

**LEGISLATIVE DRAFTING IN LAW MAKING: AN ANALYSIS OF CHALLENGES
IN LIGHT OF THE CONSTITUTION OF KENYA 2010**

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G62/66181/2010

**Research Project Submitted in Partial Fulfilment of the Requirements for
the Award of the Master of Laws Degree (LLM) of the University of
Nairobi**

November 2013

DECLARATION

I, **WINNIE NARASHA MOLONKO** do hereby declare that this thesis is my original research and that all sources used are cited. I further certify that the work has not been submitted for a degree in any other university.

Signed Date

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This thesis has been submitted for examination with my knowledge and approval as the university supervisor.

Signed Date.....

PROFESSOR ALBERT MUMMA

ACKNOWLEDGEMENT

I wish to take this opportunity to thank God for having brought me this far.

My sincere gratitude goes to my supervisor Professor Albert Mumma for his invaluable guidance and assistance. His patience, availability and immense knowledge have made a great impact in my career path. Thank you for your time and interest in this work.

I'm sincerely indebted to Professor Ben Sihanya through Innovative Lawyering and Sihanya Mentoring who was the Reader of my Project for his invaluable support, availability, guidance and his immense knowledge and interest in the subject. You are truly an icon and may God bless you.

I'm greatly indebted to my dear husband Charles and children; Stacy, Ciara and Jesse for their moral support and understanding, my beloved dad, mum, brothers, sisters and the family at large for the support they gave me.

A lot of thanks go to all my friends and colleagues for being an encouragement throughout my academic life. I would especially wish to thank Paul, Rose, Daniel, Esther, Florence, Letangule, Vayonda and all my former colleagues at the Capital Markets Authority and Legislative Drafting Department, State Law Office for the support they gave me.

I further wish to extend my gratitude to the State Law Office for partly sponsoring me and giving me time to pursue my studies.

To you all, thank you and God bless you abundantly.

DEDICATION

To my dear husband Charles and children: Stacy, Ciara and Jesse for whom without their love, support and understanding, I would not have gone this far. To my beloved parents Mr & Mrs Parsuyan ole Molonko and the entire family for their prayers, encouragement and continued support.

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Kenyan Statutes and Legislation

Commission for the Implementation of the Constitution Act, 2010

Constitution of Kenya, 1963 (Repealed)

Constitution of Kenya, 2010

Capital Markets Act, Chapter 485A of the Laws of Kenya

Elections Act, 2011

Government Proceedings Act

Kenya Law Reform Commission Act, 2013

Law Reform Commission Act, 1982, Cap 3 (Repealed)

National Accord and Reconciliation Act, 2008 (Repealed)

National Government Coordination Act, 2013

Office of the Attorney-General Act, 2013

Parliament of Kenya National Assembly Standing Orders, 2013

Parliament of Kenya National Assembly Standing Orders, 1998

Statutory Instruments Act, 2013

South African Statutes and Legislation

Constitution of the Republic of South Africa, 1996

South African Law Reform Commission Act, No. 19 of 1973

South Africa Rules of the National Assembly, 2011 (7th ed)

South Africa Parliamentary Joint Rules, 2011

United States Constitution and Laws

United States Constitution

US Congress Rules of the House of Representatives, 2013

ABBREVIATIONS AND ACCRONYMS

A-G	Attorney-General
CEC	County Executive Committee
CIC	Commission for the Implementation of the Constitution
CIOC	Constitutional Implementation Oversight Committee
KLRC	Kenya Law Reform Commission
MoJNCCA	Ministry of Justice, National Cohesion and Constitutional Affairs
MPs	Members of Parliament
NCOP	National Council of Provinces
SALRC	South Africa Law Reform Commission
SLA	State Law Adviser

ABSTRACT

The Constitution of Kenya, 2010 was promulgated on 27th August, 2010 ushering in a new dispensation in Kenya's social, political and economic order. The new Constitution significantly restructured and redesigned government institutions and established new systems of governance. Kenyans clamour for the new Constitution was to address a number of constitutional and governance problems associated with Kenya's previous governments. Among the constitutional and governance problems which needed to be fixed is the re-assertion of the correct relationship between the three arms of government and reforming of state institutions.

Kenya is in the 3rd year of implementing the new Constitution. Among the changes in the new dispensation is how the Government will undertake its legislative agenda. The Constitution requires both legislative and policy reform in order to achieve the intended outcome.

This study therefore, examines three pertinent issues, first is the extent to which the 2010 Constitution has re-organised and re-designed the legal and institutional framework on the legislative drafting process. Second is the adequacy of the redesigned legal and institutional framework in the quest of drafting quality and effective legislation. Third is policy formulation in the context of legislative drafting in the restructured and re-designed legal and institutional framework. The study also examines if the new Constitution addresses the inherent challenges which affect the quality of legislation. Thereafter the study concludes and proposes recommendations on measures aimed at streamlining the legislative drafting process in Kenya.

CHAPTER ONE

BACKGROUND TO THE STUDY

1.1 Introduction

Every government, be it legitimate or despotic, requires legislation.¹ Legislation is the framework through which the government converts policy into legally enforceable obligations.² G. C Thornton states that legislation is a form of communication of policy decisions having legal consequences where the functioning of the society depends.³

Vincent Crabbe states that legislation is a necessity.⁴ Legislation, to all actors in a polity therefore, is a means of achieving economic, cultural, political and social policies.⁵ It is a way used to organize relations in government.⁶ Based on the social contract theory, it is a way where the governed can hold the government responsible as it sets down rules, procedures, rights and duties. It is a form of communication between those who govern and those governed.

As Dababneh and Al-Husban observe, any form of legislation which aims at establishing a general framework for the general policy of the state must not invoke any problem during implementation.⁷ Any form of legislation, therefore, should reflect government policy, be readable, precise, and inclusive and should be able to achieve its intended purpose.

Before the enactment of the Constitution of Kenya, 2010, the Kenyan governance structure was based on the Parliamentary democracy. As Kakuongo notes, the Independence Constitution (Repealed), through various amendments, became a radically different document which resulted into the consolidation of power in the office of the President who became both head of state and head of government.⁸ In this arrangement, the Executive wielded a lot of

¹ Crabbe, Vincent (1993) *Legislative Drafting*, (London: Cavendish Publishing Ltd), 1st Edition.

² *ibid* at 2.

³ Thornton, G.C (1996) *Legislative Drafting* Butterworths, London Dublin Edinburgh, Fourth Edition.

⁴ Crabbe, “*Legislative Drafting*” *op.cit*

⁵ *Ibid*.

⁶ *ibid* at 3.

⁷ Abeer Bashier Dababneh and Eid Ahmad Al-Husban (2011), “*Practical Criteria for the Soundness of Legislative Drafting approach Evaluative and Analytic Study*” *European Journal of Social Sciences*- Vol. 21 Number 4.

⁸ Waruguru, Kaguongo, “*Introductory Note on Kenya: “History of Constitutional Development in Kenya”*”:

https://web.up.ac.za/sitefiles/file/47/15338/Introductory%20Note%20Kenya_FINAL.pdf (last accessed on 23rd November, 2013)

power in the legislative agenda. Kivuva notes that though the 1963 Constitution recognized parliament to be supreme, in reality the legislature did not function to check the excesses of the executive.⁹ Over time, the President and the executive arm in general, acquired so much arbitrary powers over the legislature.¹⁰ Ghai and McAuslan note that over time, the executive formed a habit of ignoring parliament by introducing retrogressive legislation to legalize its actions.¹¹ Nonetheless, MPs would support the passage of this kind of legislation to avoid the unpleasant consequences of criticising the government.¹²

Government initiated Bills would emanate from Government policy. The respective ministry would formulate policy on an issue to be legislated upon.¹³ The Minister would then submit the policy proposal to Cabinet for approval¹⁴. Once the policy was approved, the Cabinet would direct the Attorney- General to draft a Bill in consultation with the Ministry concerned.¹⁵ The Minister and the Attorney- General would then request Cabinet for an approval of the Bill to be introduced to the National Assembly.¹⁶

Once the Cabinet approval was granted, the Bill was published fourteen (14) days before being tabled at the National Assembly for debate. The fourteen (14) day publication notice was to make members of the public aware of the existence of the proposed legislation and to elicit comments.

The Attorney- General was mandated, through the legislative drafting department within the State Law Office, to draft Government Bills.¹⁷ For private member initiated Bills, the Directorate of Legal Services within Parliament was tasked with this mandate unless the Government took over the Bill.¹⁸

⁹ Kivuva, Joshua, “*Restructuring the Kenyan State*” at pp. 5, Nairobi: Society for International Development (SID).

¹⁰ *Ibid.*

¹¹ Ghai, Y.P and McAuslan, (1970) ‘Public Law and Political Change in Kenya’ at 240, Nairobi Oxford Press.

¹² Kivuva, Supra Note 12.

¹³ Attorney General (2002), Circular to All Ministries and Government Agencies on Legislative Drafting, p. 1(Repealed)

¹⁴ *ibid.*

¹⁵ *ibid.* at. 2

¹⁶ *ibid.*

¹⁷ *ibid.*

¹⁸ <http://www.parliament.go.ke/plone/about-parliament/departments> (last accessed on 23rd July,2013)

The Constitution of Kenya 2010 has altered the process fundamentally. The Constitution enacted a Presidential system, with complete separation of powers which seeks to strengthen the legislature and provide a counterweight to the executive power..

In the current system of governance, the members of the executive that is the President, Deputy President, Cabinet Secretaries and Attorney-General are no longer members of the legislature. Their role in law making is therefore muted, except for the President who retains the role of assenting of legislation into law.¹⁹ Due to the historical challenges where the executive would use the power of assent to derail the legislative agenda, the Constitution provides that a Bill becomes effective after seven (7) days after Parliament has passed it.²⁰

It remains unclear on who retains the responsibility of originating and drafting of laws with opinion split between Department of Legislative Drafting²¹ at the AGs office and Parliament itself, through the Directorate of Legal Services.²²

Cabinet shall no longer have to approve all legislative proposals for tabling in the House, except for money Bills where the views of the Cabinet Secretary for Finance are required. There is, thus, need to explore the challenges posed by the new system and recommend reforms necessary to ensure quality legislation.

1.2 Problem Statement

Kenya promulgated the new Constitution on 27th August, 2010 ushering in a new era of governance. As Sihanya observes, the new Constitution ushered in a new dispensation in Kenya's constitutional, social, political and economic order.²³ This has brought with it enormous demands in the implementation process. The implementation of the Constitution demands, amongst others, the enactment of legislation as provided for in the Fifth Schedule of the Constitution, aligning the existing laws to the new Constitution, restructuring

¹⁹ 2010 Constitution of Kenya, Article 115 (1).

²⁰ *ibid* Article 115 (5).

²¹ Opinion given by SC1, a State Counsel at the Department of Legislative Drafting, AGs Office, during an interview on 17th July, 2013.

²² Opinion stated by PC3, a Parliamentary Counsel at the Directorate of Legal Services at Parliament, during an interview on 18th July, 2013.

²³ Sihanya Ben, (2011) "The Presidency and the Public Authority in Kenya's new Constitutional Order": Constitutional Working Paper No. 2, Society for International Development).

institutions and organs of government and creating new policies and reviewing existing policies.²⁴

Amongst other changes, the Constitution of Kenya, 2010 has altered the institutional and legal framework of initiating and drafting legislation significantly. The Constitution has introduced new challenges to the process. First, the Constitution has introduced multiple institutions involved in legislative drafting. This has brought about duplicity in their roles, lack of

co-ordination and competing interests within these centres. Second, there has been a rushed legislative process in drafting and passage of laws due to heavy legislative demands and strict legislative calendar set out in the Fifth Schedule of the Constitution.

Third, the Constitution has re-introduced bi-cameral legislature where both the National Assembly and the Senate have legislative mandates. This has brought about differences between the National Assembly and the Senate in their roles in the origination, consideration and enactment of legislation.²⁵ Fourth, there is lack of clarity on which actor has the ultimate role in origination of Bills. Fifth, the Constitution by introducing a system with complete separation of powers: the Executive, Legislature and the Judiciary with specialized roles, has brought about friction within these institutions.

The Constitution further, did not fully address inherent challenges in the legislative drafting process which includes weak policy development mechanisms, capacity constraints, lack of feedback mechanisms and poor public participation.

The above challenges affect the quality and efficacy of the legislative product. They lead to enactment of laws that have numerous errors and inconsistencies with the Constitution. Katherina Staronova and Katarina Mathernova observe that poorly drafted laws are difficult to interpret and to implement.²⁶ The Kenyan High Court has, in numerous matters been called

²⁴ Sihanya Ben, (2011) “Constitutional Implementation in Kenya, 2010-2015: Challenges and Prospects, 2011-2015” FES Kenya Occasional Paper, No. 5.

²⁵ The Senate moved to the Supreme Court (Advisory Opinion Reference No. 2 of 2013) for an advisory opinion on the role of the National Assembly and the Senate in the origination, consideration and enactment of the Division of Revenue Bills.

²⁶ Katherina Staronova and Katherina Mathernova, 2002 IP Fellows Public Policy Process in “*Recommendations for the improvement of the Legislative Drafting Process in Slovakia.*” at p.7

upon to exercise its Constitutional interpretation role and the Supreme Court, advisory role.²⁷ They further have to be constantly amended, even before they are fully implemented.

There is therefore need to investigate the changes introduced to legislative drafting processes by the Constitution of Kenya, 2010. There is also need to analyse the challenges posed by the new constitutional framework, and the extent to which the Constitution has addressed pre-existing challenges. The above evaluation should then generate reforms necessary in the legislative drafting process in bid to ensure quality legislation in Kenya.

This study has achieved the foregoing in addressing the problem.

1.3 Research Objectives

The study's main objective is to investigate the adequacy of the legal and institutional framework for legislative drafting in Kenya in the context of transition from the previous constitutional framework to the new framework under the Constitution 2010.

This objective is further broken down to the following three specific objectives:

1. First, to examine changes introduced by the Constitution of Kenya, 2010 to the legislative drafting framework in Kenya.
2. Second, to evaluate the weaknesses in the legal and institutional framework for legislative drafting in Kenya.
3. Third, to propose necessary legal and institutional reforms in the legislative drafting process in Kenya towards producing quality and effective legislation.

1.4 Research Questions

The study answers the following research question: Is the legal and institutional framework for legislative drafting in Kenya adequate?

This research question is further broken down to the following three specific questions: first, what changes have been introduced by Constitution of Kenya, 2010 to the legislative drafting framework? Second, what weaknesses are inherent in the legal and institutional framework for legislative drafting in Kenya? Third, which legal and institutional reforms are necessary in the legislative drafting process in Kenya towards producing quality and effective legislation?

²⁷ See the Advisory Opinion Reference No. 2 of 2013 and Supreme Court Advisory Opinion Reference No. 2 of 2012.

1.5 Hypothesis

The study tests the following hypothesis:

The Constitution of Kenya, 2010, by introducing changes in the legislative drafting framework in Kenya has not addressed inherent challenges that lead to poor quality of the legislative product in Kenya.

1.6 Conceptual and Theoretical Framework

This study relies on Thornton's Concept of five stages in legislative drafting which a drafter must follow in order to develop quality legislation.²⁸ These are understanding, analysis, design, composition and development and scrutiny and testing.²⁹ According to Thornton drafter should begin by trying to understand fully the instructions and their background, analyses the implications of the instructions, designs the legislative scheme, proceeds to draft, revises and develops the draft and finally tests the draft and have it scrutinized by other drafters.³⁰

Thornton argues that the main and most important task of a drafter is to have a thorough and complete understanding of the proposed legal means for the achievement of Government policy.³¹ As Stefanou observes, bad drafting promotes all problems that have plagued the third world such as corruption, nepotism and bad governance.³² Regarding, drafting instructions, Thornton observes that, first, there must be guidance to those who prepare drafting instructions in order to get the idea of what the drafter needs.³³ Second, consultations must be facilitated between the drafter and the policy maker at an early stage to aid the drafter get a grasp of what the proposed legislation intends to achieve.³⁴ On this note, a drafting office should prepare a manual or other form of instructions to the policy makers on what drafting instructions should entail.³⁵

²⁸ Thornton, G.C (1996) *Legislative Drafting op.cit.*

²⁹ *ibid.*

³⁰ G.C Thornton (1996), *Legislative Drafting, op. cit* at 124-142.

³¹ *ibid* at 124.

³² Constantin Stefanou and Helen Xanthaki, (2005) "Manual in Legislative Drafting" IALS London.

³³ Thornton "*Legislative Drafting*", *op. cit.*

³⁴ *ibid.*

³⁵ *ibid* at 125.

At the analysis stage, a drafter should subject the proposals to a careful analysis against the existing law, special responsibility areas and practicality.³⁶ This stage is very important and the drafter should be aware of all existing written law, common law, case law and international obligations and standards.³⁷

The design stage is an opportunity for a drafter to conceptualize and weigh if there is actually any need for legislation. As Lord Radcliffe observes, needless legislation must be discouraged.³⁸ He notes that law which cannot be readily obeyed cannot survive the spectacle of its continual making and unmaking.³⁹

The composition stage is the actual drafting. Thornton asserts that this is the most crucial stage where a drafter needs plenty of time to draft, scrutinize and revise the document.⁴⁰ He argues that the drafter should work closely with the instructing officer in order to detect and remedy any inadequacies and ambiguities.⁴¹ The last drafting stage is scrutiny and testing where the drafter must take a critical and objective gaze at the finished draft.⁴² This should be tested applying various hypothetical circumstances and approaching the draft from users' perspective.⁴³

Kenyan legislative drafting is in contravention of Thornton's concept in varying propositions. First, the drafting instructions are done in form of a draft Bill with a summary of objectives and reason.⁴⁴ Second, there is no drafting manual or any other form of guidance from the drafting office to the instructing ministries on the form in which drafting instructions must conform with. Third there is constraint of time. Legislative drafting is done within strict timelines for instance strict timeline set under the Fifth Schedule the Constitution.

This study is also informed by Lon Fuller's requirements of just law-making and administration. He argues that rules must meet certain criteria to warrant title 'law'.⁴⁵

³⁶ *ibid* at 133.

³⁷ *ibid*.

³⁸ Lord Radcliffe, "Some Reflections on law and lawyers", 10CLJ at 366.

³⁹ *ibid*.

⁴⁰ *ibid*.

⁴¹ *ibid*.

⁴² *ibid*.

⁴³ *ibid*.

⁴⁴ See A-G's Circular on Drafting Instructions.

⁴⁵ Peter P. Nicholson (1974), *The Internal Morality of Law: Fuller and His Critics*, Chicago Journal of Ethics

According to him, nothing can count as law unless it satisfies eight principles. These principles require law to be expressed in general terms, publicly promulgated, prospective in effect, expressed in understandable terms, consistent with one another, not require conduct beyond the powers of the affected parties, not be changed so frequently that the subject cannot rely on them and be administered in a manner consistent with their wording.⁴⁶

Fuller's eight principles of internal morality of law were later criticised by HLA Hart to be mere principles of efficacy of law.⁴⁷

Kenyan laws are in line with the above principles in varying proportions. Most statutes are largely expressed in general terms leaving room for navigation through unforeseen circumstances. The laws are further publicly promulgated. Every Act of Parliament or Regulations pursuant to those Acts must be published in the gazette before they come into force. In 2010, the new Constitution of Kenya was publicly promulgated in an event at Uhuru Park. In addition, most Kenyan laws, with very few exceptions, are prospective rather than retrospective in their effect and implementation. Most Kenyan laws never demand conduct beyond the powers of the affected parties.

However, Kenyan laws are in contravention of a number of Fuller's principles. Some of the laws, including the Constitution, are not expressed in understandable terms. For instance, the new Constitution is vague on the date of the first elections, leading to a Constitutional Court ruling to resolve the dispute. The Supreme Court also had to rule on whether to include spoilt votes in calculation of a presidential candidate's percentage of votes cast in a general election.

Some laws are not consistent with each other. CIC recently released an audit report on 21 Bills enacted by Parliament and assented to by 26th August 2011,⁴⁸ in which they highlighted several internal inconsistencies in these laws, conflicts with other laws and variance with the

Vol. 84, No. 4, p. 309, available at: www.jstor.org/stable/2380144, (last accessed 12th July, 2013).

⁴⁶ *ibid*, p. 310; also Lon L. Fuller (1969), *The Morality of Law*, (Yale University Press: New Haven, Connecticut), p. 5; also Edwin W. Tucker (1965) *Book Review: The Morality of Law by Ron. L. Fuller*, Indiana Law Journal, Vol. 40, Issue 2, p. 274.

