



# INTRODUCTION TO LEGISLATIVE DRAFTING

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- The discipline of legislative drafting in the Commonwealth can be traced back to England in the 15th century
  - Barristers in private practice, counsels and officials were chosen to draft statutes upon petition from either House of Commons or the House of Lords. Subsequently the role was assumed by the office of Parliamentary Counsel
  - In Kenya, we currently do not have the title of 'Parliamentary Counsel', as the drafters come from various areas, e.g. the state law office, private practice, academia, etc

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- In Kenya from the colonial times till recently, the task of drafting laws was placed upon the office of the Attorney General (i.e. the state law office)
  - Times have changed now, i.e. we have 2 dedicated bodies for legislative drafting: Parliament and the Kenya Law Reform Commission undertake drafting of the laws; however, the office of the Attorney General is still the final institution to review the legislation before publishing it
  - The nature of legislative drafting makes it a discipline
  - Legislative drafting may be described as an Art, for the reason that it nurtures abilities of clear, cogent, concise thinking into a habit of

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- **Legislation has been defined as the process of making or enacting a positive law in written form, according to some type of formal procedures, by a competent branch of Government constituted to perform this process**
  - **(i) In this context, positive law is identified to mean statutory, man-made laws as compared to natural law (law as is) → the legitimacy of positive law is derived from civil or political authority**
  - **(ii) This differs from natural law which is a body of unchanging moral principles that are regarded as a basis for all human conduct (law as it ought to be) → the legitimacy of natural law is derived from moral reasoning based on what is believed to serve the best interest or common good of society**

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- • **Legislation is the product of a legislative process according to which competent legislative bodies enact rules of law on particular matters**
  - • **The main purpose of the legislative arm of government is to enact laws, however, the legislature should not be used as a mere 'rubber stamp' to legitimise interference with the legal process**

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- **LEGISLATIVE DRAFTING**

- • **It involves the drafting of binding rules of law for the regulation of society which are to be enacted by government bodies with legislative powers**
- **Involves communicating the law to the members of society through the written language/platform which is a legislative instrument**
- **Drafters must elect a language that they know will communicate to members of society at large**
- **Drafters must be deliberate in their word usage to ensure everyone understands the legislative instruments. your target cannot be Advocates**

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- **Legislative Drafting describes the entire process of taking ideas, refining them and developing the language to carry them out, organising the language so as to achieve the sponsor's objective. This may be broken down into:**
  - **(i) Raw ideas, stemming from a problem in the country**
  - **(ii) Refine the ideas**
  - **(iii) Organise the language, to ensure the problem and the means to avoid or correct it can be understood by society at large**



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- **Specialists who weigh the past, consider the present and project into the future to enable a piece of legislation places on the statute book to be of great assistance to the whole society**
  - **A drafter has to deal with problems of the past and present and also think of the future by laying down the rules that will stand the test of time. Examples of learning from the past:**
    - **(i) Creation of the Supreme Court to deal with presidential election petitions following the 2007 post-election violence**
    - **(ii) Prior to 2006, we did not have any statute that dealt with particular sexual offences (now we have the Sexual Offences Act) and so we had a society in which sexual offences were prevalent → e.g. prior to the SOA 2006, gang rape and HIV offences were not recognised and/or governed by statute**



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- **Legislative drafting requires constant study and involvement → years of experience and hard work are needed to produce a successful drafter**
  - • **Have basic understanding of the law**
  - • **Pay meticulous attention to detail**
  - • **Ability to supply a systematic approach to solving a problem**
  - • **Have an analytical mind**
  - • **Be well informed and must keep abreast of events in the jurisdiction and the world generally**

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- • Appreciate the cultural, economic, political and social policies that form the basis of drafting legislation
  - (i) E.g. The Prohibition of Female Genital Mutilation Act 2011 was introduced because many girls were dying due to this harmful cultural practice
  - Ready and willing to learn from stakeholders and work with them
  - • Show concern with the practical and effective implementation of the Law
  - • Ability to carry out extensive legal and factual research into the scope of the problem which it to be dealt with by the legislation

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- • **Need for clear and comprehensive drafting instructions to the drafter from the policy maker**
  - **(i) Instructions must be clear for the drafter to know what the problem is**
  - **(ii) The instructing client has a set of ideas that are submitted to the drafter in order to convert the ideas into law**
  - **(iii) The ideas may be part of what we call policy → remember: the policy maker and the drafter cannot be the same person; the policy maker should give instructions to the legislative drafter to ensure that the policy maker does not usurp the role of a drafter**
  - • **The general role and responsibility of the drafter is to effectively communicate the intention of the policy maker to those will use or be affected by the legislation**

