stevens & Sons, London, 1966.

17 Art. 7.

18 Art. 44 covers the right to a fair hearing, freedom from slavery, torture and inhuman treatment as well as the right to an order of *habeas corpus*.

19 Rules 110 and 111 of the Rules of Procedure of Parliament, <www.parliament.go.ug/files/rules%20of%20procedure%20for%20the%208th%20parliament%20of%20uganda.pdf>, accessed 20 July 2009.

20 (1992) 177 C.L.R. 106.

freedom of communication was necessary in a democratic, representative government and was, therefore, an implied restriction on Parliament's legislative powers.

The other reason why the legislative power of Parliament in Uganda cannot be absolute is contained in Article 137 of the Constitution which gives the Constitutional Court power to declare any law void if it is inconsistent with any provision of the Constitution. The court has since 2000 used that power to strike down a number of laws passed by Parliament, the most prominent of them being the Constitution (Amendment) Act of 2000 in which Parliament attempted to pass an Act to amend the Constitution in a manner not envisaged by the Constitution; and the Referendum (Political Systems) Act of 2000[21] where Parliament neglected to follow the procedure prescribed by the Constitution. In both cases, the Constitutional Court held the Acts of Parliament as unconstitutional.

Today, the judicial review of legislation on constitutional grounds is practiced in many countries and where such review occurs, the legislature cannot claim supremacy. In the U.S constitutional case of *Marbury v. Madison,* Chief Justice Marshall rejected the idea that the courts must close their eyes to the Constitution when upholding the doctrine of Parliamentary supremacy.[22] While in this case Chief Justice Marshall was examining parliamentary supremacy and judicial review against the U.S. Constitution, his opinion holds true for all countries with a written constitution that imposes limitations on the power of Parliament and allows the courts to examine all legislative acts to ensure their compatibility with the Constitution.

Although Bar-Siman-Tov[23] suggests that judicial review of legislation is compatible with the supremacy of Parliament and that "it is necessary for the courts to examine an Act of Parliament to ascertain whether Parliament has spoken". He fails to recognize in the first place, that it is the very act of a court examining the Act made by Parliament, whether this is to establish that Parliament has spoken or not, that undermines the supremacy of Parliament. Secondly, the principle as expounded by Dicey and recognized by various scholars including Bar-Siman-Tor is based on the courts playing the role of enforcing Acts of Parliament by taking judicial notice of every Act passed by Parliament, and thus maintaining their immunity from any post enactment scrutiny unless that scrutiny is done by Parliament itself. Where parliamentary supremacy exists, this is intrinsic to the very

21 The Act was successfully challenged when Parliament expedited the procedure of passing legislation in a manner not foreseen by the Constitution. *Paul K Ssemwogerere & Z. Luwum v. Attorney General,* Constitutional Petition No. 3, 2000. <www.saflii.org/ug/cases/UGCC/recent.html>, accessed on 16 July 2009.

22 He asserted that: "This doctrine would subvert the very foundation of all written Constitutions. It would declare that an act, which, according to the principles and theory of our government, is entirely void; is yet, in practice, completely obligatory. It would declare that if the legislature shall do what is expressly forbidden, such act, notwithstanding the express prohibition, is in reality effectual. It would be giving to the legislature a practical and real omnipotence, with the same breath which professes to restrict their powers within narrow limits." 5 U.S p. 178.

23 I. Bar-Siman-Tor, 'Legislative Supremacy in the US? Rethinking the Enrolled Bill Doctrine', Columbia Law School, Columbia Public Law & Legal Theory Working Papers, 2008, p. 47, <lsr.nellco.org/columbia-pllt/08149>, accessed on 22 July 2009.

existence of the courts but cannot be done by the courts if they are in doubt as to whether Parliament has necessarily spoken or not. Therefore, whereas the Constitution of Uganda presents features of legislative exclusivity to Parliament, this does not translate directly into legislative supremacy of Parliament since the very Constitution expresses qualifications to this power which have become a test of how Parliament exercises that power.

Indeed, in the case of Uganda, the question of whether Parliament is supreme or enjoys sovereignty in the enactment of law was settled in 1995 by Article 2 of the Constitution which provides that the Constitution is the supreme law of Uganda and any law which is inconsistent with the Constitution is void. This provision read together with the various restrictions and limitations that are built within the Constitution especially on how Parliament's power to legislate may be exercised, makes the doctrine of parliamentary supremacy unsustainable in Uganda where the Constitution is supreme.

C. The Pre-legislative Legislature

I. Pre-legislative Scrutiny

Pre-legislative scrutiny involves the "scrutiny by a parliamentary committee of a bill that has been published in draft form by the Government"[24] and it takes place before the final drafting of a bill has been decided and before the bill is introduced into Parliament formally. According to Smookler,[25] the concept is fairly new but in the UK where the idea has gained ground, "there have been calls for increased scrutiny of bills in draft format as early as the 1950s, although the concept became increasingly popular in the 1990s". The publication of bills ahead of their introduction in Parliament enables time for comments to be made before the measure is finalized and formally introduced. The purpose of pre-legislative scrutiny is to produce better laws.[26]

The idea is to give select committees of Parliament an opportunity to examine the legislative proposal before it is formally presented to Parliament. The process of pre-legislative scrutiny has advantages for both the government and Parliament. For the Government, it is an additional form of consultation which includes the public and, more importantly, Parliament. The comments collected from Parliament and the reception that the bill receives among the Members of Parliament are also a good gauge to the government of how the bill will be received when it is formally introduced in Parliament. For Parliament, its main use is to influence the Government's legislative policy before it is firmly entrenched. The work

24 J. Smookler, 'Making a Difference? The Effectiveness of Pre-legislative Scrutiny', *Parliamentary Affairs*, Vol. 59, No. 3, 2006, p. 522.

25 Id.

26 Barnett maintains that: "In order to improve the quality of legislation, governments increasingly publish draft Bills for consideration before the Bill is presented in its proposed final form." H. Barnett, *Constitutional and Administrative Law*, 6th edn, Routledge Cavendish, London 2006, p. 385.

undertaken by a parliamentary scrutiny committee can also be utilized by parliamentarians once the full bill has been formally introduced.

In Uganda, subjecting bills to pre-legislative scrutiny is not required by the Rules of Procedure of Parliament and since 1995 there have only been three bills on which a committee was consulted when the bills were still in draft form.[27] This is a stark contrast to other commonwealth countries like the UK where for purposes of pre-legislative scrutiny, between 1992 and 1997, 18 bills were published in draft; and 1997 to 2004 no fewer than 42 bills were published in draft,[28] with no fewer than 12 bills published in 2003-2004.[29]

Whereas pre-legislative scrutiny of bills in draft form is not formally done in Uganda, the government is increasingly seeking the approval of the parliamentary caucus of the ruling party although this is after the bill has been published and presented to Parliament but before formal consideration of the bill by the committee has begun.[30] The purpose of the political party caucus discussing the bill is for the relevant Minister to "justify the provisions of the bill to the MPs of his or her political party in an effort to garner support for the bill in the committee and the House"[31] or to justify the party requiring the MPs to support the bill in Parliament. This form of scrutiny although not required by the rules of either Parliament or the political parties, gives the MPs through their political party a rare opportunity to get acquainted with the policies behind the bill and propose any amendments that will ensure that they support the bill in the House. This system has been used to good measure to get MPs involved in improving the bill by discussing the principles and provisions of the bill freely within the parliamentary caucus.

