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Some insights into statutory law-making in Botswana*

Summary

This paper examines the law-making process in Botswana, one of Africa's best examples of vibrant parliamentary democracy. Although the whole process is modelled on the British Westminster system, it has, however, been shaped and influenced by some local realities. An example of this is the existence of a House of Chiefs that has no legislative powers and plays only an advisory role in certain specified matters. After examining the pre-legislative stage, which arguably, is the most important stage in the law-making process, and the legislative stage itself, the paper highlights some of the important lessons that can be drawn. Two main points stand out. First, it is now clear that parliament as the people's representative needs to play a more active part in the law-making process especially at the critical deliberative pre-legislative stage. Secondly, there is a need to abandon the much criticised British system of drafting statutes in highly technical, obscure and complex language that can hardly be understood either by legislators or ordinary citizens in favour of the emerging trend towards texts drafted in plain language. To be both relevant and effective, legislation must respond to human needs, aspirations and convictions in a language that they can both understand and identify with.

Insae rakende die (statutêre) wetgewende proses in Botswana

Hierdie artikel ondersoek die wetgewende proses in Botswana, een van Afrika se beste voorbeelde van 'n lewenskragtige parlementêre demokrasie. Alhoewel die hele proses gebaseer is op die Britse Westminster stelsel, is dit nieteenstaande gevorm en beïnvloed deur plaaslike omstandighede. 'n Voorbeeld hiervan is die sogenaamde *House of Chiefs*, wat geen wetgewende bevoegdheid het nie, maar slegs 'n adviserende rol in gespesifiseerde aangeleenthede speel. Na bestudering van die aanvangsfase (wat heel waarskynlik die belangrikste fase in die proses is) en die wetgewende fase self, beklemtoon die artikel sekere belangrike aspekte waaruit iets geleer kan word. Twee hoofpunte staan uit — eerstens is dit nou duidelik dat die Parlement, as volksverteenwoordiger, 'n meer aktiewe rol moet speel in die wetgewende proses, veral tydens die aanvangsfase. Tweedens ontstaan die behoefte om weg te doen met die Britse stelsel, wat kritiek uitgelok het as gevolg van die opstel van wetgewing in hoogs tegniese en komplekse taal (wat onverstaanbaar is vir beide wetsopstellers en die man op straat), ten gunste van die tendens om wetgewing in gewone en verstaanbare taal op te stel. Om relevant en effektief te wees, moet wetweging voldoen aan menslike behoeftes, aspirasies en oortuigings, in 'n taal wat hulle kan verstaan en mee kan identifiseer.

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1. Introduction

One of the most important features of an effective and efficient legal system is its capacity to reflect the changing needs and demands of the society in which it operates. A modern legal system therefore presupposes continuous law-making activity. This paper examines the most dominant form of law-making, that is, legislation, in Botswana, one of Africa's best known examples of a vibrant parliamentary democracy.

Although the end product of legislation, in the form of Acts of Parliament, are regularly published in the Gazette and easily recognised, not many people understand how they come about. The modern legislative process in Botswana is a complex multi-stage process in which diverse considerations and constraints operate at different levels in such a way that it may not be very easy to say who actually "makes" the laws.

This article will start by examining the pre-legislative stage, which, arguably, is the most important stage of the law-making process in the Westminster parliamentary system that Botswana inherited at independence. This is followed by a discussion of the legislative stage, which examines proceedings in Parliament from when legislation, in the form of a Bill is introduced until it becomes law after receiving presidential assent. In the penultimate part of the article, some of the important lessons that can be drawn from this process are highlighted. Although the whole law-making process in Botswana is firmly rooted in the British model, it has significantly been shaped and influenced in many ways by local realities.

2. The pre-legislative stage

Analytically, the pre-legislative stage in Botswana can be said to involve several steps that lead to the identification and registration of the basic policy problems and issues, and the drafting and presentation of a Bill in Parliament. In addition to this, the pre-legislative stage also involves the processes of consultation, cabinet approval of the project and the drafting of the Bill itself. Before examining these steps, something needs to be said about the nature and composition of the Botswana Parliament because this inevitably impacts the law-making process.