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- **PRINCIPLES OF LEGISLATIVE DRAFTING**

- • **Legislative restraint: stakeholders should approach the enactment of laws prudently and avoid making unnecessary legislation**
- • **Compatibility and uniformity: new legislation should be harmonised with existing legislation**
- **(i) It is very important that the legislative drafter ensures that the legislation is compatible with and complies with the constitution, to avoid being deemed unconstitutional and rendered null and void**

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- **Clarity, recognisability, intelligibility and accessibility**
  - **Simplicity and brevity**
  - **Accuracy and unambiguity**
  - **Legal certainty and justice: who does the law apply to and the person responsible for implementing the law, so that there is certainty regarding who that particular law effects**

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- **Brown, George Mackay (1921-1996)**
  - **“We who deal in words must strive to keep language pure and wholesome; and it is hard work, as hard almost as digging a stony field with a blunt spade.”**
  - **Legislative drafting is not just a technical exercise. A drafter is the advisor to the Government in its legislative capacity. The drafter must work in close collaboration with the instructing department and ensure that, so far as possible, legislation is based on sound legal principles, gives effect to the intended policy and is clear and understandable as practicable.**

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- **The drafter has a wider responsibility to ensure that, in public interest, legislation as finally enacted by parliament or made by the Executive:**
    - Complies with fundamental legal principles including constitutionalism**
    - Complies with guidelines**
    - Is workable and effective**
    - Is clear and unambiguous**
    - Will withstand challenge or adverse criticism in the courts and in law schools**
    - Does not impose unnecessary or unreasonable compliance costs.**
  - **A drafter must thus have a good basic knowledge of the law of the jurisdiction in which he is operating and must be a person who shows the necessary interest in legislative drafting.**



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- **The scope of the legal problems which will come in the way of the drafter is almost unlimited and the drafter will experience the fascination in the use of words and the correct choice of words for the solution of any particular problem. The work of the drafter must be related to practical goal of preparing laws which can be readily understood and which will carry out the policies of the Government in a form acceptable to Parliament.**
  - **An analytical mind is also essential to good drafting. A drafter must keep up to date with events in his or her country and events in the world generally. The drafter should be in a position to appreciate the political, economic and social policies that will undoubtedly be the background to the drafted legislation.**

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• **Typically, the drafter's work involves:**

- Receiving and reviewing instructions from the instructing department.**
- Raising issues with the instructing department that arise out of the instructions or seeking clarifications.**
- Producing drafts that are clearly drafted and that give effect to the policy intent.**
- Devising solutions to problems that arise during the drafting process.**
- Assisting in resolving conflicts between departments over the policy or provisions in a draft**
- In the case of Bills, drafting amendments for select committees incorporating changes made during the parliamentary process and ensuring that the assent copies of enactments passed by parliament are completely accurate.**

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- **At the same time, however, if a drafter considers that the policy or some aspect of it does not comply with legal principle, or is or may be unworkable, or that the instructions are to draft something that will not be understood, the drafter must raise the matter with the instructing department and if necessary, with the responsible minister and the Attorney General.**
  - **The drafter must attempt to reduce the legislative purpose or intention to simple terms in order to be able to express it simply. As far as possible, everyday language should be used. Where necessary, clarity of expression should take precedence over style. Drafting which is grammatically correct and respects the rules of punctuation makes it easier to understand the text as well as its translation into other languages.**

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- **Philosophical Role of the Drafter**
  - **Catalyst for social development and change**
  - **As a drafter, every time you sit to draft legislation, you have to consider the past, see the present and foresee the future. The law should be able to apply to all situations.**
  - **Word mechanic**
  - **The greatest asset of a draftsman is the ability to get many ideas from people and engineering them in a single sentence creating rules, obligations, sanctions et cetera.**
  - **A draftsman creates graphs in the mind of people.**
  - **A draftsman dictates how particular circumstances are to be dealt with.**
  - **As a drafter, one should foresee challenges and come up with solutions to those problems.**

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- **Contribute to achieving justice and welfare for society**
  - **As a draftsman, one should be the gatekeeper of legislation.**
  - **A drafter should ensure that legislation is geared towards achieving justice and welfare in the society.**
  - **Legislative advisor**
  - **A drafter plays this role just as a lawyer does.**
  - **A draftsman should advise the government and the client on the technical aspects of drafting a particular piece of legislation.**