In addition, in order to facilitate consultation with the MPs in Uganda, Parliament has mainly been engaged through workshops specially tailored for a specific committee, with the intention of smoothing things over in an effort to aid easier passage of the bill when it is formally presented to Parliament.[32]

The value of a committee undertaking pre-legislative scrutiny, in the very few cases where the committees have been engaged has been enormous. Indeed in the

27 According to Jackie Akuno, the Uganda Law Reform Commission which prepared the bills held workshops with the Committee to discuss the Domestic Relations Bill, the Domestic Violence Bill and the Islamic Personal Law Bill. Interview with Jackie Akuno 24 July 2009.

28 Lord Norton of Louth, Parliament and Legislative Scrutiny: An Overview of Issues in the Legislative Process, *in* A. Brazier, *Parliament, Politics and Law-Making: Issues & Developments in the LegislativeProcess*, Hansard Society, London 2004, p. 8.

29 J. Smookler 'Making a Difference? The Effectiveness of Pre-legislative Scrutiny', *Parliamentary Affairs*, Vol. 59, No. 3, 2006, p. 522.

30 Since 2007 all bills are presented to the NRM Parliamentary Caucus soon after they have been given a First reading in Parliament and the party agrees on which amendments will be moved to the bill by the Minister or the individual MPs, where there is no agreement, the members may still move the amendment although they are discouraged but not stopped from doing so.

31 Interview with H. Lwabi, First Parliamentary Counsel, Uganda, (Kampala, 2 July 2009).

32 According to Jackie Akuno, Senior Legal Officer Uganda Law Reform Commission, the practice of involving MPs when the bill is still in draft form helps them to "collect and address all the concerns of the MPs and ensure safe and easy passage of the bill when it gets to Parliament" Interview with Jackie Akuno Senior Legal Officer, Uganda Law Reform Commission, (Nottingham, 26 July 2009).

case of the Domestic Relations Bill, a project that was controversial from the beginning, the involvement of the Committee on Legal and Parliamentary Affairs created ownership of the bill when it was eventually introduced in Parliament. According to some of the MPs who looked at the bill, the opportunity was good for the Uganda Law Reform Commission to look again at the bill and "address the concerns of the MPs so that when the Bill is introduced in Parliament, they have no issues with it".[33]

II. Does Pre-Legislative Scrutiny Work?

Seidman and Seidman argue that a bill should have as its principal task, the "solution to a social problem that is targeted by the promoters of the bill, expressed in a series of commands, prohibitions or permissions."[34] The duty to ensure that the legislative solution proposed by the executive in the bill will address the problem identified falls squarely on the legislators. Their objective while looking at the bill is to ensure that the bill is what the government claims it to be, nothing less and nothing more. How well they scrutinize the bill, to this end, may depend largely on when they get access to the bill and all the attendant reports. Pre-legislative scrutiny when conducted effectively may provide Parliament with the best opportunity to assess and evaluate a bill in order to design effective legislative solutions.

Although the involvement of Parliament in the legislative process gives MPs an opportunity to give their input in the process when the minds of the executive are not yet made up, the selective nature in which it is used, even in countries like the UK where the concept has quickly but informally become part of the legislative process, leaves a lot of control to the executive since Parliament may only be consulted when the executive considers it necessary or unavoidable. In fact, Smookler[35] acknowledges that the executive publishes in draft only those bills on which it wishes to "build consensus or steer a policy." The publication of bills in draft for purposes of pre-legislative scrutiny is therefore the exception and not the norm. For the bulk of the legislation, Parliament is an outsider until the bills are formally presented to it, sometimes too late to make any substantial or meaningful improvements to the bill as drafted by government.

Any form of scrutiny of a government initiative by Parliament is seen by the executive as a threat to the passage or existence of that proposal. It is therefore not surprising that while a government would like to subject a bill in draft form to some form of scrutiny, its fears lie in the fact that the bill may face so much premature criticism from the MPs who may demand that certain changes are made

33 Abdu Katuntu, MP (FDC) and Wilfred Niwagaba, MP (NRM) Madinah Tebajukira 'MPs Oppose Sections of Domestic Relations Bill The New Vision 7 July, 2008 <allafrica.com/stories/200807080546.html>, accessed 12 July 2009.

34 A. Seidman & R.B. Seidman 'Law, Social Change, and Development: The Fatal Race- Causes and Solutions' *in* Seidman, Seidman, Mbana & Hu Li (Eds) *Africa's Challenge: Using Law for Good Governance and Development*, Africa World Press Inc., Trenton NJ 2007, p. 34.

35 J. Smookler 'Making a Difference? The Effectiveness of Pre-legislative Scrutiny', *Parliamentary Affairs*, Vol. 59, No.3., 2006, p. 522.

to the bill before it is presented to Parliament. Although Smookler[36] maintains that the challenges to a bill after it is introduced in Parliament are a result of the additional knowledge obtained through the pre-legislative scrutiny, such demands would put the executive at the mercy of Parliament and legitimately hinder its capacity to secure the passage of legislation in the form in which it is most desirable for the government to be able to carry out its mandate from the electorate. Pre-legislative scrutiny should therefore be seen by government as a benefit, not a threat, since aside from it being an extra opportunity to improve the bill through consultation, it also signifies a "healthy and vibrant government"[37] that is able to justify its measures and welcome critical scrutiny.

With the bulk of legislation being introduced by the executive, Parliament is reduced to a "house of review"[38] merely examining what has been initiated, developed, shaped and crafted by the executive. The process within government involves the discussion of numerous drafts between various government departments before a final agreed draft is considered by Cabinet. If any meaningful review is to be made of any bill the scrutiny has to start at the conception stage. Effective and responsible law-making is a shared responsibility between the government and Parliament. It requires Parliament not to sit back and wait to scrutinize a bill when it is presented by the executive but to get involved in the process of developing and influencing the shape and structure of the bill.

The process of seeking the approval of a section of MPs from the ruling party, which is widely gaining ground in Uganda, is further entrenching seeds of partisanship in the legislative process and is threatening to divide committees along party lines and undermine any examination of a bill that a committee may wish to make. It is also difficult to assess the contribution of MPs because of these dual allegiances: to the party and to the role of a legislator representing a particular constituency. Since party positions do not always reflect the aspirations and needs of constituents, MPs trying to strike a balance have been branded 'rebel MPs' because they talk in the 'wrong forum', voicing opinions contrary to what has been agreed upon by the party.[39] The adversarial process in which the opposition and the government confront each other characterizes many debates in Parliament and achieves little in the committees.[40] The fact that the meetings of a Parliamentary caucus are attended by the President does not help matters and

36 Id. p. 533.

37 Strengthening Parlaiment: Report of the Commission to Strengthen Parliament, July 2000, Published by the Conservative Party London, p. 5.

38 C. Sharman 'The Senate and Good Government' paper presented at a lecture in the Senate Occasional Lecture Series at Parliament House, 11 December 1998. <202.14.81.230/Senate/pubs/pops/pop33/c09.pdf>, accessed 23 July 2009.

39 According to the African Leadership Institute, a think tank that has graded and evaluated MPs performance in Uganda, "[T]he issue of independence versus party discipline has attracted a great deal of attention and debate." D. Pulkol and S.C. Kaduuli, Strengthening the Uganda Parliamentary Scorecard, 8 October 2008. Available at SSRN: <ssrn.com/abstract=1280756>.

40 According to Florence Achieng, "[T]he Committee is many times divided along party lines and this affects the work especially on bills since we have to adjourn so that party positions can be reached or discussed." Statement by Florence Achieng, Legal Counsel to the Legal and Parliamentary Affairs Committee, Uganda (Personal correspondence, 26 July, 2009).

only serves to emphasize the control that the executive has over the legislative process even after a bill has been introduced in Parliament. Parliament is thus reduced to a mere legitimization committee giving its assent to measures that were agreed upon by the government without any input from the institution vested with the power to make law.