2.1. The Botswana Parliament

The Botswana Parliament, according to Section 57 of the Constitution, consists of the President and the National Assembly. The National Assembly for its part consists of the President, as an *ex officio* member, 40 elected Members of Parliament (MPs), 4 specially elected MPs, and the Attorney-General as an *ex officio* member.[1] Section 86 of the Constitution

1 Since independence, Botswana Constituency boundaries and consequently the number of MPs have been increased on three occasions; first in 1974, when one constituency was added to the existing 31, then by a further two in 1984 and finally, in 1994, six more were added to bring the number to the present 40 constituencies.

states that "Parliament shall have power to make laws for the peace, order and good government of Botswana". A unique feature of the constitutional system is the existence of a House of Chiefs that, however, does not play the role that the House of Lords plays in the British system. It is not part of the legislature and it does not have the power to make laws. According to Section 85 of the Constitution, the House of Chiefs may discuss matters within the executive and legislative authority and must be consulted on all issues pertaining to customary matters, and Bills relating to tribal land and chieftainship.[2]

Does this mean that the Botswana Parliament has legislative supremacy? Dicey, writing in the 19th century, stated the doctrine of parliamentary legislative supremacy in these terms:

> Parliament … has … the right to make or unmake any law whatever; and further, that no person or body is recognised by the law of England as having a right to override or set aside the legislation of parliament.[3]

Although the Botswana Constitution confers law-making powers on parliament, in practice, the doctrine of parliamentary legislative supremacy, at least in the strict sense defined by Dicey, neither characterises the Botswana constitution, nor has it ever characterised the unwritten British Constitution. There are at least two main reasons for this. Firstly, the Botswana Courts, like English Courts, have substantial powers to develop and "make" law through the doctrine of judicial precedent. Secondly, ministers and local authorities are often given powers by Parliament to legislate by way of statutory instruments, orders, regulations and by-laws. It is still true to say that the very cornerstone of the constitutional legislative position of the Botswana Parliament is aptly captured by Dicey's words. The only exception to this is that one parliament cannot enact legislation in such a way that a later parliament cannot repeal it, even by an express provision purporting to do so. The effect of such unrepealable legislation would be to destroy the supremacy of later parliaments. As Sir Robert Megarry put it in *Manuel v Attorney-General*:

> As a matter of law, the courts of England recognise parliament as being omnipotent in all save the power to destroy its own omnipotence.[4]

Botswana is one of the few African countries that has since independence on 30 September 1966, successfully practised a full-fledged multi-party parliamentary democracy. Although there are at least 10 registered parties, a modest number when compared with the present situation in other African

2 When the House of Chiefs was proposed, the Chiefs preferred it to operate as the British House of Lords but the politicians found this completely unacceptable, fearing that a Chiefly chamber in a bicameral legislature would seriously impede the modernisation that the country needed. See generally Proctor 1968:59-79.

3 Dicey 1959:39-40. In fact, many constitutional lawyers would even go further and say that parliament can do anything except make a woman a man or a man a woman.

4 [1983] 3 All ER 822.

countries,[5] the political scene has, since independence been dominated by one party, the Botswana Democratic Party (BDP). Starting with the pre-independence elections in 1965, the BDP has won an overwhelming majority of seats in all elections. In the 1994 elections, it briefly lost some ground when the opposition Botswana National Front (BNF) increased its representation from 3 to 13 seats. However, a major split within the BNF, resulting in a faction creating the Botswana Congress Party (BCP) in 1998, made it easy for the BDP to secure a landslide victory in the recent 1999 elections. The table below shows the extent of the BDP's domination.

Table 1: The party representativity of the Botswana Parliament 1966 - 2001.

Election Year	No. of Parties that participated	Parties that won seats	Number of seats won and voter percentage	
			Seats	Voter Percentage
1965	4	Bechuanaland (now Botswana) Democratic Party (BDP)	28	80.1%
		Bechuanaland People's Party (BPP)	3	14.1%
1969	4	BDP	24	68.3%
		Botswana Independence Party (BIP)	1	6%
		Botswana National Front (BNF)	3	13.5%
		BPP	3	12.1%
1974	4	BDP	29	76.6%
		BNF	2	11.5%
		BPP	1	6.5%
1979	4	BDP	29	75%
		BNF	2	12%
		BPP	1	7.4%
1984	5	BDP	29	68%
		BNF	4	20.4%
		BPP	1	6.5%
1989	7	BDP	31	64.7%
		BNF	3	27%
1994	9	BDP	27	54.4%
		BNF	13	37%
1999	6	BDP	33	82.5%
		BNF	6	15%
		Botswana Congress Party (BCP)	1	2.5%

Botswana is, therefore, basically a one-party dominated parliamentary democracy with a weak and fragmentary opposition. Because the inherited Westminster model of law-making is essentially executive-driven, controlled and dominated, especially at the most important pre-legislative stages, the existence of a weak opposition generally, as shall soon be shown, limits the effectiveness of parliamentary scrutiny of legislation.

