Drafting Legislative Provisions: Challenges and Opportunities

Vijay K Bhatia[1]

Introduction

The general function of legislative discourse is directive: to impose obligations and to confer rights. As legal counsel are well aware of the age-old human capacity to minimise obligations and to maximise rights, in order to guard against such eventualities, they attempt to define their model world of obligations and rights, permissions and prohibitions as precisely, clearly and unambiguously as linguistic resources permit. Another factor that further complicates their task, especially within the common law jurisdictions, is the fact that they deal with a universe of human behaviour, which is unrestricted, in the sense that it is impossible to predict exactly what may happen within it. Nevertheless, they attempt to refer to every conceivable contingency within their model world, and this gives their writing its second key characteristic of being all-inclusive. In this paper, I would like to examine the complexities involved in the process of the construction, interpretation and use

[1] The author is a Visiting Professor in the Department of English, City University of Hong Kong. His research interests are: Genre Analysis of academic and professional discourses, including, legal, business, newspaper, advertising, genres; ESP and Professional Communication; simplification of legal and other public documents; cross-cultural and cross-disciplinary variations in professional genres. Some of his recent research projects include Analyzing Genre-bending in Corporate Disclosure Documents, and International Arbitration Practice: A Discourse Analytical Study, in which he leads research teams from more than 20 countries. He has published widely in international journals. Two of his books, Analysing Genre: Language Use in Professional Settings and Worlds of Written Discourse: A Genre-based View, are widely used in genre theory and practice.

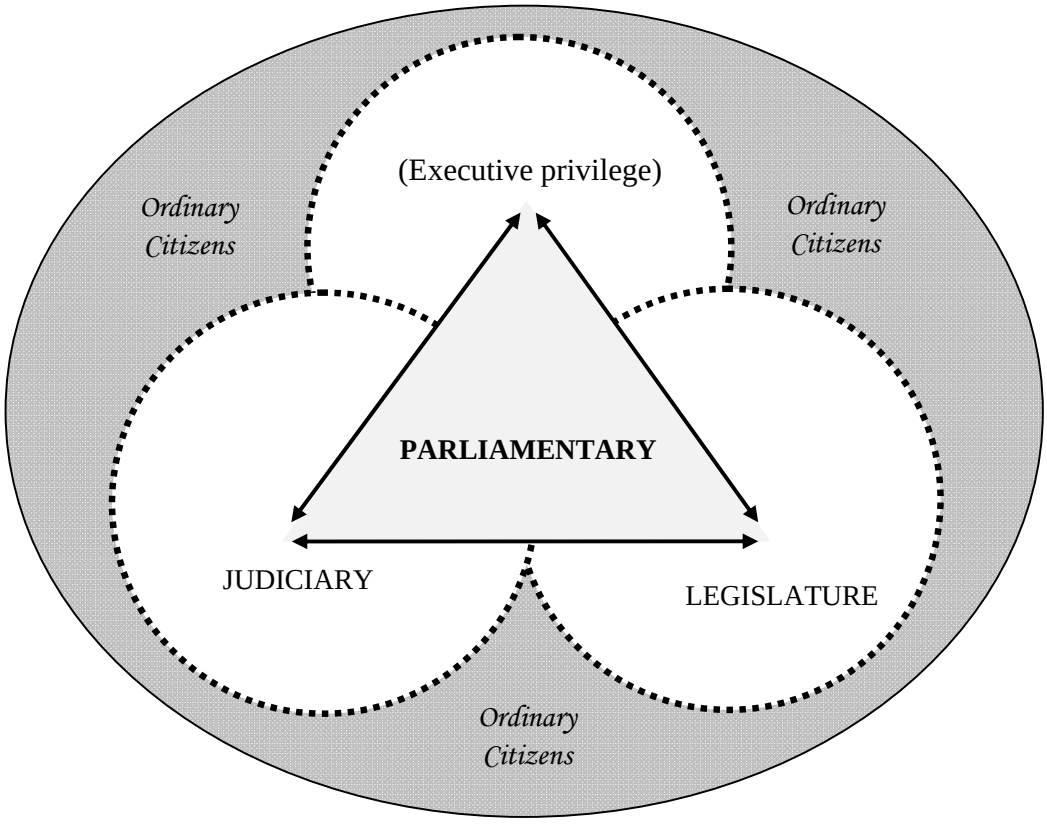
of legislative provisions, considering the challenges, and opportunities confronting a legislative counsel to make such provisions clear, precise, unambiguous, and all-inclusive, paying particular attention to the nature and function of participant management which constrain legislative actions. In spite of the challenges associated with legislative drafting, in particular those of accessibility, transparency of information, and the related opportunities of power and control in and through its interpretation and application, there seems to be a window of opportunity to make some changes to the way legislative provisions are drafted.