The process of preparing legislation is frequently overloaded. The result is that the consultation process is rushed or curtailed and policy is sometimes not settled well in advance of drafting a bill. To encourage pre-legislative scrutiny, bills should be published in draft ahead of their introduction in Parliament and a process of consultation should be undertaken on the draft bills in an effort to improve the policy behind the bills, to shape the substance and the drafting of the bills. While pre-legislative scrutiny will enable Parliament to look at a draft of a bill before being introduced in Parliament, it alone will not cure all that is ailing the legislative process. There is need for government to commit resources, time and political will before any meaningful scrutiny can be achieved. Pre-legislative scrutiny will no doubt put pressure on Parliamentary Counsel who is already overstretched and yet the early involvement of Parliament will not shorten the legislative process but make it longer in order to give Parliament adequate time to study the proposal in draft and be able to give meaningful and effective comments and feedback. Yet all this cannot be achieved unless and until the government looks at Parliament as an equal partner in the legislative process and commits to listening to criticism and proposals for amendment or calls for justification of the principles that are contained in legislation.

D. Making the Law

I. The Legislative Process in Uganda

Article 91(1) of the Constitution of Uganda provides that the power of Parliament to make laws shall be exercised by Parliament passing bills to which the President gives his assent. While the Constitution recognizes that a Member of Parliament may either individually or with others bring a legislative proposal,[41] the bulk of the legislative work of Parliament has its origins in the executive branch of government. The ideal law-making process begins with the decision[42] to have a law in place when this is considered necessary or expedient.[43] When ideas for legislation have been formulated, a process of consultation within the executive begins, the length and detail of which depends on what sort of legislation is being

41 Art. 94 (4) (b) attempts by individual MPs to be proactive and initiate legislation have been suffocated by the Government by suggesting that the individual MP works with government in developing the bill. <www.parliament.go.ug/index.php?option=com_wrapper&Itemid=33>, accessed 27 July 2009.

42 In Uganda, Cabinet will make this decision by approving general principles that are to be incorporated into the law. Chapter 1Y-b of the Uganda Government Standing Orders, Government Printer, Entebbe 1964.

43 The process begins when "a Minister of the Cabinet (who is in charge of the respective department) decides that a new draft law" is required to take care of a particular situation. A. Burger, *A Guide To Legislative Drafting in South Africa*, Juta Cape Town, 2001, 7.

considered and how quickly it is needed. The consultation is sometimes followed by the initiation of proposals in either a Green Paper or White Paper and calling for comments from interested parties. In the ideal legislative world, the comments obtained from the circulation of the Green or White Paper will be considered by the Government and incorporated into a bill which will then be introduced into Parliament.

The government in Uganda has not always taken this logical approach to law making, sometimes because of the nature of the legislation, urgency or sheer confidence that the legislative measures will be enacted by Parliament regardless. In fact according to Chinery-Hesse, in the twenty years that he has worked on legislation in Uganda "the publication of government proposals or a Green Paper, a White Paper and considering the comments from both processes was only used in the period leading up to the amendment of the 1995 Constitution."[44]

Once the executive has made up its mind on the measures of public policy it wishes to turn into law, it will bring these forward to Parliament and seek its assent. Parliament will then embark on a study and examination of the proposal presented to it in order to enact it into law, in the form in which Parliament thinks is necessary, best satisfies and embodies the most effective means of achieving the legislative intention contained in the proposal.

The legislature as a representative body has over a number of years developed a set of procedures it uses to study and examine the legislative proposals brought to it by the executive. These have now become entrenched in the standard rules and procedures of Parliament and are useful aids when Parliament is scrutinizing the legislative measures brought before it. The first one is the use of committees of smaller numbers of MPs to study and examine the proposed legislative proposals and make recommendations to the bigger body of all MPs. In Uganda, Article 90 of the Constitution provides for the use of standing committees by Parliament and one of their core tasks is to "discuss and make recommendations on all bills laid before Parliament." In furtherance of this function, Parliament has appointed 12 standing committees and 13 sessional committees with subject headings ranging from agriculture, statutory bodies, finance, defence, tourism, legal and parliamentary affairs to gender, foreign affairs and natural resources. All bills without exception are, as a matter of procedure, referred to the relevant committee after their First Reading for this purpose.[45] This form of examination of a bill accounts for the largest form of scrutiny of legislation in Uganda. According to Brazier, standing committees are able to provide an effective form of scrutiny and can "tease out the details of a bill if the members are well informed, given enough time and the Minister taking them through the bill is prepared to engage in genuine debate."[46] The use of committees in scrutinizing

44 Interview with L.J. Chinery-Hesse, Legislative Drafting Consultant to the Government of Uganda 24 July 2009.

45 Rule 113 of Rules of Procedure of Parliament <www.parliament.go.ug/files/rules%20of%20procedure%20for%20the%208th%20parliament%20of%20uganda.pdf>, accessed 28 July 2009.

46 A. Brazier, 'Standing Committees: Imperfect Scrutiny' *in* A. Brazier (Ed), *Parliament, Politics and Law-Making: Issues & Developments in the Legislative Process*, Hansard Society, London 2004, p. 16.

Figure 1. Impact of Committees on bills: changes made to a bill by the Legal and Parliamentary Affairs Committee

Bill	Number of clauses at introduction of bill in Parliament	Number of amendments proposed by the Committee and made by Parliament
1. The Business, Technical, Vocational, Education and Training Bill, 2008	32	17
2. Audit Bill, 2007	52	15
3. Uganda Road Fund Bill, 2007	50	14
4. The Political Parties and Organisations (Amendment) Bill, 2008	2	6
5. The Law Revision Fines & Other Amounts in Criminal Matters Bill, 2006	8	1

Source: Parliament of Uganda. <www.parliament.go.ug/index.php?option=com_frontpage&Itemid=1>, accessed 27 July 2009.

legislation at various stages has been adopted by many countries and has been largely hailed as valuable. According to Lord Norton, "the experience of committees examining Bills has generally been a productive one."[47] Parliamentary committees are also a means of providing an opportunity for more groups and individuals to be engaged in the policy questions before Parliament. The committees cannot make policy and while they may initiate legislation,[48] only one bill has to date been initiated by a committee.[49] The bulk of their contribution to the legislative process is trying to influence policy and making improvements in the form of amendments to legislation. The following table of selected bills considered by the Parliament of Uganda between 2007 and 2008 highlights the impact of committees on bills through amendments.

In contrast to Figure 1, in the UK, during the parliamentary session of 1997 to 1998, Blackburn and Kennon observe that fifteen of the twenty main government bills ended up with more sections than they had clauses when they were introduced in Parliament, "with the 131 clauses of the Crime and Disorder Bill attracting 558 amendments and the 90 clause Competition Bill getting 343 amendments."[50] While the number of amendments alone cannot be a measure for the impact of Parliament on any bill, since the bulk of amendments are minor techni-

47 Lord Norton of Louth 'Parliament and Legislative Scrutiny: An Overview of Issues in the Legislative Process' *in* A. Brazier (Ed), *Parliament, Politics and Law-Making: Issues & Developments in the Legislative Process*, Hansard Society, London 2004, p. 6.

48 Art. 90 (3) (b) of the Constitution allows standing committees "to initiate legislation in their respective areas of competence".

49 The Government Assurances Bill, 2008 initiated by the Standing Committee on Government Assurances <www.parliament.go.ug/index.php?option=com_docman&task=cat_view&gid=73&Itemid=102, accessed 27 July 2009.