5 For example, Benin has 150 registered political parties, and Cameroon more than 160.

2.2 The sources of legislation

As Woodrow Wilson observed, the origins of legislative policy and legislation itself, is an aggregate, not a simple production. Therefore, it is impossible to tell how many persons, institutions, opinions, and influences have entered into the composition of any particular legislative proposal.[6] Legislative policy-making is usually the result of a confluence of factors streaming from an almost endless number of tributaries that end up as proposals for either new law or changes to existing law. Such legislative proposals may come from sources such as parliamentary questions, public opinion, pressure group campaigns, government manifesto commitments, recommendations of a law review commission, a commission of inquiry, the decision of a court of law,[7] the initiatives of an individual MP, the recommendations of a service department or from the Cabinet.

The use of permanent or *ad hoc* commissions, like departmental, inter-departmental, or presidential commissions, to effect a systematic investigation and deliberation of issues before the preparation of draft proposals for a change in the law is quite common in Botswana. The great majority of these have usually been in response to particular and unexpected events. For example, a series of spectacular corruption scandals in the 1990's led to the appointment of several Presidential Commissions of Enquiry.[8] On the basis of their findings, the *Corruption and Economic Crime Bill* was introduced in 1993 to counter what, the then Vice President, Festus Mogae described as a "serious matter" which required "extraordinary measures".[9] The sister *Bill on the Ombudsman*, had been recommended much earlier in 1982 when the Presidential Commission on Economic Opportunities called for the establishment of a "Public Commissioner" to address complaints of inefficiency, delays and malpractice in the administration.[10] Recently, a Presidential Commission, referred to as the Balopi Commission, was appointed to probe into the possibility of amending Sections 77, 78 and 79 of the Constitution. Several permanent commissions are also in existence that can play a role in formulating policy suggestions that may ultimately lead to changes in the law. Besides the Judicial Service and Public Service Commissions, provided for in Sections 103-104 and 105-106 respectively, of the Constitution, there is also the Law Reform Committee that was contemplated as one of the Select Committees of Parliament in Order 102 of the *Standing Orders of the National Assembly.*[11] It was given the powers to review all legislation passed by the National Assembly and to perform this function, it could "call for persons, papers and documents".[12] The assumption must have been that based on its review of

6 Cited by Walkland 1968:21.
7 See for instance, the famous *Attorney-General v Unity Dow* [1992] BLR 119 decision that led to the amendment of the *Citizenship Act* in 1995.
8 Fombad 1999:243.
9 Fombad 1999:244.
10 Fombad 2001:58.
11 *Standing Orders of the National Assembly of Botswana*/1998:order 102(1) and (2).
12 Molokomme and Otlhogile 1992:19.

legislation, it could recommend changes in the law. The Commission was established in 1979, consisting of 9 MPs and the Attorney-General. It has often received requests from Parliament, Government Ministers, members of civil society and NGOs, to look into some laws. So far, it has been criticised as operating more like an opinion-gathering institution than a law reform body that is supposed to initiate or advise on legal reforms.[13] Generally, depending on the type of commission created and its powers, this stage of the policy cycle is markedly open and consultative in the sense that it facilitates a structured dialogue between the relevant stake holders in a given policy area. If Bills are thus drafted based on the recommendations of and with the active participation of specialist feedback from a commission, they are likely to be passed in Parliament with little opposition.

A great majority of legislation originates from government departments. Within these departments, civil servants play an extremely important role in continuously identifying issues on which new or amended laws are needed and preparing drafts for their ministers. Although the Government usually has a legislative agenda with clearly identified policies on specific areas of law reform, it is usually the civil servants who translate these political ideas into concrete legislative proposals that go into a Bill. Pressure groups, especially during election campaigns, attempt to commit parties to particular policies. Once a government is elected, the struggle now becomes that of pressuring the government to carry out these commitments.

Whilst the overwhelming majority of Bills that go before Parliament are Government Bills, each year, as a matter of principle, some time is reserved for the introduction of Private Member's Bills by individual MPs who are not ministers.[13] Private members' Bills do not usually go far in Parliament, especially where these have been initiated by members of the opposition parties. It has been doubted whether private members' Bills serve anything more than a demonstrative purpose. Professor Bromhead argues that such Bills act as a safety valve for frustrated backbenchers.[14] Private members' Bills are frequently tabled with the primary aim of putting pressure on a government or simply airing a controversial issue rather than any serious expectation (especially in a one-party dominated parliament like Botswana) that it will be adopted. Nevertheless, some private members' Bills have succeeded where they are able to secure government support. An example of this was the Bill that was proposed by the late Gaefalale Sebeso to amend the *Affiliation Proceedings Act*.

2.3 The consultative process

Before a government Bill is drafted, consultation may take place with as many organisations and pressure groups that are interested in the matter, as possible. Where the proposed legislation impinges on the responsibilities

13 See generally the arrangement of public business in the *Standing Orders of the National Assembly of Botswana*: order 22.