⁴⁷ H.L.A. Hart (1965), *Book Review: The Morality of Law by Ron. L. Fuller*, Harvard Law Review 78, p. 1281.

⁴⁸ CIC (2012), *Audit Report on the Acts Enacted by Parliament and Assented to by 26th August 2011*, available at: http://www.cickenya.org/index.php/resource-center/downloads/downloads-reports/item/download/168_ec7bed60d218460f3b20a9aeb9f30813, (last accessed 12th August, 2013).

Constitution. Several judges hearing election petitions across the country have faulted the Elections Act, 2011 for contravening the Constitution.⁴⁹ The Constitution provides that petitions should be filed within 28 days after the declaration of results,⁵⁰ while the Act states that losers should petition within 28 days after publication of winners in the Kenya Gazette.⁵¹

Finally, a number of recently enacted Acts of Parliament have been repealed or amended frequently, even before they are fully implemented, creating doubts whether the citizens can rely on them. For instance, the National Government Loans Guarantee Act, 2011 was repealed within a year of its enactment. Further extensive amendments have been proposed to the National Police Service Act, and the National Police Service Commission Act, even before their full implementation.

The inherent problems in the Kenyan legislation process can be traced to historical challenges relating to the governance structure. There is lack of consultation between the institutions charged with the formulation of law and absence of clear roles of these institutions.

The legislative drafting process is critical in producing legislation that is in tandem with Fuller's principles. This study operates on the hypothesis that due to poor drafting processes, most laws in Kenya are not consistent with each other, are capable of interpretations in manner not consistent with their wording, are impossible to understand and have to be amended frequently even before they are fully implemented. This study seeks to propose reforms in the drafting process which will ensure an effective end product, that is, effective legislation.

The study also relies on the theory of public participation. Public participation is a process which provides private individuals an opportunity to influence public decisions and has long been a component of the democratic decision-making process.⁵² Public participation is

⁴⁹ For instance, see *Suleiman Said Shahbal v Independent Electoral Boundaries Commission & 3 others*, High Court at Mombasa, Election Petition No. 8 of 2013, available at: <http://www.kenyalaw.org/newsletter/20130603.html>. Justice Fred Ochieng held that Section 76(a) of the Elections Act, 2011 that required the filing of an election petition within twenty eight days after publication of election results in the gazette was inconsistent with and contravened Article 87(2) of the Constitution.

⁵⁰ Constitution, *op. cit.*, Article 87(2).

⁵¹ Section 76(a) of the Elections Act, 2011.

⁵² Judith E. Innes & David E. Booher (2004) *Reframing Public Participation: Strategies for the 21st Century*, Journal of Planning Theory & Practice, Vol. 5, No. 4, 419–436, available at: www.csus.edu/ccp/publications/reframing_public_participation_final.pdf (last accessed 12th July, 2013).

important in legitimizing the process of law making and consolidating democracy. Public involvement is a means to ensure that citizens have a direct voice in public decisions. The theory holds that in a democracy, it is the public that determines where it wants to go and the role of its representatives and bureaucratic staff is to get them there. Therefore, an end, that is legislation, should be chosen democratically even though the means: that is implementation and policies are chosen technocratically.

This study emphasizes on a holistic approach to legislative drafting process. As much as there is need for clear separation of powers between the arms of government, this study demonstrates how a compartmentalized approach to legislative drafting and lack of coordination in these multiple centres have been an impediment to the enactment of quality and effective legislation.

1.7 Literature Review

There is a growing list of academic and professional writing relevant to the topic of study. The literature discussed below were reviewed in preparation for this study.

Samson Maundu examines the constitutional implementation process in Kenya.⁵³ His paper posits several challenges facing the legal drafting department at the A-G's office. The paper notes that officers giving instructions to the A-G's office to draft legislation are non-lawyers who do not have extensive experience in the interpretation of the Constitution. He notes that they end up giving vague instructions.⁵⁴

In addition, the A-G's office insists on receiving drafting instructions in the form of draft Bills. Most instructing officers, thus, rely on outside consultants to prepare these draft Bills. The consultants, some of who are experienced lawyers, have a rudimentary grasp of the principles of drafting, reflected in the quality of Bills they prepare. Such draft Bills when submitted to the AG are of very poor quality, often making it difficult to determine their purposes and how these purposes may be achieved.⁵⁵ Finally, the Fifth Schedule of the

⁵³ Samson Davies Maundu (2013), *Implementing the Constitution of Kenya: Why Parliamentary Counsel Find it Difficult*, The Loophole, Journal of the Commonwealth Association of Legislative Counsel, Issue No. 1 of 2013, pp. 5- 14, available at: <http://www.opc.gov.au/CALC/docs/loophole/loophole-March 13.rtf>.

⁵⁴ *ibid*, at 10.

⁵⁵ *ibid*.

Constitution sets strict deadlines, within which certain laws must be enacted, a challenge to drafters.⁵⁶

The sum effect of the above is that more time is lost attempting to determine the purposes or principles of the proposed legislation than in actual drafting. As a result, by the time final instructions are settled, time is already running out. Some of the unwanted effects of proposed legislation are discovered only after the Bill has been introduced into Parliament or, sometimes, after it is enacted into law.⁵⁷ As Thornton observes, the involvement of drafters before the policy has been fully developed and accepted are likely to avoid delays during the drafting process especially in the case of major and complex proposals.⁵⁸

The paper ends by suggesting that there is need for a Kenyan legislative drafting manual at the AG's office.⁵⁹ Such a manual would describe what parliamentary counsel can do when drafting legislation, including providing the mechanical details of how to number, when to use italics, and which formulae to use when inserting provisions in a Bill. It would standardise procedures across the entire government for drafting legislation, especially drafts by non-legislative counsel. It would help ensure through administrative means that all departments, especially those that rely on outside consultants, prepare drafts that meet the requirements of the Office of the AG.⁶⁰ It would reduce drafting errors, ensure uniformity, and increase efficiency. The time taken by legislative counsel and instructing officers in agreeing to the instructions would be reduced significantly, ensuring that deadlines are met and the drafting process is accelerated. It would also free-up legislative counsel to concentrate on their core function of drafting, and reduce their need to engage in drafting-related activities such as policy activities that should ideally remain the preserve of instructing officers and their departments.⁶¹

The above paper is useful in informing the challenges faced by the office of the AG in drafting legislation. It however ignores other departments and bodies involved in legislative drafting. It also does not propose any concrete legal reforms towards streamlining the drafting

⁵⁶ *ibid*, at 11.

⁵⁷ *ibid*.

⁵⁸ Thornton, "*Legislative Drafting*" *op. cit* at 126.

⁵⁹ Maundu, "*Implementing the Constitution of Kenya*" *op. cit* at 12.

⁶⁰ *ibid*.

⁶¹ Crabbe, "*Legislative Drafting*" *op .cit*.

process. This study goes further to examine all institutions mandated to play a role in legislative drafting. It also proposes legal reforms aimed at streamlining the drafting process in Kenya.

Anne Kiunuhe examines legislative drafting in Kenya.⁶² Her article notes that legislative drafting requires not only an excellent command of the English language but also a good appreciation of the subject matter of the legislation. Further, good laws should be drawn up in an intelligible and consistent manner and in accordance with the established principles of legislative drafting and presentation.⁶³

On challenges facing legislative drafting in Kenya, the paper highlights that the Legislative Drafting Department in the State Law Office is understaffed. It had only 25 members of staff, against a required total staffing level of 44. Among these, only 13 were parliamentary counsel, of which only three have obtained a diploma in legislative drafting.⁶⁴ The second challenge is that the Kenya Law Reform Commission lacked a drafting department.⁶⁵ Finally, Parliament lacked effective scrutiny of laws with many Bills being passed replete with errors, which ought to be noticed and corrected before passage.⁶⁶

The article explains that the above challenges have contributed to poor draftsmanship, which has sometimes come under the sharp criticism of the High Court when it declares certain provisions unconstitutional.⁶⁷ The article notes that the Acts of Parliament required in order to give full efficacy to the Constitution should not only be enacted but also drafted to the highest standards.⁶⁸ The article ends by praising the move by the Commonwealth Secretariat to provide experts to assist Kenya in drafting the many laws required to be enacted pursuant to the new Constitution. The article however calls for hard work, training and enhancing the capacity of the bodies charged with law reform and legislative drafting.⁶⁹

⁶² Anne Kuinuhe (August, 2010), *Why Drafting of Kenyan Laws Needs Urgent Revamping*, The Business Daily Nation, available at: <http://www.businessdailyafrica.com/Opinion-and-Analysis/Why-drafting-of-Kenyan-laws-needs-urgent-revamping/-/539548/995384/-/item/0/-/a72o2nz/-/index.html>, (last accessed 3rd July, 2013).

⁶³ *ibid.*, at 1.

⁶⁴ *ibid.*

⁶⁵ *ibid.*, at 2.

⁶⁶ *ibid.*

⁶⁷ See *Suleiman Said Shahbal v Independent Electoral Boundaries Commission & 3 others*.

⁶⁸ Kuinuhe, (August, 2010) “*Why Drafting of Kenyan Laws Needs Urgent Revamping*” *op. cit.* at 3.

⁶⁹ *ibid.*

The article is useful to this study because it highlights the challenges faced in the legislative drafting process. However, the article only identifies two institutions charged with legislative drafting and ignores others. It also makes general recommendations on how to improve the process. This study goes further to address all institutions involved in legislative drafting in Kenya. The study also highlights additional challenges. Finally it makes specific recommendation on legal reforms necessary to streamline the legislative drafting process in Kenya.

G.C. Thornton examines extensively the drafting process and the role of a legislative drafter.⁷⁰ He asserts that legislative drafting does not necessarily begin with the receipt of drafting instructions and end with completion of the agreed draft. He observes that the drafting process needs to be seen in a wider context if it is to be understood fully.⁷¹ He further notes that the receipt of instructions is just one part of the process of legislation, whereby an idea or concept concerning the social framework of the society becomes government policy, and eventually passes through the legislative machinery to reach the statute book as law. David Elliot asserts that the quality of drafting instructions facilitates the role of drafters.⁷²

As rightly observed by Thornton, the drafter is not usually a party to the beginning of the process.⁷³ The desire for legislation may in any instance come from any sources perhaps a commission of inquiry, a political party's manifesto, a parliamentary committee, a law reform sector, a trade or a professional sector, a pressure group representing a sector of the public or a judicial decision which may have revealed an error or loophole in an existing law.⁷⁴ No matter where the ideas originate, it is not until they are accepted by government as part of its policy that they become the prime concern of the drafter.⁷⁵

Thornton's book is useful to this study as it articulates the processes which a legislative drafter must consider in drafting quality legislation. However, for Thornton only identifies two institutions, the institution giving drafting instructions and the drafting office charged

⁷⁰ G.C Thornton (1979), *Legislative Drafting*, (London: Sweet & Maxwell Ltd), Fourth Edition.

⁷¹ *ibid* at 124

⁷² Elliot, David (1992) "Getting Better Instructions for Legislative Drafting" (Victoria, British Columbia) at 3 <<http://www.davidelliot.ca/legislativedrafting.htm>> (accessed on 19th November, 2013)

⁷³ Thornton, *Supra* Note 52.

⁷⁴ *ibid.*

⁷⁵ *ibid.*

with legislative drafting but ignores others. He also dwells on the drafting of public Bills and ignores the process of drafting Private Bills. This study goes further to address all institutions involved in legislative drafting in Kenya. The study also examines the process of drafting Private Bills and its conformity with drafting standards and policy.

There are also varied opinions on the interface between the legislative drafter and the policy maker. Thornton asserts that *“the regulation and control of society is the field in which the draftsman toils; his task is to frame the communication of policy decisions having legal consequences to members of the society.”*⁷⁶ He recognizes that, *“the legal drafter has a small though responsible part to play in the earlier stages before policies are finally determined and ready to be expressed in the legislative form.”*⁷⁷ He, therefore, concludes that the drafter’s major task is in the field of communication and on the basis of his instructions, the drafter must survey the relevant law as it exists and make his decision as to the content of what is to be communicated and how it should be communicated. For Thornton, a drafter need not know anything about the substance but only how to use words to communicate what the person who designed the substance had in mind.

Crabbe on the other hand, proposes that matters of policy should be left to the Executive arm of government⁷⁸. He states that a drafter *“is a technician whose function is to translate policy into law.”*⁷⁹ He further states that *“since there is a thin dividing line between policy and implementation, between practice and procedure... a drafter can participate in policy deliberations,”* but he cautions that *“the drafter should not usurp the role of a policy maker.”*⁸⁰ Crabbe appreciates that as much as the interest of a drafter in policy is not denied, clear separation of powers should be maintained and the as drafter’s knowledge in policy matters could be limited.⁸¹

⁷⁶ G.C. Thornton (1979) *Legislative Drafting* (London: Sweet & Maxwell Ltd), 2nd Edition.

⁷⁷ *ibid*, p. 33.

⁷⁸ Crabbe, *supra* Note 1 at 21.

⁷⁹ *ibid*.

⁸⁰ *ibid*.

⁸¹ *ibid*.

Professor Grad⁸² on the other hand proposes that in legislative drafting, “*form follows function*”. He proposes that a drafter should liaise with the officials from the line ministry, who often lack legislative drafting skills.⁸³ Further, he criticizes instances where drafting is carried out by consultants, who may not be competent, leading to a tendency where the ministry concentrates on producing a legislative draft with insufficient prior consideration of the policy which it should reflect.⁸⁴

The above pieces of literature attempt to locate the role of the drafter in policy formulation. They however are varied in their approaches. This study emphasizes on a holistic approach to the legislative process. The study also asserts the need for streamlining the legal and institutional framework for better coordination in the drafting process. It also emphasizes the need for drafters to be involved in policy formulation, as policy forms the basis of any form of legislation.

1.8 Justification

Kenya is in the 3rd year of implementing the Constitution, 2010. Parliament is required to enact at least 49 pieces of legislation to operationalize the Constitution⁸⁵. The existing laws have to be amended to align it with the new framework. Further, institutions and systems of government including Parliament, Judiciary and constitutional Commissions, among other institutions, are to be created or restructured. The Constitution has also restructured the institutions charged with initiating and drafting of legislation. This is, thus, a busy period for legislative drafters in Kenya.

This study explores the weaknesses and loopholes that exist in the drafting process. It informs the various actors in the drafting process which includes the Legislative Drafting Department within the Office of the Attorney General, the Commission for the Implementation of the Constitution (CIC), the Kenya Law Reform Commission (KLRC), Directorate of Legal Services within Parliament and the Constitutional Implementation Oversight Committee, of the inherent challenges on their quest of drafting quality and effective legislation.

⁸² Frank Grad, ‘Legislative Drafting As Legal Problem Solving: Form Follows Function’, in *Drafting Documents in Plain English*, (Practising law institute: Commercial and Practice Course Handbook series No 203, 1979.

⁸³ *ibid*, at 56.

⁸⁴ *ibid*, at 58.

⁸⁵ Constitution, *supra* note 22, Fifth Schedule.

The study also makes recommendations on the legal and institutional reforms necessary so as to create an efficient legislative drafting process, which shall in return guarantee enactment of quality legislation.

The study draws comparisons with South Africa and the United States of America (USA). Historically, Kenya's relentless search for a new constitution was informed by the need to re-define the relationship of the citizens with government. There was deep dissatisfaction with the nature of the exercise of executive power.⁸⁶ As Kivuva notes, Kenyans had been angered by previous governments that had ruled the country without regard to the wishes of the majority.⁸⁷ Sihanya notes that since independence, the executive, more so the presidency, animated and dominated the discourse on constitution making, the constitutional process, and constitutional review and implementation, as well as political processes.⁸⁸

The executive over time wielded a lot of power leading to power imbalances between the executive and other arms of government.⁸⁹ This led to the presidency dominating in the legislative agenda in parliament and passed law to legitimize his actions. The question of separation of powers, therefore, became one of the underlying reasons for constitutional reform.

Scholars who have studied African states on the other hand, are of the view that African states are weak, exploitative, illegitimate, fragile and without roots in the community.⁹⁰ According to Huntington, the African state is faced by political instability and that national governments only exercise tenuous control over state.⁹¹

Comparatively, western democracies have been referred to as being different from African states because they govern with a minimum degree of legitimacy.⁹² Sandbrook argues that the

⁸⁶ Committee of Experts Final Report p 88.

⁸⁷ Kivuva, "*Restructuring the Kenyan State*" *op. cit.*

⁸⁸ Sihanya, (2011) "Constitutional Implementation in Kenya, 2010-2015" *op. cit.* at 128.

⁸⁹ *ibid.*

⁹⁰ Bratton, M (1989). "Beyond the State: Civil Society and Associational life in Africa". *World Politics*, 41(3), 407-430.

⁹¹ Huntington, S (1968). '*Political order in changing societies*' New Haven: Yale University Press.

⁹² Kivuva, "*Restructuring the Kenyan State*" *op. cit.*

western state is considered as impartial arbiter whose role is to promote national interest, efficiency and national welfare.⁹³

The doctrine of separation of powers has been embraced in the constitutions of most democratic countries in the world. In its inspiration to address the challenges brought about by the imbalance of power between the three arms of government, Kenya's Constitution, 2010, enacts a presidential system similar to that of South Africa and USA. These countries have maintained this balance of power between the president and the legislature, each of which is functionally independent and competent. .

The drafting process in these countries is thus comparable.

To the above extent, the study is justified.

1.9 Research Methodology

The study required data on the legal framework concerning legislative drafting in Kenya and comparative approaches to legislative drafting from South Africa and the US. The study is designed to be an exploratory research predominantly based on review of literature. The methods to be used will include both primary and secondary sources of data. Library services will be highly utilized in exploring the relevant materials from textbooks, scholarly articles and reports on the subject to support the arguments made in the study.

The primary sources consulted included the Constitution of Kenya, 2010, various Acts of Parliament from Kenya, South Africa and US, and also data from interviewees.

Data from interviewees was collected through in depth-interviews. In depth interviews were conducted with five officials from the Legislative Drafting Department within the Office of the Attorney General, five officials from the Directorate of Legal Affairs within Parliament and five advocates knowledgeable on legislative drafting matters. Further, two officials each from the CIC and KLRC were interviewed. The interviewees were selected using purposive sampling method, which enabled identification of only the interviewees with most

⁹³ Sandbrook, R (1980). *"The politics of basic needs: urban aspects of assaulting poverty in Africa"*. London: Heinemann.

information. The determining factor of choice was experience in dealing with legislative drafting; actual drafting, academic specialization and published papers.

Data analysis was mainly qualitative, bringing out personal views of individuals, gathered from the interviews.

1.10 Chapter Outline

The study contains five chapters, outlined below.

1.10.1 Chapter One: Background to the Study

This chapter gives a brief introduction to the study by giving a bird's eye view of the theme of the study. Background information, statement of the research problem, research objectives, research questions, hypothesis, theoretical framework, literature review, justification and research methodology have been enumerated.

1.10.2 Chapter Two: Legal Framework on Legislative Drafting in Kenya

This chapter examines the legal framework for legislative drafting in Kenya. It analyses the various law making provisions for the legislative process both before and after the enactment of the new constitution. It outlines comparative perspectives from South Africa and US on the same matters.

1.10.3 Chapter Three: Institutional Framework for Legislative Drafting in Kenya

This chapter examines the institutional framework for legislative drafting in Kenya. It also examines the extent to which the 2010 Constitution has re-structured the institutions charged with legislative drafting with the view of establishing the inherent challenges. It also enumerates comparative perspectives from South Africa and US on the same matters.

1.10.4 Policy Making in the Context of Legislative Drafting

This chapter examines the current practice in policy formulation in the context of legislative drafting in Kenya. It elaborates on the need for a formal policy process that encompasses the formulation of the problem, design of the concept, strategies and policy analyses. It also examines the extent to which private member Bills conforms to government policy.

1.10.5 Chapter Four: Conclusions and Recommendations

This chapter highlights the major conclusions and recommendations of the study. The conclusions section sums up the findings in the preceding Chapters. The study then makes recommendations on the reforms necessary so as to strengthen the legislative drafting process in Kenya.

CHAPTER TWO

LEGAL FRAMEWORK ON LEGISLATIVE DRAFTING IN KENYA

2.1 Introduction

This Chapter examines the legal framework on legislative drafting in Kenya. It analyses the provisions relating to legislative drafting processes in Kenya before the enactment of the new Constitution and inherent challenges manifested by that dispensation. The Chapter also seeks to examine the changes introduced by the new Constitution. Further, the Chapter will evaluate if the changes brought about by the new dispensation are adequate in the quest of drafting effective legislation.