50 R. Rogers & R. Walters, *How Parliament Works*, 5th edn, Person Longman, Harlow 2004, p. 178.

cal and drafting corrections, this illustrates the "policy influencing"[51] nature of Parliament and the opportunity that Parliament has to improve legislation and how this can affect legislation if used effectively. Even technical drafting amendments can make a huge improvement to a bill since MPs are not only concerned with the "justification of the content of legislation but also about the wording to convey the legislative message."[52]

The second set of procedures that Parliament uses in the legislative process is the time long method of gradually programming the stages of consideration for all legislation. Like in many commonwealth countries,[53] a bill in Uganda will go through the First Reading, which is merely the formal introduction of the bill in Parliament.[54] The bill will then be referred to the relevant Sessional Committee which will have forty-five days[55] to study and examine the bill and make a report which will be debated at the Second Reading and will contain any or all of the amendments that the committee feels should be made to the bill. The scrutiny at this stage is in the form of debate generally on the floor of the House and is confined to matters of principle rather than detail. After the Second Reading, the bill will then be considered by all members of Parliament after constituting themselves into the Committee of the Whole House. This is another critical stage of the legislative process, since Parliament scrutinizes the bill in detail at this stage, usually clause by clause, while considering and incorporating all the amendments that are necessary or proposed to the bill. It is this stage together with the examination of the bill by the relevant select committee that comprise the actual law-making by Parliament. Indeed, Miers and Brock contend that it's the total sum of what happens at these two stages that makes Parliament effective in legislating since "the outcome of amendments tabled in respect of each legislation is one of the better indicators of the impact of Parliament on legislation."[56]

II. Analysis - Why Parliament Matters in the Legislative Process

Whichever way you look at it, law will affect society or a section of it. The Constitution recognizes the right of every Ugandan to participate in the affairs of

51 Due to the reactive nature of Parliament, it has been dubbed "a policy-influencing legislature" *Strengthening Parliament: Report of the Commission to Strengthen Parliament,* July 2000, published by the Conservative Party, printed by Colour Quest London, p. 5.

52 A.D. Oliver-Lalana 'Legitimacy Through Rationality: Parliamentary Argumentation as Rational Justification of Laws' *in* L.J. Wintgens (Ed.), *The Theory and Practice of Legislation: Essays in Legisprudence,* Ashgate, Aldershot 2005, p. 245.

53 This is one of the many features of the legislative process that was adopted by former British colonies and protectorates from the Westminster Parliament.

54 Rules 109 and 112 of the Rules of Procedure of Parliament. <www.parliament.go.ug/files/rules%20of%20procedure%20for%20the%208th%20parliament%20of%20uganda.pdf>, accessed 27 July 2009.

55 Rule 113 of the Rules of Procedure of Parliament <www.parliament.go.ug/files/rules%20of%20procedure%20for%20the%208th%20parliament%20of%20uganda.pdf>, accessed 27 July 2009.

56 D. Miers & J. Brock, 'Government Legislation: Case Studies' *in* D. Shell & D. Beamish (Eds.), *The House of Lords at Work,* Oxford University Press, Oxford 1993, p. 97.

government.[57] Yet no person can be present at all of the decisions or in all the decision-making bodies whose actions affect their life because they are so many and they are so dispersed. Therefore, the use of representatives is not only desirable but necessary for decision making to be effectively carried out in sizeable populations. Citizens need a body that can "scrutinise and if necessary change the legislative proposals"[58] brought forward by the government. Parliament is therefore important to the ordinary citizen because it is the key, and authoritative, link between the citizen and government. It ensures that government is questioned and forced to justify itself. This is one of the "major creeds of democratic theory":[59] that the decision-making revolves around the deliberation and decision of a few representing the many. An effective Parliament is therefore critical in voicing the concerns of the electorate by ensuring that the executive can justify each measure that it proposes to legislate upon. An effective Parliament ensures that:

> government engages in rigorous thinking, is able to argue convincingly for what it proposes, and that its proposals emerge after robust probing that takes place in the full glare of public exposure.[60]

Even if it is inevitable that government will in the end have its way, Parliament is the forum in which it must explain itself and be held accountable. The explanation may take various forms like "responding to criticism of proposed legislation at the second reading of a bill or on detailed amendments put forward by a committee or an MP".[61] The committee is not just a debating forum but can take oral and written evidence, involving many more people in a formal process of consultation thus making the legislative process more accessible to those outside Parliament.

While the use of committees currently provides the most effective means of scrutinizing bills in Uganda, since most of Parliament's legislative work is done in committees,[62] there is only so much that a committee of Parliament can do to a bill; because it plays a responsive role by nature "by responding to proposals and actions of government"[63], proposals that the government has had for a considera-

57 Art. 38 (1) of the 1995 Constitution.

58 *Strengthening Parliament: Report of the Commission to Strengthen Parliament*, July 2000, published by the Conservative Party London, printed by Colour Quest, p. 5

59 S. Besson 'The Paradox of democratic Representation' *in* L.J Wintgens (Ed.), *The Theory and Practice ofLegislation: Essays in Legisprudence*, Ash Gate, Aldershot, 2005, p. 128.

60 *Strengthening Parliament: Report of the Commission to Strengthen Parliament*, July 2000, Published by the Conservative Party, London, p. 5.

61 R. Rogers & R. Walters, *How Parliament Works*, 5th edn, Person Longman, Harlow 2004, p. 85.

62 In a study of the performance of Uganda's Parliament in the period 2006-2007, the African Leadership Institute found that most of the work of Parliament is done in the committees where bills are reviewed and amended. *Parliamentary Scorecard 2006-2007: Assessing the Performance of Uganda's Legislators* (African Leadership Institute Kampala 2008) 4 <aflia.org/uploads/publications/scorecard2007.pdf?PHPSESSID=1fdda8009a1029613b48763042ceea7a>, accessed 27 July 2009.

63 R. Rogers & R. Walters, *How Parliament Works*, 5th edn, Person Longman, Harlow 2004, p. 369.

ble period of time it cannot, for instance, reject a whole government bill and substitute it with its own within the forty-five days within which a committee is required to report back on the bill. This leads to amendments that amount to mere adjustments of the bill in the margins or a 'tidying up' process. In the case of complex and big bills, if the prescribed time runs out without the committee looking at every provision of the bill, parts of the bill may receive no scrutiny at all. The time limitation will also affect the consultation that a committee can undertake on the bill. This is the main limitation of prescribing time limits for Parliament to undertake scrutiny since "it is not always possible to anticipate accurately the time needed for adequate consideration of a bill".[64]

Additionally, the methodology of the committees in Uganda[65] has largely been consulting other specialist organizations or professionals on the subject of the bill and receiving oral or written evidence from organizations or interest groups that may be affected by the proposed law, without carrying out any independent research on the bill or the policy behind it. This has reduced them to mere arbiters between two or more opinions or schools of thought without being sufficiently enlightened about the subject. For MPs who are not specialists in the subject matter or in statutory drafting, the task of understanding the content of a complex bill, its implications for other aspects of the law and the relationship between various clauses can be daunting. Yet an MP is not given enough time to acquire the specialist knowledge on any one subject during their tenure in Parliament, if they don't already have it by the time they join Parliament, as they may only serve two years on a committee before they are moved to another sessional committee by the Party Whips.[66]

The use of committees in the scrutiny of legislation while initially effective, is now increasingly being infiltrated by the confrontation between government and the opposition, often along party lines, leaving little or no room for meaningful debate and scrutiny as the committee is split along party lines and those who are supposed to scrutinize the bill become lobbyists and promoters of the bill because it is promoted by a particular political party. Indeed one MP has lamented that "Parliament cannot do much since two thirds of the House is an extension of the Executive. We have only 70 voices in Parliament."[67]

Added to this is the poor attendance statistics of the MPs in the committees. In assessing the performance of MPs during the period 2006-2007, the African Leadership Institute found that the average attendance rate for an MP who is not

64 A. Brazier, 'Standing Committees: An Imperfect Scrutiny' *in* A. Brazier (Ed.), *Parliament, Politics and Law-Making: Issues & Developments in the Legislative Process*, Hansard Society, London 2004, p. 16.

