The Hallmarks of the Legislative Drafting Process in Common Law Systems:

A Comparative Study of Eswatini and Ghana

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Abstract

This research study is an attempt to test the comparative criteria developed by Stefanou in his work where he discusses the characteristics that defines the drafting process in the two most dominant legal systems, common and civil law. It examines the legislative drafting process in common law countries with the aim to establish if the comparative criteria identify with the process that defines the drafting of legislation in those jurisdictions. Two common law jurisdictions were selected and an in-depth comparative analysis of steps undertaken in their drafting process was done. The scope of the study is only confined to the drafting process in the common law system and the criteria that is tested are those which define the drafting process in the common law jurisdictions only.

Keywords: legislation, comparing drafting process, Commonwealth Africa, comparative law.

A Introduction

The development of the legislative drafting process in the common law system has a similar thread that runs through all common law jurisdictions. This thread illuminates the similarities of the process of drafting legislation in those jurisdictions which are dominated by the English style of drafting. Stefanou[1] correctly posits that in the main, there are three factors that provide the basis for these similarities. The colonial legacy has had much influence on the drafting style in common law jurisdictions.

When the British Crown took over the administration of a territory during the colonial period, the statutes of general application, the common law of England, and the legal doctrines as they existed in England became the basic law

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1 C. Stefanou, 'Comparative Legislative Drafting: Comparing across Legal Systems' (2016) 18 European Journal of Law Reform 123-138 at 125.

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of that territory.[2] Subsequently, the English colonies adopted the legal system, for example, the drafting style, that was introduced to them by their colonial masters and have maintained that approach to date. This reflects the conviction that countries with the absence of traditions for drafting and law would require a starting point in legal maturity. And this starting point was provided in the form of drafting manuals.[3]

The trainings that the Commonwealth Office provided to its former colonies continued to buttress this position, as the Commonwealth countries received training that was in line with the drafting style of the UK Office of the Parliamentary Counsel. This resulted in common law jurisdictions having to adopt a drafting style that is characterized by similar processes. The first Secretary-General of the Commonwealth Office, Arnold Smith, noted that the primary function of the Secretariat was to provide information about legislation in Commonwealth countries including a series of training courses for parliamentary draftsmen.[4] Following this statement, it is common cause that such training was mainly if not entirely based on the English style of drafting.

Until very recently, the Attorney General's Office of Eswatini was sending legislative drafters to undertake training courses in legislative drafting in Ghana which ran for 12 weeks each year. This course constituted one of the series of trainings that were provided and funded by the Commonwealth Office with its curriculum having been developed and agreed on by the Commonwealth Secretariat in consultation with the Commonwealth Africa Member States.[5]

Prior to such trainings, as a former British protectorate, the early legislative instruments in Eswatini followed the British style of drafting. Ghana would, from time to time, host drafters from all the Africa Commonwealth Countries for the training.[6] All the senior drafters who joined the drafting department at the time when the course was still being offered had the opportunity to attend the training. As indicated above, since its inception, the course incorporated a syllabus that was agreed on by the Commonwealth Secretariat and developed by Professor Patchett.[7] This meant that the content of the course and what the African Commonwealth countries had to understand to be meant by the subject on legislative drafting was determined in London. If there was any change to the

2 C.V. Crabbe, 'Drafting in Developing Countries: The Problem of Importing Expertise' (1992) 4(3) African Journal of International and Comparative Law 630-648 at 632. *See also* in this respect, C.V. Crabbe, *Legislative Drafting* (1993) at 25.

3 H. Xanthaki, 'Drafting Manuals and Quality in Legislation: Positive Contribution towards Certainty in the law of Impediments to the Necessity for Dynamism of Rules' (2010) 4(2) Legisprudence 111-128 at 122.

4 E. Appiah, 'Training and Development of Legislative Counsel in Commonwealth Africa – the Way Forward' (2011) 4 The Loophole 79-90 at 82.

5 L. Dushimimana, 'Aspects of Legislative Drafting: Some African Realities' (2012) The Loophole 45-50 at 46.

6 Publication of the Commonwealth Secretariat, 'Evaluation of the Commonwealth Secretariat Support to Member Countries on Legislative Drafting' (2015) Evaluation Series No: 97 at 3. Available at www.thecommonwealth.org (accessed on 3 July 2020.)

7 Appiah (note 4) at 84.

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course, such changes were agreed on and approved in London before they could be included into the course programme.

Similarly, a structured programme was made available in the University of the West Indies through the Commonwealth funding. Commonwealth countries around the world sent their drafters to study towards a certificate, advanced diploma, or masters programmes.[8] It cannot be denied therefore that such trainings provided a harmonized and seamless approach in the drafting process in common law countries, and hence the process is characterized by many similarities today. As correctly observed, this has also improved the scholarship in legislative drafting in the common law system compared to its development in the civil law system.[9]

I Emerging Trends

It appears, however, from recent scholarship that the harmonized approach is gradually gaining attention even in civil law jurisdictions, as the drafting process is gradually changing to emulate the common law approach. The European Union's (EU) legislative process is a classic example of this. The EU, having been founded by civil law proponents, has its laws drafted following the civil law approach, one characteristic of the process being the decentralization of the first drafts as it emanates the EU executive body (EU Commission) and not the Parliamentary Counsel. Contrary to the common law approach where the first draft originates and remains in the same originating source throughout the process of the bill,[10] the first drafts can originate from different members of the EU Commission who are not lawyers but policy officers under the sectors concerned.[11]

The new and emerging experiences show a gradual shift from the civil law practice to that of the common law, as lawyers are now getting involved in the early stages of the drafting process and seek to improve the drafting of the first draft, and are moving towards a full-fledged legislative counsel role.[12] Inroads have been made into the development of a joint training programme for all drafting lawyers that seeks to build a common culture and approach in drafting legislation and would ensure a harmonized system, including common drafting guidance.[13] It is observed that the practice of office drafting guidelines and manuals is synonymous with the common law system, yet it is now gaining much attention even in civil law jurisdictions.[14]

8 *Ibid.*

9 *See* Stefanou (note 1) at 125.

10 V.C. Crabbe, *Legislative Drafting* (1993) at 12.

11 W. Robinson, 'Evolution of European Union Legislative Drafting' (2014) The Loophole 7-28 at 11.

12 *See ibid.* (note 7) at 12.

13 *Ibid.*

14 A.Q. Papafio, 'Drafting Conventions, Templates and Legislative Precedents, and their Effects on the Drafting Process and the Drafter' (2013) 15 European Journal of Law Reform at 15.

II The Hypothesis, Objective and Methodology

The hypothesis of this article is that the legislative drafting process in the common law system is characterized by specific elements that can only be identified with drafting in that system. The objective of this article is to test the seven characteristics that have been expounded by Stefanou as the main characteristics that define the drafting process in common law jurisdictions. This will be done through a systematic examination of the real practice of the legislative drafting process in the two countries that have been identified and are understood to be incorporating the common law approach to drafting legislation.

As a way of methodology, it will examine the available literature in the legislative drafting processes in Eswatini and Ghana, both common law jurisdictions, with the aim to demonstrate that the process in these jurisdictions takes the trajectory as described by Stefanou. The office guidelines and manuals, where available, will be used as the main reference material in making the analysis. These documents contain the actual guidelines on the process to be followed and as such, provides accurate information on how the process is undertaken from beginning to end. Other scholarly materials will also be used. For purposes of examination, a descriptive and comparative approach will be adopted to establish the characteristics of the drafting process in these two countries.

The seven distinctive characteristics will be used as the criteria for comparison. These are: centralization of the drafting unit, the exclusivity of the first draft, the development of the drafting instructions, the element of the solitary drafter, the length of training undertaken as a drafter, the separation of policy from drafting, and finally, the lack of accompanying documents when drafting.