2.2 Legislative Processes in the Constitution

The 1963 Constitution provided for a Parliamentary system of Government where the president and the cabinet of ministers were members of the legislature. The Attorney-General, who was also an appointee of the President, was a Member of Parliament.⁹⁴ The President was a representative of a constituency and was allowed to sit in Parliament and deliberate on any parliamentary proceedings, assented to Bills, had control over the parliamentary calendar, appointed the Attorney-General, appointed MPs to the Cabinet⁹⁵ and also determined the size of Cabinet.

Although the 1963 Constitution recognised Parliament to be supreme, in reality the legislature hardly functioned as a check on the executive.⁹⁶ As Kivuva notes, policies and legislative agenda of government was made by the president and members of his inner circle.⁹⁷ Parliament passed retrogressive legislation as a result of coercion and fear of unpleasant consequences if an MP was found to be criticising the executive.⁹⁸ Nancy Kassop, observes that the presidents make law unilaterally, every day.⁹⁹ She argues that there is increased influence of the presidency both in policy making and legislative authority.¹⁰⁰ The President appointed key actors in the legislative process including the A-G and the cabinet, participated in parliamentary debates and assented to Bills and the heavy presence of

⁹⁴ 1963 Constitution, (Repealed) Article 36.

⁹⁵ *ibid* Article 17.

⁹⁶ *ibid*.

⁹⁷ Kivuva, “*Restructuring the Kenyan State*” *op. cit.*

⁹⁸ *ibid*.

⁹⁹ Mark C. Miller & Jeb Barnes (eds) (2004) “*Making Policy, Making Law; An Interbranch Perspective*” Georgetown U Press, Washington, DC, “The view from the President,” pp. 72-88.

¹⁰⁰ *ibid*

executive in parliament compromised the objective deliberation, debate and passage of legislation.

The law making process in Kenya was like many Commonwealth jurisdictions. The process depended on the type of Bill in question, whether a Government initiated legislation or a private member initiated Bill. The object of public Bill, as stated by Gicheru, is to alter general law on a question of public¹⁰¹ thus such legislation emanated from Government policy. For Government Bills, the Ministry concerned formulated policy on an issue to be legislated upon.¹⁰² This may have arisen due to changes in a particular situation which needed an amendment of an existing law or an introduction of a new law altogether.

The Minister then submitted the policy proposal to Cabinet for approval. Once the policy was approved, the Cabinet directed the Attorney-General to draft a Bill in consultation with the Ministry concerned.¹⁰³ The Minister and the Attorney-General then requested Cabinet for an approval of the Bill to be introduced to the National Assembly.¹⁰⁴ Once the Cabinet approval was granted, the Bill was published fourteen (14) days before being tabled at the National Assembly for debate.¹⁰⁵

The 2010 Constitution has introduced fundamental changes to the legislature as an institution of representation and law making. The Constitution has introduced a bi-cameral government which has been delinked from executive control. The Legislature comprises of two houses, the National Assembly and the Senate.¹⁰⁶ The National Assembly represents constituencies and the Senate represents the interests of county governments.¹⁰⁷ According to Kirui and Murkomen, the Kenyan Senate is unique in terms of specificity of its functions.¹⁰⁸ The Senate is mandated to perform legislative and oversight authority over matters that exclusively affect county governments.¹⁰⁹

¹⁰¹ Gicheru, N "Parliamentary Practice in Kenya" Nairobi, Transafrica Publishers, 1975.

¹⁰² *Supra* note 15.

¹⁰³ *ibid*, p. 2.

¹⁰⁴ *ibid*.

¹⁰⁵ *ibid*.

¹⁰⁶ Constitution, *op. cit*, Article 93(1).

¹⁰⁷ *ibid* Article 95 (1) and 96(1).

¹⁰⁸ Kirui, Kipkemoi and Murkomen, Kipchumba (2011) "The Legislature: *Bi-Cameralism under the new Constitution*", Constitutional working Paper Series No. 8, SID, p.16

¹⁰⁹ Constitution, *op.cit* Article 96.

The Senate will therefore, play a vital role in the formulating policies and legislative aspects including the functions or mandate of the county institutions of governance like the county assemblies, of county executives, monitoring of funds allocated to the county government and delivery of services.¹¹⁰ The creation of a bi-cameral system will create an appellate hierarchy in enactment of laws.¹¹¹

On the law making functions, any Bill may be introduced to the National Assembly.¹¹² Money Bills are only considered by the National Assembly.¹¹³ Bills concerning county governments may originate in either House.¹¹⁴ With the legislative roles vested on both Houses, it is expected that disagreements may arise where both Houses have competence over the matter. The Constitution provides mechanisms to resolve contentious issues through mediation committees made up of members from both Houses¹¹⁵ or through the Supreme Court rendering its advisory opinion.¹¹⁶

Recently, the Senate moved to the Supreme Court for an advisory opinion on the role of the National Assembly and the Senate in the origination, consideration and enactment of the Division of Revenue Bills.¹¹⁷ The Supreme Court, in its advisory opinion, affirmed that the Senate has a clear role in consideration and passage of the Revenue Bill as it affected counties. Rawal DCJ, in concurring with the majority decision, observed that the Constitution is categorical on the rejection of exclusionary claims to powers of governance as the letter and spirit of the Constitution is suffused with the call of accountability, co-orporation, responsiveness and openness.

2. 3 Parliamentary Processes in Legislative Making

The Legislature is one of the main actors in the legislative agenda. The Parliamentary processes with respect to the origination, drafting and passage of legislation are analysed below.

¹¹⁰ *ibid.*

¹¹¹ Kirui and Murkomen “The Legislature: *Bi-Cameralism under the new Constitution*” *op.cit.*

¹¹² Constitution *op.cit.*, Article 109(2).

¹¹³ *ibid* Article 109(5)

¹¹⁴ *ibid* Article 110(1).

¹¹⁵ *ibid.*, Article 113.

¹¹⁶ *ibid.*, Article 163(6).

¹¹⁷ Advisory Opinion Reference No. 2 of 2013.

2.3.1 Standing Orders

Parliamentary processes are largely based on standing orders. Standing Orders is a written document containing rules, policies, procedures, regulations, and orders for the conduct of business in Parliament. They are rules for the guidance and governance of parliamentary procedure which endure through successive Parliamentary sessions until vacated or repealed. The Standing Orders are usually formulated collectively by the members of Parliament (MPs). The current Standing Orders for both the Senate and National Assembly were adopted on 9th January, 2013.¹¹⁸

2.3.2 The Process of Legislating Government Initiated Bills

Upon a legislative proposal being received from the A-G's office and approved by the Speaker, the legislative proposal was sent back to the A-G for publishing as a Bill in the Kenya Gazette.¹¹⁹ It was then the responsibility of the Minister or any other member desiring to introduce the Bill to deliver to the Clerk a sufficient number of copies of the Bill for distribution to Members.¹²⁰

The Bill was published for a period of fourteen (14) days, or such shorter period as the House approved.¹²¹ The public would get access for the first time to the complete Bill upon publication, and had fourteen (14) days to read the Bill and prepare their input at the Committee stage. The Bill would then be referred to a Committee for thorough scrutiny, which had to present the Committee's report to the House within ten (10) calendar days of such committal.¹²² Again this period was too short for any meaningful engagement of the public to factor in their input. There was no express requirement for consulting members of the public on their views on the Bill. Despite the lack of express provisions, members of the public would participate in the formulation of Bills by giving their views through memoranda to the Committees.

Under the 2010 Constitution, the President, Cabinet Secretaries and the Attorney- General are no longer members of Parliament. This creates uncertainty in tabling and facilitating

¹¹⁸ Parliament of Kenya (2013), *The National Assembly Standing Orders*, as adopted by the National Assembly on 9th January, 2013, during the Fourth Session of the Tenth Parliament, Clause 114(1).

¹¹⁹ National Assembly Standing Orders (Repealed), as adopted by the National Assembly on December 10, 2008, during the Second Session of the Tenth Parliament, 2008, Clause 104(3).

¹²⁰ *ibid*, Clause 104(4).

¹²¹ *ibid*, Clause 107.

¹²² *Ibid*, Clause 111(2).

Government sponsored legislation. The Executive has to identify individual members and request them to sponsor its Bills for introduction to the House, a role which of late has been undertaken mainly by the Leader of Majority Party in Parliament.

The sponsoring member is required to send the legislative proposal to the Speaker.¹²³ On receiving it, the Speaker refers it to the Clerk who cross checks it, drafts it in proper form where necessary and submits it back to the Speaker with comments. The comments will clarify either the proposed legislation affects or does not affect counties, it is a special or an ordinary Bill, it is a draft money Bill, it conforms to the Constitution and the law and is in order as to format and style in accordance with the Standing Orders.¹²⁴

Upon receiving back the legislative proposal from the Clerk, the Speaker directs either that the legislative proposal be not proceeded with or that it be accepted. If the Speaker certifies that the legislative proposal is accepted, the proposal is published as a Bill.¹²⁵ The Clerk of the Assembly is granted the responsibility for publishing of Bills.¹²⁶ Upon publication of a Bill in the Kenya Gazette, the Clerk obtains sufficient copies of the Bill and avails a copy of the Bill to every Member.¹²⁷

2.3.2.1 South African Process of Legislating Government Initiated Bills

The South African Constitution empowers the President, and any member of the Cabinet or any Deputy Minister who is not a member of the National Assembly, subject to the rules and orders of the Assembly, to attend and speak in the Assembly, but not to vote.¹²⁸ It further identifies persons who can introduce Bills in the Assembly to include a Cabinet member or a Deputy Minister or a member or a committee of the National Assembly.¹²⁹ However, for the National Council of Provinces (NCOP), the equivalent of Kenya's Senate, only a member or Committee of the NCOP may introduce a Bill in the Council.¹³⁰

¹²³ The National Assembly Standing Orders, 2013, *op. cit.*, Section 114(1).

¹²⁴ *Ibid*, clause 114(2).

¹²⁵ *Ibid*, clause 114(3).

¹²⁶ *Ibid*, clause 162.

¹²⁷ *Ibid*, clause 122(5).

¹²⁸ South African Constitution, Article 54.

¹²⁹ *ibid*, Article 73(2).

¹³⁰ *ibid*, Article 73 (4).

The Cabinet Secretaries, committee members or individual members therefore, first submit the Bill to the Speaker.¹³¹ They then publish in the gazette a notice of intention to introduce the Bill inviting members of the public to make comments to the respective ministers or committee.¹³² It is only after 30 days that the Bill is then formally tabled in Parliament by the Cabinet secretaries, Committee members or individual members for the first reading.¹³³

2.3.2.2 United States of America Process of Legislating Government Initiated Bills

In the US, the executive members and individual members first submit the Bill to the Speaker,¹³⁴ who refers the Bills to Committees without any debate.¹³⁵ The custom of First Reading is no longer present in Congress, having been replaced by entering of the title of the Bill in the Congress Journal and its printing in the Congressional Record.¹³⁶ The Chairpersons of the various Committees or Committee members appointed for that purpose therefore sponsor Government Bills and introduce the Bills on the floor of the House for debate.

2.4. The Process of Enacting Bills Initiated by Private Members

Individual members could develop legislative proposals independent of the Executive.¹³⁷ The Bills could be drafted by private members themselves or through the assistance of civil society groups or other interest groups. However, among the functions of the Directorate of Legal Affairs was to draft Bills initiated by private members after the passage of motions for introduction of the Bills.¹³⁸ Further, Government ministers would, with consent of the sponsoring member, take over private member Bills.

The Standing Orders, 2013 allow individual members to submit any Bills they wish to sponsor to the Speaker for approval. However, there are no clear provisions on drafting of such Bills. The roles of the Directorate of Legal Services at Parliament do not include drafting of Bills sponsored by individual members. This grants leeway to individual members

¹³¹ Rule 159 of the South Africa Parliamentary Joint Rules and Rule 233 of the South Africa National Assembly Rules.

¹³² Rule 241, South Africa National Assembly Rules.

¹³³ Rule 102, Parliament Joint Rules.

¹³⁴ US Congress (2013), *Rules of the House of Representatives*, Rule XII, Clauses 1, 2 and 7.

¹³⁵ *ibid*, Rule XIV, Clause 2.

¹³⁶ *ibid*.

¹³⁷ National Assembly Standing Orders (Repealed) *op. cit*, Clause 106 (2).

¹³⁸ Available at <http://www.attorney-general.go.ke/index.php/departments> (last accessed on 23rd November, 2013)

to engage consultants to draft a Bill and then send it to the Speaker for approval, bypassing the Directorate.¹³⁹ The Bill is thus submitted without undergoing scrutiny that Government sponsored legislation is subjected to.

The National Assembly Standing Orders, 2013 have attempted to address this disparity in respect of legislative proposals sponsored by individual members. They obligate the Speaker to refer the legislative proposal to the relevant Committee for pre-publication scrutiny and comments. The Committee is then required to submit its comments on the legislative proposal to the Speaker within fourteen (14) days of receipt of the legislative proposal.¹⁴⁰ The Committees comments inform the Speaker on whether to certify that the legislative proposal is accepted for publication into a Bill or not. The Standing Orders are however silent on the parameters and criteria for such pre-publication scrutiny.

2.4.1 South African Process of Enacting Bills Sponsored by Private Members

The South African law empowers the State law Advisers (SLAs) to check alignment to policy during certification of Government Bills. For Bills initiated by private members, the National Assembly Rules establish a Committee on Private Members' Legislative Proposals and Special Petitions to which all private member Bills are referred before publication.

The Committee may, with or without reservations, recommend to the House that permission be granted or denied for the member to proceed with the proposed legislation.¹⁴¹ The Committee shall take into account the following in recommending permission or denial of a private member Bill, first, if the proposed Bill goes against the spirit, purpose and object of the Constitution. Second, if the Bill seeks to initiate legislation beyond the legislative competence of the Assembly. Third, if the Bill duplicates existing legislation or legislation awaiting consideration by the Assembly or Council. Fourth, the Bill pre-empts similar legislation soon to be introduced by the national executive or will result in a money Bill or fifth if it is frivolous or vexatious¹⁴²

¹³⁹ Information given by PC2, a Parliamentary Counsel at the Directorate of Legal Services, During an Interview on 15th July, 2013 at Nairobi.

¹⁴⁰ National Assembly Standing Orders, *op. cit* Clause 114(3)(b).

¹⁴¹ *Ibid*, Clause 235(3).

¹⁴² *Ibid*, Clause 235A.

The above provisions allow South Africa to have a thorough scrutiny of private member Bills, similar to scrutiny of Government sponsored legislation.

2.5 Public Participation in Legislative Process

Before 2010, participatory law making was achieved at a minimum level. As Sihanya notes, the Kenya Law Reform Commission (KLRC) routinely collected views from the public before drafting of Bills.¹⁴³ The Ministries identified the legal problems that needed to be legislated and would convene stakeholder forums, in which views of the public were taken into consideration. Many Acts of Parliament did not place any mandatory requirements for public participation.¹⁴⁴

The 2010 Constitution has elaborate provisions on participatory law making. The Constitution lists participation of the people among the national values and principles of governance.¹⁴⁵ It demands that Parliament conduct its business in an open manner, and its sittings and those of its Committees shall be open to the public.¹⁴⁶ Further it calls upon Parliament to facilitate public participation and involvement in the legislative and other business of Parliament and its Committees.¹⁴⁷ Moreover, Parliament is barred from excluding the public, or any media, from any sitting unless in exceptional circumstances the relevant Speaker has determined that there are justifiable reasons for the exclusion.¹⁴⁸ Finally, it decrees that there shall be openness and accountability, including public participation in financial matters.¹⁴⁹

The current Standing Orders implement the principle of public participation. First, it requires that all Bills to be introduced on the floor of the House must have been published in the Kenya Gazette and a period of fourteen (14) days, or such shorter period as the House may resolve, has lapsed since the publication.¹⁵⁰ The fourteen (14) day period is meant to give the members of the public time to digest the contents of the Bill and form opinions on changes

¹⁴³ Sihanya, “*The Presidency and the Public Authority in Kenya’s new Constitutional Order*” *op. cit* at 25

¹⁴⁴ Capital Markets authority Act Chapter 485A of the Laws of Kenya is an example of a few statutes where public participation is mandatory. Section 12(2)(b) requires all rules, regulations and guidelines formulated by Capital Markets Authority be exposed for comments by stakeholders and the general public for a period of 30 days through notification in at least two daily newspapers of national circulation and the electronic media.

¹⁴⁵ Constitution *op. cit* Article 10(2)(a).

¹⁴⁶ *ibid* Article 118(1)(a).

¹⁴⁷ *ibid* Article 118(1)(b).

¹⁴⁸ *ibid* Article 118(2).

¹⁴⁹ *ibid* Article 201(a).

¹⁵⁰ National Assembly Standing Orders, *op. cit*, Clause 120.

necessary. The Standing Orders further require departmental Committees to which a Bill is committed to facilitate public participation and take into account the views and recommendations of the public when they make their report to the House.¹⁵¹

The Committees have twenty (20) calendar days from the time of committal of the Bill to present the Committee's report to the House, though they may request for additional time.¹⁵² To facilitate public participation, most Committees, through the Clerks, have been publishing notices in local newspapers either inviting members of the public for public hearings or requesting them to submit written memoranda to the Clerk.¹⁵³ Such notices however give very short deadlines for the submissions and short notices for the hearings.¹⁵⁴

The Standing Orders further provide that all Committee proceedings shall be open to the public unless in exceptional circumstances the Speaker has determined that there are justifiable reasons for the exclusion of the public.¹⁵⁵ They further require the Clerk, unless otherwise prohibited by any law, to allow access by the public to Journals and Records, whether audio, electronic or any other form, including all papers and accounts howsoever presented to or belonging to Parliament.¹⁵⁶

In addition, the Standing Orders allow members of the public access to sittings of the House and Committees unless, in exceptional circumstances, the Speaker has determined that there are justifiable reasons for the exclusion.¹⁵⁷ The grounds for exclusion are vague, granting the Speaker much discretion. The Speakers' decision on exclusion is final and not questionable. This may allow the Speaker to arbitrarily exclude the public without proper reasons.

¹⁵¹ *ibid* Clause 127(3).

¹⁵² *ibid* Clause 127(4).

¹⁵³ For instance, the notice inviting members of the public for public hearings and submission of memoranda on Division of Revenue Bill, 2013, published by the Clerk of the Senate on 18th May 2013, available at: <http://www.parliament.go.ke/plone/senate/news/PublicParticipationtheDivisionofRevenueBill.pdf/view>, (last accessed 15th August, 2013).

¹⁵⁴ The notice on Division of Revenue Bill, 2013, *ibid*, was published on 18th May, 2013, with the public hearing scheduled for 20th May, 2013, and the deadline for submission of written memoranda being 21st May, 2013. That amounts to 2 days' notice for the public hearing and 3 days deadline for the memoranda.

¹⁵⁵ National Assembly Standing Orders *supra* note 121, Clause 198.

¹⁵⁶ *ibid* Clause 247.

¹⁵⁷ *ibid* Clause 255.

Finally, they allow for broadcast of House proceedings.¹⁵⁸ The First Schedule to the Standing Orders contains Broadcasting Rules, which establishes the Parliamentary Broadcasting Unit to oversee the broadcasting of parliamentary proceedings.¹⁵⁹ The unit is authorised, unless the House otherwise directs, to broadcast the proceedings of Parliament and provide access to parliamentary information.¹⁶⁰ This was evidenced recently when Justin Muturi, the Speaker of the National assembly, ordered journalists to vacate parliamentary press centre due to a shortage of space for MPs to conduct House Committee meetings.¹⁶¹

The above provisions in the Constitution and Standing Orders provide avenues for public participation through attendance, observation, oral presentation of views and submission of written memoranda. However, effectiveness of this participation is in doubt as shall be discussed in the next Chapter.

2.5.1 Public Participation in Legislative Process in South Africa

The South African Constitution requires that the rules of both the National Assembly and the National Council of Provinces (NCOP) have due regard to, amongst others, representative and participatory democracy and public involvement.¹⁶² The South African Constitution also imposes an obligation on both Houses and their Committees to facilitate public involvement in their legislative and other processes.¹⁶³

In implementing this principle, the Rules of the South African National Assembly require that before a Bill is introduced in the House, a prior notice of its introduction be given in the Gazette;¹⁶⁴ and an explanatory summary of the Bill, or the draft Bill to be introduced, be published in the Gazette.¹⁶⁵ The notice in the Gazette must contain an invitation to interested persons and institutions to submit written representations on the draft legislation to the Secretary within a specified period.¹⁶⁶

¹⁵⁸ *ibid* Clause 250.

