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## **THE LEGISLATURE AS AN INSTITUTION**

A presentation made at a  
Post-Election Seminar for Members of  
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### **SPEAKING NOTES**

By

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## A. INTRODUCTION

- In a modern State, it is impossible and undesirable that State power should be exercised by a single Organ hence the justification for the three Organs namely; **the Legislature**, **the Executive** and **the Judiciary**.

To appreciate the *raison d'être* of these organs a historical perspective is necessary.

- The three organs of State emerged in several forms at different epochs. The origin is traceable to Plato and Aristotle. In the 16<sup>th</sup> and 17<sup>th</sup> Centuries, French Philosopher John Bodin and British Politician John Locke expressed their views on the theory of separation of power; but it was Montesquieu, a French man who formulated this doctrine systematically, scientifically and clearly. Writing in his book *Esprit de Lois* (The Spirit of the Law) Published in the year 1748; he said;

**“When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty, because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner. Again, there is no liberty if the judicial power is not separated from the legislative and the executive. Where it joined with the legislature, the life and liberty of the subjects would be exposed to arbitral control; for the Judge would then be the legislator. Where it joined with the executive power, the Judge might behave with violence and oppression.”**

Montesquieu was very impressed by the liberal thoughts of John Locke and he also based his doctrine on the analysis of the British Constitution of the 18<sup>th</sup> Century, as he understood it. According to Montesquieu, the secret of an Englishman's liberty was the separation and functional independence of the three departments of the Government from one another. However, this was a fallacy. The Donoughmore Committee observed:

**“In the British constitution there is no such thing as the absolute separation of the legislative, executive and the judicial powers.”** It is said: *“Montesquieu looked across foggy England from his sunny vineyard in Paris and completely misconstrued what he saw.”*

- The doctrine of separation of power was appreciated by Jurists and accepted by the Politicians alike.
  
- Blackstone in his book *Commentaries on the Laws of England*, in 1765 observed that if the Legislative, the Executive, and the Judiciary functions were given to one man, there was an end to personal liberty.

John Madison of the United States of America also proclaimed:

**“The accumulation of all power legislative, executive and judicial, in the same hand, whether of one, a few or many and whether hereditary, self-appointment or elected may justly be pronounced the very definition of tyranny.”**

- The Constituent Assembly of France declared in 1789 that there would be nothing like a Constitution in the Country where the doctrine of separation of power was not acceptable.
- For a better understanding and appreciation of the role of the Legislature it is important to critically look into the relationship between the three organs of government and further critically look at the doctrine of separation of power.
- This doctrine is based on the assumption that the three functions of the Government, legislative, executive and judicial are distinguishable from one another but in fact it is not so. They are no watertight compartments. It is not easy to draw a demarcating line between one power and another with mathematical precision.
- According to Friedman and Benjafield: the truth is that each of the three functions of Government contain elements of the other two and any rigid attempt to define and separate those functions must either fail or cause serious inefficiency in Government.
- According to Basu in *Administrative Law*: in modern practice, the theory of separation of powers means an organic separation and a distinction must be drawn between `essential` and `incidental` powers and that one organ of the Government cannot usurp or encroach upon the *essential* functions belonging to another organ; but may exercise some *incidental* powers thereof.

## **B. PRIMARY FUNCTIONS OF THE LEGISLATURE**

### **(i) Legislation**

- The legislative functions of government consist of enacting rules binding on the citizens of the particular state generally and any such rule made in due form, would be accepted as law by the courts of a unitary state without question.
  
- The legislative process is not concerned solely with actual making of new laws; it also involves the *travaux preparatoires*, the parliamentary process of debate, inter-departmental consultation and discussion, and also consultation with “outside” interested bodies, such as local authorities, trade unions or professional associations; and in some countries the legislative process may involve the subsequent promulgation of the legislation. Much of this process is the concern of the Executive, although the legislation itself is the result and creation of the Legislature, the general rule or expression of policy as determined and enacted.
  
