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BUILDING AN INDEPENDENT PARLIAMENT THE CREATION OF RULES OF PROCEDURE FOR PRIVATE MEMBERS BILLS & THE CREATION OF THE OFFICE OF THE PARLIAMENTARY DRAFTSMAN

by

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Under the Fourth Republican Constitution, the Governance Structure that was created envisaged the separation of powers through the three principal arms of Government The Executive, the Legislature & the Judiciary - each playing very specific roles. The activities of the three arms of Government are all aimed towards ensuring the maintenance of checks & balances; and the continued democratic governance of the Country according to the Rule of Law and in a manner that is responsive to the economic, political and social needs of the people of this Country.

In this arrangement Parliament has been vested with the legislative power of the State which is to be exercised in accordance with the Constitution (Article 93 (2)). The purpose of this paper is to look at the manner in which parliament currently exercises its legislative function and the opportunities it has for expanding and enhancing

its exercise of legislative power so as to make the institution more responsive to and relevant to the economic & social development needs of the people of Ghana. It is the belief of the author that this will help in strengthening and entrenching our democratic structures a lot further.

THE PROCESS FOR EXERCISING THE LEGISLATIVE FUNCTION ENVISAGED BY THE CONSTITUTION

The 1992 Constitution in Article 103(3) provides that

"Committees of Parliament shall be charged with such functions, including the investigation and enquiry into the activities and

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administration of ministries and departments as Parliament may determine and such investigation and inquiries may extend to proposals for legislation".

Further in article 106(1) it states that

"The power of Parliament to make laws shall be exercised by bills passed by Parliament and assented to by the President".

It goes on to state in article 106(2) that

"No bill, other than a bill as is referred to in paragraph (a) of article 108 of this Constitution, shall be introduced in Parliament unless

- (a) It is accompanied by an explanatory memorandum setting out in detail the policy and the principles of the bill, the defects of the existing law, the remedies proposed to deal with those defects and the necessity for its introduction; and
- (b) It has been published in the gazette at least fourteen days before the date of its introduction in parliament."

Our Constitution therefore implicitly has created the opportunity for the preparation and presentation of proposals for legislation from other quarters than from the Executive. Indeed, by the terms of Article 103 it is quite clear that Parliament itself also has the authority to make proposals for legislation.

The only circumstances in which Parliament does not have the right to enact legislation without the authority of the Executive are to be found in Article 108 of the Constitution where it is stated

that:

"Parliament shall not, unless the bill is introduced or the motion is introduced by, or on behalf of, the President

- (a) proceed upon a bill including an amendment to a bill, that in the opinion of the person presiding, makes provision for any of the following
 - (i) the imposition of taxation or the alteration of taxation otherwise than by reduction; or
 - (ii) the imposition of a charge on the consolidated fund or other public funds of Ghana or the alteration of any such charge otherwise than by reduction; or
 - (iii) the payment, issue or withdrawal from the Consolidated Fund or other public funds of Ghana of any moneys not charged on the Consolidated Fund or any increase in the amount of that payment, issue or withdrawal; or
 - (iv) the composition or remission of any debt due to the Government of Ghana; or
- (b) Proceed upon a motion, including an amendment to a motion, the effect of which, in the opinion of the person presiding, would be to make provision for any of the purposes specified in paragraph (a) of this article.

I have taken the liberty of stating the article in full to clarify the point that unless the passage of any legislation has a direct impact on the public purse by way of creating a charge on public funds or reducing the amount that Government would

receive in revenue, it is possible for parliament to make legislative proposals that have as their focus, issues affecting how we organize any other aspects of our national life.

Unfortunately over the past twelve years of democratic governance Parliament has not yet availed itself of the opportunity. The proposition that this paper seeks to advance is that by so doing, Parliament has failed to fulfill its mandate under the Constitution & in the process has denied itself the opportunity to make itself much more relevant in the system of Constitutional Governance.