¹⁵⁹ First Schedule Broadcasting Rules, Rule 1 (1).

¹⁶⁰ *ibid* Rule 1(2).

¹⁶¹ <http://www.capitalfm.co.ke/news/2013/09/speaker-lifts-veil-on-media-access-to-parliament/> (last accessed on 22nd November, 2013)

¹⁶² South African Constitution, *supra* note 131, Article 57(1)(b) and 70(1)(b).

¹⁶³ *ibid* Articles 59(1)(a) and 72(1)(a).

¹⁶⁴ Clause 241(1)(b) South Africa National Assembly Rules.

¹⁶⁵ *ibid* Clause 241(1)(c)

¹⁶⁶ *ibid* Clause 241(2).

Further, for Bills sponsored by committees, the committees are required to arrange their business in such a manner that interested persons and institutions have a period of at least three (3) weeks after the draft Bill or particulars of the draft Bill have been published in the Gazette to comment on the proposed legislation, before its introduction on the floor of the House.¹⁶⁷ These arrangements must also give officials of any relevant State department or other executive organ of State, a sufficient opportunity to state their case before the committee.¹⁶⁸

Further once government sponsored Bills have been introduced and committed to committees, the committees are required to make invitations, press statements, advertisements or in any other manner, to the public to comment on the Bill.¹⁶⁹ The above provides for dual public participation in state sponsored Bills, first, at the Cabinet Secretary level and second, at the Parliamentary committee level.

In addition, House sessions, meetings of the committees and sub-committees are open to the public, including the media. The member presiding may not exclude the public, including the media, from the meeting, except when legislation, House rules or resolutions of the Assembly provide for the committee or sub-committee to meet in closed session.

Closed sessions can also be allowed when the committee or sub-committee is considering a matter which is of a private nature that is prejudicial to a particular person, protected under parliamentary privilege, or for any other reason privileged in terms of the law, confidential in terms of legislation or of such a nature that its confidential treatment is for any other reason reasonable and justifiable in an open and democratic society.¹⁷⁰ The rules are therefore more specific on when public can be excluded, as opposed to Kenyan Standing Orders which grant the Speaker unfettered discretion.

2.5.2 Public Participation in Legislative Process in the US

The US House of Representatives Rules facilitate public participation in legislative process. The Rules provide for broadcast of House sessions and committee meetings.¹⁷¹ They also

¹⁶⁷ *ibid* Clause 240.

¹⁶⁸ *ibid* Clause 240(a) and (b).

¹⁶⁹ *ibid* Article 249(2).

¹⁷⁰ *ibid* Article 152(1).

¹⁷¹ *supra*, note 66, Rule V.

guarantee access to committee hearings by members of the public.¹⁷² The public is only excluded, first, when disclosure of testimony, evidence, or other matters to be considered would endanger national security.

Second, if it would compromise sensitive law enforcement information, or would violate a law or rule of the House.¹⁷³ Third, whenever it is asserted by a member of the committee or a witness that the evidence or testimony at a hearing may tend to defame, degrade, or incriminate any person.¹⁷⁴ The Rules allow participation by the public through witness before committees¹⁷⁵ and submission of written memoranda.¹⁷⁶ The Rules finally allow for public access to records and proceedings of the House.¹⁷⁷

2.6 Challenges in the Legal Framework on Legislative Drafting in Kenya

The fundamental changes brought by 2010 Constitution on the legal framework on legislative drafting came with a number of challenges as analysed below.

2.6.1 Rushed Legislative Drafting Process

Katherina Staronova and Katarina Mathernova argue that the law making system must be a planned and coordinated process which is deliberately devised to provide adequate time for preparation, consultation inside and outside Government and Parliamentary consideration.¹⁷⁸ In the Kenyan situation, there is a tendency of accelerating the legislative drafting process when faced with weighty legislative matters, through reduction of timelines on publication and debate.¹⁷⁹ Bills are published for fourteen (14) days before being formally introduced on the floor of the House.¹⁸⁰ After the first reading, the committees have only twenty (20) days to discuss and submit their reports.¹⁸¹

¹⁷² *ibid*, Rule XI, Clause 2(g)(1).

¹⁷³ *ibid*, Rule XI, Clause 2(g)(2)(A).

¹⁷⁴ *ibid*, Rule XI, Clause 2(k)(5)

¹⁷⁵ *ibid*, Rule XI, Clause 2(j).

¹⁷⁶ *ibid*, Rule XI, Clause 2(m).

¹⁷⁷ *ibid*, Rule VII, Clause 3.

¹⁷⁸ Katherina Staronova and Katherina Mathernova, “*Recommendations for the improvement of the Legislative Drafting Process in Slovakia.*” *op.cit* at.7

¹⁷⁹ Information given by SC 4, State Counsels at Legislative Drafting Department at the A-G’s office.

¹⁸⁰ Kenya National Assembly Standing Orders, *supra* note 121, Clause 120.

¹⁸¹ *ibid*, Clause 127(4).

Some of the reductions may be due to genuine time pressure, with situations at hand requiring quick fix solutions. For instance, the National Accord and Reconciliation Act, 2008, which amended the Constitution and established the Coalition Government, had to be done swiftly as the country was on the verge of civil war after the post- election violence of 2007- 2008. Later the Act was found to have several deficiencies. First the Act under section 3(2) recognized the Prime Minister as the person having the largest number of members of the National Assembly yet section 3(1) subordinated the Prime Minister under the President. And second, section 4 of the Act mandated the Prime Minister to coordinate and supervise execution and functions of Government without elaborating how this will be done. This later proved to be practically challenged as structurally, the ministries were under the firm grip of the President.

The 2010 Constitution sets a very strict calendar of the enactment of laws required for implementation.¹⁸² Legislative drafting is therefore done within very tight timelines, allowing little time for consultations, which negatively affects the quality of legislation. Many reductions of the publication and debate periods are made to meet deadlines set in the Constitution for Bills implementing the Constitution. This arises due to lack of planning, with the A-G forwarding the Bills to Parliament a month and even in other instances weeks to the deadline,¹⁸³ yet he had a whole year to draft the Bills. For instance, 15 Bills were passed by Parliament within four days to meet the 27th August, 2011 Constitutional deadline.¹⁸⁴

In a later audit by CIC, most of the Acts were found to have glaring inconsistencies, errors and unconstitutional provisions.¹⁸⁵ It is against this backdrop that CIOC vowed to put a stop to the rushing of Bills to allow quality debate.¹⁸⁶ However, the trend has not ended with

¹⁸² Constitution, *op.cit*, Fifth Schedule.

¹⁸³ The Standard (August 22, 2011), *Bills: Cabinet in Panic Mode as Deadline Looms*, http://www.standardmedia.co.ke/?articleID=2000041315&story_title=bills-cabinet-in-panic-mode-as-deadline-looms&pageNo=3, (last accessed 10th August, 2013).

¹⁸⁴ Musoku Geoffrey (29th August, 2011), *History Made as Parliament Passes 15 Bills in Four Days*, The Nairobi Star, available at: <http://www.the-star.co.ke/news/article-51542/history-made-parliament-passes-15-bills>, (last accessed 13th August, 2013).

¹⁸⁵ CIC (2011), *Audit Report on the Acts Enacted by Parliament and Assented to by 26th August 2011*, available at: <http://www.cickenya.org/cicoldsite/reports/audit-report-acts-enacted-parliament-and-assented-26th-august-2011>, (last accessed 14th August, 2013).

¹⁸⁶ Wambui Ndonga (October 31, 2011), *No More Rushing Bills in Parliament, CIOC Vows*, Capital FM News, available at: <http://www.capitalfm.co.ke/news/2011/10/no-more-rushing-bills-in-parliament-cioc-vows> (last accessed 15th August, 2013).

delays still evident in 2013. This has created a trend where Parliament enacts weak legislations in a rush to beat the constitutional implementation deadlines.¹⁸⁷

Further, ministerial requests for legislation are always urgent, with a tendency to shorten the publication period for almost all Bills. For instance, the National Assembly recently reduced the publication period for National Police Service Commission (Amendment) Bill, 2013 and the National Police Service (Amendment) Bill, 2013 from fourteen (14) to seven (7) days.¹⁸⁸ This was done despite opinions that the Bills are contrary to express constitutional provisions and have inconsistencies.¹⁸⁹

The fast tracking of Bills has a negative impact on the quality of legislation. The situation results in draft laws of various qualities which vary in compatibility, uniformity and applicability. As a result, new laws have severe inconsistencies and shortcomings and they need to be amended shortly after they come into force and sometimes even before. Inevitably, this makes the subsequent implementation phase difficult as low quality laws are difficult to interpret.

2.6.1.1 South Africa Practice in Enacting Urgent Bills

South African law also allows for fast-tracking of Bills. The member in charge of the Bill or the Leader of Government Business in Parliament submits such requests to the Joint Programme Committee of Parliament.¹⁹⁰ The Committee may dispense with any rule that may impede prompt passage of an urgent Bill, shorten any period within which any step in

¹⁸⁷ Elizabeth Karanja (2011), *Beating the Clock: The Passing of Legislation Required Under the New Constitution*, p. 2, available at: <http://www.africalegalnetwork.com/wp-content/uploads/2012/10/The-passing-of-legislation-required-under-the-new-Constitution-Elizabeth-Karanja-Anjarwalla-Khanna-ALN-Insight-October-2011.pdf>.

¹⁸⁸ National Assembly (2013), *Programme of Parliamentary Business for the Week Commencing Tuesday, July 23, 2013*, available at: http://www.parliament.go.ke/plone/national-assembly/business/programme-of-parliamentary-business/week-commencing-tuesday-july-23-2013/at_multi_download/item_files?name=WEEK%20COMMENCING%20TUESDAY,%20JULY%202013,%202013.pdf.

¹⁸⁹ Ombati, Cyrus (July, 24 2013), *Changes to Police Bills Unconstitutional*, The Standard, available at: http://www.standardmedia.co.ke/?articleID=2000089242&story_title=changes-to-police-bills-unconstitutional, Wahito, Margret (August 4, 2013), *Civil Society Opposed to Changes in Police Acts*, available at: <http://www.capitalfm.co.ke/news/2013/08/civil-society-opposed-to-changes-in-police-acts>, Edwin Mutai (August, 2013), *Human Rights Body Opposes Changes to Police Laws*, Business Daily <http://www.businessdailyafrica.com/Human-rights-body-opposes-changes-to-police-laws/-/539546/1933032/-/f0pdanz/-/index.html>, Standard Digital (July 30, 2013), *Kimaiyo's Amendments to Police Reforms Bill may Fuel Impunity*, available at: http://www.standardmedia.co.ke/m/story.php?articleID=2000089674&story_title=Kimaiyos-amendments-to-police-reforms-bill-may-fuel-impunity (all last accessed 12th August, 2013).

¹⁹⁰ South Africa, Joint Parliamentary Rules, Rule 216.

the legislative process relating to the Bill must be completed, or make any procedural ruling that may facilitate prompt passage of the Bill.¹⁹¹

Such a decision must, however, be taken in a Committee sitting where both the Speaker and the Chairperson of the Council are present.¹⁹² The decision must also be tabled in each House on its first sitting day after the decision was taken, for ratification by the House.¹⁹³ An urgent Bill is defined as one whose delay in its passage may seriously affect the interests of the state or the general public; or one, due to other exceptional circumstances requires prompt passage.¹⁹⁴

The South African law therefore defines Bills which are urgent. It further provides for wide consultations before fast-tracking any Bill, reducing the possibility of misusing the process.

2.6.2 Poor Public Participation Mechanisms

There exists a poor public participation mechanism in Kenya. Staronova and Mathernova, state that public consultation should take place at each stage of legislative process.¹⁹⁵ They observe that public consultation has many benefits as it may *inter alia* give rise to a better understanding of the activities to be regulated and problems to be solved. It may also result in legal solutions which will more likely encourage compliance and it may enable Government to be more responsive to the needs and interests of the affected persons.¹⁹⁶ As Kaguongo notes, public participation legitimises the resulting legislative document and owning of the document hence greater compliance.¹⁹⁷

Public participation requires adequate awareness, so as to enable the public participate from an informed perspective. The public therefore needs to be informed of the existence and contents of the Bill through advertisements and notices in the print media and radio slots, notices on a dedicated parliamentary television channel, media statements by the chairpersons of committees, specific invitations to interest groups, notices on Parliament's web site and

¹⁹¹ *ibid*, Rule 216(2).

¹⁹² *ibid*, Rule 216(3).

¹⁹³ *ibid*, Rule 216(4).

¹⁹⁴ *ibid*, Rule 216(6).

¹⁹⁵ Staronova and Mathernova “*Recommendations for the improvement of the Legislative Drafting Process in Slovakia.*” *op. cit* at.7.

¹⁹⁶ *ibid*.

¹⁹⁷ Kaguongo, “*Introductory Note on Kenya: “History of Constitutional Development in Kenya” op. cit.*

notices posted and distributed at places such as the Parliamentary offices at the constituency level.

Communication through the above channels should give adequate time to the public to synthesize the information and form informed opinions. The public should then be engaged through submission of written memoranda and public hearings when necessary.

As indicated, public participation mechanisms in Kenya are not adequate. There are four factors defining this, first, the law provides for publication of Bills only in the Kenya Gazette, a publication whose circulation is limited to Advocates and very few elite persons. Second, the publication periods are on many occasions shortened, denying the public the 14 days for reading the Bills, synthesizing its contents and forming an informed opinion on the matter.¹⁹⁸ Third, the notices published by the Clerk on behalf of committees give very short deadlines within which the public can submit their views. Finally, most of the views submitted by members of the public are not taken into consideration when the Committees compile their reports.¹⁹⁹ This in a nutshell, falls short of the participatory process as envisaged by the Constitution.

2.6.3 Lack of Evaluation Mechanisms on the Effectiveness of Legislative Instruments

Testing of the effectiveness of legislation in Kenya is not done. The legal framework does not provide for any evaluation mechanisms. A proper legal drafting system should conduct evaluations to establish the impact after the enactment of the legislation. Such evaluation would address a number of questions, first, have the goals been achieved with the current provisions? Second, which side effects have appeared and are these considerable? Third, to what extent have burdens and relief developed? Fourth, has the provision proven itself as practicable and will it be observed and obeyed? Fifth, is there a need for repeal or amendment?

¹⁹⁸ For instance, the publication of the National Police Service Commission (Amendment) Bill, 2013 and The National Police Service (Amendment) Bill, 2013 were shortened from 14 to 7 days.

¹⁹⁹ For instance, Kiprono Kittony, the Chairman of Media Owners Association, protested that the input of the stakeholders was not considered by the Committee in the deliberations of the Kenya Information and Communication (Amendment) Bill, 2013 which was passed with contentious clauses. Daily Nation, dated 4th November, 2013.

Results of such evaluation are potent tools in the hands of the drafter when amending or repealing laws. As Crabbe observes, many laws are passed as a matter of formality and this may lead to the law being largely unknown to the audience intended and may be resisted by the intended audience hence a negative impact on the efficacy of the law as well as the efficacy of Government.²⁰⁰ There is, thus, need to have a mechanism of getting feedback from the affected persons on legislation.

Currently there is no legal framework on feedback mechanisms where those affected by the law are given a chance to interrogate its effectiveness. Thornton argues that draft legislation should be tested by applying it to various hypothetical circumstances. He further argues that an effort should be made to approach the draft from the position of users, perhaps with the aid of small groups to discuss and review the Bill's comprehensibility.²⁰¹

2.7 Conclusion

This Chapter sought to analyse the significant structural changes to the legal framework on legislative drafting in Kenya, as introduced by the 2010 Constitution. The Chapter further analysed the adequacy of the redesigned roles of the Executive and the Legislature who are the main actors in the legislative process. The redesigned processes have brought about major administrative and procedural challenges. The pertinent challenges identified in this Chapter include lack of clear provisions on the origination and drafting of Bills, poor public participation mechanisms in the legislative process and rushed legislative drafting due to the heavy legislative demands set by the Constitution.

The 2010 Constitution has also re-structured institutions engaged in legislative drafting. However, the Constitution and its implementing laws remain vague on certain matters touching on legislative drafting. They further do not address institutional challenges in the legislative drafting process before the enactment of the new Constitution.

These institutions are discussed in detail in the next Chapter.

²⁰⁰ Crabbe, *“Legislative Drafting” op. cit* at 11.

²⁰¹ Thornton, *“Legislative Drafting” Fourth Edition, op. cit* at 173.

CHAPTER THREE

INSTITUTIONAL FRAMEWORK ON LEGISLATIVE DRAFTING IN KENYA

3.1 Introduction

The Constitution 2010 has created, abolished or restructured institutions engaged in legislative drafting in Kenya. This Chapter examines existing institutions before 2010 and how these institutions have been re-structured. The Chapter will further explore the new institutions engaged in legislative drafting which introduced by the Constitution. The Chapter will conclude by examining the adequacy of these institutions and if the challenges existing before have been adequately addressed.

3.2 The Role of the Executive in Legislative Making

At Kenya's independence in 1963, the Government was modelled on the Westminster system with a dual executive where the president exercised the executive authority and a prime minister who was responsible for the day to day running of government assisted by the Cabinet. As Kivuva observes, a frenzy of constitutional amendments began that saw the consolidation and over-concentration of legitimate power and authority in the executive arm of government, and the presidency in particular, at the expense of other arms of government.²⁰²

The president was a representative of a constituency and was allowed to sit in parliament and deliberate on any parliamentary proceedings, had control over the parliamentary calendar, appointed the Attorney-General, appointed MPs to the Cabinet²⁰³ and he also determined the size of Cabinet. In this arrangement, the executive controlled the legislature by rewarding loyalty through appointments to ministerial positions and excluding critics.²⁰⁴

Although the 1963 Constitution recognised parliament to be supreme, in reality, the legislature hardly functioned as a check on the executive.²⁰⁵ Policies and legislative agenda of Government were made by the president and members of his inner circle.²⁰⁶ Parliament passed retrogressive legislation as a result of coercion and fear of unpleasant consequences if

²⁰² Kivuva, "Restructuring the Kenyan State" *op. cit.* at 4

²⁰³ 1963, Constitution, *op.cit.*, Article 17.

²⁰⁴ Barkan JD and Matiangi, F(2009) "Kenya's tortuous path to successful development"
<<http://www.africanlegislatureproject.org/content/kenya-country-report>>

²⁰⁵ *ibid*

²⁰⁶ Kivuva, "Restructuring the Kenyan State" *op. cit.*

an MP was found to be criticising the executive.²⁰⁷ The president participated in parliamentary debates and assented to Bills.

Under the 2010 Constitution, the executive has been restructured to address the inherent challenges posed by the ‘imperial president’. But as Kassop notes, the modern president make law every day.²⁰⁸ She observes that presidents make law unilaterally or jointly where their actions intersect with other branches of Government.²⁰⁹ There has been significant influence of the president’s legislative making authority due to the growth of the presidency in all aspects including numbers, scope of its powers, its increasing specialization and its technical expertise.²¹⁰

In the 2010 Constitution, the president is no longer a member of parliament.²¹¹ All key executive appointments including the appointment of Cabinet Secretaries and the A-G require vetting and approval of the National Assembly. The Parliament’s vetting of executive appointments will ensure that professional and high performers are retained in the public service. It will also end the culture and patronage- based appointments and enhances transparency and accountability in public affairs. Kivuva cautions however, that the vetting may become one avenue of conflict between the executive and the legislature that might impact negatively on the functions of Government.²¹²

He further notes that there is a real danger that the vetting process and appointments may be overly political. Guinier observes that in cases where the president’s party lacks majority in Parliament, the vetting process could degenerate into obstructionism and the "dictatorship of the majority".²¹³ This played out in Kenya during the vetting of Charity Ngilu and Najib Balala as Secretaries to the Cabinet. Although most MPs had reservations on their active participation in Jubilee Coalition campaigns, the Government used its ‘tyranny of numbers’ to approve their nomination.

²⁰⁷ *ibid.*

²⁰⁸ Mark Miller & Jeb Barnes “*Making Policy, Making Law; An Interbranch Perspective*” *op.cit.*

²⁰⁹ *ibid.*

²¹⁰ *ibid.*

²¹¹ Constitution, *op. cit* Article 97.

