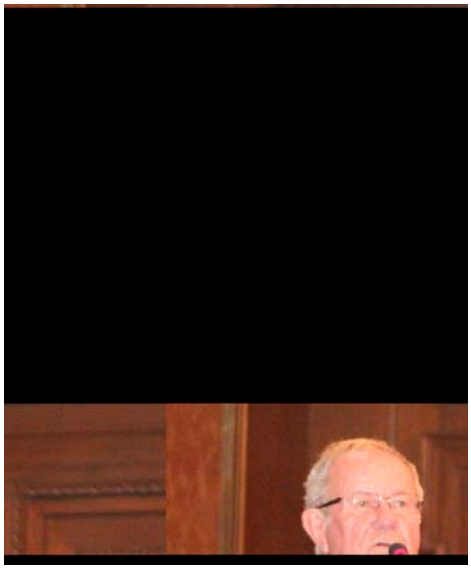
Legislative Drafting in Mauritius: A Developing Discipline

Sir Victor Glover[1]



Abstract:

This article looks at the development of legislative drafting in Mauritius from its French and British colonial origins through its multi-cultural and religious development and its independence in 1968 to the present. The paper also considers the challenges of recruiting, training and retaining legislative counsel in this country.

Introduction

1. Let me start by explaining that two historical peculiarities have, in different ways, had an impact on the law-making process in Mauritius. The first is that it was, before becoming an independent state on 12 March 1968, subjected to a long period of French rule from 1715 to 1810 and to an even longer span of British rule from 1810 to 1968. It has thus developed a hybrid system of laws which is mostly derived, and sometimes copied from French and English sources. The second is that Mauritius never had an indigenous population. At the time when sugar was the backbone of its economy, planters at first relied on slaves who came from the African continent and Madagascar to work in the cane fields. When slavery was abolished in 1835, indentured labour was brought in from the Indian sub-continent to man the plantations. In more recent times, immigrants from China were allowed into the country where they at first were small traders. I would add, to complete this historical digression that Mauritius was originally so named in honour of the stadhouder Prince Moritz van Nassau during a brief period of Dutch occupation in the 17th Century. The

[1] Kt., G.O.S.K. Former Chief Justice and Attorney General's Consultant in Legislative Drafting, and First Parliamentary Counsel of post-independence Mauritius.

Dutch managed to do 3 things during their short stay, 2 of them good and one bad. On the one hand, they introduced sugar cane and deer from what was then the Dutch East Indies and on the other they decimated the Dodo population.

2. From 1715 to 1722, Mauritius was under French military rule and there was no formal promulgation of laws. From 1722 to 1766, the country was under the administration of the *Compagnie des Indes* and only a few laws were passed: those were compiled in the *Code Delaleu* which ceased to have effect in 1788. A more substantial number of laws were brought into force after 1766 when the Isle de France, as the French had named the island, became a colony belonging to the French King, including a *Code des Noirs* meant for the slaves, a *Code Pénal* borrowed from the law in France in 1793 and three of the famous Napoleonic Codes, namely the *Code Civil*, the *Code de Commerce* and the *Code de Procédure Civile*, which came into operation during the last years of French occupation. An article of the *Act of Capitulation* of 1810, later embodied in the Treaty of Paris of 1815 which formally signalled the end of the Napoleonic wars, provided that "*les habitants de l'île de France pourront conserver leurs lois, coutumes et réligion*" (the inhabitants of Isle de France may retain their laws, customs and religion). The laws enacted between 1766 and 1810 and 1810 and 1840, that is to say the latter part of the period of French occupation and the beginning of British colonisation are contained in two volumes entitled *Code Decaen* and *Code Farquhar*, respectively the names of the last French Commander and the first British Governor of Mauritius, as the occupiers had renamed the territory.

In both those codifications there appear side by side a French version and an English version, which were both authoritative. As from 1841, the English text was said to be the only authoritative one and all laws, including those that amended the French Codes, had thereafter to be written in English. It was only in 1962 that the British rulers were persuaded to pass an Order in Council which authorised the use of French to amend texts written in French. The *Code penal* of 1793 had been replaced by a *Penal Code Ordinance* in 1838 which has since been renamed the *Criminal Code*. It is now the only law which has a French and an English text side by side. It is mainly for that reason, and because the English text is not always a reliable translation from the French, that we have retained section 10 of our *Interpretation and General Clauses Act*, which lays down that -

> Where in an enactment a French term or expression is used, or an English term or expression is explained by reference to a French term or expression, the interpretation of the enactment shall be in accordance with that of the French term or expression.