14 Cited in Walkland 1968:71.

of other government departments or governmental agencies, they will be consulted. The exact nature and extent of the consultation will depend on the government department responsible for the legislative project.

The Botswana Government often sets out its proposals for legislative changes in consultation documents known as Green and White papers, another relic of the Westminster system. The Green paper usually sets out the Government's tentative proposals that are still taking shape and seeks comments from the public. As such, the Green paper may represent the best that the government can propose on the given issue, but leaves a final decision open until the reaction of the public to it has been carefully analysed.[15] A White paper on the other hand, usually announces the Government's firm policy position for implementation and may be debated in Parliament before a Bill on the issue is presented. The White paper is usually formulated in such terms that a withdrawal or major amendment, following consultation, public or parliamentary debate, tends to be regarded as a humiliating climb down.[16] The number of Green and White papers published each year usually gives a rough indication of the extent to which the government engages in broad consultations in the pre-legislative process.

2.4 The role of the Cabinet

Almost all laws reaching the statute book would have emanated from measures discussed and approved in the Botswana Cabinet and introduced by way of Government Bills.[17] Cabinet control of the pre-legislative stage of legislation is one of the unique features of the Westminster model of law-making. The Cabinet itself does not legislate, for as Beer and Ulam point out, "it is merely the decisive apex of a very complex structure of decision-making involving all sorts of forces (the party in and outside Parliament, the civil service, pressure groups) that press upon the Cabinet and, by constant intervention, help shape the principle and details of legislation".[18]

Cabinet control over the pre-legislative process extends from matters relating to the substantive content of legislative projects to the actual wording of the Bills and ultimately the timing of their presentation to Parliament. The minister responsible for a legislative project has to present the proposal to Cabinet for a policy appraisal and approval. Thereafter, the proposal with necessary instructions is sent to the Attorney-General, who as the Legal Advisor to the Government under Section 51 of the Constitution, is responsible for drafting all government legislation. Various drafts may go to the responsible minister for consideration and other interested government departments and stakeholders may also be consulted before a final draft is arrived at. The final draft is taken back to the Cabinet for its final approval before the Bill is scheduled for introduction into Parliament.

15 Zander 1999:8.
16 Zander 1999:8.
17 For the functions of the Cabinet, see the Constitution of Botswana/1966: section 50.
18 Walkland 1968:55.

As Walkland observed of the British legislative process (and the same is largely true of the Botswana process) from their normally distant genesis to their publication, the process of development of a Government Bill is entirely under the control of a minister and the Cabinet; the final Bill that is usually presented to Parliament represents a process of thought and a distillation of ideas, practical considerations, pressure group representations and commission hearings which might, in some cases span years.[19] At very few stages, if at all, in this very crucial part of the life of a law, will MPs have had a hand in the preparatory process. Real parliamentary participation at the deliberative stages of the legislative process survives only in the present attenuated arrangements for private members' Bills which, in practical terms, add very little to the total volume of legislation that goes through Parliament each year. Insofar as there is real deliberation in the whole legislative process, it is now situated much earlier than at the parliamentary stages, in the interplay between political parties, pressure groups, departments and the Cabinet.

2.5 The drafting process

As indicated earlier, an approved departmental legislative proposal or any other legislative project approved by Cabinet is sent to the Attorney-General, who is the Government's draftsman, with instructions on what to do. The Attorney-General heads the Attorney-General's Chambers, a department falling directly under the Ministry of Presidential Affairs and Public Administration. It is made up of six divisions namely a General division, Civil division, Legislative Drafting division, Administration division, Deeds Registry/Lands division and the Prosecution division. The Drafting division handles drafting matters.

The Attorney-General usually receives legislative proposals containing instructions and the background to the proposal. Because of its highly technical nature, legislative drafting is very demanding in terms of time, the length of which will depend on the subject matter of the Bill and the expertise called for. The Attorney-General, as the draftsman, is ultimately responsible not only to the minister but also to the Cabinet and to Parliament for producing the desired result in the correct form and in the language that is aptly chosen to produce the legal effect intended. There are usually two main issues that he focuses on. Firstly, he has to ensure a good style and presentation in clear language. Secondly, he has to ensure that any proposed legislation does not conflict with pre-existing legislation, the Constitution or Botswana's international obligations. However, it is likely that the whole drafting process usually operates within Bennion's nine parameters for effective draftsmanship, namely legal effectiveness, procedural legitimacy, timeliness, certainty, comprehensibility, acceptability, brevity, debatability, and legal compatibility.[20] In the final analysis, whilst the departments and the