65 Uganda Parliament Committee Reports <www.parliament.go.ug/index.php?option=com_docman&task=cat_view&gid=56&Itemid=102>, accessed 30 July 2009.

66 Rule 159 of the Rules of Procedure of Parliament <www.parliament.go.ug/files/rules%20of%20procedure%20for%20the%208th%20parliament%20of%20uganda.pdf>, accessed 30 July 2009.

67 S. Naturinda & M. Nalugo 'MPs Vow to Block Phone Tapping Bill' *Daily Monitor* 7 March 2009, <www.monitor.co.ug/artman/publish/news/MPs_vow_to_block_phone_tapping_Bill_80904.shtml>, accessed 20 July 2009.

a Minister is 40%.[68] Yet a Minister on the same committee attends at the rate of 90%. While the high attendance rate for Ministers can be out down to their often being required to give official testimony to committees, it is difficult for the non Minister MPs to influence legislation if they cannot match the attendance rates of those who are not only promoting the legislation, but have also been involved in its development for a long time before it is introduced to Parliament.

This problem is compounded by the recently adopted procedure of submitting bills to the parliamentary caucus of the party in government before the bill is considered by the committee. With controversial bills, the modus is to require all the MPs of the party to support and vote for the bill and to refrain from questioning the provisions of the bill or introducing amendments that have not been agreed upon by the MPs caucus. The MPs caucus therefore acts as an obstacle to effective scrutiny by Parliament as it ties the hands of the MPs and stops them from effectively performing their role as law-makers.

It has been suggested that "defective legislation is the result of weaknesses in the legislative system"[69] and that most of the legislation coming out of Parliament is "ill thought out, incomplete, poorly drafted, ambiguous or inaccurate".[70] Yet trying to get a government to change its position on a bill at committee stage is exceedingly hard even for Parliament. The government will propose legislation to fulfil and reflect commitments made in its manifesto before a general election or to reverse policies of a previous government. So, as far as the government is concerned, by the time a bill is introduced in Parliament, it accurately represents the position of the government and as such, the Minister promoting a bill will defend the bill publicly because it represents what the government has agreed upon. Most of the legislation will be presented to Parliament in this state and the government expects Parliament to give its assent without trying to change what has already been agreed upon by the government. Riddell[71] acknowledges this when he argues that:

> Parliament's main legislative function lies largely in legitimisation. The main decisions are taken before Parliament sees a bill. Most bills are the product of hard bargaining in government with Parliament being presented in effect, with a *fait accompli*, too late to exert any real influence.

Whereas a bill is by definition a draft Act of Parliament, government tends not to see it this way. For it, each bill has gone through a lengthy process of development and debate between governmental departments and ministers, the govern-

68 *Parliamentary Scorecard 2006-2007: Assessing the Performance of Uganda Legislators*, African Leadership Institute, Kampala, 2008, p. 36. <aflia.org/uploads/publications/scorecard2007.pdf?PHPSESSID=1fdda8009a1029613b48763042ceea7a>, accessed 27 July 2009.

69 Lord Williams, 'The Role of the House of Lords in terms of Parliamentary Scrutiny' Paper Presented at Justice Annual Lecture, 9 October 2002 <www.justice.org.uk/images/pdfs/lordwilliams.pdf>, accessed 1 August 2009.

70 G. Drewry & J. Brock 'Government Legislation: An Overview' *in* D. Shell & D. Beamish (Eds.), *The House of Lords at Work*, Oxford University Press, 1993, p. 75.

71 P. Riddell, *Parliament Under Blair*, Politicos Publishing, London 2000, p. 222.

ment has consulted those that it feels have an interest in the bill and therefore the bill should be defended vigorously because it represents the position agreed upon by government and any amendments to the bill which are not introduced by government are seen as compromising the government position and opening to debate what has been settled by government.[72] It is such attitude towards legislative proposals that obscures proper scrutiny of a bill once it has been introduced in Parliament. The involvement of Parliament therefore, early on in the legislative process affords the best opportunity for the government to benefit from engaging Parliament in the legislative process, when the government is still open to change since both government and Parliament have the responsibility towards the "citizen to get the law right"[73], and as the institution entrusted with the duty to make laws, it is vital that Parliament joins and determines the shape of the legislation at the earliest possible opportunity.

The individual MPs are not only there to scrutinize initiatives introduced by the executive, but are empowered by Article 94 to initiate legislation through the introduction of private member's bills. While this power exists, to date only four private member's bills have been introduced since 1995.[74] The efforts of the MPs are frustrated constitutionally by Article 93 which restricts MPs from introducing bills which have financial implications, since these are reserved for the government. This provision has been a major restriction on the introduction of private member's bills because financial implications are difficult to avoid in a bill "since most legislation is not self-executing."[75] At other times, the private member's bills are killed off in their infancy by the government hurriedly approving principles for a similar bill and stalling the process of the individual member through consultation. According to Dennis Obua, "the experience is frustrating and meaningless as the government fights to hijack private members bills."[76] While this explains the small number private member's bills, it also highlights the fact that there is very little that an individual Member of Parliament can do on their own to influence the legislative process if their efforts are not supported by the executive.

72 According to Drewry & Brock this makes ministers defensive and they will "...often resist the pressure to look again because they do not want to leave the door open for further discussions either inside or outside Parliament." G. Drewry & J. Brock 'Government Legislation: An Overview' *in* D. Shell & D. Beamish (Eds.) *The House of Lords at Work*, Oxford University Press, 1993, p. 75.

73 Lord Williams, 'The Role of the House of Lords in terms of Parliamentary Scrutiny' Paper Presented at Justice Annual Lecture 9 October 2002 <www.justice.org.uk/images/pdfs/lordwilliams.pdf>, accessed 1 August 2009.

74 The Budget Act, 2001 and the Administration of Parliament Act 1997.The Copyright & Neighbouring Rights Act, 2006 Act 19/2006 introduced by Hon Jacob Oulannyah and the Persons with Disabilities Act, 2006 Act 20/2006 introduced by Hon. Dora Byamukama. C. Kyokunda, 'Parliamentary Legislative Procedure in Uganda', Vol. 31, No. 3, 2005, p. 18.

75 C. Kyokunda, 'Parliamentary Legislative Procedure in Uganda', *Commonwealth Law Bulletin*, Vol. 31, No. 3, 2005, p. 18.

76 MP (Youth, Northern Uganda) Mercy Nalugo 'Minister Legislators Clash over FGM Bill', The Monitor 22 June, 2009 <allafrica.com/stories/200906230769.html>, accessed 12 July 2009.

E. Delegating Law-Making Powers: The Abdication of Parliament

I. Introduction

The ideal separation of powers requires that the law-making powers of a state are carried out by an organ of the state which is different from the organ carrying out administration and enforcement or interpretation of the laws. However, the exigencies of modern states have led the legislature to transfer some of its law-making powers to the executive. Whereas it has been asserted by constitutional law purists that this "transfer undermines the very essence of the separation of powers and derogates from the legal principle of *delegatus non potest delegare*",[77] it is unreasonable to expect Parliament to make all the laws that a state requires and still be capable of performing its other functions like bringing the executive to account. Yet the need for the executive to be involved in law-making outside the legislature has increasingly gained ground in the recent past.