²¹² *ibid.*

²¹³ Guinier, L (1994). ‘*The tyranny of the majority: Fundamental fairness in representative democracy*’. New York: Free Press.

The 2010 Constitution sought to achieve a balance of power between the three arms Government with clear separation of powers. The Government however, is neither not so watertight nor so compartmentalised.²¹⁴ The president monitors the every step of the legislative process.²¹⁵ The legislative process is not an exclusive domain of the legislature as presidents participate fully in their unfolding.²¹⁶ This legislative partnership, if carried out genuinely, may produce intended policy outcome.²¹⁷

As a result of the President's role in law making, institutional structures are needed to assist him in legislative process. These include the Cabinet, A-G's Office and the Kenya Law Reform Commission. The institutions are examined below.

3.2.1 The Role of the Cabinet in Legislative Making

The 1963 Constitution provided for the Cabinet. The Cabinet consisted of the president, vice-president, the Prime Minister, the Deputy prime Ministers and other ministers.²¹⁸ The size of the Cabinet and who was appointed to it was the prerogative of the president. The Cabinet members had to be either an elected or a nominated MP. This, according to Kivuva, allowed the president perks and powers of patronage thus seriously eroding the principle of checks and balances.²¹⁹ It led to a situation where half of the legislative branch in the coalition government of Mwai Kibaki and Raila Odinga were part of the executive either as ministers or assistant ministers.²²⁰

Although the passage of legislation was vested in the legislature, the executive through line ministries would originate and draft Bills to be enacted by the legislature.²²¹ Any ministry that identified a need for legislation would prepare a non-legal draft crystallising the problems, which the new measure sought to solve, or the objectives it must achieve.²²² The minister would then submit a memorandum to the cabinet seeking Cabinet approval and

²¹⁴ Miller & Barnes, *Supra* note 101.

²¹⁵ This has been currently achieved through the active role of Adan Duale, the Leader of Majority in Parliament, who pushes the Jubilee Coalition Agenda in Parliament.

²¹⁶ *ibid.*

²¹⁷ Peterson, Mark (1990). "Legislating Together: The White House and Capitol Hill from Eisenhower to Reagan". Cambridge, Mass Harvard Press.

²¹⁸ Constitution, *op. cit.*, Article 17.

²¹⁹ Kivuva, "Restructuring the Kenyan State" *op. cit.*

²²⁰ *ibid.*

²²¹ *ibid* at 1.

²²² *ibid.*

outlining the purposes of the proposal. Upon approval by Cabinet, the memorandum and the proposal would be forwarded to the A-G's office to proceed with the drafting of the Bill.²²³

The 2010 Constitution has restructured the Cabinet significantly. The Constitution establishes a cabinet consisting of the President, the Deputy President, the A-G and the Cabinet Secretaries.²²⁴ To address the challenges of the former regime and check on the potential dominance of the executive, the president does not determine the size of the cabinet and Cabinet Secretaries are not members of parliament.²²⁵ The constitution also requires presidential nominees to the position of Cabinet Secretaries to be subjected to vetting and approval by Parliament.²²⁶

The Cabinet Secretaries are also bound by leadership and integrity provisions as enumerated under Chapter Six of the Constitution. The Constitution allows any member of the National Assembly, supported by at least one-quarter of all the members of the Assembly to compel the president to dismiss a Cabinet Secretary on the grounds of gross misconduct, violation of the Constitution or the law or if a Cabinet Secretary has committed a crime under national or international law.²²⁷ Cabinet Secretaries are also accountable individually and collectively to the President and are required to attend before a Committee of Parliament to answer any question concerning matters within their responsibility, as well as provide parliament with full and regular reports concerning matters under their control.²²⁸

This kind of oversight reduces the president's abilities to influence the Cabinet in the performance of its duties.²²⁹ This will also likely to end the culture of non-performers who are retained through nepotism and patronage based appointments and will likely see more professionals go into government service²³⁰.

²²³ *ibid*, p. 2.

²²⁴ Constitution, *op.cit* Article 152.

²²⁵ *ibid*, Article 3

²²⁶ *ibid*, Article 2

²²⁷ *ibid*, Article 156 (2)

²²⁸ Article 153, Recently, Charity Ngilu, the cabinet Secretary for Lands, National Housing and Urban Settlement was summoned by parliament to explain her role in the creation of the Office of Director of Lands in violation of the constitution.

²²⁹ Kivuva, "Restructuring the Kenyan State" *op. cit.* at 12.

²³⁰ *ibid*.

Sihanya however observes that the President's powers under Article 132(2) (b) of the Constitution which include the mandate to direct and co-ordinate the functions of ministries and departments, and assign responsibility for the implementation and administration of any Act of Parliament to a cabinet secretary, is not clear.²³¹ He notes that the President may, for example, commandeer or usurp the statutory powers of a cabinet secretary, or direct the cabinet secretary on how to exercise discretionary powers under a statute.²³²

The Constitution however does not clearly define the roles of Cabinet Secretaries. Their roles are clarified in the National Government Co-ordination Act.²³³ The Cabinet secretaries are responsible for first, coordinating the functions of the national government at the national level.²³⁴ Second, they formulate policy and guide, where required, the implementation of the policy in respect of the respective Ministry, State departments or agencies under them.²³⁵ Third, they act as a link between the State department and the President or Parliament as the case may be.²³⁶

The law, therefore, does not expressly grant them a role in legislative drafting and legislative making. However, their coordination role may be interpreted to include approval of Government legislative proposals. Further, the Constitution authorises a County Executive Committee (CEC) to prepare proposed legislation for consideration by the county assembly.²³⁷ The resultant argument is that CECs in County Governments are akin to the Cabinet in the national Government. The Cabinet is therefore by extension also allowed to propose legislation.

3.2.2 The Role of the Attorney-General in Legislative Drafting

Historically, the A-G is a member of the inner cabinet with other Cabinet members and one of the president's closest confidants and advisers.²³⁸ This gives the A-G the political and legal

²³¹ Sihanya, "The Presidency and the Public Authority in Kenya's new Constitutional Order" *op. cit.*

²³² *ibid.*

²³³ Act No. 1 of 2013.

²³⁴ *ibid* Section 9(1).

²³⁵ *ibid* Section 9(3).

²³⁶ *ibid* Section 9(4).

²³⁷ Constitution *op. cit.*, Article 183(2).

²³⁸ The former US John Kennedy appointed his brother, Robert who had no legal experience.

responsibilities.²³⁹ As Kassop further notes, the A-G's due the proximity and close relationship with the President, political considerations may trump legal ones.²⁴⁰

The 1963 Constitution established the office of the Attorney-General.²⁴¹ It granted it two major roles, first, being the principal legal adviser to the Government.²⁴² Second he was charged with instituting, undertaking and discontinuing criminal proceedings against any person before any court in respect of any offence alleged to have been committed by that person.²⁴³ The President had leeway in appointing the A-G without approval by any other arm of government and without definite term of office.²⁴⁴ As Kivuva observes, the A-G was a presidential surrogate and propagated the president's political agenda, for example selective prosecutions and acquittals.²⁴⁵

The A-G then restructured his office internally. In the structure, there is Treaties and Agreements Department which deals with Government to Government Agreements, International Conventions and Treaties. The Public Prosecution Department was a department under the A-G mandated to institute, undertake or discontinue criminal proceedings.

Civil Litigation Department advise the Government in civil litigation matters, offer legal representation to the Government and other public sector institutions in civil litigation and undertake arbitration for the Government and its agencies.

The department of Registrar-General deals with the registration of Companies, Business Names, Charges and Debentures, Chattels Mortgages, Adoptions, Trade Unions, Books and Newspapers and marriages. The administration of Copyrights is undertaken by the Kenya Copyright Board but administratively, falls under the A-G's office. The Advocates Complaints Commission was mandated to receive and investigate complaints relating to professional misconduct against advocates, their firms and their employees. The

²³⁹ Miller & Barnes, *supra* note 101

²⁴⁰ *ibid.*

²⁴¹ Constitution 1963, *op. cit.*, Article 26.

²⁴² *ibid* Article 26(2).

²⁴³ *ibid* Article 26(3).

²⁴⁴ Amos Wako, the longest serving Attorney-General served for 20 years (1991 - 2011)

²⁴⁵ Kivuva, "Restructuring the Kenyan State" *op. cit.* at 13.

Administrator-General was mandated to administer estates of deceased persons and finally the Legislative Drafting Department which drafted public Bills is analysed below.²⁴⁶

3.2.2.1 Legislative Drafting Department

The department was tasked with drafting of Bills, subsidiary legislation and notices of appointment to State Corporations, Constitutional Offices and to participate in law revision initiated by the Attorney- General.²⁴⁷ The department was also responsible for publishing Bills, Acts of Parliament and subsidiary legislation in the Kenya Gazette. The Department received drafting request in form of a zero-draft from the ministry concerned once all the policy issues have been settled.²⁴⁸ This in itself poses challenges as drafters are reduced to mere editors as they are confined to the superficial examination of the draft. As Simamba notes, a drafter must gain a clear understanding of the intended legislation and must review the factual framework that forms the background of the drafting request.²⁴⁹ It also poses the challenge of misunderstanding the draft as there is an assumption that a proper legislative plan had been conceived at the ministerial level.²⁵⁰

The 2010 Constitution establishes the office of the Attorney-General.²⁵¹ In order to enhance the doctrine of separation of powers, the A-G is no longer an *ex-officio* member of Parliament. The President's unilateral power to appoint the A-G has been curtailed as the President appoints and Parliament vets, and approves the nomination. The A-G is also bound by leadership and integrity provisions as enumerated under Chapter Six of the Constitution.

The A-G is charged with two functions, first being the principal legal adviser to the Government²⁵² and second, representing the national Government in court or in any other legal proceedings to which the national Government is a party, other than criminal proceedings.²⁵³ The Constitution established an independent office of the Director of Public Prosecutions (DPP) to take over criminal prosecution which was formally a function of the

²⁴⁶ Available at <http://www.attorney-general.go.ke/index.php/departments> accessed on 29th July, 2013.

²⁴⁷ *ibid.*

²⁴⁸ Attorney General (2002), *Circular op.cit.*

²⁴⁹ Bilika H Sibamba, (2007) the Loophole Journal of the Commonwealth Association of Legislative Counsel: "Managing increasing Government expectations with respect to Legislation while maintaining quality: An Assessment of developing jurisdictions" (Presented at the CALC conference, Nairobi Kenya, 13-15 September, 2007.

²⁵⁰ *ibid.*

²⁵¹ Constitution *op.cit.*, Article 156

²⁵² *ibid* Article 156(4)(a).

²⁵³ *ibid* Article 156(4)(b).

A-G.²⁵⁴ This according to Kivuva, is a milestone because it has the potential to improve the delivery of justice in the country.²⁵⁵ The DPP have powers to direct the Inspector of Police to investigate any case as this departs from the former practice where the A-G, who was the president's surrogate was head of prosecution.²⁵⁶

Although the Constitution is largely muted on the A-G's role as a drafter of Government Bills, the Constitution mandates the A-G to coordinate with the Commission for the Implementation of the Constitution (CIC) and the Kenya Law Reform Commission (KLRC) in preparing for tabling in Parliament the legislation required to implement the Constitution.²⁵⁷

In addition, the Constitution allows an Act of Parliament or the president to allocate additional functions to the office.²⁵⁸ Parliament, in the reliance on this Article, enacted the Office of the Attorney-General Act, 2013. The Act defines other functions of the A-G in addition to those stipulated under Article 156 of the Constitution.

The A-G is responsible for advising Government Ministries, Departments, Constitutional Commissions and State Corporations on legislative and other legal matters and advising the Government on all matters relating to the Constitution, international law, human rights, consumer protection and legal aid. However, there has been a debate on the role of the A-G in advising Constitutional Commissions and State Corporations. As Sihanya notes, the Constitutional Commissions, unlike the former Commissions are administratively and financially delinked from the executive.²⁵⁹ This gives these commissions autonomy. CIC, for example, utilises legal services from private legal practitioners as opposed to utilising legal services of the A-G.

²⁵⁴ *ibid*, Article 157.

²⁵⁵ Kivuva, "Restructuring the Kenyan State" *op. cit.* at 13.

²⁵⁶ Constitution *op.cit* Article 157.

²⁵⁷ *ibid* Article 261(4) and Sixth Schedule Section 6(b).

²⁵⁸ *ibid* Article 156(4)(c).

²⁵⁹ Sihanya, "The Presidency and the Public Authority in Kenya's new Constitutional Order" *op. cit.*

Further, the A-G negotiates, drafts, vets and interprets local and international documents, agreements and treaties for and on behalf of the Government and its agencies. The A-G also coordinates reporting obligations to international human rights treaty bodies to which Kenya is a member or on any matter which member States are required to report.

The A-G also reviews and oversees legal matters pertaining to registration of companies, partnerships, business names, societies, adoptions, marriages, charities, chattels, hire purchase, coat of arms and administration of estates and trusts. In addition, the A-G, in consultation with the Law Society of Kenya, advises the Government on the regulation of the legal profession, represents the national Government in all civil and constitutional matters in accordance with the Government Proceedings Act, Cap. 40. The A-G represents the Government in matters before foreign courts and tribunals and performs any function as may be necessary for the effective discharge of the duties and the exercise of the powers of the Attorney-General.

Finally, the A-G is responsible for drafting legislative proposals for the Government and advising the Government and its agencies on legislative and other legal matters. This latter function has been relied on to firm up the school of thought that the A-G should remain responsible for drafting of Government sponsored legislation, under the pre-2010 structure and process. The proponents of this school therefore, argue that the Constitution 2010 has not changed the position on drafting of Government sponsored Bills.²⁶⁰ It has only changed the process of introducing the same to Parliament, leaving the role of the A-G in the drafting process unscathed.

3.2.3 The Role of the Kenya Law Reform Commission in Legislative Drafting

The Kenya Law Reform Commission (KLRC) was established in 1982 to aid in systematic development and reform of the law.²⁶¹ Its role in origination of Bills was in developing programmes for the examination of different branches of law with a view to reform, including recommendations as to the agency by which that examination should be carried.²⁶²

²⁶⁰ See Note 23 and 24.

²⁶¹ Vide Law Reform Commission Act, 1982, Cap 10 Laws of Kenya.

²⁶² *ibid* Section 3(1)(b).

Further, the Commission was tasked to examine particular branches of law and then formulate, by means of draft Bills or otherwise, proposals for reform.²⁶³

The Commission was also tasked to provide advice and information to ministries and departments in the Government with regard to the reform or amendment of a branch of the law appropriate to that ministry or department.²⁶⁴ The placement of the Commission under the A-G meant that the Commission only originated proposals and the responsibility of approval, drafting and originating the final Bill was the role of the AGs office.

Following the re-organization of Government ministries and functions after the formation of coalition Government in 2008, the Commission was moved administratively to the then Ministry of Justice, National Cohesion and Constitutional Affairs.²⁶⁵ The Act was however not amended accordingly as it still referred to the Attorney-General as the directing authority.

The above mandate was restricted and heavily subordinate to the A-G. In fact, contrary to the legal requirement that the Commission examine particular branches of the law and formulate draft Bills and proposals for reform, the Attorney-General would commonly establish task forces with a law reform mandate outside the ambit of the Commission.²⁶⁶

Although the Commission was mandated to advise departments and ministries with regard to amendments to any branch of the law relevant to them, the departments and ministries would routinely engage consultants to reform their statutes.²⁶⁷ The above constraints reduced the ability of the Commission to properly discharge its mandate.

The 2010 Constitution recognizes the Kenya law Reform Commission (KLRC) and mandates it to co-ordinate with the Commission for the Implementation of the Constitution (CIC) and the Office of the A-G in preparing for tabling in Parliament, the legislation required to implement the Constitution.²⁶⁸

²⁶³ *ibid* Section 3(1)(c).

²⁶⁴ *ibid* Section 3(1)(e).

²⁶⁵ This was effected vide Presidential Circulars No. 1 of 2003 and of 2008.

²⁶⁶ Examples of these taskforces include the task force on children, sexual offences and education.

²⁶⁷ An example is the Capital Markets Authority contracted International Securities Consultants to draft the Securities and Investments Bill, 2011 and The Capital Markets Authority Bill, 2011.

²⁶⁸ *ibid* Sixth Schedule Clause 6 (b).

The KLRC is currently established under the Kenya Law Reform Commission Act, 2013. The functions of the Commission are to first, work with the Attorney-General and the Commission for the Implementation of the Constitution (CIC) in preparing for tabling, in Parliament, the legislation and administrative procedures required to implement the Constitution.²⁶⁹ Second, to provide advice, technical assistance and information to the national and county governments with regard to either reform or amend of a branch of the law.²⁷⁰ Third, to formulate and implement programmes, plans and actions for the effective reform of laws and administrative procedures at national and county government levels.²⁷¹ Fourth, to consult and collaborate with State and non-State organs, departments or agencies in the formulation of legislation to give effect to the social, economic and political policies for the time being in force.²⁷² Fifth, to formulate, by means of draft Bills or otherwise, any proposals for reform of national or county government legislation²⁷³ and sixth, upon request or on its own motion, advise the national or county governments on the review and reform of their legislation.²⁷⁴

The Act is silent on where the Commission is administratively domiciled save for a provision that it shall be responsible to the Cabinet Secretary in charge of matters relating to law reform. Recently, the AG has made appointment of members to the Commission under the Kenya Law Reform Commission Act.²⁷⁵ This creates confusion in respect of its relationship with the office of the AG. Both are constitutional offices and it is arguable that both institutions are horizontally the same in hierarchy. KLRC and A-G's office are both mandated to advise on legislative matters and both institutions undertakes the actual drafting of legislation.

The Act is also silent on how the Commission shall advise the county government on legislation and it does not place any obligation on the county governments to seek the advice of the Commission on legislative matters.

²⁶⁹ Section 6(1)(b) Kenya Law reform Commission Act, 2013.

²⁷⁰ *ibid* 6(1)(c).

²⁷¹ *ibid* 6(1)(e).

²⁷² *ibid* 6(1)(f).

²⁷³ *ibid* 6(1)(g).

²⁷⁴ *ibid* 6(1)(i).

²⁷⁵ Gazette Notice no. 13448 of 4th October, 2013.

In comparison to South Africa, there exists a South African Law Reform Commission (SALRC). The role of the Commission is purely advisory. The Commission is charged with the responsibility of first, investigating matters appearing on a programme approved by the Minister of Justice and Constitutional Development and make recommendations to Government Departments for the development, improvement, modernisation or reform of the law. Second, the Commission advises on matters including the repeal of obsolete or unnecessary provisions, removal of anomalies and bringing uniformity in the various parts of the Republic. Third, consolidation or codification of any branch of law and fourth, take steps to make common law readily available.²⁷⁶

Though SALRC is authorised to prepare draft legislation which is the legislation is then submitted to the Minister for approval by the Cabinet and certification by State Law Advisers (SLA) before tabling in Parliament.²⁷⁷ SALRC, therefore, only executes its mandate through Ministries.

3.3 Parliament's Role in Legislative Drafting Process – The Directorate of Legal Affairs

Prior to 2007, the legal work of the Parliamentary Service Commission was undertaken by the office of the A-G on request of the Clerk. The reasoning behind establishing the Directorate was fourfold.²⁷⁸ First, the Attorney- General is the Principal Legal advisor to Government and was a member of the Cabinet and the National Assembly. It was therefore argued that the continued procurement of legal services from the Attorney-General diminished the status of Parliament and equated it to a department within the Executive.

Second, in the spirit of separation of powers, Parliament needed to distance itself from the control of the Executive and exert its supremacy. This was achieved by Parliament taking control of the management and administration including the modalities for procuring its legal services.

Third, since the role of Parliament includes the making and unmaking of Government, legislation, imposition of tax to raise revenue, oversight and making decisions for the distribution of natural resources, it would, therefore, be impractical to seek legal advice from

²⁷⁶ South African Law Reform Commission Act 19 of 1973, section 4.

²⁷⁷ *ibid*, section 5(5).

²⁷⁸ <http://www.parliament.go.ke/plone/about-parliament/parliamentary-departments-legal>
(accessed on 29th July, 2013)

the A-G who is the principal legal adviser of the Government which Parliament is exercising oversight over.