19 Walkland 1968:71.
20 Bennion 1978:235.

Cabinet may have the last word on matters of policy, the Attorney-General as draftsman has the last word on matters of form and law, although as Sir Harold Kent observed, "both parties poach freely on each other's preserves".[21]

3. The legislative stage

This section looks at how a Bill becomes law. The procedure for presenting Bills is laid by down by Parliament by virtue of Section 76 (1) of the Constitution, in the *Standing Orders of the National Assembly of Botswana* adopted on 5 October 1966, as subsequently amended. The Standing Orders provide for "three readings" of a Bill, a feature that became part of the Westminster parliamentary procedure in the sixteenth century.[22] At Westminster, in the days before the invention of printing, the only practicable way in which all MPs could find out what was in a Bill was by having the contents, which were written in longhand, read aloud by the clerk. Besides, most of the MPs in those early days could not read. Hence, the use of the term "reading". In essence, at this stage, a Bill goes through the following steps:

1. first reading
2. second reading
3. committee stage and reporting
4. third reading, and
5. presidential assent.

3.1 First reading

Bills are usually introduced after notice of an intention to do so has been given.[23] Each Bill must contain a short title and a long title setting out its purpose, and must be accompanied by a memorandum stating its objects.[24] Apart from ministers, assistant ministers and the Attorney-General, MPs are only allowed to present Bills after the Assembly has passed a motion giving them leave to bring the Bill.[25] This usually makes it almost impossible for private members' Bills, especially from the opposition parties in Botswana, to even get a first reading, unless the government supports the Bill.

The first reading, under Order 60(4), is no longer a matter of reading a Bill to illiterate MPs. In fact, all that this provision requires is for the Bill to be handed to the clerk at the table by the member presenting the Bill. The clerk is then required to "read aloud the short title of the Bill, which shall then be recorded as having been read a first time". However, when the National Assembly is adjourned *sine die*, a Bill may also be read for the first time simply

21 Cited in Zander 1999:18.
22 McDonald 1989:151-152.
23 *Standing Orders of the National Assembly of Botswana*: order 60(1).
24 Order 59.
25 Order 60(2).

by it being presented to the clerk who shall record this fact in the minutes of the proceedings.[26] After the first reading, the Bill is to be printed in full and copies of it are made available to all MPs to enable them to study it before the second reading.[27] With the exception of an Appropriation Bill, the clerk is also required to cause the text of the Bill to be published in the Gazette.

After the first reading, the member in charge is required to appoint a later day for the second reading or, in exceptional cases "appoint that the second reading shall take place later the same day".[28] As a general rule, no Bill, other than an Appropriation Bill, is to be read for a second time earlier than 30 days after it was read for a first time.[29] However, the National Assembly may by a motion moved by a minister after the first reading and before a date is fixed for the second reading, decide that the Bill be proceeded upon as a matter of urgency, in which case there might be a second reading before the normal 30 days period allowed for the study of Bills after their first reading.[30] Such motions have not proved very popular and in recent times three such motions have been rejected.[31] Another exception to the 30-day rule is provided for by Section 88(2) of the Constitution. According to this provision, no date shall be fixed for the second reading of a Bill that affects tribal and customary matters until 30 days have elapsed from the date when the Bill was referred to the House of Chiefs.

3.2 The second reading

The next stage in the progress of a Bill is the second reading. According to Order 63(1), only "the general merits and principles, but not the details, of the Bill may be debated and no amendment to the motion may be moved". This is probably the most important stage in the life of the Bill, at the end of which a vote can be taken, unless the Bill is non-controversial. Most Bills that go through this stage usually find their way into the statute book. The Whips' power of political patronage and coercion will usually be effective both at this stage and in the committee stages to ensure a favourable vote. However, as a reflection of the vibrancy of Botswana's democracy, the BDP Government, despite its regular huge parliamentary majority, has sometimes suffered embarrassing defeats. A recent example, is the *National Assembly (Salaries and Allowances) (Amendment) Bill* of 2001, which was rejected at the second reading. According to Order 63(2), if a motion for the second reading of a Bill is rejected, no further proceedings shall be taken on that Bill.[32]

26 Order 60(5).
27 Order 60(8).
28 Order 61(1).
29 Order 61(3). It must however, be noted that this paper does not discuss the separate procedure that is provided for proceedings in respect of Appropriation Bills.
30 *Standing Orders of the National Assembly of Botswana*: order 61(3).
31 These are: *The House of Chiefs (Salaries and Allowances) (Amendment) Bill*/ 2001; *Specified Offices (Salaries and Allowances) Amendment Bill*/ 2001 and, *Judges (Miscellaneous Provisions) Bill*/ 2001.
32 See the separate procedure for Appropriation Bills in Orders 75-79.