II. Need and Source for Delegated Legislation

In countries where a constitution is the supreme law and apportions governmental power to the various organs of the state, the constitution may also express whether that legislative power may or may not be delegated. In the case of Uganda, the executive doesn't have inherent legislative power and may only exercise legislative power when it is delegated to it by Parliament. The power of Parliament to delegate its law-making authority is implicit in Article 79 (2) of the Constitution which provides that: "no person or body other than Parliament shall have power to make provisions having the force of law in Uganda *except under authority conferred by an Act of Parliament.*" In countries like South Africa where the constitution gives the law-making function to Parliament but is silent on whether Parliament may delegate that power, the courts, in the absence of a provision prohibiting Parliament from delegating its legislative authority, have read this power into the Constitution and have held that it is not unconstitutional for Parliament to delegate the law-making power vested in it by the Constitution.[78]

The presence of two law-making authorities has led to a distinction in the classification of legislation with primary or principal legislation being the law made directly by Parliament and subsidiary, delegated or subordinate legislation being the term given to legislation made under authority delegated by Parliament. The necessity for delegated legislation is arguably driven by numerous factors. In the first place the pressure upon parliamentary time is so great that if Parliament handled all the primary legislation plus accompanying statutory instruments at the same time, "it would be forced to pass far fewer Acts than it does; or drasti-

77 H. Punder, 'Democratic Legitimation of Delegated Legislation- a Comparative View on the American, British and German law.' *ICLQ*, Vol. 58, No. 2, 2009, p. 354.

78 Rudman argues that this interpretation of the constitution is now the basis of delegated legislation by Parliament in South Africa since the Constitution doesn't expressly address the issue. D. Rudman 'Delegation by Parliament of its Legislative Power: A South African Perspective', Paper presented at CALC Conference, Nairobi, Kenya, September 2007, <www.opc.gov.au/calc/docs/calc_loophole_August2008.pdf>, accessed 24 July 2009.

cally alter its system of passing them."[79] The more procedural and subordinate matters are withdrawn from detailed Parliamentary discussion, the greater is the time which Parliament can devote to consideration of essential principles in legislation. The idea is to relieve Parliament from acting as sole legislator in all areas which would otherwise make it very cumbersome for the legislature to be able to effectively perform its function of law-maker alongside its other constitutional functions like approving appointments made by the executive and making the executive accountable for its actions. Secondly, the subject matter of legislation is increasingly becoming complex and technical, yet although the executive deals with technical issues on a daily basis, Parliament doesn't have the resources or expertise to deal with technical issues beyond establishing the suitability of the principles and the framework within which the executive are to operate while coming up with the technical rules. Punder[80] argues that the "technical soundness of the executive makes it better suited to making rules regarding technical matters and relying on Parliament's authority to give legitimacy to those rules." Thirdly, delegated legislation is widely conceived to be more flexible than an Act of Parliament as it provides an opportunity for constant adaptation to the changing circumstances and makes it easier for the executive to govern. In fact Rudman contends that "due to the rapidly-changing environment in which we now live, it is important for the law to be easily adapted"[81] to the environment in order for it to serve its purpose. The Supreme Court in Uganda has echoed this by observing that "the necessity of acting swiftly in an emergency and the need for great flexibility to meet changing circumstances"[82] are some of the reasons for delegated legislation. Justification for delegated legislation underscores the fact that delegated legislation matters and is increasingly important. In fact in many countries[83] it is so necessary that it completely outnumbers primary legislation in a way that makes delegation of law-making powers the norm rather than the exception.

In Uganda, the use of delegated legislation is so prevalent that it is unusual to find an Act of Parliament that does not provide for the executive or other body outside of Parliament to make rules, regulations, orders or other form of statutory instrument.[84]

79 F.D. Nakachwa, 'The Role of the Legislator in Delegated Legislation', *Uganda Law Focus,* 2002-2003, p. 21.

80 H. Punder 'Democratic Legitimation of Delegated Legislation- A Comparative View on the American, British and German Law' *ICLQ*, Vol. 58, No. 2, 2009, p. 356.

81 D. Rudman, 'Delegation by Parliament of its Legislative Power: A South African Perspective' Paper presented at CALC Conference, Nairobi Kenya, September 2007, <www.opc.gov.au/calc/docs/calc_loophole_August2008.pdf>, accessed 24 July 2009 p. 47.

82 *Attorney General v. Rwanyarare & Others* Constitutional Appeal No. 2/2003 <www.judicature.go.ug/judgements.php>, accessed 20 July 2009.

83 In America, UK and German the subsidiary legislation far outnumbers primary legislation. H. Punder, 'Democratic Legitimation of Delegated Legislation – A Comparative View on the American, British and German Law', *ICLQ,* Vol. 58, No. 2, 2009, p. 356.

84 Between 2006 and 2008 of the laws that were passed by Parliament, only those laws that were amending existing legislation did not contain a provision for the making of subordinate legislation.

III. Role of Parliament in Delegated Legislation

While the constitution of Uganda recognizes in Article 79 that Parliament may by its Act confer legislative authority to another person or authority, it does not set the limits within which this power may be conferred and is silent on what role Parliament plays in delegated legislation. The logical explanation that has been offered for the Constitution remaining silent on a key issue like this is that since "delegated legislation is directly related to Acts of Parliament, related as child to parent"[85] and the Constitution has already made provision on what Parliament may do in respect of Acts of Parliament, it's then upon Parliament to determine the extent of the delegated powers and how they should be applied, in the Act delegating the law-making powers.

The approach by Parliament in Uganda has often been to express the delegation in very standard and general words.[86] The delegation is not limited to technical matters or matters of detail but also to anything that Parliament may have overlooked or omitted while enacting the Act.[87] There is no constitutional requirement for Parliament to supervise the effective utilization of the delegated legislative power but in a limited number of cases, Parliament has required that the legislation arising out of the delegated authority is laid before Parliament where Parliament may revoke the subsidiary legislation usually within twenty-one days.[88] In all other cases, Parliament has taken a back seat after delegating authority to a member of the executive or other quasi non-governmental organization or statutory corporation.

85 H. Punder, 'Democratic Legitimation of Delegated Legislation – A Comparative View on the American, British and German Law', *ICLQ*, Vol. 58, No. 2, 2009, p. 357.

86 In the Acts passed by Parliament in 2008, the general words "The Minister may make regulations for the carrying into effect the provisions of this Act" or a variation of them are used in all the Acts of 2008 except those that require the approval of Parliament. *See* Laws of Uganda, 2008 <www.ugandaonlinelawlibrary.com/lawlib/2008_laws.asp>, accessed 27 July 2009.

87 In order to justify the delegation of legislative powers when considering the Public Service (Negotiating, Consultative & Dispute settlement Machinery) Bill, 2006 one legislator argued thus: "There are no regulations but there are some matters that have been provided for specifically, and we can see that there are some matters that are not catered for. Our problem was on those matters that are not specifically provided for by any clause in this Bill. How will the minister come in? Under which instrument will he come in to provide for those matters? We are just trying to provide for a way out so that in future we can come up with regulations to assist the process of negotiation and dispute settlement in areas that have been left out in this Act, and there are many issues that have been left out. We anticipated that those details in most of the laws – even in other countries – are legislated for by regulations." Dr. Lyomoki MP (Workers) Parliamentary Hansard <www.parliament.go.ug/index.php?option=com_wrapper&Itemid=33>, accessed 27 July 2009.