Fourth, there was need for prompt, cost effective and efficient provision of legal services which the office of the Attorney-General would not provide due to capacity constraints and prioritization.²⁷⁹ Parliament also needed a legal adviser who understands how Parliament works in order to offer advice that is well suited to Parliament's operations.²⁸⁰

The functions of the Directorate were first, to provide legislative services to the National Assembly, its Committees and the Parliamentary Service Commission.²⁸¹ Second, drafted private Members Bills upon the passage of motions for introduction of such Bills.²⁸² Third drafted amendments to Bills to be proposed to the House by any Member of Parliament or Committee of Parliament and fourth, ensured that the Bills passed comply with the Constitution.²⁸³

The 2010 Constitution has made significant changes to the Legislature as an institution of representation and law making. The National Assembly has retained its role in of legislation, law making and oversight of the executive.²⁸⁴ The Senate also has a legislative role in debating and approving Bills concerning counties.²⁸⁵

The 2010 Constitution establishes the Parliamentary Service Commission.²⁸⁶ The Commission is charged with the responsibility of among others, constituting offices in the parliamentary service and supervising office holders.²⁸⁷ The previous Directorate of Legal Affairs has been reconstituted into Directorate of Legal Services. The department is headed by a Director, Legal Services who coordinates the legal services function in the National Assembly.²⁸⁸

²⁷⁹ This was the time when Constitutional Review process was on-going hence the A-G was fully engaged. The Drafting Department within the A-G's Office had only 15 drafters whom 3 had a Diploma in Legislative Drafting and where busy with the Constitutional Review Process.

²⁸⁰ *ibid.*

²⁸¹ *ibid.*

²⁸² *ibid.*

²⁸³ *ibid.*

²⁸⁴ Constitution *op. cit.*, Article 95

²⁸⁵ *ibid.*, Article 96

²⁸⁶ *ibid.*, Article 127 (1)

²⁸⁷ *ibid.*, Article 127 (6).

²⁸⁸ <http://www.parliament.go.ke/plone/about-parliament/parliamentary-departments-legal> (last accessed 6th November, 2013)

The department is tasked with first, the administration and overall management of the legal services provided to the National Assembly. Second, it is charged with the responsibility of formulating and disseminating legal drafting policy in the National Assembly. Third, the department liaises with the Director, Litigation and Compliance and the Office of the Attorney-General on litigation matters involving the National Assembly. Fourth, giving legal opinions on matters before or relating to the National Assembly and Parliament and giving legal advice on commercial matters. Fifth, providing any other legal services that may be required by the National Assembly, its Committees, Parliament, the Speaker or the Clerk and, carrying on legal research on matters before the Directorate.²⁸⁹

The role of drafting of individual member initiated Bills has been left out in the new roles of the Directorate thereby leaving the Directorate with no clear defined role in legislative drafting.

The above has informed a push to have this Directorate take over and be in charge of drafting services for all Bills, both Government and individual member initiated Bills. The proponents of this school of thought argue that Bills should now originate from within Parliament.²⁹⁰ They refer to the Constitution and practice to argue for this position. The Constitution stipulates that any Bill may originate in the National Assembly.²⁹¹ Further the Constitution provides that a Bill may be introduced by any member or Committee of the relevant House of Parliament.²⁹² The Constitution finally states that every person has a right to petition Parliament to consider any matter within its authority, including enacting, amending or repealing any legislation.²⁹³ The proponents of this view further argue that the Constitution has entrenched complete separation of powers with the A-G and Cabinet Secretaries are no longer members of Parliament, therefore delinking the role of generation and passage of laws exclusively to Parliament with the emergence of powerful Committees.

²⁸⁹ *ibid.*

²⁹⁰ School of thought fronted by PC 1, PC 3 and PC 4, Parliamentary Counsels at the Legal Services Department, during an interview on 19th July, 2013, at Nairobi. Their views were echoed by CIC 1, a legal officer working with the CIC, & ADV 2, ADV 3 and ADV 5, Advocates knowledgeable on legislative Drafting.

²⁹¹ Constitution, *op. cit.*, Article 109(2).

²⁹² *ibid* Article 109(5).

²⁹³ *ibid* Article 119(1).

The proponents further argue that the revamped Legal Services Department of Parliament should take over the drafting of Bills from the Legislative Drafting Department at the A-G's Office.²⁹⁴ This position would leave the AG with no role to play in originating and drafting of Bills.

3.4 Constitutional Commissions Engaged in Legislative Making

The 2010 Constitution establishes constitutional commissions and independent offices. As Sihanya, observes, the introduction of Constitutional commissions and Independent Offices, the 2010 Constitution seems to have introduced a fourth arm of government in the constitutional framework.²⁹⁵ He argues that the rationale of establishing these commissions is to protect the sovereignty of the people, secure observance by all state organs of democratic values and principles and promote constitutionalism.²⁹⁶

The constitutional commissions engaged in legislative making are the Commission for the Implementation of the Constitution (CIC) and the Constitution Implementation Oversight Committee (CIOC), which are analysed below.

3.4.1 The Legislative Role of the Commission for the Implementation of the Constitution (CIC)

The Constitution provides for the formation of the Commission for the Implementation of the Constitution (CIC).²⁹⁷ It identifies four functions of the Commission. First, to monitor, facilitate and oversee the development of legislation and administrative procedures required to implement the Constitution. Second, to co-ordinate with the Attorney-General and the Kenya Law Reform Commission in preparing, for tabling in Parliament, the legislation required to implement the Constitution.

Third, to report regularly to the Constitutional Implementation Oversight Committee on progress in the implementation of the Constitution and any impediments to its implementation. And fourth, to work with each constitutional commission to ensure that the letter and spirit of the Constitution is respected.

²⁹⁴ See note 292.

²⁹⁵ Sihanya, *"The President and Public authority in Kenya"* *op. cit.*

²⁹⁶ *ibid* at 21.

²⁹⁷ Constitution, *op. cit.*, Sixth Schedule, section 5 (1).

The CIC is to be dissolved five years after its establishment or at the full implementation of the Constitution as determined by Parliament, with the National Assembly retaining discretion to extend its life. The Commission is operationalized by the Commission for the Implementation of the Constitution Act, 2010, which merely repeats its functions as stipulated in the Constitution.

Its coordination role in preparing, for tabling in Parliament, the legislation required to implement the Constitution grants CIC a major role in legislative drafting during the period of its existence. Though its mandate is limited to legislation required to implement the Constitution of Kenya 2010, this mandate has put CIC on a collision course with the A-G. A tug of war has played out between the two institutions, revolving around four issues.

First is on the delay by the A-G in facilitating Cabinet approval and forwarding the Bills to the National Assembly after the CIC has approved them.²⁹⁸ This delay leads to the Bills being presented to Parliament a few days before Constitutional deadlines, necessitating Parliament to rush the enactment period and reduce the periods of publication for the Bills.

Second, the A-G is accused of forwarding to the National Assembly certain Constitutional Bills without seeking input from CIC.²⁹⁹ This, the CIC feels, undermines their mandate and is contrary to the Constitution. Third, the A-G and Cabinet are accused of engaging in further amendments that compromise the Constitutionality of certain Bills, soon after the CIC's approval.³⁰⁰ Such amendments are viewed by CIC as having not been thoroughly scrutinized and meant to serve selfish interests. They contribute to poor quality Acts, which have to be

²⁹⁸ Ndonga, Wambui (July, 19, 2011) *Blame Game over Delayed Bills*, Capital FM News, available at: <http://www.capitalfm.co.ke/news/2011/07/blame-game-over-delayed-bills>, , The People Daily (July 28, 2013), *Githu Denies role in Delay of Enacting Bills by MPs*, available at: <http://www.thepeople.co.ke/12428/githu-denies-role-in-delay-of-enacting-bills-by-mps>, (all last accessed 15th August, 2013)

²⁹⁹ Opiyo, Peter (December 23, 2011), *Nyachae, Githu Clash Over Drafting of Constitutional Bills*, The Standard, available at: https://www.standardmedia.co.ke/?articleID=2000048809&story_title=Nyachae,-Githu-clash-over-drafting-of-constitutional-Bills, Peter Opiyo (December 24, 2011), *Nyachae Team Cries Foul Over Key Bills*, The Standard, available at: https://www.standardmedia.co.ke/?articleID=2000048876&story_title=Nyachae-team-cries-foul-over-key-Bills, (all last accessed 13th August, 2013). The AG had tabled in Parliament Judicature (Amendment) Bill, 2011, Contingencies Fund and County Emergency Funds Bill, 2011 and the National Government Loans Guarantee Bill, 2011, without seeking CIC's input.

³⁰⁰ Emeka-Mayaka Gekara and Kipchumba Some (April 16, 2011), *Nyachae Protests Change in Key Bills*, available at: <http://allafrica.com/stories/201104180156.html>, Moses Njagih (August 1, 2013), *CIC says Information Ministry Tweaked Media Bill Despite Pact*, available at: http://www.standardmedia.co.ke/?articleID=2000089905&story_title=cic-says-ministry-tweaked-media-bill-despite-pact, (all last accessed 9th August, 2013).

amended even before implementation. The CIC thus, seeks to have final say on the Bills before they are forwarded to the National Assembly.

The final issue is on lack of respect. The A-G has been accused of chiding the CIC as composed of, “people who are not permanently in office, whose terms would end in two years or so.”³⁰¹ The A-G is further reported to have opined that the role of the Government to originate Bills did not change in the new Constitution, with CIC’s role is merely advisory and that the A-G’s office is independent and cannot be supervised by CIC.³⁰² The above comments are seen by CIC to be demeaning to their status and roles and disrespectful of their constitutional mandate.

The above wars are partly due to lack of clarity in the law on the exact roles of these two institutions.

In contrast, South African law grants State Law Advisers (SLA) a certification role, thus, a final say on the content of Bills to be tabled before the House. Further the US law allows Committees of Parliament, through Office of the Legislative Counsel, House of Representatives to alter Bills before presenting them to the floor of the House, grating the office the final say on the content of Bills before the House. The laws in the two countries, thus, pre-empt any conflict that may arise out of duplicity of roles.

3.4.2 The Legislative Role of the Constitutional Implementation Oversight Committee

The Constitution establishes the Constitutional Implementation Oversight Committee (CIOC) charged with the responsibility of overseeing the implementation of the Constitution.³⁰³ The functions of the Committee include, receiving regular reports from the CIC on the implementation of the Constitution. These reports include, first, reports concerning, the preparation of the legislation required by the Constitution and any challenges in that regard.³⁰⁴ Second, the process of establishing the new commissions.³⁰⁵ Third, the process of establishing the infrastructure necessary for the proper operation of each county

³⁰¹ Felix Olick (December 23, 2011), *AG Fights Back, Terms CIC Claims ‘Irresponsible,’* The Standard, available at: <http://www.standardmedia.co.ke/?articleID=2000048831&pageNo=1>, (last accessed 13th August, 2013).

³⁰² *ibid.*

³⁰³ Constitution *op. cit* Sixth Schedule Clause 4.

³⁰⁴ *ibid* paragraph (a)(i).

³⁰⁵ *ibid* paragraph (a)(ii).

including progress on locating offices and assemblies.³⁰⁶ Fourth, the devolution of powers and functions to the counties.³⁰⁷ And, fifth, any impediments to the process of implementing the Constitution.³⁰⁸

The Committee is further tasked to coordinate with the A-G, the CIC and relevant parliamentary Committees to ensure the timely introduction and passage of the legislation required by the Constitution. It is tasked to take appropriate action on the reports including addressing any problems in the implementation of the Constitution.

3.5 Challenges in the Institutional Framework on Legislative Drafting in Kenya

The 2010 Constitution, by either introducing new institutions or re-structuring institutions charged with legislative drafting as analysed above, has brought a number of challenges to the system. These challenges include, lack of clarity on the origination and drafting of Bills, multiple institutions with overlapping mandates leading to duplication, poor coordination between these multiple institutions and capacity constraints. The challenges are analysed below.

3.5.1 Lack of Clarity on Origination and Drafting of Bills

The Constitution is not clear on the role of initiation and drafting of Bills, both Government and individual member initiated Bills. Though the Office of the Attorney-General Act, 2013 places the role of drafting Government initiated legislation on the A-G, there is no provision on individual member initiated Bills. The Cabinet is not granted any role at law in origination of Bills. There is divergent opinion as to which department, between the Legislative Drafting Department under the A-G's office and Directorate of Legal Services under Parliament, is responsible for drafting of government Bills.

There were strong opinions from respondents in both departments on the responsibility for drafting, with both claiming ultimate responsibility. A presidential system is characterized by clear separation of powers, leaving Parliament to be in charge of the whole legislation process, including drafting of Bills. The law in Kenya is not clear on this matter.

³⁰⁶ *ibid* paragraph (a)(iii).

³⁰⁷ *ibid* paragraph (a)(iv).

³⁰⁸ *ibid* paragraph (c).

3.5.1.1 South African Provisions on Origination and Drafting of Bills

South African Constitution has more clarity on the role of the Executive in initiation of Bills. It identifies preparing and initiating legislation as a function of the Executive.³⁰⁹ It further allows Cabinet members or Deputy Ministers to introduce a Bill in the National Assembly.³¹⁰ The National Assembly Standing Orders³¹¹ further allow the Executive, through the Ministers or their deputies to prepare and initiate and introduce Bills in the National Assembly.³¹²

The National Assembly Standing Orders expressly authorises the National Assembly to initiate or prepare legislation, except money Bills³¹³ and consider, pass, amend or reject any legislation before the Assembly.³¹⁴ It therefore grants concurrent powers to both the Executive and National Assembly to initiate and prepare legislation. In practice, with a few exceptions, all Bills tabled before Parliament emanate from the Executive.³¹⁵ The respective departments or ministries initiate and draft most Bills in South Africa, utilizing departmental specialists, sometimes assisted by consultants, after consultation with interested persons and institutions.³¹⁶

3.5.1.2 The US Provisions on Origination and Drafting of Bills

The US Constitution enacts a system of clear separation of powers similar to Kenya, with the role of Executive in initiation of legislation muted. The President is obligated by the Constitution to periodically make a State of the Union address, and recommend to Congress for their consideration such measures as he shall judge necessary and expedient.³¹⁷

Following the President's message to Congress on the State of the Union, the President himself, a member of the President's Cabinet or the head of an independent agency may originate executive communication, in the form of a message or letter transmitting a draft of a

³⁰⁹ South African Constitution *op. cit.*, Article 85(2)(d).

³¹⁰ *ibid* Article 73(2).

³¹¹ Parliament of the Republic of South Africa (2011), *Rules of the National Assembly*, 7th Edition, [http://www.parliament.gov.za/live/content.php?Category_ID=147\(last](http://www.parliament.gov.za/live/content.php?Category_ID=147(last) accessed 18th August, 2013).

³¹² *ibid*, Rule 231.

³¹³ South African Constitution *op.cit* Article 55(1)(b).

³¹⁴ *ibid* Article 55(1)(a).

³¹⁵ Parliament of the Republic of South Africa (2013), *Reviewing The Legislative Process in Parliament*, a Report prepared by the Joint Task Team on the Legislative Process in Parliament, p. 2, available at: <http://www.parliament.gov.za/content/Reviewing%20the%20legislative%20process%20in%20Parliament%20-%20as%20presented%20to%20the%20JRC%20on%2013%20Nov%202008-1.doc>, (last accessed 16th August, 2013).

³¹⁶ *ibid*.

³¹⁷ The United States Constitution, Article II, Section 3.

proposed Bill to the Speaker of the House of Representatives and the President of the Senate.³¹⁸ This is currently a prolific source of legislative proposals to the Congress. The Standing orders provide for receipt by the Speaker³¹⁹ of executive communication from the President and other members of the Executive,³²⁰ which is then referred to the appropriate Committees without debate.³²¹ The departments or ministries are therefore responsible for initiating and preparing Government legislation.

The US House of Representatives Rules further empower any member of the Congress to introduce any Public Bill at any time while the House is in session by delivering it to the Speaker for referral to the Committees.³²² The role on initiating and preparing legislation is therefore an obligation concurrent on both individual members and the Executive.

Due to lack of delimitation of matters on which the Executive can exclusively legislate on, individuals, NGOs and lobby groups take advantage to lobby individual members of the Congress to sponsor Bills for introduction to the House. The respective Committees are therefore left with the role of sieving through multiple Bills on the same matter from members and the Executive so as to produce harmonised Bills.

Since much of the drafting for formal introduction to the floor of the US House of Representatives is done at the Committee level, there has been established the Office of the Legislative Counsel House of Representatives.³²³ This office is mandated, first, to independently advise and assist the House, “in the achievement of a clear, faithful, and coherent expression of legislative policies.”³²⁴ Second, it also prepares Bills for introduction to the Congress and are in charge of drafting legislation at all stages of the legislative process.³²⁵ Third, it provides impartial and confidential drafting services to all Members, House Committees and subcommittees.³²⁶

³¹⁸ Sullivan, V. John (2007). *How Our Laws Are Made*, available at: <http://www.gpo.gov/fdsys/pkg/CDOC-110hdoc49/pdf/CDOC-110hdoc49.pdf>, (last accessed 15th August, 2013).

³¹⁹ US Congress (2013), *Rules of the House of Representatives*, Rule XII, Clause 8, available at: clerk.house.gov/legislative/house-rules.pdf, (last accessed 16th August, 2013).

³²⁰ *ibid*, Rule XII, Clause 1.

³²¹ *ibid*, Rule XIV, Clause 2.

³²² US Congress Rules, *op. cit*, Rule XII, Clause 7.

³²³ Vide Legislative Reorganization Act of 1970; 2 U.S.C. 281, enacted on October 26, 1970.

³²⁴ *ibid*, Title V, sec. 501,

³²⁵ US House of Representatives (2012), *Office of the Legislative Counsel House of Representatives*, available at: www.house.gov/legcoun, (last accessed 17th August, 2013).

³²⁶ Ida A. Brudnick (2013), *Support Offices in the House of Representatives: Roles and Authorities*, p. 4, available at: www.fas.org/sgp/crs/misc/RL33220.pdf, (last accessed 15th August, 2013).

There is, however, no general requirement that Members utilize this service for their drafting needs when preparing Bills to be submitted to the Speaker for referral to the Committees.³²⁷ Bills may originate from any source in the US, but the ultimate role of drafting is placed on the Office of the Legislative Counsel, House of Representatives, as opposed to Kenya's Parliament Legal Services Department, which has a much lesser role in drafting of Bills.

3.5.2 Multiplicity and Duplicity of Institutions Charged with Legislative Drafting

The 2010 Constitution has created institutions with overlapping roles in legislative drafting. The institutions established by the former legal framework are still in existence with no clear provisions on their drafting role. The presidential system of government has brought about unprecedented powerful Committees of Parliament with the Leader of Majority acting as a "messenger" between the Executive and the Legislature with no clear role of the Executive in the drafting process.

These multiple centres have also brought about compartmentalization of the legislative process and power struggles. With this multiplicity of institutions engaged in legislative formulation, there are serious coordination problems in the actual drafting of legislation. The shift in legal framework has left institutions confused as to their actual role in the formulation and drafting of Bills.

3.5.2.1 South African Institutions Engaged in Legislative Drafting

South Africa has fewer institutions involved in drafting and passage of Bills. The respective departments or ministries draft the Bills, utilizing departmental specialists, sometimes assisted by consultants, after consultation with interested persons and institutions. The Minister then tables the Bill for consideration by the Cabinet.

Once approved by Cabinet, the Bills are forwarded to the State Law Advisers (SLA), whose mandate is to certify that the Bills are consistent with the Constitution and are properly drafted in the form and style which conforms to legislative practice.³²⁸

³²⁷ *ibid.*

³²⁸ National Assembly Rules, *op. cit* Clause 243(1A).

Parliamentary Rules demand that the SLA certify the Bills before they are tabled in Parliament by the Minister or Deputy Minister.³²⁹ The SLA in certifying the Bill in practice check compliance with the Constitution, check compliance with the rule of law and check whether the Government policy is properly captured in the draft Bill and furnish an opinion with regard to classification of the draft Bill.³³⁰ SLAs can propose amendments in areas they feel necessary and the amendments must be implemented before they certify the Bill.

3.5.2.2 The US Institutions Engaged in Legislative Drafting

The US has departments or ministries being tasked to draft Government Bills, with the Office of the Legislative Counsel, House of Representatives being ultimately responsible for the final drafting for purposes of introduction on the floor of the House. Since Committees can effect changes to Bills referred through executive communication, the Committees through the Office of the Legislative Counsel have the final say on the content of Bills tabled in the House.