When a motion for the second reading of a Bill has been approved, the Bill is usually sent to a Committee of the Whole House (CWH) unless either the Assembly by motion commits the Bill to a Select Committee,[33] or the Speaker also makes a similar suggestion if he is "of the opinion that the Bill would specially benefit or otherwise specially affect some particular person or association or corporate body".[34]

3.3 Proceedings before a committee of the whole house or a select committee

Most Bills tend to be sent to the Committee of the Whole House (CWH) and Select Committees would usually be appointed only in cases of financial or technical Bills. The purpose of a Select Committee is usually to enable a small group of MPs to give more detailed consideration to a Bill, or to certain aspects of it, than can be done on the floor of the chamber. Unlike proceedings before the CWH, Order 112 allows the Select Committee to obtain evidence from the public, interested parties and relevant governmental agencies to assist it in its deliberations. Appointments to the Select Committee are made either by motion of the National Assembly or by the Committee of Selection.[35] Order 89(1) requires that every Select Committee is constituted so as to ensure that as far as possible the balance of the parties in the Assembly is thereby reflected. Whilst this usually ensures that the government keeps its majority, the opposition and minority parties are also fully represented. The CWH on the other hand, consists of all the MPs. In fact, according to Order 53, when a Bill is committed to a CWH, the Speaker leaves his chair and seats himself at the clerk's table to the right of the clerk and the Assembly shall then be in committee with the Speaker acting as Chairman. Although the objectives of both committees are to scrutinise and report on Bills, the purpose of this is "not to discuss the principles of the Bill but only its details".[36]

A Bill in committee may be considered clause by clause or where it becomes necessary to save time, in groups of clauses or in series of interdependent clauses. At the end, the same question "that the clause (or the clause as amended) stand as part of the Bill" is put on each clause or group of clauses as the case might be, by the Chairman.[37] Although the committees are only restricted to discussing the details but not the principles of Bills, they have the power to "make such amendments therein as they shall think fit, provided that the amendments including new clauses and new schedules are relevant to the subject matter of the Bill".[38] Any proposed amendments must come within four parameters. These are that the amendments must:

33 Order 64(1)(a).
34 Order 64(1)(b).
35 Orders 87(1) and 88(1).
36 Order 65(1).
37 Order 67(1) and (2).
38 Order 65(2).

1. be relevant to the subject matter of the Bill and to the subject matter of the clause to which it relates;
2. not be inconsistent with any clause already agreed to or with any previous decision of the committee upon the Bill;
3. not be such as to make the clause which it proposes to amend unintelligible or ungrammatical; and
4. not be, in the opinion of the Chairman, frivolous or meaningless.

All Bills that have been considered by a committee are reported with or without amendments to the Assembly. This stage provides an opportunity for MPs to propose amendments, especially to Bills from Select Committees. A Bill that emerges from this process without an amendment goes straight to the third reading. However, any member who desires to propose further amendments or to introduce new provisions to a Bill that is being reported from a CWH may propose a motion for a recommital of the Bill. After such a motion has been moved, no amendments may be proposed to the Bill except where this is to widen the scope of the proposed recommital.[39] When a motion of recommital is agreed upon, the CWH shall examine only the specified clause or clauses, or schedule or schedules in the same manner as it examined the original Bill. Once the recommital proceedings are completed, the member in charge of the Bill shall report the Bill as amended (or as unamended) to the Assembly. No further motion on such recommitted Bills are allowed.[40] On the other hand, where the Bill to be recommitted is from a Select Committee, the procedure is different in that, after the adoption of the motion for recommital, the Assembly immediately resolves itself into a CWH in order to consider the Bill.[41] Here, the report and recommendations of the Select Committee will be fully considered.

The report stage provides the Assembly with an opportunity to refer a Bill (or certain of its clauses) back to the CWH for general consideration or for reconsideration of a specific matter or matters. It operates as a useful safeguard against a small committee amending a Bill against the wishes of the Assembly, and provides a chance for second thoughts.[42] Governments may, however, use this stage not only to restore parts of a Bill lost in committees or to remove parts added to it, but also, sometimes (and controversially too) to make major amendments to Bills.[43] A major amendment may be introduced at this point because after this stage, the Bill is not examined clause by clause but as a whole.