3. After the abolition of slavery, and the *Code des Noirs* had been done away with, most of the people of African descent were subsequently converted to Christianity so that the need was not felt to make particular provision in our law to cater for any special needs of theirs. The situation of those whose ancestors originated from the Indian sub-continent was different. As early as 1941, provision was included in our law for what was originally

called the *Muhammadan Waqf Ordinance*, and later the *Waqf Act*. The Act enables persons of the Muslim faith to bequeath property in perpetuity for charitable, pious or religious purposes and it states that the Act shall be interpreted in accordance with the principles of Muslim law. While at first our law provided that any person could, instead of taking an oath before a Court, make a declaration on the ground that he had no religious belief or that the taking of an oath was contrary to his religious belief, provision was subsequently included to say that a person of the Hindu or Muslim faith could, instead of taking an oath, make a solemn affirmation. The matter is now formally dealt with in our *Constitution* at section 11 (4), as follows -

> No person shall be compelled to take an oath that is contrary to his religion or belief or to take any oath in a manner that is contrary to his religion or belief.

For similar reasons, the law relating to marriage has over the years undergone two main changes: the first to provide that a religious marriage ceremony performed by an "authorised person" shall have the effect of a legal marriage before a Civil Status Officer; and the second to lay down that any other religious marriage shall have certain consequences for the spouses and their offspring.

4. In contrast, although section 16 (4)(c) of the *Constitution* provides that a law shall not be considered to be discriminatory if it says that the law relating to adoption, marriage, divorce, burial or devolution of property on death shall be the personal law of persons of a particular race or creed, successive Governments have so far been unwilling to accede to requests from several quarters for the wholesale adoption of Muslim personal law in Mauritius.

5. Finally, on this introductory aspect of our law-making process, it is worth pointing out that, no doubt because English appears to have become a universal language for trade and business, there has been a growing move from foreign investors to request that an authoritative version of the *Code Civil Mauricien* in English should be adopted, particularly in relation to its provisions that govern the law of property and of contract. The newly appointed Attorney General has now indicated that this change would be expedited.

Post-Independence Legislative Drafting

6. Legislative Drafting in a structured and modelled form can be said to have really come into its own as from the early 1970's, mainly because as long as Mauritius was a Colony of the British Crown, the Governor was required to forward to the Secretary of State for the Colonies in London a copy of every Bill adopted by the Legislature together with a report and a statement of objects and reasons and the British Sovereign retained a power of disallowance in respect of every law. Moreover there was little or no out-sourcing and Bills were prepared by law officers who had no training in legislative drafting and they drew heavily for models on Halsbury's Statutes.

7. Before that, however, it had become apparent that the United Kingdom had decided to get rid of most its colonies. One may recall Iain McLeod, Secretary of State, telling the leaders of our political parties in the course of a visit in 1961: "Of course, Gentlemen, independence is not a matter of choice, only one of timing". The essentials of what was to become our *Constitution*, to which every other law is subject, were worked out during talks at Lancaster House in 1965, where it was agreed that it would be a Westminster model with a Chapter on Human Rights and Fundamental Freedoms borrowed from the *European Convention on Human Rights*. Professor S.A. de Smith acted throughout as Constitutional Commissioner. But no agreement was reached at the time on the *modus operandi* for the protection of minorities: that was hammered out later in Mauritius by the inclusion of a First Schedule to the Constitution which provided for additional seats in the Legislative Assembly by means of what became known as the Best Loser System.

8. Not very long after independence, however, there came the establishment of the office of Parliamentary Counsel in 1971, of which I was the first holder after following a 6-month course run in London by the Ministry of Overseas Development under the tutorship of Sir Noel Hutton, K.B., the recently retired First Parliamentary Counsel. Incidentally, while listening to the excellent addresses in the First Session of the 2011 CALC conference about whether what legislative counsel does is an Art, a Science or a Discipline, I was reminded of what one of the Tutors at the Course told me, which was: "I hope that in Mauritius you will not have the problems which face the legislative counsel preparing a Bill in England. Here, the Judges expect a nice picture but the member of the House of Commons wants a railway time table". That was followed by the enactment of the *Laws of Mauritius (Correction of Errors and Minor Amendments) Act* in 1972, the *Revision of Laws Act* in 1973 and a new *Interpretation and General Clauses Act* in 1974. All this enabled us to move away from the former practice whereby, for example, Clause 2 of every Bill, headed "Interpretation", used to read -

> In this Ordinance, unless the context otherwise requires, the following words and expressions, including their grammatical variations and cognate expressions, shall have the following meanings, that is to say -.

Clause 2 of every Bill now reads "In this Act-" followed by the list of definitions.