In order to identify and discuss a detailed framework for the analysis and drafting of legislative action, I would like to draw on Goffman's notion of participation framework (1981) taking into account the nature and function of the legislative provision and its organization, identifying the role of participants and institutions, which seem to influence and constrain the construction, accessibility, and interpretation of relevant and appropriate legislative action in a given socio-legal context. Referring to spoken interaction, Goffman provided an insightfully powerful model of a speaker-hearer participation, which can be decomposed into a range of different categories. About the speaker, he suggested four different kinds of roles. The *Animator* is the one who actually produces the talk, whereas the *Author* is the one who is responsible for putting speech acts into words and sentences. Similarly, the *Principal* is the party who is socially responsible for what is said, and the *Figure* is a character depicted in the Animator's talk. On the other side of the interaction, he classifies the *Hearer* in various categories, deconstructing it into different participants, who include bystanders, eavesdroppers, addressed and unaddressed hearers, and so on. He also points out that the talk can be embedded not simply in any speech event, but in action that the speech or talk is trying to achieve, and therefore he argued for the use of primary context for making sense of what the speaker is trying to do.

When we look at the contextual configuration of legislative construction and interpretation, we find a dynamic complexity of participation structure which is rarely seen in any other form of professional writing. In Goffman's terms, the legislative counsel is the *Author*, and legislative institution (whether a legislative assembly, Parliament or any other statutory body) is the *Principal*; however, the factor that really complicates the construction process is the role of the governmental institution in the form of the Executive, which often has some role to play, not only in the construction, but more importantly, in the interpretation and execution of the legislative provisions. So from the point of view of the construction of legislative actions, we find two major participating institutions (not necessarily individuals as is often the case in a number of other professional contexts), i.e., the legislature, which has the political power to negotiate legislative intentions, and the government executive bodies, in particular the legal affairs division, which has the executive privilege to give expression to legislative intentions, which is then passed on to the legislative counsel to put it in appropriate and acceptable words. Unfortunately the legislative counsel, who has the main responsibility of giving expression to the will of the Parliament is never present in the Parliament when the intentions are being discussed, which makes his task difficult.

This represents only one side of the coin, as it were. What adds additional complexity to his task is the other side of the coin, which concerns the nature of the recipient structure, the

complicated relationship they seem to have with different recipients, and the nature of loyalty they are required to display in their drafting practice. On the one hand, their addressed readers are the members of the judiciary, legal community, including judges associated with the system of courts; on the other hand, they have the ordinary people with no legal background at all, who are often referred to as their unaddressed audience, although it is possible to claim that they are the real audience, who are governed by what the legislative provisions they draft. So who the legislative counsel is supposed to be loyal to, the judiciary, who has the primary duty to interpret what they write, or the ordinary people, who are ultimately governed by these provisions, or the legislature or Parliament who are referred to as the *Principal*? It is impossible to satisfy all these requirements at the same time because the three sets of audiences have very little shared background knowledge, although believers in plain language law claim that it is possible to write in language equally accessible to all of them, including the ordinary people as well as to the judiciary. The truth however lies somewhere in between. I shall come back to this issue a little later, but first I would like to make the recipient structure a bit more complex by adding one more participant to it, that is, the Executive with the privilege to interpret legislative intentions to suit socio-political decisions of the government, as far as possible. The complexity of participant structure can be visually represented as in the following diagram:



Dynamics of participation framework in Legislative Drafting

The participation framework briefly discussed here offers an interesting tool, not simply for the analysis of legislative drafting contextual constraints, but also a set of three other important related legal concepts, that of *Transparency*, *Power*, and *Control*. Power and Control are seen as the function of the relationship between some of the main participants involved, directly or indirectly, not only in the drafting process, but also in the interpretation and use of legislative provisions. Different parties have some degree of power and hence control over the construction and interpretation of legislative processes, though the amount is limited by their role, as well as their access to discursive resources. The real challenge in the construction of legislative discourse is the nature and extent of under and over specification of legal scope in the expression of legislative intentions. This also raises the issues of accessibility (comprehensibility and interpretability), transparency, power, and control in specific socio-political and legal systems. The issue of specification, or rather lack of it, was initially mentioned in the paper, and has been summed up in Bhatia (1982) as follows: 'Legislative expressions are required to be clear, precise and unambiguous, on the one hand, and all-inclusive, on the other'. It may appear to be a contradiction, but a close analysis reveals that a clever balance between the two is the essence of the craftsmanship of legislative intent. As an outsider, I believe that legal draftsmen have always been conscious of the institutional conflicts involved in the specification of legislative intentions as well as the legislative authority, especially in parliamentary democracies, where legislative authority is invested in the legislature as it represents the people who elect them. As a result, they (Parliament and the drafting community) zealously guard this right (Renton, 1975) and would not like to handover this role either to the judiciary or to the executive, which creates the possibility of a three-way institutional conflict. Edward Caldwell, a senior parliamentary counsel, frames this tension quite nicely as follows:

> There's always the problem that at the end of the day there's a system of courts and judges who interpret what the legislative counsel has done. It is very difficult to box the judge firmly into a corner from which he cannot escape … given enough time and given enough length and complexity you can end up with precision but in practice there comes a point when you can't go on cramming detail after detail into a bin...
>
> (Quoted in Bhatia, 1982:25)

Another factor that makes their task even more difficult is that they also need to construct their legislative provisions in such a way as to avoid any potential conflict with any preceded or preceding legislation. Caldwell, (Quoted in Bhatia, 1982), once again, points out,

> Very rarely is a new legislative provision entirely free-standing ... it is part of a jigsaw puzzle ... in passing a new provision you are merely bringing one more piece and so you have to acknowledge that what you are about to do may affect some other bit of the massive statute book.

Crystal and Davy (1969), in a somewhat similar manner, point out,

> The legal draftsman often goes to great lengths to ensure that a legislative provision says 'exactly what he wants it to say, that is precise or vague in just the right parts and just the right proportions, and that it contains nothing that will allow a hostile interpreter to find in it a meaning different from what he intended.
>
> (Crystal & Davy 1969: 212)

On the other side, to make matters even more difficult, draftsmen are almost universally criticised for making their provisions inaccessible to ordinary citizens often questioning their loyalty to their so-called 'real readers'. Proponents of plain English movement claim that legal writing is 'wordy, unclear, pompous, and dull' (Mellinkoff, 1963:24), 'the largest body of poorly written literature ever created by the human race'. (Lindsey, 1990), and 'the blind pursuit of precision will inevitably lead to complexity; and complexity is a definite step along the way to obscurity' (Thornton (1996:52-53). It has also been claimed that legal discourse, especially in common law jurisdictions, is the function of a conspiracy theory, according to which—

> … the professions use language in ways that mystify the public or at least stultify critical thinking…Critics argue that the language of the professions is both a symbol and a tool of power, creating dependence and ignorance on the part of the public ... it creates the illusion of authority.
>
> (Danet, 1980: 452)