B The Drafting Process in Eswatini

The government, as is the case in most jurisdictions, has the right and sole responsibility to introduce new legislation. Other private entities and bodies can make proposals with regard to areas that they think need regulation, but the government will have the final word on whether or not legislation should be developed on that particular area. In practice, the executive arm of government dominates and control the legislative process, including the timetable for such legislative proposals.[15] In most jurisdictions, especially presidential jurisdictions, the government's power to manage the legislative programme is derived from the position of their being the majority in the House which enables them to have every proposal voted in their favour. When a new government comes into office after the general elections, it will normally have a number of policies that it wishes to put into effect.

15 D.R. Miers *et al.*, Legislation (1982) at 12.

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Effectively, this gives the government the chief role in the legislative process.[16] Similarly, the government determines how the legislative function should be discharged, including identifying any challenges and putting up proposals on how they can be corrected. This makes the role of the drafter not an easy one, as they have to keep up with the pace of the government in making sure that all legislative proposals are prepared and delivered on time. The present approach of the drafting process and the establishment of the drafting offices in common law jurisdictions is the culmination of such powers as the process finds it origins in the work of the Office of the Parliamentary Counsel of England.

The Office was established at the height of the realization of the government's role and responsibilities for the initiation of legislation and coordination of all the activities related thereto.[17] In the centre of the evolution of the Office was the need to put in place a centralized system for drafting that was to facilitate the harmonization of the legislative drafts and ensuring consistency in the drafting style.[18] It was observed that the most consistent and time-consuming aspect of the government's plans for Parliament was its legislative programme.[19] In order to ensure the safe passage of such bills, the government had to draft them carefully and argue in their favour in both houses.[20]

The Office houses legislative counsels, who are public servants appointed to draft legislation to support the legislative programme of the government.[21] Therefore, if the executive can propose the enactment of legislation and supervise the process of drafting from the start to the end, what then is the role of Parliament in the legislative process? Some writers have described, correctly, that the role of Parliament is that of rubber-stamping the work of the executive,[22] making Parliament a law-making body only in name.

I The Legislative Function in Eswatini

The drafting stage is the first instance where the policy as a whole is subjected to a form of rigorous scrutiny with much focus on its legitimacy.[23] The main function of the drafter at this point is subjecting the policy ideas to a rigorous intellectual analysis.[24] The drafter tries hard to align the policy proposal with all the other facets of the legal order that may bear on the proposal. If, for instance, the drafter at the bill formulation stage opines that the proposed policy initiative cannot work, that has to be taken seriously as that may affect numerous aspects

16 *Ibid.*, at 13.

17 *Ibid.*, at 30-31.

18 *Ibid.*

19 D.M. Dean, Contents: In Law-Making and Society in Late Elizabethan England: The Parliament of England (1996), 1584-1601 at 9.

20 *Ibid.*

21 L. Mulitalo, 'The Practice of Legislative Drafting in Samoa, a Plural Society of the South Pacific' (2012) The Loophole 28-44 at 29.

22 *See* Miers *et al.* (note 15) at 15.

23 E.C. Page, 'Their Word Is Law: Parliamentary Counsel and Creative Policy Analysis' (2009) 4 Journal of Public Law 790-811 at 791.

24 *See ibid.*, at 797.

of the legal order. Legislative proposals must be consistent with the provisions of the constitution, for example, and failure to ensure that harmony might raise serious constitutional challenges. In *Liyanage v. Rex*,[25] the Privy Council in Sri Lanka expunged an Act of Parliament[26] and declared it invalid because it infringed on the doctrine of separation of powers.

The process of writing down the legal provisions that attempt to give effect to the policy proposal (bill drafting) is an exclusive function of a specific office in Eswatini, and a bill cannot be presented before Parliament unless or until that office approves it to be in the form that it should be in terms of substance and style. With regard to this, Thring correctly posits that a drafter must be able to produce a bill in a form that is likely to be approved in Parliament.[27] This function is discharged by full-time drafters who are employed by the government as civil servants.

The legislative function in Eswatini is regulated by a written constitution.[28] Like most common law countries, the Constitution is the supreme law of the country. Section 77 (5) (a), (e) provides that the function of the Attorney General (AG) shall be to draft and sign all government bills to be presented to Parliament and to assist ministers in piloting bills in Parliament and provide guidance in legal matters to Parliament. In line with these provisions, and the provisions of Section 77 (6),[29] the AG develops a programme of work on how the office will discharge these functions.

The programme includes the delivery of the entire legal duties of the AG including the advisory function, as it were. The AG's Office has two departments, the litigation and the drafting departments. The placement of Parliamentary Counsel in Parliament – whose responsibility is to assist Parliament during the debate of bills by ensuring that all comments and legal questions by both Houses are accurately recorded, and clarity is provided on the legal form and substance of bills where needed in Parliament – is also the function of the office of the AG. Thring therefore correctly observed that Parliamentary Counsel is there to ensure that the bill passes through Parliament.[30]

Thus, the constitutional arrangement makes the office of the AG the only office that can provide centralized services for the drafting of legislation in the country. Crabbe correctly posits that the Constitution is a fountain of all powers

25 (1967) 1 AC 259 PC.

26 The Criminal Law (Special Provision) Act, 1/1962.

27 G. Engle, 'Bills Are Made to Pass as Razors Are Made to Sell: Practical Constraints in the Preparation of Legislation' (1983) 4 Statute Law Review at 7.

28 Constitution of Swaziland Act, 1/2005 outlines the procedure to be followed in the bill formulation process and it enjoins the Office of the Attorney General as the institution entrusted with such duties and that of advising the government in all legal matters.

29 The Attorney General is authorized to exercise these functions either in person or by subordinate officers acting in accordance with the general or specific instructions of the Attorney General. This means that the drafter cannot initiate the drafting of any bill or assist a Minister with the piloting of a bill without the special instructions by the Attorney General.

30 E.C. Page, 'The Civil Servant as a Legislator: Law-Making in British Administration' (2011) 79 Droits et Société 637-668 at 637.

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and the source of authority and its provisions are commands to be obeyed.[31] It is such authority and command that provides the basis for the many characteristics that the drafting process possesses in Eswatini, which shall be examined in the following section.

II The Centralization of the Drafting Process

The established practice in common law jurisdictions is that the process of legislation starts at the departmental or ministerial level. It is triggered by the policy process which eventually requires that policy proposals be crystallized in the form of binding rules called legislation which in turn binds all those that the policy is meant to apply to. Without policy proposals crystallizing into legal rules, there can be no legal basis for implementing and achieving the policy goals. The sponsoring ministry makes a proposal to Cabinet for the development of policy in a specific area that falls within the responsibilities of that ministry. Where Cabinet approves the request, then the ministry will prepare a policy write-up in the form of a draft.

The draft policy is submitted to the Public Policy Coordination Unit (PPCU), a department under the prime minister's office that is responsible for advising ministries on every policy proposal that is submitted to Cabinet for approval. The role of the PPCU is to advise ministries on the accuracy and relevancy of the policy proposal before the proposal is brought to Cabinet. The PPCU aligns the policy proposal with other existing policies and ensures that the proposed policy is in harmony with the entire programme of the government. In the same way as an Act of Parliament is a part of the country's entire legal order and thus cannot stand on its own,[32] likewise, policy proposals too cannot be approved in isolation without an examination of how they sit within the entire policy scheme of the government. The reason is simply that once the policy is approved, it will form the essence of the process of bill drafting that will see to the enactment of the document called an Act of Parliament.