In practice, because of the BDP Government's usual comfortable majority, it has been able to dominate the different committees and make any rejection of Bills extremely difficult, if not impossible. However, it has

39 Order 68(3).
40 Order 69(4).
41 Order 71(1) and (2).
42 Zander 1999:52-53.
43 McDonald 1989:161; Zander 1999:52-53.

sometimes come under pressure from its backbenchers. In 1993, the *Motor Vehicle Insurance Fund Bill* was withdrawn at the committee stage by the minister responsible for it, after serious pressure from BDP backbenchers. Recently, the *Public Procurement and Asset Bill* of 2001 was also withdrawn to enable the minister to make the substantial amendments that backbenchers had requested. This is quite possible because Order 74 allows the member in charge of a Bill to withdraw it at any stage.

3.4 The third reading

The third reading is usually a formality. The debate is "confined to the content of the Bill and no amendment may be moved" at this stage.[44] Although a contentious Bill may be followed by a vote, any defeat which may spell the end of the Bill is extremely unlikely. In fact, in Britain, McDonald in his study is able to trace only three instances during the last century when Bills were defeated at this stage in the British Parliament.[45] At this stage, the parties generally recognise that the battle is over and a perusal of the Botswana Hansard record of Parliamentary proceedings will bare testimony to the pertinent observations by Zander of what happens during third reading debates, that "apart from a few set-piece occasions when a formalized debate precedes a vote, a few minutes only are spent reviewing the victories and defeats of the campaign, and in paying compliments to opponents".[46]

After the debate when the Bill has been passed, the clerk usually reads the long and short titles of the Bill and writes at the end of it the words: "Passed by the Botswana National Assembly this day", giving the date.[47] The text of the Bill is then sent to the Government Printer who prepares four copies which the clerk prepares for submission to the president.[48]

3.5 Amendments to the Constitution

Another important departure from the Westminster model and a reflection of Botswana's semi-rigid constitutional regime is the special procedure provided for Bills aimed at amending the Constitution. Section 89(1) of the Constitution states as a general principle that "Parliament may alter" the Constitution. Two special procedures are provided and apply to two specified categories of provisions.

The first, and perhaps the less rigorous and stringent procedure is required for any amendments relating to the matters specified in Section 89(3)(a) and (b). The proviso to these subsections says:

44 *Standing Orders of the National Assembly of Botswana*: order 73(2).
45 McDonald 1989:161.
46 Zander 1999:53.
47 *Standing Orders of the National Assembly of Botswana*: order 73(3).
48 *The Acts of Parliament Law*/1966: section 5.

> A Bill for an Act of Parliament under this section shall not be passed by the National Assembly unless —
>
> (i) the final voting on the Bill in the Assembly takes place not less than three months after the previous voting thereon in the Assembly;
>
> and
>
> (ii) at such final voting the Bill is supported by votes of not less than two-thirds of all the Members of the Assembly.

A far more stringent procedure is provided with respect to amendments relating to the provisions specified in Section 89(3)(b). In addition to complying with the procedure provided above, Bills on such matters shall not be presented to the President for his assent unless after their passage through the Assembly, they have been approved by a majority of the electorate in a referendum. The obvious purpose of this is to ensure that a government with a strong majority like the BDP Government should not on a whim amend the constitution in a way that could lead to the entrenchment or perpetuation of its rule. As a measure to limit and control frequent and arbitrary amendments of the constitution, this appears to have worked reasonably well because Botswana is one of the very few African countries that has retained its independence constitution (with only about 15 amendments).

3.6 Presidential assent

The final step in the enacting process of legislation is submission for presidential assent. According to Section 87(2) of the Constitution, he may withhold this assent. Withholding assent is such an unlikely occurrence in the Westminster system that the only occasion when Royal assent was withheld in Britain was in 1707 when Queen Anne vetoed a Bill.[49] However, in the unlikely event that a Botswana President withholds his assent to a Bill, the Bill shall be returned to the national assembly.[50] If the National Assembly resolves within six months of the Bill being returned to again present it for assent, the President must assent within 21 days or dissolve Parliament.[51] Where the President gives his assent, as is normally the case, the Bill becomes an Act of Parliament.[52] It is published by the Government Printer in the Gazette and may come into operation on one of the following dates:

1. the date of presidential assent; or
2. the date on which the Act is published in the Gazette; or
3. the particular date or dates specified in the Act; or

49 McDonald 1989:151.
50 Constitution of Botswana: section 87(3).
51 Constitution of Botswana: section 87(4).
52 Constitution of Botswana: sec 87(5). The Acts of Parliament Law: section 7(2).