It also led to the redrafting of several old enactments by following a set pattern, which has largely been made use of to the present day. After I had left the Attorney General's Office on being made a Judge of the Supreme Court, the final act of this first phase in an attempt at modernising our law-making process came towards the end of the decade that in 1981 saw an amendment to the *Revision of Laws Act*, which repealed a large number of spent or obsolete enactments, and the publication of an edition of the *Revised Laws of Mauritius,* which was the first one of its kind for 35 years. Those were the work of a Law Revision Unit set up in the Attorney General's Office under the guidance of the Solicitor General L.E.

Venchard Q.C. and Professor A. Angelo of the University of Wellington in New Zealand, whose services were loaned to us for a lengthy period.

Recruitment, Training and Retention of Legislative Counsel

9. Mauritius is a small jurisdiction and it has been the practice since long for the Judges of our Supreme Court not to be recruited from the Bar but appointed by promotion of Magistrates or of law officers from the Attorney General's Office. This has meant that legislative counsel who have undergone training at considerable expense to the State have little scope for making a career in the field but, after a few years, move to the Bench when a vacancy occurs there. It is worth noting in this connection that, between 1993 and 2003, no fewer than 5 law officers held office as Parliamentary Counsel, of whom 3 were subsequently appointed as Judges of the Supreme Court and 2 retired. Besides, the 3 law officers who hold office as Parliamentary Counsel and Assistant Parliamentary Counsel are required to give assistance by performing other duties such as giving advice to Ministries and Government Departments, appearing in Court cases involving public bodies and attending conferences in Mauritius and abroad. Thus, the time they are able to devote to the business of legislative drafting, revision, updating and research is perforce rather limited. This paucity of skilled and experienced draftsmen has led to more frequent outsourcing and, I am told, explains why successive Attorneys General have resorted to my services as consultant over the last 13 years after I had retired from the office of Chief Justice and from the public service.

10. There have, nevertheless, since the 1970s, been quite a few opportunities for the training of some of our law officers in the field of legislative drafting. The Overseas Governments Legal Officers Course which I followed was attended every year by a law officer for as long as it lasted until the 1980s. In the 1990s, 2 law officers were seconded to the Attorney General's Office in Canberra under the Australian Sponsored Training Scholarship Programme, and one obtained a scholarship in 1994 to read for an LLM in Legislative Drafting at the University of the West Indies. Courses have been available in Ghana over the last 4 years run by the Commonwealth Secretariat. We have also had the benefit of courses run in Mauritius, in 2007 and 2008 by Emeritus Professor Keith Patchett and in 2010 by Professor Vincent Crabbe. I have, for several years, been running a course in elementary legislative drafting for newly appointed law officers.

11. More recently, the then Attorney General took the laudable initiative of setting up a permanent Law Reform Commission chaired by a senior member of the Bar and comprising representatives of the Judiciary, the three branches of the legal profession, the Law Department of the University and the civil society. But financial constraints have compelled it to operate with a staff of two with the result that, although the Commission has produced several well researched reports on a number of topics, not all of them were accompanied by a draft Bill, something which the statute setting up the Commission

requires it to do as far as practicable. That in turn has meant that several of its recommendations have not moved on to the implementation stage.

12. One other weakness in our law-making process relates to the absence of any systematic form of training for the administrative staff of our Ministries and Government Departments, which would have enabled them to master the technique of putting up drafting instructions. Legislative Counsel in the Attorney General's Office are more often than not forced to guess at the underlying policy behind legislative proposals if not required to monitor the actual formulation of policy. Since it goes without saying that a good piece of legislative drafting presupposes a clear grasp of the essentials of the motivating idea behind the text, the results produced by legislative counsel are sometimes not quite adequate. I ran a course for 2 sets of administrative officers in 2009 but much more needs to be done in a more formal and regulated setting.

Conclusion

13. The picture which this paper has attempted to portray will not be complete without some reference to two further matters. The first is subsidiary legislation which, owing to financial and staffing constraints, has received far less attention from the law-makers, legal and political, than have Acts of Parliament. The last codification of our statutory instruments, in the form of a Revised Edition, dates back to the publication in 1952 of work which had been completed in 1945. That was when Sir Charlton Lane, who had just retired as our Chief Justice, prepared a Revised Edition of Statutes and Subsidiary Legislation to replace the one which had come into operation in 1923. The second is the absence of any form of noter-up process, even in relation to Statutes. The 2 Attorneys General who wrote prefaces to the latest Revised Editions of our Acts of Parliament, in 2000 and 2007, had given the undertaking that Annual Supplements and/or Consolidation Volumes would be published. A Supplement to the 2007 Revised Edition has just been published updating the text up to 30 June 2009.