Therefore, a bill is the first legal expression of a policy proposed and developed within a particular government department, and the translation of that policy into a legal text is performed by a group of highly skilled and specialized lawyers in the office of the Attorney General called Parliamentary Counsels.[33] The value of the efforts of the Parliamentary Counsel in this process is also acknowledged by Margaret Wilson, a former minister responsible for the Office of the Parliamentary Counsel for New Zealand.[34] Once the policy is approved by the PPCU, it is then presented to Cabinet by the minister concerned, with the support of senior government officials in the ministry who may be experts in the area being sought to be regulated.

31 Crabbe (note 10) at 57.

32 *See ibid.*, at 19.

33 'Parliament for Lawyers: An Overview of the Legislative Process – Sir William Dale Annual Memorial Lecture' (2002) 4(4) European Journal of Law Reform 511-524 at 513.

34 M. Wilson, 'Sir William Dale Annual Memorial Lecture: Gender-Neutral Law Drafting: The Challenges of Translating Policy into Legislation' (2011) 13(2) European Journal of Law Reform 199-209 at 202.

The AG is an *ex officio* member of Cabinet and attends all the statutory meetings of the Cabinet. Further, he may be called upon at any time to attend any other meetings that are convened by the prime minister (PM) and give legal guidance as the principal legal advisor of the government.[35] Proposals such as requests and approval of a policy proposal by ministries are deliberated and considered during the statutory meetings of Cabinet that are held every Tuesday. Where Cabinet approves and grants permission to a sponsoring ministry to continue developing the policy and drafting the necessary legislation that will support the policy being proposed, the AG will already know that since he will be part of that meeting.

Following Cabinet approval, the sponsoring ministry prepares the drafting instructions that will be presented to the AG's Office as a request to have the law drafted in the manner that will be detailed in the instructions. The AG's Office is a department located in the Ministry of Justice and Constitutional Affairs, but which exercises complete autonomy in accordance with the provisions of the Constitution.[36] According to a government circular that was issued in 2016, the AG has the same powers and privileges as a minister of the Crown. The drafting instructions come in the form of a memorandum addressed to the AG outlining the specifics of the law to be drafted following the dictates of the policy and also indicating that Cabinet has approved the proposal and authorized the enactment. Drafting instructions basically form a request to the AG to draft a piece of legislation in accordance with the broader objective of the policy. The instructions will describe and limit the content of the proposed legislation and state whether the bill to be drafted will be in line with what Cabinet has authorized.[37]

The drafting instructions cannot be taken to any other office other than the office of the AG. No other institution or office in Eswatini has the authority to prepare draft bills which can be presented to Parliament except for the AG's Office. When presenting or piloting a bill in Parliament, a minister can only be assisted and guided by the Attorney General or his representative, normally the Parliamentary Counsel that is seconded by the AG to the Parliament.

III The Exclusivity of the First Draft

The first draft, referred to as the preliminary draft under the Guidelines,[38] originates from the legislative drafting department of the AG's Office, where Parliamentary Counsel is assigned to prepare the first draft upon receipt of the instructions. The first draft forms the basis of the drafter's work and it remains with the assigned drafter until the draft bill is presented to Parliament. All changes that are made at any stage of the drafting process are incorporated into the first draft. The first draft provides a blueprint for the bill from start until its

35 Section 77 (3) (a).

36 Section 77 (8) provides that, 'In the exercise of the functions vested in the Attorney-General by this Constitution, the Attorney-General shall not be subject to the direction or control of any other person or authority.'

37 F. Wilson and O. Zaale, *Kingdom of Swaziland: Guidelines for Instructions to Draft and Process Legislation 2011* at 12.

38 *See ibid.*, at 18.

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final form, and it remains with the AG's Office at all times and even after the bill has come into law. The first draft remains an official record at the drafting department of the AG's Office. The sponsoring ministry may be provided with a copy of the first draft as it provides a base for the build-up of the bill until the final draft is produced. Once the final draft is agreed on between the sponsoring ministry and the Parliamentary Counsel responsible for that assignment, the final draft will be shared with the ministry.

In the event that anything arises concerning that legislation at any stage of its enforcement, reference is made to the first draft to ascertain answers to questions like: Why was the law enacted in the first place? Who was the Parliamentary Counsel responsible for drafting the bill that led to the enactment? What kinds of processes were done during the drafting process including a report of the entities that were consulted? All this information will be stored as a reference to the first draft; depending on the nature of the issues that could arise, such information might be necessary and relevant to assist and find a solution to the problem. The same approach applies with regard to the conclusion of international agreements where Eswatini is a party to and has negotiated and concluded an international agreement, whether at the bilateral or multilateral level. Such agreements are sent to the AG's Office first for verification and approval before they are sent to Parliament for ratification. The AG's Office has to ascertain if such agreements are consistent with the corpus of the law, mainly the Constitution.

IV Drafting Instructions

As a general rule and practice, the AG's Office does not initiate the process of drafting an Act of Parliament. At all material times, the Office receives a request either from a specific ministry department or from Cabinet for the drafting of a specific law. These requests would come from time to time in the form of drafting instructions. As Stefanou correctly posits, the purpose of the drafting instructions is to give drafters all the necessary information that will enable and guide them when writing the piece of legislation.[39] It is the receipt of drafting instructions that will set the ball rolling for the Parliamentary Counsel.

The practice of common law jurisdictions is that the instructing agency or sponsoring ministry will instruct the AG's Office (or whatever name they call their drafting office) on the legislation they would like to develop to achieve the policy outcome.[40] These instructions are normally developed by the policy personnel with the assistance of the ministry's legal advisor. The instructions could be in writing or verbal, as is sometimes the case, but the Office must have received instructions from the sponsoring ministry to initiate the drafting process. In principle, the involvement of the drafter is invited by the receipt of instructions by the AG's Office[41]. Whichever form they come in (even though

39 *See* Stefanou (note 1) at 127.

40 T. Walsh, 'Addressing the Decline of Capacity to Give Drafting Instructions' (2013) 3 The Loophole 59-361 at 26.

41 Miers *et al.* (note 15) at 84.

written instructions are the most preferred), drafting instructions must state clearly that Cabinet has given approval for the drafting of the legislation and state the principal objectives the legislation is intended to achieve.[42]

It is not common that a private body sends a request directly to the AG's Office for the drafting of any legislation in Eswatini. The normal practice is that where a private body, for example, a non-governmental organization (NGO), advocates for the enactment of a particular law, they will firstly engage and discuss with the government department or ministry that is responsible for those issues. Where the department sees the need for the legislation to address the concern in that particular area, then the department will follow the normal policy process and write to Cabinet and present a policy proposal. Where Cabinet approves, the department will then make a request to the AG's Office for the drafting of the law as if the law were the initiative of the department or ministry.

The Sexual Offenses and Domestic Violence Act of 2018 (SODV) is one such law that was proposed and enacted because of the pressure applied by the Swaziland Action Group Against Abuse (SWAGAA). This is a non-governmental body responsible for upholding and promoting respect for the rights of women and children in the country as well as providing post-trauma counselling and support to victims of abuses of any kind. The prevalence of sexual violations against women and children in the country compelled this organization to stand up and call for a law to be put in place by the government that will adequately deal with the scourge in a way that will prove a deterrence for would-be offenders.

Instead of issuing instructions to the AG's Office to draft the law, the organization petitioned Parliament as the law-making body to make the necessary interventions and put in place a law that would address the escalating rate of sexual abuse and violence against women and children in the country. Pursuant to the petition, Parliament instructed the Minister for Justice and the Minister for Police to undertake the necessary processes that would ensure and facilitate the drafting of the law. Eventually, it was the Minister for Police and the Director of Public Prosecutions Directorate who issued instructions to the AG for the drafting of the SODV Act that came into force in 2018.