Indeed the Constitution in Article 22 specifically mandated Parliament to enact legislation regulating the property rights of spouses, although Parliament has not yet risen to the task hopefully it will sooner than later, find itself in a position to do so.

THE DEFICIENCIES IN THE CURRENT PRACTICE

Due to the fact that under our current practice Presidential and Parliamentary elections are held concurrently, and taking into consideration Parliament's lack of assertion of its powers within the Governance process; some participants in the political and governance process and even the public at large, may be labouring under the misconception that Parliament as an institution mainly exists to pass into legislation the Governance program of the Executive, though this has de-facto been the practice of Parliament for the first three terms of the Parliament of the fourth Republic.

A developing Country such as Ghana has a great deal of catching up to do with the rest of the developed world and we recognize that different sectors of the economy & society are developing at different paces, with varying demands, requirements and challenges that need to be addressed. Parliament should show that it is a dynamic institution capable of contributing to the development process and being in the forefront of enquiring into the specific needs of these different sectors of our economy and sections of our society, and legislating for the promotion of economic development, development of the governance process and provision of social protection that exist in other parts of the World.

Though we all subscribe to the national agenda contained in Chapter 6 of the Constitution (the directive principles of State Policy), the assumption of an all-wise and all-knowing Executive that should be responsible for providing all the answers to our problems is at best unrealistic and at worst stifles the initiative of the various actors within the body politic to contribute to the Governance process. The creation of an enabling environment for Parliament to take a more pro-active role in investigating the deficiencies that exist and proposing legislation to remedy any identified defects in the system would encourage other civil society organizations to deepen their cooperation with parliament in seeking solutions to the Nation's problems. Whereas today Parliament is to some extent regarded as an institution focused on the task of critiquing other Ministries/Departments & Agencies legislative proposals, this is not a very productive process especially where Members do not have enough in-depth background information on the

considerations that have gone into the drafting of such a bill. It also puts Members of Parliament in the position of largely passive participants in the shaping of Government policy.

Perhaps we are in this situation because the Westminster Model/Parliamentary system of democracy envisages a combination of the executive and legislative functions within the governance system where the leader of the party in power is a member of the legislature and at the same time the Head of Government business. Within this sort of system the party in power to a large extent determines the legislative agenda of the Government.

In creating our democratic structures we opted for a hybrid system of governance that took features from both the Executive model and the Parliamentary system. It is only proper then that as we have created this hybrid model that we should explore its possibilities and make it responsive to our demands and aspirations as a nation.

THE WAY TO CHANGE

Parliament is the master of its own procedures, and these are contained in its Standing Orders. The Parliamentary Service Board has the power with the prior approval of Parliament to make regulations for the effective and efficient administration of the Parliamentary Service. Parliament therefore has it within its power to remedy this deficiency and to create the procedures, services, facilities and conditions to enable it to exercise its legislative mandate more fully.

The only Constitutional requirement that would

have to be met to present proposals for legislation are those contained in Article 106 which have previously been referred to. To recap, this would involve the provision of an explanatory memorandum setting out in detail the policy and principles of the Bill, the defects of the existing law, whether there is any legislation that deals with the issues the Bill proposes to address, the remedies that this legislative proposal contained in the bill seeks to put forward to address the defects and the necessity for its introduction.

The existing Standing Orders do not make provision for any specific procedural provisions for an MP or group of MP's to take the initiative to make any legislative proposals. The draft standing orders that were prepared in 2004 have not yet been passed by parliament and they only re-state the provisions of Article 106 (2), and for that reason are slightly deficient because there is the need to be more specific in the way and manner this should be done.

I have taken the liberty of looking at the practice in the State Legislatures of California and Ohio, and also looking at the practice at the level of the Federal Legislature of the United States in both the House of Representatives and the Senate. I have also looked at the Office of the Parliamentary Counsel in the U.K. and in Australia. The proposals made in this paper for adoption by the Parliament of Ghana are not adoptions of the practice of any of the institutions referred to, but rather looks to the practice in those countries to suggest solutions that would be relevant to our circumstances.