- The most striking feature of most parliamentary systems of government is the extent to which the legislative process (from the stage of formulation of policy, through the drafting stage, and right up to the final stage of voting on the third reading of a Bill) is under control of the Government. This is not to say, however, that Parliament plays no part at the policy formulation stage. Debates initiated by the opposition do allow policies to be aired before the proposal reaches an advanced stage.

- In theory it can be said that legislative activity provides Parliament with important opportunity for scrutinizing and controlling government activity. In practice, however, Parliament's position is weakened by the fact that the Government can, in a variety of ways, by-pass the legislative process; and by the fact that even when it is used, it is too formalized to provide any real check on the Government's policies and activities. Indeed it can be argued that Parliament should not be seen as a governing institution but as debating forum.

### **C. SCRUTINY OF GOVERNMENT ACTIVITY**

Control or influence over the substance of legislation is necessarily minimal; the Government can always ensure that its policies become law much in the way that it desires. Ryle, in his book *the Commons in the Seventies*, puts the picture of the Commons thus:

**“Thus much of the criticism of Parliament and particularly of the House of Commons today, flows, I believe, from this fundamental mistake in their perceived functions. Parliament is wrongly blamed for bad government because Parliament does not govern. To put it badly; the government governs; Parliament is the forum where the exercise of government is publicly displayed and is open to scrutiny and criticism. And the commons do not control the Executive not in real sense; rather the Executive controls the Commons through the exercise of their party majority power.”**

### **(i) Ministerial Responsibility**

The other function of Parliament is that of scrutinizing the day-to-day running of Government. The constitutional linchpin of this activity is the doctrine of ministerial responsibility. Unfortunately, this doctrine means little more than that a Minister must be prepared to answer questions in the House on the activities of his or her Department. Very rarely does the doctrine and practice lead to a ministerial resignation. More potent in this respect is whether the conduct in question will cause the government embarrassment in the country at large. The pressure to resign is more likely to be effective if it emanates from the President than if it comes from Parliament.

### **(ii) Questions**

Parliamentary questions have two main functions: to elicit information about the activities of government and to ventilate policy issues, which arise out of the day-to-day running of government. Oral questions tend to be designed for political purposes rather than for getting information. Even if Ministers rarely resign as a result of revelations elicited by Parliamentary questions, it is nevertheless true that the Government can be embarrassed by questions and can be prompted to do something about the matters raised. Important, too, is the fact that the question is really the only parliamentary procedure which has remained under the complete control of the back-bencher; and for this reason, if for no other, questions remain an important counterweight to government power.

### **(iii) Select Committees**

Unlike standing committees, which consider legislation at the



committee stage and operate in an essentially adversarial way as microcosm of the committee of the Whole House, select committees are more investigative and usually less partisan. Their membership consists of backbenchers that are particularly interested in the area of the committee. It is important to have a wide range of committees so that a committee monitors all the major departments of state. The select committee system is potentially a very important tool in scrutinizing Government activity. It can provide much more thorough and systematic investigations than can questions, which are haphazard and often ill informed. The backbencher asks a question from a position of relative ignorance whereas the select committees have significant investigatory powers. An important practical constraint on the work of the committee is the fact that at the end of the day, a committee cannot force a Minister or a civil servant appearing before them to answer particular questions or to answer them in a non-evasive way.

#### **D. DELEGATION OF LEGISLATION**

- In liberal democracies, Parliament is not a gathering of specialised experts. Generally speaking, they are, and should be, composed of competent generalists, skilled in the art of finding out what the people want, or at least what they will abide, and expressing the views of those people they represent.
- Parliament functions best when they deal with general principles, broad objective and fundamental issues concerning individual rights, freedoms and the problem of groups and regions. If they are to do this things well, they are not likely to attract people with the competence to supervise closely the

fulltime experts of civil service, and they are not likely to have the time to grind out all the detailed laws and amendments thereto which are required in modern democratic states. For these and other reasons Parliaments of the Commonwealth countries, have delegated considerable legislative authority to be used under enabling parent Acts which confine themselves to the determination of the broad objectives.