V The Solitary Drafter

The drafting department of the AG currently has only seven drafters responsible for attending to all the requests from ministries for the drafting of new bills and amendments of existing legislation. While the work demands even more officers, the department has to make do with the available staff. Working as a team in the bill drafting process would be an ideal situation where possible, but taking into consideration the current situation and the available drafters in the Office, it is always impossible to have a draft done as a team.

Upon receipt of the instructions from the instructing ministry, the principal Parliamentary Counsel assigns the work to a drafter who will work independently in drafting the legislation. The assigned drafter remains in active and constant consultation with the instructing ministry while the process proceeds. Where

42 *See* Crabbe (note 10) at 15.

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there is the need for engaging with other entities and/or stakeholders during the process, the assigned drafter will be responsible for keeping up those engagements and getting as much information about the proposal as possible.[43] The assigned drafter drafts the bill from start to finish and once completed, it is submitted to the principal Parliamentary Counsel for approval; but throughout the process, the assigned drafter works as a lone man. Throughout the drafting process, the assigned drafter is guided by the instructions which are further clarified through consultation with the instructing office from time to time as the process unfolds. As such, drafting instructions saves and the drafter in an excellent way, hence, they should be given due importance by both the office preparing them and the office receiving them.[44]

VI Very Long Training

Legislative drafting is a discipline which requires continuous training and experience. It is a game of skill and these skills are acquired over a long period of time.[45] Even though training on the job is also a required element to obtain a holistic knowledge of the field, the knowledge, understanding and skills that drafters need can be gained through formal training offered in postgraduate programmes prepared under the guidelines of academic institutions.[46] This means that for drafters to excel in their job, they should receive further training over and above their basic training as lawyers. They must undertake specific training as a drafter.[47] It is therefore a correct proposition that it could take up to 10 years to train to be a qualified drafter.[48]

What is clear and agreed on between all the academics referred to above is that in Commonwealth jurisdictions, there is a need for further training, specifically for drafters, if they are to be effective in their work. The training is and should be a combination of both vocational (training on the job) and professional academic training. This being the considered view, it is common cause that the course of training as a legislative drafter is bound to be a long one. This is the approach that is taken by the AG's Office presently. To be enrolled as a drafter in the Chambers, one must be an admitted attorney of the High Court of Swaziland. On an average, it takes six years for one to be enrolled and admitted as an attorney in Eswatini. Five years would have been spent at law school training as a lawyer, and one year is spent serving articles of clerkship in preparation for admission as an attorney. Upon admission, Counsel can then be posted to the drafting department where, upon assuming the role of Parliamentary Counsel,

43 K.O. Lamidi, 'Theories of Public Administration: An Anthology of Essays' (2015) 6 International Journal of Political and Good Governance 1-35 at 17.

44 H. Xanthaki, 'Legislative Techniques in Rwanda: Present and Future' (2013) 15 European Journal of Law Reform 95-176 at 101.

45 V.C. Crabbe, 'Teaching Legislative Drafting: The Commonwealth Experience' (1998) 19 Statute Law Review 113 at 117.

46 *Ibid.*, at 115.

47 H. Xanthaki, *Legislative Drafting: Art and Technology of Rules for Regulation* (2014) at 358.

48 D.R. Miers and A.C. Page, 'Teaching Legislation in Law Schools' (1980) 1 Statute Law Review 23 at 25.

there are further trainings that are a compulsory requirement for drafters. This has been the 'Course in Legislative Drafting' that was sponsored by the Commonwealth Secretariat with Ghana as the host country.

To date, there is only one officer in the department holding a master's degree in legislative studies, which she obtained at IALS. She has since been promoted to the position of Deputy Attorney General and head of the drafting department. Other officers have attended the three-month course in Ghana, while others have only been trained on the job by senior Parliamentary Counsels. Budgetary constraints[49] have made it almost impossible for the government to send officers for further training elsewhere, since the Commonwealth Secretariat stopped funding the three-month programme that was offered in Ghana a few years ago.

The academic training allows the drafter to understand the concept of quality in legislation and to become aware of what choices drafting entails, as drafting is only a part of the legislative process which is also part of the policy process.[50] What is required from formal training is not the provision of concrete answers to specific drafting questions,[51] but rather an understanding of all the aspects that feed into the process. This is combined with the mentoring that junior Parliamentary Counsel receives from the senior counsels in the department and this will be for some time before the junior counsel can be assigned to work independently.

The inability to retain trained drafters in the Office has also been a major problem that even today contributes to the shortage of drafters. In the past, a number of counsels who managed to obtain their master's degrees in legislative studies from the University of West Indies in Barbados also left the Office in pursuit of greener pastures, some in the private sector and some outside the country. This is a programme that was also funded by the Commonwealth Secretariat specifically for Commonwealth countries following a request that was made by the Commonwealth Ministers of Justice.

VII Separation of Policy from Drafting

When drafting instructions are developed and sent to the AG's Office, they reflect policy aspirations by the instructing ministry that have to be converted into concrete rules known as legislation. The drafter engages with the instructing ministry on the preliminary issues of the drafting process on the basis of the instructions which are basically policy statements and at that point the drafter will be trying to engage and understand the policy issues. Before the legislation can be drafted, the underlying policy must be determined, because legislation is as a result of policy being translated into legislative form.[52] Without such discussions and understanding, it will be difficult for the drafter to embark on the process of legislation. For the drafter to understand the legislative proposal, there

49 On the estimated costs of training a drafter and a trainer over a period of five years, *see* Stefanou (note 1) at 129.

50 Xanthaki (note 47) at 359.

51 G. Bowman, 'The Art of Legislative Drafting' (2005) 7 European Journal of Law Reform at 15.

52 *See* the Eswatini Guidelines at 6.

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must be a clear understanding and grasp of the policy issues that underpin the legislative policy proposal. They must ensure that they fully understand the instructions and communicate the policy set out in the instructions in as clear a manner as possible.[53]

The drafting process tests the policy, helps refine it, and generates a better sense of the practical operation of the proposed scheme.[54] Thus, it is impracticable for the drafter to draft effectively without a conceptual understanding of the policy landscape and how the legislative plan will fit into the entire scheme of things. Even though the drafter, in a strict sense, does not take part in the policy consideration that eventually feeds into the legislation process, there is a need for some level of understanding the policy issues behind the proposal for the smooth sailing of the drafting process once it has commenced. The practice in the AG's Office is that the ministry legal advisor, who is otherwise well-versed with the issues, briefs the assigned drafter on the background of the proposal before the actual drafting begins and after the receipt of the instructions by the AG. This is so that the drafting process can be smooth and done within the earliest time possible.

VIII Lack of Accompanying Documents When Submitting Draft to Parliament

The drafter prepares the draft in close consultation with the instructing ministry. The draft will be changed numerous times before the final draft is produced. Once the final draft is agreed on between the ministry and the drafter, the ministry convenes a meeting with the Parliamentary Portfolio Committee responsible for that ministry to educate them on the proposed law before it gets to Parliament. This is meant to hasten the debate process when the bill gets to Parliament, because the Portfolio Committee comprises members of Parliament, and would be in a better position to assist the House in understanding the bill when it is finally tabled. An explanatory memo will normally be attached to the bill explaining briefly what the bill is about, and also save as a record that the bill was sent to Parliament. Save for the explanatory memo, there are no other accompanying documents that are attached to the bill when it is finally sent and presented to Parliament for debate.