88 Section 38 of The National Audit Act 2008, Act 7 of 2008 requires the approval of Parliament before the Auditor General can make any delegated legislation to give effect to the Act; Section 7 of the Law Revision (Fines and Other Financial Amounts in Criminal Matters) Act 2008, Act 14 of 2008 also requires the approval of Parliament.

IV. Should Parliament Supervise Use of Delegated Legislative Powers? Analysis of the Role of Parliament in Delegated Legislation

The power to make law is vested in Parliament by Article 79 of the Constitution which also envisages that power being delegated by Parliament to some other person or body. What is envisaged by Article 79 is a restrained delegation of authority after careful and deliberate debate and consideration and not a blanket transfer of legislative authority. As the Constitutional law-maker, Parliament remains responsible for all legislation whether primary or subsidiary, otherwise, it would be relinquishing its constitutional function. In fact, Punder acknowledges that "Parliament elected by the people bears political responsibility for all laws, including those created by the executive."[89] This is because the responsibility for all laws imposed by the electorate on their representatives cannot be taken away without good cause as that would directly undermine the power of the electorate and the sovereignty of the people from who all power constitutionally derives.[90] It is therefore incumbent on Parliament to set and maintain a criterion to use as a basis for the grant and evaluation of delegated law-making authority. Legislation, whether primary or delegated is too important to society leave it open and undefined. There is a need for Parliament to set basic guidelines on delegating its law-making powers and how to exercise the delegated powers. Parliament cannot transfer its power "without performing its essential function, i.e. without laying down a policy or standard for the guidance of the delegated authority."[91] There is now too great a readiness in Parliament to delegate wide legislative powers to Ministers yet there is no formal guidance on how the authority should be utilized. There should be, as a bare minimum, a standard of when Parliament may delegate its legislative authority and how this power should be exercised; and this standard should be consistent with Parliament's role as law-maker. In Germany[92], the *Bundestag* is required by the constitution to define the content, purpose and scope of the legislative powers which are delegated to the executive. As such, the enabling provision in the parent Act and the delegated legislation made under its authority is void if the purpose and scope are not clearly defined. In the U.S, the Supreme Court once forced Congress to set standards by means of delegating statutes for the executive regarding the extent of legislative powers conferred upon it.[93] While the purpose and scope standard is not enshrined in the constitution in the case of common law jurisdictions, it has been used by the courts through judicial review to determine the legality of subsidiary legislation made using powers delegated by an Act of Parliament. In *Attorney General v. Rwanyar-*

89 H. Punder, 'Democratic Legitimation of Delegated Legislation – A Comparative View on the American, British and German Law', *ICLQ*, Vol. 58, No. 2, 2009, p. 363.

90 Art. 1 of the 1995 Constitution of Uganda acknowledges the sovereignty of the people.

91 Indian Law Institute Study No. 10: Delegated Legislation in India, Tripath Ltd, Bombay 1964, p. 59.

92 Art. 80 para. 1, Basic Law 1949 <www.psr.keele.ac.uk/docs/german.htm>, accessed 27 July 2009.

93 *Wayman v. Southard* (1825) 23 US,1; *see also J.W. Hampton Co v. US* (1928) 276 US,394; *Schechter Poultry Co v. US* (1935) 295 US, 495.

are,[94] where the Supreme Court considered the exercise of legislative authority by the Chief Justice, the court held that where the purpose of the delegated authority is to bring into force an Act of Parliament, it takes effect upon the exercise of the authority.

The responsibility of Parliament to make law stemming from the Constitution cannot be overemphasized. Inherent in that duty is the role of Parliament to scrutinize all the legislative measures that emanate from the executive. In order to facilitate Parliamentary scrutiny of delegated legislation to safeguard the constitutional role of Parliament, laying of delegated legislation in Parliament, either in draft or after they have been made, must be included in every provision delegating legislative authority. To this must be attached the requirement for Parliament to signify its approval by a resolution so as to give legitimacy to the delegated legislation. The requirement in the enabling provision for delegated legislation to be laid before Parliament ensures that Parliament not only performs its duty of scrutinizing executive acts, but also gets involved in legislative measures for which it is ultimately responsible. In Ghana, all statutory instruments are required by the Constitution to be laid before Parliament and only take effect after twenty-one days if they are not annulled by Parliament.[95] Although this may increase the volume of legislation that Parliament has to deal with, and may seem to directly contradict or even defeat the very purpose of the delegation, it is necessary if the quality of legislation is to be maintained and the executive excesses are to be minimized.[96] Sharman contends, and rightly so, that it is "particularly inappropriate to give the government of the day a free hand in making new laws"[97] because then, all the laws will reflect the interests of the government either politically or administratively and undermine the legislative authority of Parliament as an equal partner in the legislative process.

Sometimes the power is delegated to an authority that is not directly under the executive or answerable to Parliament, like the National Council for Higher Education,[98] or the Insurance Commission,[99] without any requirement for the delegated legislation to be laid before Parliament. While this is supposed to facilitate the making of legislation which is free from political considerations and whose only regard is the public interest, short of judicial review, and in the absence of a gen-

94 Constitutional Appeal No. 2 of 2003 <www.saflii.org/ug/cases/UGSC/2004/2.rtf>, accessed 26 July 2009.

95 Art. 11(7) of the Constitution of Ghana, 1992 <www.ghana.gov.gh/ghana/law_ghana.jsp>, accessed 27 July 2009.

96 According to Nandala Mafabi, MP, the "practice of leaving delegated legislation to the executive alone is very dangerous. Parliament must be involved" in order to vet the exercise to ensure that it is in accordance with the power which was granted. Parliament of Uganda, Hansard, <www.parliament.go.ug/index.php?option=com_wrapper&Itemid=33>, accessed 27 July 2009.

97 C. Sharman, 'The Senate and Good Government' Paper presented at Senate Occasional Lecture Series at Parliament House, 11 December 1998. <www.aph.gov.au/Senate/pubs/pops/index.htm>, accessed 27 July 2009.

98 Section 29 of the Universities and Other Tertiary Institutions Act 2001, Act 7 of 2001 empowers the Council to make Orders.

99 Section 98 of the Insurance Act, chapter 213 of the Laws of Uganda, 2000 authorizes the Uganda Insurance Commission to make regulations.

eral guideline or standard, issued by Parliament, on the exercise of the delegated authority, the requirement to lay the resultant legislative instrument before Parliament is the only way of getting Parliament to scrutinize the instrument to ensure its compliance with the Constitution or any other laws that have already been enacted by Parliament.

Where the power delegated involves the amendment of an Act of Parliament through the use of so-called '*Henry VIII* clauses' like the broad power given by Parliament to the Attorney General under the Law Revision (Fines and Other Financial Amounts in Criminal Matters) Act, 2008[100] to amend other Acts of Parliament to bring them into conformity with the fines passed by Parliament, it is imperative that the legislative instrument made in furtherance of such powers is examined by Parliament. Otherwise, Parliament will be directly relinquishing its law-making power in favour of the executive without any safeguards to ensure that it is utilized as envisaged by the Constitution or by Parliament.