However, the legal discourse written in civil law jurisdictions, which may appear to be simple and plain as compared with similar discourse in common law jurisdictions, presents a different kind of accessibility issue, which is the other side of the coin (Bhatia, 2005). The crucial issue here is whether there is a conspiracy of the other kind in civil law jurisdictions, by which simple enactments are used as instruments of socio-political control. Ghai (1997), a prominent specialist on constitutional law, rightly identifies this lack of specificity in drafting as one of the main reasons for contentious interpretations in the 1984 Joint Declaration on Hong Kong.

> The two broad areas on which there was considerable contention were the relations between the Central Authorities and the HKSAR and the political structure of the HKSAR. China had fought off the British during the negotiations for the Joint Declaration on these issues, and an appearance of consensus was purchased at the expense of ambiguity and obfuscation.
>
> (Ghai, 1997:61)

Challenges in legislative drafting

In the context of what we have been discussing, I think there are two ways of looking at lack of 'comprehensibility' in legislative discourse, one resulting from syntactic complexity and all-inclusiveness leading to over-specification of legal scope as in common law drafting practice, and the other resulting from syntactic simplicity and under-specification of legal scope, as in civil law drafting tradition. The first one is likely to be more comprehensive and transparent, but may be relatively more difficult to comprehend, especially for the non-

specialist ordinary readers. The second one, on the other hand, is likely to be more accessible to lay persons, but can be contentious when it comes to interpretation in real life contexts, as in a court of law, giving the Judiciary and/or the Executive extensive discretionary powers to interpret the legislative intention (for more elaborate evidence of this issue, see Bhatia, 2005). In the context of legislative drafting in the common law tradition, I would now like to propose two ways of handling legislative provisions for ease of accessibility and interpretation.

Opportunities legislative drafting (easification v. simplification)

As in most technical discourses, especially those which have public implications, we need at least two versions: one for specialists, and the other for ordinary citizens. It is a common practice in sciences, where we have the original reports on experiments, and also a popular version for uninitiated readers. The two versions would serve two very different communicative purposes, one legislative, and the other informative. Both will need to have their own respective mechanisms, depth of specificity and levels of reader accessibility. In order to make the specialist versions easier for processing and interpretation, I would like to suggest 'easification' of legislative provisions, keeping them clear, precise, unambiguous, and all-inclusive, and as transparent as linguistic resources permit. However, they can still be relatively more accessible to its intended readership. The provision will still be equally authoritative, detailed, and adequately specified, serving the same legislative function in the court of law. However, greater accessibility can be achieved by using a number of easification measures, which I will discuss next, but before that, I would like to mention and distinguish the other 'simplified' version I have in mind for the ordinary non-specialist readers.

Simplified versions for non-specialists should be like popular or simple accounts of authoritative versions to inform the citizens about some of the main legislative intentions and their implications for their personal and public affairs. This can be a plain language version, not necessarily all-inclusive, but informative, not authoritative, authentic, or complete in all respects, but easily accessible to larger non-specialist readers. Such simplified versions should be meant for public awareness, which may even include legal intentions, explanations, and typical examples. A reasonable degree of awareness can also be achieved by involving ordinary people in the public consultation exercises, which are being increasingly used in many of the democracies almost everywhere. Let me now suggest and illustrate some of the common easification devices for making legislative provisions more accessible.

Easification devices

Of the many easification devices I have discussed elsewhere (Bhatia, 1982, 1983, 1987, 1993), I would like to mention a few here, in particular what I call 'Clarifying cognitive structuring', 'Reducing information load at specific syntactic points', 'Minimising the use of syntactic discontinuities', 'Avoiding excessive and non-essential nominalisations', 'Indicating legislative intentions', 'Illustrating legislative issues', 'Choosing referential links wherever necessary', etc. Let me give more substance to what I have been suggesting by taking a couple of examples to clarify legislative intentions.