C The Drafting Process in Ghana

The training made available to drafters of the Commonwealth African countries has encouraged the appropriate conditions for the professionalization of the drafters' function.[55] While skills development should always be present and progressive, African drafters have been able to gain access to the training and skills required for the job, although it has since been stopped. The scarcity of drafters in the Commonwealth African countries has guaranteed that every

53 *Ibid.*, at 21.

54 H. Xanthaki, Thornton's Legislative Drafting (2019) 5 ed at 141.

55 J.N. Aryee, 'Professionalising Legal Drafting in Commonwealth Africa: Training for Administrators in the Civil Service' (2008) 34(1) Commonwealth Law Bulletin 3-14 at 3.

drafter who receives training on the field has the opportunity to practice and gain the necessary experience as a drafter. This has contributed to sharpening the knowledge and expertise of drafters in the region.

For a considerable amount of time, Ghana has been at the centre of providing such expertise and access to the required skills for drafters in Commonwealth Africa by hosting the course on legislative drafting that was offered and sponsored by the Commonwealth Secretariat. The access to the training opportunities and the benefit of being the host for these trainings elevated Ghana to become one of the few Commonwealth African countries that has highly skilled drafters. It is one of the pioneers in the advancement of legislative drafting expertise in the African region. The regional experiences and minds that have converged in their territory has helped them remain on top of the emerging practices and interventions in the field. Such skills and practices are among the key elements needed in the centralized drafting system present in the Commonwealth African countries. Not every lawyer can draft legislation, and for lawyers to be able to draft effective legislation they must have received adequate specialized professional training and grooming on the subject. Of note is that all Commonwealth African countries are English-speaking countries, and as such follow the common law system of drafting.

This section will examine the characteristics that define the drafting process in Ghana with the aim to highlight how the style of drafting that was inherited from Britain and the teachings and practices have influenced the drafting process in that country. This will be shown by tracing the design of the process and the steps taken when a legislative assignment is executed. As we have already seen how the process unfolded in Eswatini, the same approach of analysis will be undertaken for Ghana.

I The Legislative Function in Ghana

It is common cause that Parliamentary Counsel in common law jurisdictions are civil servants and thus have a developmental role to play in the drafting process, by taking the developmental interests of the government into consideration when assigned to draft any piece of legislation. The Civil Service Law of Ghana, 1993, states the objective of the Civil Service as one to "assist the Government in the formulation and implementation of government policies for the development of government".[56] The implementation of government policies can thus be achieved through legislative enactments. Seidman notes correctly that to achieve development that serves popular needs, the exercise of democratic state power through legislation constitutes an essential tool.[57] In parallel with this, the broad objectives of the Commonwealth legislative drafting support the notion that the

56 Section 2.

57 A. Seidman *et al.*, 'Instrumentalism 2.0: Legislative Drafting for Democratic Social Change' (2011) 5 Legisprudence 95-142 at 96.

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law has an active role to play in accelerating the process of orderly development especially in developing countries.[58]

Likewise, it is equally correct that the highest form of policy formulation and development is legislation, which is always the function of Parliamentary Counsel in common law systems.[59] This being the case, when engaging in a drafting function, the drafter becomes the agent of development. It is thus important that legislative drafters receive the necessary training that will make them efficient in their work as shapers of the developmental interests of the government. The organization of the drafting function of Ghana, like all common law countries, is modelled on the British system. Every bill, regardless of the ministry or department sponsoring it, will be sent and attended to by a drafter in the central drafting office who possesses both legal and drafting expertise.[60]

As is the case in Eswatini, the drafting function in Ghana is vested with the office of the Attorney General. The Constitution of Ghana provides that the AG is the principal legal advisor to the government and advises on all legal issues, both criminal and civil.[61] The Ghana position is contrary to that in Eswatini in the sense that in Eswatini the Director of Public Prosecutions (DPP) has the sole constitutional mandate to deal with criminal matters and prosecution of criminal offenders[62] and the AG does not have the mandate to handle such matters, except where the DPP consults the AG in relation to matters where national security may be at stake.[63] Similarly, the DPP has no power to consider any legal issues that are of a civil nature as that is the constitutional mandate of the AG.

II Centralization of the Drafting Process

Like all common law jurisdictions, Ghana adopts the centralized model of the legislative drafting system. As a former British colony, her legal system dates back to her pre-independence past and the legal institutions are thus modelled on those of England.[64] Foreign drafters were assigned and sent to Ghana to draft laws for the country until the establishment of the legislative drafting division in the AG's Office, whose mandate is the preparation and drafting of the country's laws.[65] Janet refers to such laws as statutes and defines them as the form of law created by the supreme legislative body in Ghana.[66] According to the Constitution, Parliament is the supreme law-making body in Ghana and the

58 D. McClean, 'Ten Years of the CFTC Legislative Drafting Training Programme' (1985) 11 Commonwealth Law Bulletin 226-236 at 226.

59 R. Edward, 'Law and Legislation in the Administrative State' (1989) 89 Columbia Law Review 369 at 374.

60 R. Seidman, 'Law Development and Legislative Drafting in English Speaking Africa' (1981) 19 Journal of Modern African Studies 133 at 156.

61 Section 88 (1), (3), (5).

62 Section 162 (4), (5).

63 Section 162 (7).

64 S.Y.-C. Fung, 'The Rise and Fall of the Proviso' (1997) 18(2) Statute Law Review 104.

65 AN Quartey-Papafio Drafting Conventions, Templates and Legislative Precedents and their Effects on the Drafting Process and the Drafter, LLM, Institute of Advanced Legal Studies, School of Advanced Study (2012) 9-10.

66 J. Daniels, 'Statute Law in Ghana' (1972) 4 Review of Ghana Law 113-128 at 113.

power to make such laws shall be exercised by bills passed by Parliament and assented to by the president.[67]

Bills are proposed by the government ministries or departments when they send instructions to a centralized body that has an exclusive constitutional mandate to execute and monitor the legislative drafting programme of the country.[68] In effect, all legislation in Ghana emanates from a very small body of draftsmen within the Attorney General's department.[69] The office of the AG is a department in the Ministry of Justice and within the department is the legislative drafting division.[70] The Division is solely responsible for drafting all primary and secondary legislation in Ghana. Archer also highlights that the process of the codification of the law in Ghana is also a responsibility of the AG's Office.[71] He states that once the law has been properly researched and approved, the researcher's proposal for codification could only be reduced into a proper legal draft in the AG's Office as the centralized body entrusted with the legal drafting function. Even though there has always been a shortage of drafters in the Chambers,[72] this approach signifies the centrality of the legal drafting function in the country. The drafting function is undertaken by lawyers who are employed by the government as civil servants and trained in drafting legislation.[73] Their main function is that of transforming government policy into legally binding rules or law. The drafter's role is that of receiving instructions that contain the policy aspirations and transforming the policy desires of the respective government department into actual legal drafts in a process called drafting of legislation.[74]

III The Exclusivity of the First Draft

Where the drafting function is centralized in and assigned to a specific body that deals solely with the drafting of the country's laws as is the case in Ghana, it becomes common cause that the first draft will emanate from and remain with that centralized body until such time that a final draft is prepared and agreed on by all the parties concerned. There might be various stakeholders or actors in the drafting process, as Justice Crabbe, as he then was, indicated in his interview with the researcher from Friedrich-Ebert Stiftung Ghana.[75] He refers to the drafting process as one that constitutes a crystallization of ideas, in that many actors are involved in the process.

67 Section 106.

68 H.M. Boayke, Policy and the Legislative Drafter: The Case in Ghana, LLM, Institute of Advanced Legal Studies, School of Advanced Study (2014) at 11.