#### **E. CONTROL OF DELEGATED LEGISLATION**

- Parliament having delegated legislative powers to deal with the *minutiae* for which they have neither the time nor the competence, is left with the problem of ensuring that this powers shall not be abused. The possibility of abuse in the exercise of delegated legislative power is inconsiderable. Government officials are inevitably disposed to “getting on with the job” and to avoiding interference whenever possible. They have long experience, highly skilled techniques, and believe they know best how to carry out an allotted task.
  
- They develop a natural impatience of restraint once broad objectives have been determined, of that kind of restraint, which seem to attach more importance to means than to ends, and to form than to substance. The Government official, like many other people in this imperfect world, is to be watched most carefully when he is acting in the best intentions. The point is, power can be of an encroaching nature, and its encroachments are usually for the sake of what are sincerely believed to be good, and indeed necessary, objective.

Parliament is the appropriate institution to supervise the use of delegated legislative power. If executive officials are to exercise these powers effectively, it can be further argued that there must be sound techniques of control. Gibbon stated: "so long as the representative is not provided with instruments of ready control, he is likely to trust the official less and be more tempted to interfere even in technical matters.... Freedom of the official depends on the assured mastery of the representative which in turn depends on the sound technique."

## **F. TYPOLOGIES OF LEGISLATURES IN AFRICA: A SAMPLING OF EXPERIENCES**

Owing to the colonial experiences, three major traditions of legislative design are discernible in many African countries. The practical manifestations of these designs are to be seen with varying permutations in the different countries normally referred to as:-

- (i) Francophone
- (ii) Lusophone
- (iii) Anglophone

### **(i) Francophone**

#### **Ivory Coast (Cote d' Ivoire)**

The Parliament is a single chamber known as the National Assembly constituted by deputies elected through universal, direct, adult suffrage. The life of the Legislature is five years.

The Constitution provides that the functions of the Legislature are:-

- (i) To vote laws and authorise taxes.
- (ii) That every deputy is a representative of the entire nation.

Other details of the legislative process are left out to legislation.

## **(ii) Lusophone**

### **Angola**

- Angola has a single Chamber known as the People's Assembly composed of three hundred and twenty three (323) members elected by universal, equal, direct, secret and periodic adult suffrage. The members of the National Assembly are elected through a system of proportional representation where each province is represented at the National Assembly by five (5) members. Each province is constituted into an electoral college: The remaining 130 members are elected nationally and for this purpose, the whole country is considered to be a single electoral college.

The Constitution lists the following as the functions of the legislature:-

- (i) amendment of the Constitution;
- (ii) approval of the constitution;
- (iii) approval of laws on all matters except those reserved by the Constitution Law for the Government;
- (iv) confer legislative authorisation of the government;
- (v) approve, on the proposal of the Government, the National Plan and the general state budget;
- (vi) establish and alter the political administrative divisions of the country;
- (vii) grant amnesty and general pardons; authorise the President of the Republic to declare a state of siege or a state of emergency;
- (viii) setting out the extension, suspension of constitutional guarantees and monitor the implementation thereof;

- (ix) authorise the President of the Republic to declare war and make peace;
- (x) approve international treaties on matters within its absolute legislative powers as well as treaties of peace;
- (xi) ratify decrees;
- (xii) promote proceedings against the President of the Republic for the crime of bribery or treason.

The Constitution further states that the National Assembly shall have full and legislative powers on the following among others:-

- (i) acquisition, loss and re-acquisition of nationality;
- (ii) Rights; freedom and basic guarantees of citizens;
- (iii) elections and the statutes of the office holders in sovereign bodies and local government and other constitutional bodies;
- (iv) ways and means of organising and running local government bodies; a system of referendum;
- (v) organization, functions and proceedings of the Constitution Court;
- (vi) organization of national defence and general basis of organizational functioning and discipline of the Angolan Armed Forces;
- (vii) system of state of siege and state of emergency;
- (viii) associations and political parties;
- (ix) monitoring systems and systems of weights and measures;
- (x) definition of limits of territorial waters;
- (xi) exclusive economic area and Angola's right to contiguous sea beds.