3.5.3 Poor Coordination by Institutions Engaged in Legislative Drafting

There is poor coordination at the Bill inception stage between the actors engaged in legislative drafting. The Ministries concentrate on producing a legislative draft, with insufficient prior consideration of the policy which it should reflect. Thus, instead of drafters converting a concept paper into a clearly enforceable normative rules, the law is drafted from scratch without clear vision and picture of what the law is supposed to tackle, and it what way. This is due to disconnect between the drafters and policy makers.

Further, although drafting should be undertaken by officials at ministries who are principally engaged in drafting of legislation, it is currently done by substantive departments with no specialized drafting practice or by legal departments who do not have the actual substantive knowledge on a particular subject.

³²⁹ *ibid.*

³³⁰ Phuti wa Setati (2009) *State Law Advisers*, a paper presented at the IMASA National Conference, available at: <http://www.imasa.org.za/dmdocuments/presentations2009/STATE%20LAW%20ADVISERS.ppt>, (last accessed 15th August, 2013).

There is little or no coordination among legislative and substantive specialists in separate departments within the ministry. Consequently, some laws are drafted only by the specialist in the substance of a particular matter, with little or no input from the drafters. This poses challenges during parliamentary debate due to legal inadequacies and major delays occur when the draft law is returned for rewriting several times. Conversely, some laws are drafted by drafting experts who draft in a policy vacuum leading to loss in the intent and purpose of legislation. Poor coordination between the various actors in the legislative drafting process and non-participation of drafters in the policy formulation stage has profound setbacks on the legislative product as it brings about inconsistencies and low quality laws which are difficult to interpret or implement.

3.5.4 Capacity Constraints in the Institutions Engaged in Legislative Drafting

Legal drafters are tasked to translate Government policy into legislation. This stage is crucial for the outcome of quality legislation. According to Crabbe,³³¹ drafters perform an extremely difficult task. They have to think of the past, the present and the future. They have to consider the conduct of the society in the past, deal with the present and lay down rules of conduct for the guidance of the society.³³²

He further observes that drafters are tasked to put themselves into the place of legal practitioners who will move the court based on the provisions of a certain law.³³³ They will also consider the position of a judge who will interpret the law. The drafter will also factor in the intention of the policy maker and finally the Legislature which will debate the drafter's pieces of work and the task requires hours of concentration, planning and strategy.³³⁴ Further, the drafter is also required to have at least basic knowledge of all aspects of law and this requires a well- equipped law library.

The 2010 Constitution sets out a heavy legislative agenda with strict datelines in the process of its implementation.³³⁵ As Kinuhe observes, Legislative Drafting Department in the State Law Office is understaffed. It had only 25 members of staff, against a required total staffing level of 44.

³³¹ Crabbe (1993), *Legislative Drafting, op. cit.*

³³² *ibid.*

³³³ *ibid.*

³³⁴ *ibid.*

³³⁵ The Constitution requires the enactment of 49 pieces of legislation to be enacted within 5 years.

Among these, only 13 were parliamentary counsel, of which only three have obtained a diploma in legislative drafting.³³⁶ She also notes that the Kenya Law Reform Commission lacked a drafting department.³³⁷

Kenya lacks a sufficient pool of skilled legislative drafters. The capacity to undertake research in the Legislative Drafting Department and in Parliament is greatly hampered by lack of resources and skilled human resource.³³⁸

3.6 Conclusion

The Constitution 2010 has re-structured and introduced new institutions engaged in legislative drafting in Kenya. The Chapter explored these institutions and the challenges posed by the new system. A number of challenges emerge, first is the duplication of institutions with no clear definite roles on legislative drafting. This has brought about overlaps, coordination problems and competing interests.

Second, the institutions which were established by the former Constitution with a role in legislative drafting are still in place. These institutions, the A-G's Office and Kenya Law Reform Commission are still in place without a clear role in legislative drafting. These institutions have attempted to re-assert their positions hence a conflict with the new institutions. Third, the Constitution sets out weighty legislative demands within strict timelines in order to operationalize the Constitution. This exerts pressure on the institutions thus compromises on the quality of these laws.

Policy formulation in legislative drafting is an integral part and a prerequisite in drafting quality legislation. Drafters are currently not engaged in policy formulation yet it is a critical component in legislative drafting.

The next chapter examines policy making in the context of legislative drafting.

³³⁶ Kinuhe, "Why Drafting of Kenyan Laws Needs Urgent Revamping" *op. cit.*

³³⁷ *ibid.*, at 2.

³³⁸ Kinuhe, "Why Drafting of Kenyan Laws Needs Urgent Revamping" *op. cit.*.

CHAPTER FOUR

POLICY MAKING IN THE CONTEXT OF LEGISLATIVE DRAFTING

4.1 Introduction

This Chapter examines the current practice in policy formulation in the context of legislative drafting in Kenya. The 2010 Constitution has entrenched participatory and inclusive policy making processes. The Chapter examines the extent which this has been achieved. It will also elaborate on the need for a formal policy process that encompasses the formulation of the problem, design of the concept, strategies, implementation policy analyses and review. It also analyses policy making in the context of private member initiated legislation and its conformity with Government policy.

4.2 Kenya's Policy Development Framework on Legislative Drafting

As Sihanya notes, before the enactment of the new Constitution, participatory law making was achieved at a minimum level by the involvement of legislative organs like the Kenya Law Reform Commission which routinely collected views from the public before drafting Bills.³³⁹ The Constitution now requires all persons making or implementing public policy decisions to ensure participatory process.³⁴⁰ He further observes that the Constitution requires participatory legislative processes at all legislative levels including the Senate, National Assembly, county assemblies, KLRC, A-G's Office, ministerial offices, and constitutional as well as statutory commissions with legislative mandate.³⁴¹

However, the constitutional requirement of participatory policy and legislative processes has not been fully implemented. There is currently no formal framework for the development of policies that underlie the drafting of legislation in Kenya. There are no formal rules or guidelines on the broader policies that encompass the formulation of problem, design of concepts, strategies and policy analyses or design of action plans, regulatory impact studies, monitoring and implementation.³⁴² The practice is that a drafter receives instructions in the form of a layman's draft from the concerned Ministry with a policy paper attached to it.³⁴³ These documents submitted to the drafter and often than not, lack analytical reasoning and data. The documents submitted contains a summary of the principle objects of the Bill and

³³⁹ Sihanya, "The Presidency and Public Authority in Kenya" *op. cit* at 25

³⁴⁰ *ibid.*

³⁴¹ *ibid*

³⁴² Information given by SC 3, a State Counsel at the Ministry of Mining, during an interview on 18th July, 2013 at Nairobi.

³⁴³ Attorney-General's circular, *op.cit.*

how existing legislation affects the subject.³⁴⁴ This summary is often brief which makes it difficult or almost impossible for a drafter to comprehend what transpired during policy deliberations.

Although individual ministries have internal methodologies on policy development, they consider the technical aspect of the final product in the formal legislative process rather than techniques of policy analysis or concept drafting. Most of the time, ministries do not develop a concept paper or action plan prior to drafting of legislation.

Moreover, there are no mechanisms during the policy development phase that would facilitate consensus with all stakeholders at the policy formulation phase when the process is best affected.³⁴⁵ An example is the Kenya Information and Communication (Amendment) Bill, 2013 where stakeholders are at loggerheads with the legislature over contentious provisions. The media stakeholders are citing inadequate consultations and mischief.

The Bill proposes to empower the Communications and Multimedia Appeals Tribunal to impose a fine of Kshs. 20 million on any media enterprise and a fine of not more than Kshs.1 million on any journalist adjudged to have violated the Act or Code of conduct.³⁴⁶ This, to the media stakeholders, is too punitive and the Tribunal can use its big stick any way it wants to, without justification and without rules.³⁴⁷ They further argue that to make matters worse, the tribunal is directly appointed by the Cabinet Secretary for Information.³⁴⁸ The Cabinet Secretary also appoints the selection panel and chooses the Tribunal members based on the recommendations of the panel.³⁴⁹ This tribunal will be directly answerable to the Information Cabinet Secretary. This will give powers to the Information secretary who influences the appointment to the Tribunal, disciplines and controls the media.

³⁴⁴ *ibid.*

³⁴⁵ *ibid.*

³⁴⁶ Proposed Amendments to section 102 of the Kenya Information and Communications Act, Chapter 411A, Laws of Kenya.

³⁴⁷ The Star Newspaper <http://www.the-star.co.ke/news/article-141993/new-bill-will-impose-censorship-kenya>, (last accessed on 20th November, 2013)

³⁴⁸ *ibid.*

³⁴⁹ *ibid.*

4.3 Nexus between Policy and Legislative Drafting in Kenya

In the context of legislative drafting, policy has been defined as the expression of the practices of Government or administration, in the form of instructions received by drafters and that, once drafted and enacted, will give effect to the actions that the Government has decided upon as those it wishes to carry out.³⁵⁰ Policies are like a plan of action which guide towards making sure legislation is complied with.³⁵¹ As Sihanya notes, the 2010 Constitution has opened space for the exercise of popular sovereignty in governance by entrenching participatory policy and legislative process.³⁵²

A policy outlines what a Government ministry hopes to achieve and the methods and principles it will use to achieve them, stating the goals of the ministry.³⁵³ Though not law, a policy document often identifies new laws needed to achieve its goals. Policy sets out the goals and planned activities of a ministry and department but it may be necessary to pass a law to enable the Government to put in place the necessary institutional and legal frameworks to achieve their aims.³⁵⁴

On the other hand, legislation refers to laws which serve to legally prohibit certain actions and ensure others are carried out. Laws set out standards, procedures and principles that must be followed. If a law is not followed, those responsible for breaking them can be prosecuted in court.³⁵⁵

The relationship between the two is that laws must be guided by current Government policy. During policy formulation, problems should be analysed thoroughly to capture the nature of the problem, objectives and policy options.³⁵⁶

³⁵⁰ Grant, Elizabeth (2011), *The Wavering Line between Policy Development and Legislative Drafting*, p. 59, available at: www.opc.gov.au/calc/docs/Loophole_papers/Grant_Aug2011.pdf , (last accessed 28th August, 2013).

³⁵¹ *ibid.*

³⁵² Sihanya “*The Presidency and Public Authority in Kenya*” *op. cit.*

³⁵³ Education and Training Unit (2012) *The Policy and Law Making Process*, available at: <http://www.etu.org.za/toolbox/docs/govern/policy.html>, (last accessed 20th August, 2013).

³⁵⁴ *ibid.*

³⁵⁵ *ibid.*

³⁵⁶ Kosovar Institute for Policy Research and Development (2006), *Laws Without Policy: Waste, Dead Letter And Futility*: www.kipred.org/advCms/documents/87068_E_PB-04.pdf, (last accessed 20th August, 2013).

There exists a wide range of policy objectives and tools to bring about desired social change besides creating new legislation. The alternative objectives and tools include secondary legislation, economic incentives among others. These should first be explored. Drafting a new law is, therefore, one of several ways of achieving Governmental policy objectives and laws should be used only when it is superior to more cost-effective mechanisms.³⁵⁷

If the options fail, a concept paper specifying the requirement for legislation should be developed, elaborating the pros, cons and failures of other approaches. At this point, the legal drafter should then convert the policy decisions into practical, effective and clear legal rules. Policy analysis should inform the law prior to its adoption, and also inform the implementation and monitoring of effects that it was made for.³⁵⁸

However in Kenya, most draft laws are often prepared from scratch, with drafters receiving minimum input from the policy. To improve the quality of legislation in Kenya, there must be recognition that policy development is an essential precursor to legislative drafting. Involvement of drafters in policy formulation would ensure that properly thought-out answers are provided on fundamental questions of policy and approach, especially for complex and difficult reforms.³⁵⁹

Implementation of policy must remain subordinate to the operation of law. The application of policy must remain within the boundaries set by governing legislation. Policies should therefore only serve as aspirational statements regarding the direction of Government, or provide further detail for the implementation of a legislative scheme where such clarification is expressly allowed for in the governing statutory instruments.³⁶⁰

4.4 The Kenyan Drafter and Policy Formulation

On receiving drafting instructions, the Kenyan legislative drafter is required to give effect to the policy decisions of the Government by drafting the instrument that will turn the current law from what it is into what it has been decided that it ought to be. Therefore, the traditional position is that drafters are not involved in deciding what the law ought to be. As observed by

³⁵⁷ *ibid.*

³⁵⁸ *ibid.*

³⁵⁹ View expressed by ADV 1, an advocate knowledgeable on legislative drafting matters, during an interview on 17th August, 2013.

³⁶⁰ Grant, “*The Wavering Line between Policy Development and Legislative Drafting*” 455, p. 15.

Grant, their work is mainly to translate a policy into law.³⁶¹ Once the policy-makers have declared the objective, the drafters translate these policies into Bills by choosing the words to use and how to effectively communicate that objective to enable the enforcement of the legislation.³⁶²

However, a closer look reveals that the drafter's designer role bridges the gap between the policy declared by the relevant Government official or policy-maker and the behaviour of those responsible for actually implementing the law. When drafting the Bill, a drafter communicates and thus communicating how to put the law into effect, the drafter must prescribe who will do what, including both Governmental and private actors, to implement the law.³⁶³ Drafters design the detailed rules that fill the gap between generalized policy ends and the people who actually carry out that policy. Drafters, in effect substantially contribute to the Bills' substantive content.

Crabbe notes that a drafter has a vital role in the conception and birth of an Act of Parliament.³⁶⁴ He argues that a drafter has a duty to express legislative policy in a language free from ambiguity as the drafter is mandated to transform Government policy into law.

As Crabbe further observes, government expects a drafter to ensure that the Bill is drafted in harmony with all existing legislation and the piece of legislation should express the legislative intention as accurately as possible, and capable of only one interpretation which the government intends that law to have.³⁶⁵ Generally, legislative drafters do not initiate policy and they are currently not involved in policy formulation. They are mainly technicians whose function is to translate policy into law. Crabbe poses the question, "*how does one translate policy without understanding that policy?*"³⁶⁶ He argues that it is inevitable that a drafter should get involved in policy considerations. He further argues that, "since there is a thin line between policy and implementation, between the motive and the motivation, between the problem and the solution of the problem, a drafter should participate early in policy issues that lead eventually to the drafting of legislation."

³⁶¹ *ibid*, p. 54.

³⁶² *ibid*.

³⁶³ View expressed by SC2, a State Counsel at the Ministry of Mining, during an interview on 18th July, 2013 at Nairobi.

³⁶⁴ Crabbe, "*Legislative Drafting*" at. 20.

³⁶⁵ *ibid*.

³⁶⁶ *ibid*, p. 21

Crabbe further notes that there is inevitability of a drafter getting involved in policy considerations. However he cautions that a drafter in his or her participation in policy process should usurp the role of a policy maker.³⁶⁷ He argues that drafters should understand their limitations and should only contribute in improving substantive policy.³⁶⁸ He, therefore, argues that for a drafter to draft high quality legislation, a drafter has to participate in the process of determining the practical content of the legislative policy.³⁶⁹

Abeerr Bashier Dababneh and Eid Ahmad Al-Husban³⁷⁰ observe that for a drafter to perform the role of drafting detailed rules, he or she has to participate in the process of determining the practical content of the policy. Grad,³⁷¹ on the other hand emphasises that the drafter is the notifier and interpreter of policy. In this role therefore, a drafter should not only be concerned with the form but also the content of the law. He argues that a drafter should not be condemned to carry out the task in a vacuum.

The argument of concern in this instance is that as much as there should be a clear separation of roles between a policy maker and legislative drafter, policy informs legislation and therefore an integral part of legislative drafting and a drafter should not be divorced from policy matters.

4.5 Weaknesses in Kenyan Policy Development System in the Context of Legislative Drafting

Kenya's policy formulation faces a myriad of challenges which affect the final legislative product. First, legislation is largely seen as an end in itself rather than a means to achieve a policy objective. The legislative agenda is often therefore decided upon without sufficient analysis of the necessity and priority of suggested legislation.³⁷² This leads to policies that are not sufficiently evidence-based and not backed by impact assessments. Lack of impact assessment leads difficulties in the implementation phase.

³⁶⁷ *ibid.*

³⁶⁸ *ibid.*

³⁶⁹ *ibid.*, p. 22.

³⁷⁰ Abeerr Bashier Dababneh and Eid Ahmad Al-Husban (2011), *Practical Criteria for the Soundness of the Legislative Drafting Approach Evaluative and Analytic Study*, European Law Journal of Social Sciences-Volume 21, Number 4.

³⁷¹ Grad, Frank (1981), *Legislative Drafting as Legal Problem Solving- Form Follows Function*, in *Drafting Documents in Plain English* (Practicing law institute: Commercial and Practice Course handbook series No 203, 1979, reprinted in Reed Dickerson, *Materials in Legislative Drafting* 277.

³⁷² Information given by SC4, a State Counsel at the Ministry of Mining, during an interview on 18th July, 2013 at Nairobi.

Second, draft Government laws are often prepared from scratch by drafters at the A-G's office with almost no guidance on policy objectives from the ministries. More often than not, drafters receive drafting instructions without a policy paper attached to it. For those exceptional circumstances where a policy paper is attached to the zero draft, there is always no justification received for choosing legislation out of the other policy responses to address the problem.³⁷³ This creates a bias in favour of new legislation instead of other forms of Government action, leading to "inflation" in the number of new laws produced annually.

Third, there is currently no formal framework for the development of policies that underlie the drafting of legislation in Kenya. There are no formal rules or guidelines on the broader policy process that encompasses the formulation of the problem, design of concepts, strategies and policy analyses or design of action plans, regulatory impact studies, budgetary considerations, monitoring and evaluation.

Although individual ministries have internal methodologies on policy development, they consider the technical aspect of the final draft Bill for example parts of the cover page and number of copies to be submitted, rather than techniques of policy analysis, concept drafting or drafting of non-legislative policies.³⁷⁴

Fourth, civil servants in ministries lack understanding of the policy development phases. These phases include, the analytical definition of the problem and the reasoning and possible ways of tackling an issue prior to legal drafting. Most of the time, ministries do not even develop a concept paper or action plan informally prior to drafting legislation.³⁷⁵ Even if there is any reasoning present for a development of a certain law, it is rarely put on paper and it is usually discussed orally. As a result, many of the draft policies submitted to the Cabinet for approval and the A-G for publication do not rely on any well researched concept paper or legislative intention.

³⁷³ Information given by SC3, a State Counsel at the Ministry of Mining, during an interview on 18th July, 2013 at Nairobi.

³⁷⁴ *ibid.*

³⁷⁵ *ibid.*

Fifth, there is lack of mechanism during the policy development phase to facilitate policy agreements on matters which cut across separate individual ministries and outside stakeholders. Consultations with other ministries take place at the end of the process when a law has already been drafted.³⁷⁶ At this stage it is often too late to settle major discrepancies and this curtails input from other ministries or leads to ministries feeling left out thus blocking the passage of certain legislation.

There is no formalized process for public participation. Consultation of stakeholders generally limited to the “institutional” partners or stakeholders. Lack of public consultation in the preparatory stage often misses out the informed views of the public and affected groups both passive and active. Though some government agencies³⁷⁷ are obligated to seek public comments on a proposed legislation, more often than not, the exposed drafts are not accompanied by policy deliberations. Lack of policy deliberation gives rise to limited policy alternatives, and may undermine the understanding of activities to be regulated and the problems to be solved.³⁷⁸ The lack of a consensus building mechanism in the policy formulation stage backfires at the implementation phase, with certain players not owning the end product.

4.6 Private Bills and Policy

Private Bills offer an opportunity for the public to support calls for new legislation or changes to existing legislation, and strengthen public interest in the parliamentary process.³⁷⁹ Besides giving backbench MPs a rare opportunity to influence Government policy on behalf of their constituents, they encourage the constituents to lobby their local MPs to enact legislation which is urgently needed, but may have been overlooked or ignored by Government.³⁸⁰ They create confidence in the public that Parliament listens to their concerns and takes action to address them.

³⁷⁶ Views expressed by ADV 3, an advocate knowledgeable on legislative Drafting, during an interview on 18th July, 2013 at Nairobi.

³⁷⁷ For example Capital Markets Authority is mandated under section 12 of the Capital Markets Authority Act (cap. 485A) to expose any legislative instrument for comments by stakeholders and the general public for a period of thirty days through notification in at least two daily newspapers of national circulation and the electronic media.

³⁷⁸ View expressed by by SC 1 and SC 2, State Counsel at Legislative Drafting Department at the AGs office, during an interview on 17th July, 2013.