A more pragmatic approach of getting Parliament involved in scrutinizing delegated legislation is the one taken by the Parliament at Westminster since 1994, through the Deregulation and Contracting Out Act. The Act gave Ministers power to amend primary legislation using statutory instruments known as regulatory reform orders, subject to certain controls. Before a Minister makes the order, he or she must consult those who would be affected and then lay the order in draft before Parliament. A committee then examines the draft order in more less the same way it would examine a bill before authorizing the Minister to issue the order.[101] This process represents the best way of discouraging non technical delegated legislation as a means of undermining and bypassing the authority and processes of Parliament. Indeed the process has been so rigorous that several government departments in the UK decided early on that they would not take this route but wait for an opportunity for the easier ride of primary legislation.[102]

F. Conclusion and Way Forward

Parliament in Uganda, like many legislatures in the commonwealth stands in a prominent and special position as the organ responsible for making law. While the evidence available mainly from the Constitution shows that the authority of Parliament in Uganda to legislate is derived from the Constitution and, unlike the Parliament at Westminster, is limited and defined by the Constitution, there is emphasis on the exclusivity of Parliament to exercise legislative authority in

100 Section 8 of Act 14 of 2008, Laws of Uganda <www.ugandaonlinelawlibrary.com/lawlib/2008_laws.asp?page=2>, accessed 1 September 2009.

101 Rogers & Walters describe the process that the committee uses to examine the including a fourteen criteria which includes the question "whether the use of this method is the right method of changing the law." R. Rogers & R. Walters, *How Parliament Works*, 5th edn, Person Longman, Harlow 2004, p. 235.

102 While the power is granted, easily granted to the executive by Act of Parliament, the process that the executive has to go through in the UK before using the power make the use of delegated legislation unattractive and give back to Parliament the power to scrutinize the legislative measure introduced by the executive. Ibid., p. 235.

Uganda. The principle of a supreme legislature with power to make or unmake any law whatever is absent in Uganda and although the powers granted are wide, they do not necessarily translate into supremacy of Parliament since the potential for judicial review by the Constitutional court which has been used to strike down Acts of Parliament, keeps Parliament always aware of the qualifications on the legislative power granted by the people through the Constitution. Yet in light of all this, the Constitution unequivocally recognizes the authority of Parliament to make laws for the peace order and good governance of Uganda. Even with the limitations placed by the Constitution and with laws increasingly taking centre stage in shaping and directing government and government policy the duty to make law is a huge responsibility that the Constitution places on Parliament.

In the exercise of its law-making powers, Parliament receives legislative measures from the executive and is rarely involved in the formulation of legislation until a bill is introduced in Parliament. Although the early involvement of Parliament in the scrutiny and development of bills before they are formally introduced in Parliament is quickly taking shape in some countries in the commonwealth, evidence indicates that this is not the case in Uganda. In line with the legislative duty of Parliament, it is crucial that Parliament is involved more in the formative stages of bills when positions have not been reached or agreed by the executive, so that the institution entrusted with making the law can make a meaningful and effective impact on the legislative process and improve the quality of legislation. Only then can parliamentarians properly call themselves law-makers. The closest to the pre-legislative scrutiny in Uganda is the politically biased initiative of presenting bills to a political party caucus or the promoters of the bill organizing a sensitization workshop for MPs but only with the intention of facilitating the safe passage of a bill in Parliament. Whereas any form of scrutiny would help contribute to better legislation, presenting a bill to a political party forum only serves to sow seeds of division among MPs and make the possibility of any meaningful pre-legislative scrutiny bleak. The sensitization workshops are helpful in familiarizing the MPs with a bill and the policy behind the bill, but should also be used to engage the MPs in examining the legislative solutions that are presented by the executive in the bill. This is the scrutiny function of Parliament and a Parliament that does not properly perform its function "will be letting down the nation and the electorate will find it hard to forgive such a Parliament".[103] While the publication of bills in draft is not done in Uganda, Parliament should insist on this as it the only way of ensuring that consultations are carried out outside government agencies and also to facilitate pre-legislative scrutiny. Parliament in Uganda and other African commonwealth countries should follow the lead of the UK in this area with modifications to suit the legislative process and needs of each individual country.

The legislative process in Uganda is characterized by the use of committees to study and scrutinise every bill before it is debated and scrutinized by the whole House. The attendance rates of the non-Minister MPs in the committees are too low for the committees to make any meaningful contribution to the bills. The per-

103 G.W. Kanyeihamba, Kanyeihamba's Commentaries on Law, Politics and Governance, *Renaissance Media Kampala*, p. 21.

formance reports made by the African Leadership Institute[104] make very grim reading especially when it comes to committees. Because of this, whereas the committees present the greatest opportunity for Parliament to influence legislative proposals from the executive, the amendments that have come out of the committees are mere technical or drafting adjustments that don't affect the substance or policy of the bills. The power for committees to initiate legislation is present but has been used only once since 1995 because the committees, like Parliament, have taken the back seat and wait for the government to initiate legislation which they rubber stamp. Similarly, while there is power for the individual MPs to initiate legislation, only four bills have been initiated in this way in the last ten years. Although there are prohibitions like not initiating legislation with financial implications and frustration by the government when they try, which operate against the use of private members bills, the opportunity should at the very least be used to put pressure on the executive to act and leave it to the executive to explain to the electorate at election time. There is need for Parliament to do more than just review bills from the executive. Responsible law-making requires Parliament to engage the government on its legislative agenda and participate as partners in the legislative process since the constitutional duty to make law has already been ceded to Parliament by the Constitution.

Delegating legislative authority is now a big part of exercising legislative authority by any legislature. The delegation is necessary for the effective governance in a modern state and, in the case of Uganda, is authorized by the Constitution. Yet delegation doesn't translate into Parliament absolving itself of the responsibility to check how the delegated powers are used by the executive because ultimately, the role of law-maker is a constitutionally recognized one and imposes on Parliament a burden of examining legislative acts, which never shifts. For this reason, it is argued that "law-making is the domain of the legislature and shouldn't be delegated excessively to the executive".[105] Responsible delegation therefore requires Parliament to set guidelines and a general standard for the use of the delegated powers. In addition, in order for Parliament to implement its supervisory role over the authorities exercising the delegated authority, every instrument made under delegated authority should as a rule be laid before Parliament for its approval rather than selectively applying this to a few instruments as is the case presently. Although it may not be necessary to establish a whole committee of Parliament to deal with delegated legislation like in the UK, it is necessary that some form of supervision is conducted generally by Parliament. The delegation of powers to amend an Act of Parliament through *Henry VIII* clauses should be discouraged by Parliament since it places too much legislative authority in the hands of the executive and is subject to abuse. Instead, a quicker legislative process may

104 The African Leadership Institute has studied and assessed the performance of the Ugandan Parliament since 2005 and has to date issued two reports, Parliamentary Scorecard 2006-2007: Assessing the Performance of Ugandan Legislators, African Leadership Institute, Kampala 2008.

105 D. Rudman 'Delegation by Parliament of its Legislative Powers: A South African Perspective', Paper presented at the Commonwealth Association of Legislative Counsel Conference, Nairobi September 2007, p. 3, available at <www.opc.gov.au/calc/docs/calc_loophole_August2008.pdf>, accessed 24 July 2009.

be adopted in the case of repeals or amendments for a committee to study and make these without going through the entire legislative procedures.

In the final analysis, making law is arguably the most important function of Parliament. The Constitution recognizes the importance of laws and places the responsibility of making law on Parliament. The Constitution provides the framework within which the initiation, debate and enactment of legislative measures should take place as a shared responsibility between the executive – which initiates most of the laws, and the legislature – which studies, examines and debates those measures. Effective and responsible law-making requires that those to whom the responsibility has been entrusted are engaged and fully participate in the process. Until now, the executive has dominated this partnership and reduced Parliament to a mere 'House of review'. There are so many ways, as discussed in this paper, in which Parliament can strengthen its influence in the law-making process and improve the quality of legislation.