The Angolan Constitution has further stated that where the Parliament shall have relative sole legislative powers in its right to propose legislation, the Constitution has exhaustively laid down all the functions that the parliament is required to carry out.

***Although Angola was a Portuguese Colony its post-independence structure drew from the Soviet Union Marxist Leninist Style Government structure owing to the political inclination of its first President, Agostino Neto.***

### **(iii) Anglophone**

#### **Kenya**

- At independence Kenya had a bicameral Parliament with a Senate and a House of Representatives.
- The Senate consisted of 41 members drawn from Regions.
- The House of Representatives consisted of members elected from the constituency under a first past the post rule.
- The bicameral structure was designed to underpin what was essentially a federal system.

Later, in 1966 the bicameral structure was abolished and replaced with a unicameral system with a Parliament consisting of the Executive and the National Assembly. The unicameral structure was a statement that Kenya had embraced a unitary system.

- The uniqueness of the Kenyan system is that the Chief Executive played a dual role, as a legislator and as a President.

- Amendments to the Kenyan Constitution between 1964 and 1990 were deliberately designed to emasculate the National Assembly, which was reduced into a rubberstamping Institution. This reached its zenith when the Constitution was amended to make Kenya a *de jure* one party state in 1982.
- In the post Berlin Wall environment after 1989, Kenya was one of the Countries that clamoured for the re-introduction of multi-party politics and since then through a series of amendments the Kenyan legislature has clawed back its lost autonomy and is moving in the direction of restoring its institutional character and jettisoning its image as an organ that kowtows to the Executive.

## **G. OTHER EXPERIENCES**

### **(i) India**

- India is a bicameral federal State.
- The Parliament consists the Council of States and House of the People.
- The Council of State consists of:
  - (a) Twelve members to be nominated by the President taking into consideration their special knowledge or practical experience in respect of such matters as literature, science, art and social service.
  - (b) Not more than 280 representatives of the State (Union Territories). The representatives of each State in the

Council of States shall be elected by the elected members of the Legislative Assembly of the State in accordance with the system of proportional representation by means of the single transferable vote. The representatives of the Union Territory in the Council of States shall be chosen in such manner as Parliament may by law prescribe.

- The House of the People consists of not more than 538 members chosen by direct elections from territorial constituencies in a State and not more than 20 members to represent the Union territories, chosen such manner as Parliament may provide.
- There shall be allotted to each State a number of seats in the House of the People in such a manner that the ratio between the number and the population of the State is so far as practical the same for all the states.
- Each state shall be divided into territorial constituencies in such a manner that the ratio between them is equal.

**(ii) USA**

- All the legislative powers in the United States are vested in the Congress of the United States, which consists of a Senate and a House of Representatives.
- The House of Representatives is composed of members chosen every second year by the People of several States.



- The Senate of the United States is composed of two (2) Senators from each State, chosen by the legislature thereon for six years, and each Senator has one vote.

**(iii) Norway**

- The people exercise their legislative powers through the *Storting*, which consists of two departments, the *Lagstin* and the *Odelstin*. The *Storting* consists of 165 members. Each county constitutes a constituency.
- One Hundred and Fifty Seven (157) of the representatives of the *Storting* are elected as representatives of the constituency and the 8 representatives are elected so as to achieve a greater degree of proportionality.
- The *Storting* nominates from its members  $\frac{1}{4}$  to constitute the *Lagstin*, the remaining  $\frac{3}{4}$  to constitute the *Odelstin*. These nominations shall take place at the first session of the *Storting* that assembles after a new general election.
- Whereas the *Lagstin* shall remain unchanged at all sessions of the *Storting* assembly after the elections each Ting holds its meeting separately and nominates its own President and Secretary.
- Broadly speaking bicameral Legislatures are popular in Federal States. These may be justified in the following ways:-