69 N.A. Ollennu, 'Law Reform in Ghana in the 1970s' (1970) 7(1) University of Ghana Law Journal 1-30 at 9.

70 *Ibid.*

71 P. Archer, 'Codification of the Law: Ghana's Experience' (1987) 13(3) Commonwealth Law Bulletin 1044-1050 at 1047.

72 *Ibid.*

73 *Ibid.*

74 C. Stefanou, Drafters, Drafting and the Policy Process, Chapter 20.pdf. Available at https// studyonline.sas.ac.uk, 319-320.

75 F.E.-S. Ghana, 'Human Rights Advocacy Centre, "The Law- Making Process in Ghana"' January 2011 Publication, at 9. Available at www.fesghana.org (accessed on 13 August 2020).

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These players, according to Crabbe, include: non-governmental organizations, private citizens, public officers, government departments, the Law Reform Commission, and finally the AG.[76] Once the thoughts and ideas from all these players have been crystallized, then drafting instructions are sent to the AG to initiate the first draft. Therefore, the first draft is the culmination of the instructions that are sent to the AG's Office, from which the Parliamentary Counsel has the responsibility to prepare the first draft bill. Ultimately, the AG remains the custodian and main editor of the first draft. The reason is simply that, in the event that there has to be changes in the content of the draft, the first draft acts as a reference point of all the changes that have been made to the draft leading to the final document called a draft bill.

Once the final draft is put together and agreed on between all interested parties, the first draft remains with the drafting division of the AG's Office. This is to ensure that all the steps taken during the drafting process are properly recorded. In the event of any concerns arising from the draft bill, recourse shall always be made to the first draft to ascertain at what stage the issues that constitute the concerns were raised and what the considerations were that necessitated their incorporation into the draft bill, as the first draft reflects every step of the drafting process. The first draft is filed by the draftsmen who is first assigned to prepare the bill and edit it as and when there is a change to the contents of the draft bill.

IV Drafting Instructions

After Cabinet has approved a request from a ministry which proposes to put in place a legal framework to regulate any particular area that has been identified and agreed on by the ministry as one in need of a legal regulatory system, the requesting ministry – through the Chief Director (the equivalence of the Principal Secretary in Eswatini) – produces drafting instructions to be forwarded to the AG's Office.[77] The drafting instructions are basically a request from the sponsoring ministry to the AG requesting that they draft the proposed law in line with the conditions that have been identified and accessed through the policy formulation process. Accordingly, correctly observes that the first step in drafting is finding out what the client wants, and that is the same for all drafters,[78] wherever they may be in the common law jurisdiction. The instructions are sent to Parliamentary Counsel as a request to have the official bill drafted.[79]

Upon receipt of the drafting instructions, the Parliamentary Counsel begins the drafting process and is always guided by the instructions. It is generally agreed that the Parliamentary Counsel or the AG's Office cannot initiate the drafting process without being so instructed by a government body, either a ministry department or the Cabinet.[80] The instruction could be written or verbal,

76 *Ibid.*

77 *See* Archer (note 71) at 10.

78 D. Marcello, 'Ethics and Politics of Legislative Drafting' (1995-1996) 70 Tulane Law Review 2436-2464 at 2440.

79 *See* Archer (note 71) at 18.

80 *See* Eswatini Guidelines (note 52) at 141.

but the AG must have received such instructions. Similarly, Archer's view suggests that even for the codification of law in Ghana, the AG's Office cannot begin or initiate the codification process without the researcher's proposal (the equivalent of drafting instructions) from the Law Reform Commission requesting that the law be codified in accordance with the findings that have been approved in the codification proposal.[81]

Thornton notes that the process of drafting begins with the receipt of instructions and ends with the completion of an agreed draft. Basically, the instructions outline or should, as much as possible, provide detailed elements of the policy goals to be achieved. This is the guide that the Legislative Counsel will need to make sure that the draft bill addresses the policy areas of focus with clarity and precision. Similarly, the drafter can ensure effectiveness in the drafting process. Thus, particular attention must be paid to the instructions that are sent to the AG, as good policy may result in a bad law as a result of the poor quality of instructions.[82]

V The Solitary Drafter

The solitary drafter is an approach that is synonymous with the common law drafting system. It finds its genesis in the fact that when instructions are received by the AG's Office, they are assigned to one drafter in the Chambers to attend to it. The work is allocated in terms of the ministry that each drafter is assigned to in the Chambers. If there is a request that comes from a ministry that a particular drafter be assigned, then that assignment will be allocated to that drafter and that drafter will do the work individually and only report to the head of the drafting division and the instructing ministry.

An interview with a drafter in the AG's Office in Ghana revealed that their Office follows a similar approach where a single drafter will be assigned a drafting assignment and will be expected to work alone and only report to the head of the division on any progress made or challenges, if any. This is a similar approach to the one taken by the drafting office in Eswatini. One of the reasons for such an approach is that, upon receipt of the drafting instructions, the assigned drafter is expected to conduct research and undertake consultations with the sponsoring ministry to clear any issues that might need to be cleared. This therefore requires and, as such, provides a consolidated approach where the drafter is in charge of the process and the steps needed in undertaking the work.

Hewagana correctly notes that "drafts require constant revision considering the feedback received on drafts that are send to either the sponsoring ministry or the head of the division".[83] This kind of set-up requires that only one official or drafter be in charge of the process to ensure a proper consolidation and actioning of all the comments received. The shortage of drafters, especially in small

81 *See* Ollennu (note 69) at 1047.

82 V.C. Crabbe, 'The Ethics of Legislative Drafting' (2010) 36 Commonwealth Law Bulletin 11-24 at 14.

83 R. Hewagama, 'The Challenges of Legislative Drafting in Small Commonwealth Jurisdictions' (2010) 36 Commonwealth Law Bulletin 117-126 at 122.

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Commonwealth jurisdictions, is another factor that promotes the solitary drafting approach. Commonly, drafters are expected to achieve much within a short time.[84] Every drafter in an office is assigned a specific file – more than one most of the time – and thus each drafter will be concentrating on meeting the timelines that have been set for each assignment and barely have the opportunity to attend to someone else's files.

VI Very Long Training

> In order to produce quality legislation, drafters need an undergraduate law training, followed by specialised postgraduate training in legislative studies, combined with hands-on experience in a drafting office with an experienced senior drafter.[85]

One will appreciate that the layers of training suggested above will take a sizeable amount of training time for the aspiring drafter. The courses in legislative drafting that have been provided and funded by the Commonwealth are an indication of the intensity of training that goes into being a drafter in common law jurisdictions. Legislative counsel must be well trained to a level that can ensure that they are able to draft laws that are clear and precise, and this training can take a long time.[86]

Initially, these courses were running for a period of six months and later, the period was reduced to three months. This was following concerns by government departments that officers would be out of office for far too long a period, thus having a negative impact on their overall work output.[87] These courses were delivered in different Commonwealth countries with the aim to cover all regions of the Commonwealth. Of note is that Ghana is one of those countries that was identified as the hub for the West African region, Kenya for the East African region, and Zimbabwe for the Southern African region.[88] When the courses were stopped in Kenya and Zimbabwe, Ghana remained the only African destination for the Commonwealth course until very recently when it was stopped.

The course was offered to government officials who were working in the drafting division as drafters in their respective countries. Thus, for one to qualify for the course, they must have been qualified as a lawyer and admitted as an attorney in any court of the Commonwealth. It is therefore common cause that the drafters in the Ghana drafting division were also subject to the same requirements when enrolling for the course. As was demonstrated in the case of Eswatini on the period of time for one to be qualified as a lawyer, the length of time is similar for many African universities, ranging from four to five years for

84 M. Augustin, 'The Drafters Role in the Drafting Process' (2013) 15 European Journal of Law Reform 177-205 at 177.

85 *See ibid.*, at 178.