Clarifying cognitive structuring (for easy processing)

In common law jurisdictions it is considered advantageous to condense all the necessary information in a single sentence so as not to allow interpretation of any part of the provision out of context, but, at the same time, it tends to carry too much of information load and hence adds to the problem of lack of accessibility for its intended readers. This is the function of syntactic complexity, which makes cognitive processing almost beyond uninitiated non-specialist readers. Bhatia (1982, 1987, 1993, and 2004) suggests a number of 'easification' devices one of which clarifies cognitive structuring by clarifying syntactic complexity. Let me illustrate this by taking the following example:

> AGREEMENT BETWEEN PUBLISHER AND AUTHOR
>
> The author hereby warrants to the Publishers that the author has the right and power to make this Agreement and that the Work is the Author's own original work, except for material in the public domain and such excerpts from other works as may be included with the written permission of the copyright owners, and will in no way whatever give rise to a violation of any existing Copyright, or a breach of any existing agreement, and that the Work contains nothing defamatory or libellous and that all statements contained therein purporting to be facts are true and that nothing in the Work is liable to give rise to a criminal prosecution or to a civil action for damages or any other remedy and the author will indemnify the Publishers against any loss, injury or expense arising out of any breach or alleged breach of this warranty. The Publishers reserve the right to alter or to insist the Author alter the text of the Work in such a way as may appear to them appropriate for the purpose of removing or amending any passage which on the advice of the Publishers' legal advisers may be considered objectionable or likely to be actionable at law without affecting the Author's liability under this Clause in respect of any passage not so removed or amended. The foregoing warranties and indemnities shall survive the termination of this agreement.

The same provision can be rewritten to make cognitive structures somewhat more accessible and easier to process, as in the following version.

(1) The author hereby warrants to the Publishers that—

(a) the author has the right and power to make this Agreement, and

(b) the Work is the Author's own original work,

except for material in the public domain and such excerpts from other works as may be included with the written permission of the copyright owners, and will in no way whatever give rise to a violation of any existing Copyright, or a breach of any existing agreement, and

(c) the Work contains nothing defamatory or libellous, and

(d) all statements contained therein purporting to be facts are true and,

(e) nothing in the Work is liable to give rise to a criminal prosecution or to a civil action for damages or any other remedy, and

(f) the author will indemnify the Publishers against any loss, injury or expense arising out of any breach or alleged breach of this warranty.

(2) The Publishers reserve the right to alter or to insist the Author alter the text of the Work in such a way as may appear to them appropriate for the purpose of removing or amending any passage which on the advice of the Publishers' legal advisers may be considered objectionable or likely to be actionable at law without affecting the Author's liability under this Clause in respect of any passage not so removed or amended.

(3) The foregoing warranties and indemnities shall survive the termination of this agreement.

Let me now take Chapter 148, Amendment to Gambling Ordinance 1977 (Hong Kong).

Section16. Cheating at gambling

Any person who, by any fraud, misleading device or false practice, before or after or in the course of or in connection with gambling or a lottery, wins from another person, for himself or for any other person ascertained or unascertained, any money or other property; or fraudulently or by any deception whatsoever by words or conduct, including a deception relating to the past, the present or the future and a deception as to the intentions or opinions of any person, directly or indirectly persuades, incites or induces another person to take part in gambling or a lottery, commits an offence and is liable on conviction on indictment to a fine of $1,000.000 and to imprisonment for 10 years.

This lengthy provision, once again can be rewritten as follows:

(1) Any person who —

(a) by any fraud, misleading device or false practice, before or after or in the course of or in connection with gambling or a lottery, wins from another person, for himself or for any other person ascertained or unascertained, any money or other property; or

(b) fraudulently or by any deception whatsoever by words or conduct, including a deception relating to the past, the present or the future and a deception as to the intentions or opinions of any person, directly or indirectly persuades, incites or induces another person to take part in gambling or a lottery,

commits an offence and is liable on conviction on indictment to a fine of $1,000.000 and to imprisonment for 10 years.