4. a combination of the above in order to provide for different sections or parts of the Act to come into effect at different times; or

5. where the Act does not contain a commencement section, the date appearing on the copy of the enactment printed by the Government Printer and purporting to be the date of commencement shall be so, unless the contrary is proved.[53]

4. Conclusion

The Botswana law-making process appears to have been carefully crafted to ensure that legislation is well thought out. The Standing Orders provide detailed rules controlling the different stages that Bills go through on different days so as to avoid any surprises as well as to give MPs reasonable time to scrutinize each Bill without undue haste. It is a process that is as simple as it is complex. First, MPs are given an overview of a Bill and time to study it, then an opportunity for a more detailed clause by clause analysis and a chance to effect amendments and later a possibility for reconsideration before a last final look. For urgent or non-controversial Bills, MPs could, by motion or leave, dispense with the need to rigidly go through the different stages on different days as required by the Standing Orders and therefore approve a Bill which could become law within two weeks or less.

Although Parliament still spends a lot of time debating Bills, it is now clear that the real deliberative stage occurs mainly at the pre-legislative stage. Direct parliamentary participation in this crucial stage of the law-making process is at best limited to the virtually ineffective exercise of introducing private members' Bills, or at a later stage, in merely amending rather than actually influencing the overall general principles or contents of a Bill. This aspect of the Westminster model led Professor Griffiths to conclude that, "legislation today is more a governmental than a parliamentary function".[54] This is particularly true of a one-party dominated parliamentary situation like Botswana's. In spite of this, it is still worth noting that the powerful pressure groups in Botswana still exert pressure at all stages, from the presentation of legislative projects and throughout the processes of scrutiny and debate in Parliament. In addition, the vibrancy of open debates within the ruling BDP itself is such that backbenchers have regularly rejected or caused the government to withdraw controversial or sloppily drafted Bills.

Be that as it may, there are certain serious problems with the law-making process in Botswana. Firstly, the criticism of the quality of the English system of drafting that the Botswana draftsman has copied lock, stock and barrel goes back very far.[55] The highly technical form, the language, style and formulation of Bills make it doubtful whether MPs ever really fully comprehend

53 *The Acts of Parliament Law*: section 11, *Interpretation Act*/ 1984: section 5.

54 Griffiths 1951:291.

55 See, for example, the following two publications by Statute Law Society: 1970 and 1972.

what they are supposed to scrupulously scrutinise and approve. The late MP and former Minister, Richard Crossman observed in his diaries:

> The whole procedure of a Standing Committee is insane. What is the sense of starting at the beginning and working line by line through each clause when in many cases there is no one who understands what they mean?[56]

Although his remarks were made with reference to the British Parliament, they are equally, if not really, more true of the Botswana Parliament where the level of proficiency in the English language is fairly low. It is desirable that the Botswana draftsman should try to adopt more recent techniques that use plain language, and do away with the continuous use of complicated syntax, long sentences, and archaic or ambiguous language which makes understanding Botswana laws such an unenviable task even to jurists. The British, after much hesitation, are already set to move away from this system. The Inland Revenue Tax Law Rewrite Project has, for example, adopted more rational drafting techniques which include a new more logical structure for legislation, the use of shorter sentences, plain language where possible and greater use of explanatory material. The move towards the use of plain English in British statutes appears to be irreversible and the current English Civil Procedure Rules is a typical example of how statutes should be drafted in many common law jurisdictions in Africa (like Botswana), where the grasp of the English language by legislators is suspect. The Botswana draftsman must now aim to facilitate the legislative task by adopting these new techniques, which not only make Bills easier to understand, but ultimately enhance the understanding and implementation of laws by the ordinary citizen. Luckily, the Attorney-General needs no legislation to enable him to abandon the anachronistic drafting idiosyncrasies of the British that now clearly belong to a bygone age and move into the emerging era of plain language legislation.

Secondly, the National Assembly needs to be more active in the deliberative pre-legislative stage. This would require that more time should be spent on debating government legislative projects at their formative stages, either by debates on specific proposals or through the Law Reform Committee.

Thirdly, there is growing evidence of inadequate pre-legislative consultation resulting in laws being amended shortly after their enactment or a plethora of amendments because the Government has had to bow to public pressure. It is necessary that the Law Reform Committee is made more active in pre-legislative inquiries. It should be encouraged to take evidence from civil servants, experts, stakeholders and the wider public on legislative proposals before Bills are presented to Parliament.

Finally, it is necessary that draft Bills should always be published well in advance of their first reading. These drafts should contain detailed explanatory notes on the different clauses to facilitate more informed

56 Cited in McDonald 1989:60.

debates. The translation of Bills into Setswana, the co-official and national language which is spoken by almost everybody will help to make Bills accessible to both MPs and their constituents and thus provoke wider and more informed discussion.

Much as it must be recognised that the major decisions of the day are hardly ever made in parliament, the limited role that Parliament can still exercise must be strengthened rather than weakened. The quality of legislation that emanates from Parliament is a mirror image of the legislative process and this must be regularly updated if the law-making process is to remain effective.

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