In the United States in both the Federal and the

State legislatures proposals for bills are made by members of the legislature and do not necessarily flow from the Office of the President or the Governor's office. In all these cases the Legislatures have specialized staff who are actually responsible for the drafting of legislature and will do the necessary ground work to ensure that any proposals made are well crafted and relevant to the purpose for which they are being proposed. In the U.K and in Australia proposals for legislation most often come from the party in Government, however the Office of the Parliamentary/Legislative Counsel is also a specialized office with legislative draftspersons/specialized lawyers whose responsibility is to put the proposals into the appropriate legal language.

PROPOSALS FOR THE RELEVANT RULES OF PROCEDURE TO BE INCLUDED IN THE STANDING ORDERS TO ALLOW FOR THE PROPOSAL OF LEGISLATION BILLS BY MEMBERS OF PARLIAMENT

A proposal for legislation drafted into a bill, and eventually passed into law is a matter of importance and seriousness because of the implications for all Civil Society Actors who will be bound by the laws that are passed. Not to mention that the process of translating proposals for legislation into law is painstaking, time consuming and an expensive process. Therefore in order for a proposal for legislation to be considered by Parliament and to start the process in motion one would like to suggest that the procedure should be as follows:

1. The principal proponents of new legislation should present their proposal

for new legislation in writing by way of a concept paper. The concept paper should state the desired outcomes together with specific ideas as to how these outcomes would be achieved through legislation.

2. If the Proporent(s) of new legislation are in a position to do so, where the proposal is to amend existing legislation there should be provided a list of what they consider to be the required legislative changes.
3. After the concept paper has been prepared there should be at least 58 MP's (one more than a quarter of MP's in Parliament) confirming their support in writing to the proposals for legislation. The reason this endorsement of at least a quarter of the elected representatives of the people is being proposed is to ensure that the issues are considered by MP's to be important enough for Government machinery through Parliament to deal with the matter.
4. The 58 members then become the instructors/clients to the Office of the Parliamentary draftsman for the drafting of the bill. The main sponsors of the bill and all the others who supported the bill will be the ones to have discussions with the office of the Parliamentary draftsperson on the form the bill will take.
5. The Office of the Parliamentary Draftsperson will then be obliged to translate the concept paper of the Proponents of the Legislation into the memorandum accompanying the bill, the bill itself and ensure that the Bill is duly gazetted so that it can be laid before the House. They must also ensure that

enough copies of the Bill are prepared for distribution to all the Members of the House and all MDA's affected by the bill in one way or another.

6. The Proponents of the bill should then lay the Bill before the house for its consideration. The bill would then be referred to the appropriate committee of the House that would deal with that particular subject area for its consideration. The Committee would refer the bill to the relevant implementing Ministry/Department or Agency that would be responsible for implementing the legislation when the bill is passed into law for their comments or input, they would advertise the Bill and invite additional input from the general public.
7. When the Committee would have completed its deliberations it would present its report on the Bill to the House and then the Bill would be taken through all the stages of debate in the House, and if approved by a majority of the MP's would be passed into law, subject of course to the President assenting to the bill.

OFFICE OF THE PARLIAMENTARY DRAFTSMAN

In order for the process described above to be carried out effectively there would be the need to set up the Office of the Parliamentary Draftsman and recruit and train the Staff with the necessary legal and/or research background to make sure that the Office can function properly.

Drafting legislation is a very specialized skill within the area of law making and people tasked

with this function have to have in-depth knowledge of our Laws and our legal system. There would be the need to have enough Legislative Draftspersons and Research Assistants within this office to adequately research and advise MP's who wish to make proposals for legislation on the existing law, the way and manner the issues they are presently raising may have been dealt with in other jurisdictions and how best the proposals can be drafted into the form of a Bill to achieve their desired objective.