Now I would like to take another example from the U.K. to illustrate various levels of easification and also simplification.

REGISTRATION OF CLUBS (IRELAND) ACT, 1904 (THE ORIGINAL VERSION)

> If any excisable liquor is sold or supplied in a registered club for consumption outside the premises of the club, except as provided in section four, paragraph (h), every person supplying or selling such liquor, every person who shall pay for such liquor and every person authorising the sale or supply of such liquor shall be liable severally, on summary conviction, to a fine not exceeding for a first offence seven pounds, for a second offence fifteen pounds and for a third or subsequent offence thirty pounds, unless he proves to the satisfaction of the court that such liquor was so sold or supplied without his knowledge or against his consent, and, where it is proved that such liquor has been received, delivered or distributed within the premises of the club and taken outside the premises, it shall, failing proof to the contrary, be deemed to have been so taken for consumption outside the premises.

A possible easified version could be as follows:

> If any excisable liquor is sold or supplied in a registered club for consumption outside the premises of the club, except as provided in section four, paragraph (h),
>
> then
>
> every person supplying or selling such liquor, every person who shall pay for such liquor and every person authorising the sale or supply of such liquor shall be liable severally, on summary conviction, to a fine not exceeding—
>
> (a) seven pounds, for a first offence,
>
> (b) fifteen pounds, for a second offence, and
>
> (c) thirty pounds, for a third or subsequent offence;
>
> unless he proves to the satisfaction of the court that such liquor was so sold or supplied without his knowledge or against his consent, and,
>
> where it is proved that such liquor has been received, delivered or distributed within the premises of the club and taken outside the premises, it shall, failing proof to the contrary, be deemed to have been so taken for consumption outside the premises.

However, if one were to write the same provision in simplified manner for informative purposes meant for ordinary non-specialist audiences, the depth of specification can be compromised, as in the following version.

> **Registration of Clubs (Ireland) Act, 1904 (Simplified Version)**
>
> If any excisable liquor is sold for consumption outside the club, then every person who either pays for or authorises the sale of such liquor shall be liable to a maximum fine of—
>
> (a) seven pounds for the first offence,
>
> (b) fifteen pounds for a second offence,
>
> (c) Thirty pounds for a third or subsequent offence.
>
> OR, simply—

> It is unlawful to sell or buy excisable liquor for consumption outside a club and is punishable by fine to a maximum of thirty pounds.

There could be a number of other rhetorical and syntactic strategies that can be used to make legislative provisions somewhat more accessible, and yet equally effective in terms of adequate specification of legal scope, with the expression of required number of qualifications and contingencies.

Concluding remarks

In this brief paper I have made an attempt to indicate the enormous complexity of the legislative drafting process, identifying a number of contextual factors which contribute to the complexity of the entire process. I have also tried to highlight some of the main challenges facing the drafting community. In doing so, I have also suggested ways of meeting some of the challenges, which are unlikely to solve all the problems and overcome all the challenges, but certainly open a window of opportunity to understand and meet some of these challenges in an informed and principled manner. Since the legislative provisions are addressed to very different audiences, who do not share the same level of legal background, I argued for two different versions of the provisions, a simplified version for informative communicative purposes, and an easified version for specialist audiences meant to serve the authentic legislative communicative purposes. I also suggested a number of different rhetorical strategies useful for drafting legislative provisions in an informed principled way. Although it is not possible to illustrate all the rhetorical strategies in a paper of this kind, I have illustrated one of them taking examples from available legislative and other relevant contexts. I am also aware of the fact that there is greater awareness of these issues now than it was some time ago; however, I still feel that there is a need to pay more attention to some of these rhetorical and syntactic resources on a regular basis, rather than using them occasionally.

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