86 *See* Appiah (note 4) at 81.

87 *See* the Commonwealth Legislative Drafting Evaluation Final Report (note 6) at 3 and 16.

88 *Ibid.*

one to graduate with a law degree and another one to two years to be admitted as an attorney of the court.

Once the candidate has completed the course of study as elaborated above, it is at that point that they can qualify to be enrolled as legislative drafters in any legislative drafting office and thus eligible to undertake the advanced course in legislative drafting. It is therefore evident from this analysis that even for Ghana, the drafter undertakes long training to qualify as such, and with regard to this, the words of Crabbe are reiterated that legislative drafting is a discipline, it requires continuous training and experience. It demands hours and hours of concentrated labour.[89]

VII Separation of Policy from Drafting

The essence of the legislative process is that it is in itself a policy process. There is overwhelming concurrence among experts across disciplines that it is common cause that in the drafting process it is inevitable for drafters to involve themselves with the substance as well as the form,[90] the substance in this case being the policy considerations and concerns, thus discarding Thring's theory that the drafter concentrates only on the form and not the substance. As a starting point, the drafting instructions are policy inspirations which the drafter first has to comprehend before the drafting process can be initiated. It is impossible for the drafter to start putting the draft bill together before understanding the policy issues that are raised in the instructions. In the context of legislation, policy involves decisions about what the legislation is supposed to deal with and the manner in which those issues are to be dealt with.[91] It is therefore a practice for every common law jurisdiction to indirectly engage with the policy issues before commencing the actual drafting process. Legislation benefits from the perspective that legislative counsel brings to the formulation and implementation of the policy.[92]

This engagement is not a clear-cut one as the drafter will not be involved in the department's discussion of the policy needs but can only shape the policy through the drafting process. Once the sponsoring ministry has sent the request to the AG's Office for the drafting of a particular law, it is at that point that the drafter will engage with the sponsoring ministry and that engagement will be on the policy issues contained in the instructions. Crabbe notes that the legislative process is part of the wider policy process and not the policy process as a whole. As such, the policy process cannot be complete without the legislative process. Appiah, the former director of the legislative drafting division, Attorney General of Ghana, notes that legislative counsel has a critical role to play in the

89 Crabbe (note 45) at 117.

90 C. Stefanou, Drafters, Drafting and the Policy Process, Book Chapter, at 319. Available at www.studyonline.sas.ac.uk (accessed on 20 June 2020).

91 J.M. Keyes and D. Dewhurst, 'Shifting Boundaries between Policy and Technical Matters in Legislative Drafting' (2016) 1 The Loophole 23-30 at 24.

92 *Ibid.*

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transformation of policy into law and to clarify the policy objectives.[93] The clarification of the policy objectives by the drafter is in essence the consideration of the substance of the policy.

She notes further that legislative counsel is generally not concerned with the development of policy, but they are aware of the process to produce it.[94] This is the logical expectation from legislative counsel; counsel would otherwise not be able to draft without an appreciation of the policy formulation process because when the drafter drafts legislation, the aim is to implement the policy objectives. Similarly, when the drafter consults the sponsoring ministry on the drafting process pursuant to receipt of the instructions, the drafter consults on the policy issues that the law seeks to address. Crabbe posits that in the drafting process, legislative counsel must have an appreciation of the cultural, economic, political, and social factors that create the problem that will have to be solved by the proposed legislation.[95] It is legislative counsel's responsibility to comprehend policy and translate it into legislative form without dictating, distorting or diverting it.[96] Evidently, that level of awareness can be achieved by having legislative counsel engaging with the policy issues to a certain extent during the drafting process and not just focusing only on form.

It is argued therefore that trying to engage on the drafting process without a clear comprehension of the policy considerations could be an exercise in futility. If this view is sustained, accordingly, Thring's theory of the separation of substance from form cannot stand in modern-day drafting; this same position has been repeated by most writers, and it is not necessary to delve too much into that point here.

VIII Lack of Accompanying Documents When Submitting Draft to Parliament

The practice of accompanying documents is synonymous with the drafting by committees in the civil law system as correctly observed by Stefanou, and it is not a common law practice. It supports the logic that under the civil law system, drafts can originate from various sources and each draft will need supporting documents to show how the policy issues have been considered and addressed in the draft law. Under the common law system, every issue that is touched upon in the proposal – whether it is policy-related or of a legal nature – will be done in a small central place that will consolidate and incorporate every proposal that has been made into the draft. When the final product is done, there is no need to explain anything through accompanying documents as everything that touches on the law will be contained in the bill itself. The draft bill cannot be sent to Parliament until the drafter and the sponsoring ministry have agreed that the

93 E.M. Appiah, 'Translating Policy into Law: A Case Study of Ghana Social Protection Legislation' (2020) 1 The Loophole 55-66 at 62.

94 *Ibid.*

95 V.C. Crabbe, 'The Role of Parliamentary Counsel in Legislative Drafting' (2000) Document No:1, 1-22 at16. Paper written following a UNITAR Regional Workshop on Legislative Drafting for African Lawyers (Kampala, Uganda 20-31 March 2000. Available at www.unitar.org (accessed on 30 August 2020).

96 *See* Crabbe (note 95) at 18.

final document reflects what all the parties involved wanted and that it is in line with the instructions.

What we have seen is that Ghana follows the traditional common law practices and our research did not find any information or literature suggesting that Ghana has adopted the practice of attaching accompanying documents to the final draft bill when it is presented to Parliament. In principle, Parliamentary Counsel do not attach any documents when the draft is finalized and sent to Parliament for debate under the parliamentary system. The draft bill is attached only to a memo addressed to the principal secretary of the ministry that made the request. The memo serves only as a record that the draft was completed and sent on the date reflected on it; other than that it has no other purpose such that it can be classified as an accompanying document. When the draft bill is sent to Parliament by the sponsoring ministry, it is sent through a memo addressed to the Speaker of Parliament indicating that the AG has approved the bill for presentation before Parliament. What is evident is that throughout the process, all the elements have been identified as being applicable in the Ghanaian process.

D Analysis and Conclusion

Across all jurisdictions, whether common or civil law, the legislative function is and remains an agenda for the government. It is the government that instructs the drafting of every piece of legislation that eventually finds its way into the statute book, or codes, as the case may be, and the drafting programme is regulated by the government. Likewise, the drafting process itself and every aspect that feeds into it is the government's business. It is the government that always ensures that there are well-trained drafters who can execute the drafting function as and when the need arises. It is also the government that appoints legislative counsel and ensures that they are well trained and possess the necessary skills and expertise needed for executing their drafting function.

The need for the development of legislative counsel capacity is therefore vital for any government that wants to achieve its developmental goals.[97] In modern democracies, law has been central to the issues of governance,[98] and this has escalated the need for the governments to pay particular attention to developing proper legislative drafting institutions. Accordingly, legislation is one of the many choices that the government has on how its policies can be put into effect and implemented,[99] and it is for that reason that the government always has a keen interest in controlling the programme for developing and drafting legislation.