In view of the fact that however well trained our Legislative Draftspersons may be they may not necessarily be knowledgeable in all areas that Members wish to make legislative proposals to control and regulate, it should be possible for the Office of the Parliamentary Draftsman to take on Contract Draftspersons where the available expertise within the Office is unavailable and where external assistance would be useful. .

The functions of the office of the Parliamentary Draftsman should be to prepare draft Bills, amendments to existing legislation and Bills that have been presented for consideration. One would wish that the proposals for legislation by members should not include what is referred to as subsidiary legislation. This is because subsidiary legislation is perhaps more effectively prepared under the auspices of the MDA's that are the implementing agency of the Principal legislation and for whom these rules and regulations are the tools by which they seek to exercise and implement the mandate that has been given to them in the Principal legislation/ Act.

The Office of the Parliamentary Draftsman

1. should be responsible for the preparation of a draft that it is well crafted and legally effective to implement the policy changes that it seeks to reduce into legislation. The Draftsperson must therefore seek to do the following when drafting a Bill:

2. To present the desired outcomes in language which is clearly articulated
3. To present a workable legislative structure within which those outcomes can be achieved.
4. To prepare detailed legislative provisions which provide the legal basis for achieving those outcomes.
5. Also to draft the explanatory memoranda that will accompany the bill.
6. Further the Office of the Parliamentary draftsman should add value consisting of ensuring that all the gaps between the concept paper/instructions of the sponsors of the Bill and the final requirements for a successful legislative project for the consideration of parliament are fulfilled.
7. The Parliamentary Draftsman should help Members to clarify and to develop their concept paper into coherent and cohesive levels of detail that will become a legislative proposal for a Bill.

The Parliamentary Draftsman should expect, and the MP's should be ready to provide a sound conceptual basis for legislative projects, with well thought out instructions, and to be ready to commit time for discussion of the provisions of the bill with the Office of the Legislative Draftsperson and to be actively involved in the legislative project.

Where the Member (s) are making specific proposals because of specialized knowledge that they have themselves or due to experiences that they may have had in employment prior to their becoming Members of Parliament they would be required to think carefully about the plans or drafts ~in the context of their subject matter expertise and also to involve Officials from the relevant implementing agencies in their consultations so as to identify any unintended consequences that the Office of the Parliamentary Draftsman would have no way of discovering on its own.

Any Bill that has not been drafted by the Office of the Parliamentary Draftsman but may have been prepared by the Members themselves or may have been prepared by a non-governmental or Civil Society organization and is being sponsored by some of the MPs must be reviewed by the Office of the Parliamentary Draftsman prior to presentation or being laid before the House.

CONCLUSIONS

This paper has sought to make proposals on procedures for the presentation of Private Members Bills and the establishment of the Office of the Parliamentary Counsel in order to create an enabling environment for MP's to be more pro-active and more responsive to the concerns of the electorate. This would also allow for a more active participation of Civil Society actors in the legislative process and would encourage a greater number of people to engage more directly and effectively with Parliament. In time this would in time create an environment where the law and consequently the

direction of public policy would be a lot more responsive to the needs and demands of our rapidly evolving and changing society. It would also create a situation where people would have a greater knowledge and understanding and appreciation of Parliament as an institution, and assist in the development of a much more vibrant, responsive and professional legislature.

It would also probably encourage individual members of Parliament to consider having legislative careers as opposed to seeing Parliamentary Office as a way to get noticed for either Ministerial or Deputy Ministerial Appointments. It will also help to create a situation where people who seek election to

Parliamentary office will take pride in their work as Members of Parliament and not see the office merely as a stepping stone towards attaining higher political office.

Admittedly making these facilities available to Parliament will be an expensive process and bearing in mind that initially there will be significant costs incurred on recruitment, training and the provision of adequate facilities required to make the Office of the Parliamentary Draftsman a fully functioning Office of the Parliament of Ghana. But it is surely an investment that will bring great rewards and will help to improve our governance practices as we work towards making a better Ghana.

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*Note: Nothing written herein is to be constructed as necessarily reflecting the views of
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