³⁷⁹ Campaign for Better Hospital Food (2012), *Private Members' Bills*, <http://www.publications.parliament.uk/pa/cm201213/cmselect/cmproced/writev/786/p90.htm>, (last accessed 18th August, 2013).

³⁸⁰ *ibid.*

In an ideal presidential systems, all Bills are submitted and sponsored by members of Parliament while in ideal parliamentary systems, most legislation are submitted by the Government with individual members retaining the right to submit Bills as well. Israel is the only parliamentary democracy in the world in which about half the legislation passed originates from private members' Bills.³⁸¹

In Kenya, private Bills are not subjected to the intense scrutiny like government initiated Bills and sometimes skip the entire reviewing process. Government Bills are subjected to stakeholder *fora* at various stages and are checked for compliance with Government policy at the Legislative Drafting Department in the A-G's office. Drafters in Government align the draft legislation with established Government policy. In contrast, an individual member can engage a consultant to draft a Bill, and then send it to the Speaker for approval, bypassing the Directorate of Legal Services at Parliament.³⁸² Moreover, the member is not concerned with policy, but focuses on addressing an identified problem through legal means.

In an attempt to address the disparities between Government initiated legislation and the private Bills, the National Assembly Standing Orders, 2013 requires that all Bills should undergo pre-publication scrutiny by relevant House Committees prior to approval for publication.³⁸³ The only challenge however, is the parameters and criteria for such pre-publication scrutiny.

As alluded to earlier in this study, the 2010 Constitution also requires all public entities charged with policy formulation and legislative processes to adhere to participatory, inclusive and transparent policy and legislative making.

Individual member sponsored Bills have gained prominence in recent times with Sexual Offences Act, 2006, (Njoki Ndung'u), Unclaimed Financial Assets Act, 2011, (Joshua Lekuton), Constituencies Development Fund Act, 2003, (Muriuki Karue), Price Control (Essential Goods) Act, 2011, (Ephraim Maina), and Alcoholic Drinks Control Act, 2010,

³⁸¹ Susan Hattis Rolef (2013), *Slowing Down the Rat Race of Private Members' Bills*,: <http://www.jpost.com/Opinion/Columnists/Slowing-down-the-rat-race-of-private-members-bills-309015>,(last accessed 19th August, 2013).

³⁸² Information given by PC2, a Parliamentary Counsel at the Directorate of Legal Services, During an Interview on 15th July, 2013 at Nairobi.

³⁸³ Kenya National Assembly Standing Orders, *op. cit*, Clause 114(3)(b).

(John Mututho), being examples of laws that have originated from individual member Bills. This trend is likely to continue and become more pronounced in the new dispensation where members of the Executive are no longer Members of Parliament.

The above creates a situation where private member's Bills may not be in line with Government policy, and can frequently even contradict it. It amplifies the danger of having legislation which is not backed by policy. For instance, though the Alcoholic Drinks Control Act was enacted in 2010, the Government policy on alcohol and drug abuse is still in draft stage as at November, 2013 leaving the Act without a backing policy.

There is, therefore, need to develop a mechanism which shall ensure individual member sponsored Bills are subjected to scrutiny like Government initiated Bills so as to align it to policy.

4.7 Conclusion

The Chapter examined the current practice in policy formulation in the context of legislative drafting in Kenya. Policy informs legislation and proper policy development mechanisms are therefore a prerequisite in ensuing quality of the legislative product. Although the 2010 Constitution makes it mandatory for public participation in policy formulation, the challenges identified are, first, there is no formal process developed by the ministries to ensure full participation of the public in policy formulation. Second, there is no manual or other form of instructions from the drafting office which guides ministries on policy formulation. And third, there is no developed policy in respect with legislation initiated by private members of Parliament.

How to address these challenges in ensuring quality of legislation in Kenya forms the basis of the next and final Chapter.

CHAPTER FIVE

CONCLUSION AND RECOMMENDATIONS ON LEGISLATIVE DRAFTING IN KENYA

5.1 Introduction

The objective of this study was to investigate three pertinent issues. First, is the extent to which the 2010 Constitution has altered the legal and institutional framework on legislative drafting in Kenya. Second, was to analyse if the re-structured legal and institutional framework is adequate in the quest of drafting effective legislation. Third, was to examine the challenges brought about by the new dispensation. The study also analysed comparative perspectives from the US and South Africa and proposed necessary legal and institutional reforms in the legislative drafting process in Kenya.

This chapter summarizes the major conclusions of the study and also makes recommendations.

5.2 Summary of Conclusions

The 2010 Constitution has altered the system of governance in Kenya. The governance system has shifted significantly from a parliamentary system to a presidential system with full separation of powers. This requires a re-structuring and re-designing of state organs and re-defining their roles and relationships. The following is a summary of conclusions on the pertinent issues identified in the study.

5.2.1 Conclusion on the Legal and Institutional Framework on Legislative Drafting in Kenya

Before 2010, the Legislative Drafting Department at the A-G's office was the major player in legislative drafting in Kenya.³⁸⁴ Virtually all legislation, with the exception of a few private member initiated Bills, originated from the Executive. The major institutions involved in legislative drafting included the A-G's office, the Kenya Law Reform Commission for Government initiated legislation and the Directorate of Legal Services under the Parliamentary Service Commission for the Bills initiated by private members.

³⁸⁴ The A-G derived this mandate from Article 36 of the 1963 Constitution (Repealed).

KLRC's role was subjected to A-G's supervision, being a mere department within the A-Gs office.³⁸⁵ The presence in Parliament, of the President and Ministers, allowed the Executive to table much of the legislation and directly lobby members to adopt it from within Parliament.³⁸⁶ There was a minimal level of public participation in policy and legislative processes.³⁸⁷ The KLRC would, at minimum level, collect views from the public before drafting Bills.³⁸⁸

The 2010 Constitution has altered the drafting process materially. The Constitution enacted a presidential system with clear separation of powers. With these new changes, the following issues have emerged. First, there are challenges in tabling and facilitating Government sponsored legislation. This can be attributed to the absence of the President, A-G and Cabinet Secretaries in Parliament.³⁸⁹ Second, the Constitution created new institutions with a responsibility in legislative drafting.³⁹⁰ These multiple institutions have brought about compartmentalization of the legislative process, serious coordination problems in the actual drafting of legislation and power struggles.³⁹¹

Third, the Constitution contains elaborate provisions on public participation in the policy and legislative processes.³⁹² The Constitution requires all public institutions charged with the responsibility of formulating public policy and legislative processes to facilitate participatory, inclusive and transparent process.³⁹³ Currently, public participation mechanisms are weak, with shortened publication periods, short deadlines given by committees for submission of public memoranda and disregard of public input by Committees.³⁹⁴ This undermines the public effort to contribute to legislation. The Bills are published in the Kenya Gazette and the websites of concerned agencies. This mode of communication is out of reach to many citizens.

³⁸⁵ See Chapter 2.

³⁸⁶ Kivuva, "Restructuring the Kenyan State" *op cit*.

³⁸⁷ Sihanya "The Presidency and Public authority in Kenya's New Constitutional Order" *op cit*.

³⁸⁸ *ibid*

³⁸⁹ Constitution, *op. cit* Articles 97 and 153.

³⁹⁰ Cabinet, KLRC, A-G, CIC and CIOC.

³⁹¹ See the turf wars between the A-G and CIC referred to in Chapter 3.

³⁹² Sihanya "The Presidency and Public authority in Kenya's New Constitutional Order" *op cit*.

³⁹³ *ibid*.

³⁹⁴ See Kiprono Kittony comments.

Fourth, the Constitution requires at least 49 pieces of legislation to be enacted within a specific timeline.³⁹⁵ These deadlines, coupled with inefficiency of drafting mechanisms, exert pressure on the institutions mandated to draft legislation leading to rushed legislative process characterized by extension of parliamentary working hours and shortening of debate timelines.³⁹⁶ It leads to enactment of legislation full of errors and inconsistencies, which have to be amended before enactment.³⁹⁷

Fifth, Bills initiated by private members of Parliament are not subjected to thorough scrutiny like Government initiated Bills and sometimes skip public participation process. Though Standing Orders 2013 have introduced pre-publication scrutiny, this is not sufficient to guarantee quality of private members' Bills.

Sixth, there is no effective evaluation mechanism for evaluation of necessity for legislation and impact of enacted laws³⁹⁸ and lastly, capacity constraints persist, with low numbers of qualified drafters³⁹⁹ and resources committed to drafting.

5.2.2 Conclusion on Comparative Perspectives from South Africa on Legislative Processes

The South African Constitution expressly grants concurrent responsibility for identifying, preparing and initiating legislation to both the Executive and Parliament. It further allows Cabinet members or Deputy Ministers, not members of the National Assembly, to introduce a Bill in the National Assembly. The respective ministries initiate and draft most Bills in South Africa, utilizing departmental specialists, sometimes assisted by consultants, after consultation with interested persons and institutions.

South Africa has lesser institutions involved in drafting and passage of Bills. The respective departments or ministries draft the Bills, which are then approved by the Cabinet. Once approved by Cabinet, the Bills are forwarded to the State Law Advisers (SLA) for certification that the Bills are consistent with the Constitution and are properly drafted in the

³⁹⁵ Constitution, *op. cit.*, Fifth Schedule.

³⁹⁶ For example the publication period of the National Police Service (Amendment) Bill, 2013 was shortened from 14 to 7 days.

³⁹⁷ See analysis in Chapter 3.

³⁹⁸ See Chapter 4

³⁹⁹ Kinuhe, "Why Drafting of Kenyan Laws need Urgent Revamping" *op. cit.*

form and style which conforms to legislative practice. They are then transmitted with or without changes back to ministers for tabling in Parliament.

The categories of persons authorized to introduce Bills in the National Assembly include a Cabinet member or a Deputy Minister or a member or committee of the National Assembly. The presidential system in South Africa therefore allows the presence of the Executive in Parliament to push through executive legislative agenda. South African laws further provide for a 30 day publication period for all Bills. They provide for dual public participation in all Bills, at the drafting stage and at the Parliamentary committee level.

To prevent rushed legislative processes, fast tracking of Bills and shortening of publication periods must be approved Joint Programme Committee of Parliament, which then tables such approvals for adoption by the whole House. The standing orders further define urgent Bills. The process allows for wider consultations and sets out some criteria for consideration, preventing arbitrary and unwarranted shortening of publication periods and rushing of legislative processes.

5.2.3 Conclusion on Comparative Perspectives from US on Legislative Processes

Kenya 2010 Constitution is similar to the US Constitution with a clear separation of powers. The role of executive in initiation of legislation is muted. The President uses the State of the Union address to spell out his legislative agenda, and follows it up with executive communication, in the form of a message or letter transmitting the draft of a proposed Bill to the Speaker of the House of Representatives and the President of the Senate. State departments are therefore responsible for initiating and drafting Government legislation, which is subjected to Parliamentary committees without first reading or debate.

The Office of the Legislative Counsel within the House of Representatives prepares Bills for introduction to Congress and is also in charge of drafting legislation at all stages of the legislative process. Although the state departments draft legislation, House Committees can effect changes to Bills referred through executive communication. This leaves the Office of the Legislative Counsel within House of Representatives with the ultimate responsibility of drafting final draft Bills for introduction and debate on the floor of the House.

5.2.4 Conclusion on Policy Development Process in Kenya

Since policy informs legislation, proper policy development mechanisms are key in ensuring quality of the legislative product. Kenya lacks defined policy development mechanisms. Although Ministries have developed internal methodologies on policy development, poor coordination between various ministries, lack of public participation, lack of impact assessments and non-harmonized policy development procedures render such methodologies ineffective.

Further, although drafters translate policies into Bills by choosing the words to use in effectively communicating policy objective, they are not involved in policy formulation. This impedes their understanding of policy and minimizes their chances of getting the policy right in drafting legislation which ultimately lead to poor quality legislation in Kenya.

5.3 Summary of Recommendations

Kenya is in the third year of implementing the Constitution. As Sihanya notes, the constitutional implementation process is crucial for ensuring that the correct constitutional meaning does not differ from constitutional implementation by way of legislative, policy, institutional and administrative practices.⁴⁰⁰ The success of the implementation therefore depends on the approach. This study has identified pertinent issues as emerging challenges in the constitutional provisions relating to legislative drafting.

The following is a summary of recommendation on the pertinent issues identified in the study.

5.3.1 Recommendation on Initiation and Drafting of Legislation

The study recommends that initiation of Government legislation should still be left to respective ministries and individual members of the House. The drafting process should however, be streamlined. The drafting role of individual state entities like KLRC, CIC and the A-G should be clear. For the purposes of achieving this clarity, the study proposes the establishment of an independent Office of the Legislative Counsel within the Kenyan Parliament, along the lines of the US Office of the Legislative Counsel.

⁴⁰⁰ Sihanya, *“The Presidency and Public authority in Kenya’s New Constitutional Order”* op cit.

Such an office should bear ultimate responsibility for drafting Government and individual member sponsored Bills. It would centralize drafting services within government serving both the Executive and the Legislature. The office would, first, ensure the best use of limited resources, collective experience, skills and know-how are pooled and shared. Second, that procedures, style and format of legislation are easily standardized. Third, that the resulting legislation is more consistent and uniform, simplifying the task of interpreting the law.

Any organ or individual wishing to introduce or amend legislation should be obligated to liaise with this office for drafting purposes. The office would be responsible for ensuring that all Bills introduced in the House are aligned to the existing policy, are not inconsistent with the Constitution and are properly drafted in the form and style which conforms to legislative practice. Further, any amendments proposed in the Committees and on the floor of the House should be drafted in conjunction with this office, to ensure the above purposes remain intact in all legislation.

The office would be independent of and separate from the Executive branch of Government but would provide drafting services for the Executive, further entrenching complete separation of powers as envisaged in the Constitution. It would relieve the Legal Drafting Department at

A-G's Office of the responsibility of drafting Government legislation, and also be in charge of drafting all private member initiated legislation. This will ensure uniformity of private member Bills with the Government initiated Bills.

5.3.2 Recommendation on Institutional Framework for Drafting of Bills

As earlier indicated, the study recommends that Ministries should remain in charge of initiating government legislation. However, in initiating legislation should be tasked to utilize the services of the Kenya Law Reform Commission (KLRC) in developing the zero draft, rather than, individual consultants. This would cut the costs incurred in procuring services of independent consultants, ensure uniformity in the drafting process and also enhance the role and function of KLRC in the legislative process. Upon developing the zero draft, it should be submitted to the Office of the Legislative Counsel within the Kenyan Parliament, which would perform the functions stipulated above.

The office would take over the functions of the CIC in ensuring constitutionality of all legislation. This would also restrict the role of the A-G to advising the Government on Government sponsored legislation and not, drafting. This would, first, eliminate the duplicity and multiplicity of institutions with conflicting and blurred mandates, and second, it will enhance the full separation of powers as envisaged by the Constitution.

5.3.3 Recommendation on Public Participation in Legislative Making

The Parliamentary Standing Orders, 2013 should be amended to require a 30 day publication period. This would lengthen the period of availability of Bills for synthesis and development of memoranda by the public. Publication of Bills should also be extended to two newspapers with nationwide circulation, as opposed to the Kenya Gazette only, which has limited circulation. This would increase public awareness on the existence and contents of proposed legislation.

The period of Committee deliberation should also be increased to 30 days, with a requirement of 14 days deadline to public for submission of memoranda or attendance of public hearings. The notice inviting views from the public should be published widely. This could be through, first, advertisements and notices in print media and radio slots. Second, notices on dedicated parliamentary television channel. Third, media statements by the chairpersons of the Committees. Fourth, specific invitations of interest groups. Fifth, notices on Parliament's web site and sixth, notices posted and distributed at parliamentary offices at the constituency level. This would grant the public adequate knowledge of proposed laws and time to submit their views on the Bills and also grant the Committee adequate time to consider and deliberate on the views of the members of the public.

Shortening of publication periods and enactment processes should be subjected to a joint Committee of Parliament and Senate along the South African model. This will check the shortcomings associated with sole decisions. Further, clear parameters should be developed for consideration and approval for shortening of publication periods and processes.

Ministries and individual members in initiating legislation should be required to send out notices in daily newspapers with nationwide circulation seeking for public views on proposed laws. This would enact a dual public participation model as is evident in South Africa.

Further, there should be a strict application of the Statutory Instruments Act, 2013 which requires all subsidiary legislation to be subjected to public scrutiny and any Report accompanying the statutory instrument should evidence public participation.

Parliamentary Committees should be required to indicate the views presented by the public and a reasoned opinion on the extent of their incorporation or rejection while making their report to the House. This would ensure public views are not entirely disregarded in making of laws.

Finally, Parliamentary policy should be developed to give guidance on the factors to be taken into account in deciding on the appropriate methods and extent of public participation, whether public hearings or submission of memoranda. These would include five factors. First, the nature and content of the legislation, second, the importance and urgency of the legislation, third, the intensity of the impact of the legislation on the public or on a particular section of the public, fourth, the degree of public interest in the legislation and fifth, the practical considerations, such as time constraints and resources.

5.3.4 Recommendation on Individual Member Sponsored Bills

Private members sponsoring Bills in their personal capacity should be obligated to draft the Bills in liaison with the Office of the Legislative Counsel within the Kenyan Parliament. The office should be tasked to seek and incorporate views of the members of the public in the proposed Bill, before developing the final draft for tabling in Parliament. The office would further scrutinize the Bill to align it with the existing policy, check if it conforms with the Constitution and the form and style of legislative drafting.

The above practice would ensure that private member initiated Bills undergo the same scrutiny as Government initiated legislation, guaranteeing the quality of such initiatives.

5.3.5 Recommendation on Policy Development Process in the Context of Legislative Drafting in Kenya

The existing internal ministry specific methodologies on policy development should be harmonized into a policy development manual, detailing the process of policy formulation within Government. Such manual would stipulate the formal rules, guidelines and processes

for policy development. It would encompass the stages in policy formulation including formulation of problem, design of concepts, strategies and policy analyses or design of action plans, regulatory impact studies, monitoring and implementation.

Drafters from the Office of the Legislative Counsel should be involved in policy formulation, since they are tasked with converting the policy objectives into legislation.

5.3.6 Recommendation on the Development of a Legislative Drafting Manual for Kenya

A legislative drafting manual should be developed by the Office of the Legislative Counsel, detailing the process of development of laws. Such manual would detail the principles, processes, procedures and practices necessary in initiation, public participation and drafting of Bills. It would stipulate the form and style to be conformed to in drafting of Kenyan laws. It would also set out the legislative process in fine detail, stipulating the roles of the various stakeholders in the different stages of making and amending laws.

5.3.7 Other Recommendations on Legislative Processes

A copy of the printed official text as well as the official translation of all Acts of Parliament to Kiswahili should be retained in Parliament's archives and published on its web site.

In addition, ministries and individuals initiating legislation should be obligated to conduct evaluation and attach to the proposed legislation evaluation reports on the necessity and priority of the propose legislation. Further, the proposed Office of the Legislative Counsel in Parliament should develop evaluation mechanisms to test the effectiveness of legislation and establish the impact after the enactment of the legislation.

Finally, the recommended Office of the Legislative Counsel in Parliament should set aside resources to train drafters to ensure that the office effectively executes its proposed mandate. Kenyan universities should begin offering specialized degrees in legislative drafting, which would ensure supply of a pool of qualified drafters. The proposed Office of the Legislative Counsel should invest in a well equipped law library, greatly enhancing capacities to engage in legislative drafting in Kenya.

5.4 Conclusion

The 2010 Constitution has registered gains in addressing the historical challenges which led to constitutional reform. The Constitution has fundamentally structured the core institutions of governance. This study analysed three pertinent issues springing from the re-structuring of key institutions. First, is the extent to which the Constitution has re-structured the legal and institutional framework on legislative drafting in Kenya. Second, it analysed the adequacy of these re-structured legal and institutional framework in the quest of drafting effective legislation. Thirdly, it analysed the challenges brought by the new dispensation.

The restructure and redesigning of the legal and institutional framework on legislative drafting has had its gains and on the other hand, brought with it various challenges. These include first, lack of clarity in the origination and drafting of legislation. Second, multiple institutions mandated with legislative drafting which has brought about coordination problems within these institutions. Third, the Constitution sets out a very strict time line for the passage of legislation to operationalize it. This has put a lot of pressure on legislating institutions hence rushed legislative process. This in turn led to the passage of poor quality laws. And fourth, the study has made recommendations aimed at streamlining the legislative drafting process in Kenya. If implemented, they would go a long way in ensuring quality of the final legislative product.

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