We have seen how the Commonwealth Secretariat (an intergovernmental body) has been instrumental in the area of capacity-building for Commonwealth African drafters. Ultimately, the choice of the drafting system that a country

97 B. Simamba, 'Improving Legislative Drafting Capacity' (2002) 28 Commonwealth Law Bulletin 1125-1141 at 1127.

98 M. Vogel, 'Situation Legislative Drafting' (2008) 10 European Journal of Law Reform 275-294 at 277.

99 Xanthaki (note 47) at 4.

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would want to adopt remains to be made by that particular government, and the literature reviewed in this research has revealed that this is actually true for many other governments in Commonwealth Africa, if not all of them. Such choice has been exercised by Commonwealth countries as a collective, where they have all agreed that their colonial master should come to the party and assist Commonwealth developing countries in building the capacity for drafters in their government drafting offices. To this end, the Commonwealth has funded teaching staff and students for many courses conducted and provided under its auspices.[100]

This article sought to trace the drafting process in common law countries with the aim to highlight that the process has similar characteristics. It sought to establish whether the elements discussed by Stefanou as those informing the process can identify with the real practice of the drafting process of common law countries. Having considered the process of drafting in the two chosen countries, it has been observed that there is a lot that has been done to ensure that the drafters' capacities are developed and they are well prepared to execute their drafting function. On the contrary, not enough effort seems to have been made in making sure that the officials responsible for providing instructions to the drafter are equally aware of their role in making the drafting process a smooth and effective one. This is an equally important part of the drafting process that needs further development and consideration, as it forms the very basis and foundation of the drafting process. The drafter's task is to carry out the instructions of the client.[101] Thornton provided in great detail what the role of the drafter is, as well as what the officials proposing the law need to make available to the drafter to assist the drafting process.

In jurisdictions like Eswatini, where there are ministerial legal advisors, they should play a major role in ensuring that the instructions issued under the hand of the Principal Secretary of the ministry that they are serving in, are of a quality that would enable the drafter in the Chambers to deduce, with certainty, the objective that the ministry seeks to achieve with the proposed legislation. Instructions, according to Thornton, should clearly capture the nature of the problem by providing background information, the purpose of the proposed legislation, the means by which those purposes are to be achieved, and the impact of the proposed law on the existing body of laws in the country.

I Discrepancies or Convergences in the Drafting Process of the Two Jurisdictions under Examination

I now turn to briefly examine whether there are convergences or discrepancies in the process employed in the two countries. What is clear is that the course for the development of expertise in legislative drafting in the Commonwealth has been a joint effort of all Commonwealth countries. Since the 1970s and beyond, they have been a calling for greater assistance from the Commonwealth Secretariat in the area of drafting and assessment of each country's specific needs with a view

100 *See* Simamba (note 97) at 1127.

101 E.A. Driedger, 'Legislative Drafting' (1949) 27 Canadian Bar Review 291-317 at 293.

to providing training facilities in legislative drafting on a regional basis.[102] Consequently, this resulted in the process being characterized by similar aspects in almost all common law jurisdictions. The Ministers of Justice of common law countries were the ones responsible for putting up proposals to the Commonwealth Secretariat on the programmes that they thought could help in addressing the issues of lack of expertise and shortage of drafters in their respective countries.[103] The agreed-on and harmonized programme meant that all participating countries had a similar exposure to the teachings on the subject, resulting in the similarities that we see in the process today.

Ultimately, the trajectory that is taken by Eswatini and Ghana in the process reflects the expected similarities. Both countries have centralized the drafting process as it is executed by an institution that has the exclusive responsibility and constitutional mandate to undertake the drafting function. As we have seen, in both countries, the first draft originates from the centralized office and it remains there until the draft bill is passed into law by Parliament. These institutions in both jurisdictions cannot initiate the drafting process without being requested by a specific government or department to initiate the process. This request is made through a document called the drafting instructions which are developed by the policy officials of the sponsoring ministry and finally sent to the AG's Office under the hand of the Principal Secretary. Once the drafting instructions are received by the AG, the Parliamentary Counsel assigned initiates the process by following the five stages of the drafting process as expounded by Thornton.

Upon receipt of the drafting instructions, both jurisdictions adopt the solitary drafter approach, where a single drafter is assigned the work to do in isolation and only consult with the instructing ministry and the head of the drafting division of the designated institution, in this case the AG's Office. The period of training for lawyers in these jurisdictions is relatively long. The duration of time needed for one to be qualified with a basic law degree as well as a master of laws degree is basically the same. For a long time, drafters in both countries have been and are still using the same institutions and a similar programme to train as drafters. These institutions are either the Institute of Advanced Legal Studies, in London, the University of Barbados, Cave Hill Campus, or the University of Ghana that hosted the diploma course that was funded by the Commonwealth Secretariat. These are the three most prominent institutions where Commonwealth African drafters have been trained and are still being trained to date, with the exception of the diploma course in Ghana which was stopped a while ago. All of these institutions offer structured programmes of study on the subject.

Both countries adopted the same practice of attaching Parliamentary Counsel to the Parliament. Birobonwoha correctly observes that Uganda was the first

102 *See* in this respect the article reflecting the ten years' experience of the CFTC Legislative Drafting Training Programme (note 58) at 226.

103 *Ibid.*, at 228.

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country to have a drafter based in Parliament.[104] Eswatini adopted this approach following the training that drafters attended in Ghana, and the director of the programme at that time, Justice VC Crabbe, as he then was, had been Parliamentary Counsel in Uganda before taking up many other roles, including that of being the director of the Commonwealth programme under the Faculty of Law in the University of Ghana. Evidently, this is the result of the exchange of ideas that occurs during the training sessions as it is a practice that has been recently adopted in the country. This article did not establish any significant differences in the drafting process of these two countries.

II Conclusion

Drafting legislation is a skill, a form of art that is acquired through extensive training both in an apprenticeship and formal academic tutorship.[105] The fact that the skill can be honed through training means that there is the possibility of having a form of harmonized training in order for one to acquire the requisite skills. The sharing of ideas and experiences by drafters of different regions forms the very basis of the harmony and seamless approach that we see in the process today.[106] Thus, the benefit of the exchange programmes which cover basically the common law countries in Africa, Europe and the Caribbean cannot go unnoticed. Such harmonization could either be national, regional or multilateral, but it has yielded almost similar results. We have seen in this research how the training was harmonized to form a multilateral kind of approach which eventually informed the design of legislative drafting institutions in those countries that grouped themselves together to constitute one or several regional blocs for purposes of such training and apprenticeship activities, the one presented in Ghana being one example.

It is against this backdrop that the drafting system of these two countries draws its similarities. The advantage of the harmonization that exists today is that there is certainty in the drafting process in all common law countries, common law drafters can undertake any task that is available in any common law country with ease because they already know the steps that need to be taken, and such steps are standard, well established, and guided by the prominent authorities in the field. Needless to say, Thornton is the *locus classicus* for any discussion on legislative drafting at least in common law African legislative drafting offices or departments.

Ferrie highlights that one of the benefits of the exchange programmes between their offices was the fact that the form and structure of the legislation produced in Edinburgh and Canberra were similar and familiar.[107] Obviously, this made it possible for both offices to maximize the benefits of the exchange

104 P.P. Birobonwoha, 'Efficiency of the Legislative Process in Uganda' (2005) 7 European Journal of Law Reform 135-164 at 149.

105 K. Makamure, 'The Diploma in Legislative Drafting at the University of Zimbabwe: An Experience from the New Commonwealth' (1985) 1 Statute Law Review 21-28 at 21.

106 W. Ferrie, 'Development of Legislative Drafting Skills – The Benefits of Exchanges' (2013) The Loophole 17-22 at 18.

107 *Ibid.*

programmes and trainings. Thus, it is not a coincidence that the common law drafting process is similar in many respects, if not all.

It is therefore my view that this article has achieved what it set out to do and has illuminated the trajectory that defines the drafting process in common law countries. Further, it has demonstrated the similarities between the drafting processes in the two countries under consideration and has confirmed the comparative criteria by Stefanou. Finally, it is my hope that this work will add to the existing body of work on the subject and will be of help to other scholars from Commonwealth Africa and beyond.

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