

# The Need for Simplicity in Legislation and Challenges in its Attainment

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## Introduction

The art of simplicity is a puzzle of complexity: Doug Horton.<sup>2</sup> The quest for simplicity is the ideal desire for any legislative counsel. Often this desire is frustrated due to limitations brought about by various factors. In the case of developing countries, the quest for simplicity is deterred by a number of challenges. The reality for developing countries is that a number of local communities are faced with poverty, illiteracy, long distances, inadequate access to media and apathy, among other problems.

This paper examines the need for simplicity in legislation and discusses a number of factors that affect its attainment. These include:

- Political machinations.
- Limitation of time and human resources (not enough legislative counsel) yet the Executive has a busy legislative schedule.
- Legal compatibility; the need to avoid ambiguity.
- The requirement for harmonisation of law and policy brought about under regional integration arrangements and globalisation.
- Limitations arising from judicial interpretation — whether liberal or strict; and
- Use of the active versus passive voice-usually determined by mother tongue influence.

This paper addresses the qualities of simplicity, namely:

- Economy of language, directness, familiarity of language and orderliness.
- The conceptual and practical difficulties in attaining simplicity in addition to addressing the issue of ensuring certainty of legal effect in legislation.

This paper will further tackle the duty of legislative counsel to promote simplicity. Focus will also be on the merits of using simple language, the impact of simplicity on interpretation of laws and their enforcement and suggestions on the way forward. Some issues can only be better explained by drawing examples from legislative drafting activities at local government level.

## Simplicity in legislation and the role of legislative counsel

### *Simplicity in Legislation*

Communication is vital for good governance to prevail and one way of achieving this is through sharing of information and getting feedback. The rule of law requires that legislation should be drafted in such a way as to be clearly understood by those affected by it. The government on its part has an obligation to ensure that the Constitutional provision that all power vests in the people is obliged with. To this end, the lawmaking process must be demystified and as many people as possible be involved in the conception and delivery of any proposed laws so that it can be owned by all. Simplicity in legislation is very important in this

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<sup>2</sup> Doug Horton Quotes', posted at <http://www.brainyquote.com/quotes/quotes/d/doughorton152740.html>

regard. The subjects of any given law should be able to comprehend it, appreciate its objectives and be able to evaluate it- which is something crucial to the law reform process. The use of plain language is therefore encouraged.

Simplicity should not change the intent of the sponsors of the proposed legislation or that of the legislature. Over simplicity can lead to distortion of the proposal by resulting in ambiguity and therefore confusion as to how the law should be enforced and interpreted. What is important is to use short, well-constructed sentences; avoid jargon and unfamiliar words; avoid double/triple negatives; use the active voice instead of the passive; keep related words together and use parallel structures to express similar ideas.

Simplicity demands:

- Economy of language which requires the use of only what is required to bring out the meaning.
- Directness, in that the text is straightforward and avoids longwinded and indirect sentences.
- Language that uses familiar words in preference to that which does not.
- Orderliness whereby words are, where necessary, organised in a logical and chronological sequence throughout the legislative document.
- Consistency in language and style.

### ***The Role of Legislative Counsel***

It is the duty of legislative counsel to ensure that simplicity is attained otherwise the effort exerted on drafting legislation will have been wasted. The legislative counsel should be able to balance the sometimes conflicting and confusing interests of —

- the Executive, as sponsors of proposed laws, policy makers and law enforcers;
- the Legislature, as the primary audience and law-making body;
- the Judiciary, as interpreters of law and who have the capacity to “legislate from the Bench” by virtue of their interpretation of a given provision;
- the public, as subject of a given law; and
- lawyers and paralegal staff, who depend on a correct interpretation of these laws to ensure good service delivery.

Legislative counsel have a duty to reconcile all tenets of a well drafted piece of legislation namely the need for clarity, avoidance of ambiguity, making law applicable and directly relevant to a given society and avoidance of unnecessary detail. Legislative counsel have to adopt an attitude that requires simplicity. The challenge to legislative counsel arises from the fact that they lack a legislative mandate and any amendments that are passed on the floor (at the Committee stage), depending on the available timeframe, may to a greater extent take a form that may depart from what the proponents of simplicity argue for.

### **The impact of simplicity of legislation on interpretation and enforcement**

Simplicity eases interpretation of laws and their enforcement. This is so especially in the case of subsidiary legislation, namely guidelines, bye-laws and ordinances passed by local government councils, and where there are many non-legal officers implementing laws who need to quickly understand what is required of them under the law and cannot easily access the

Attorney General's Chambers for counsel or guidance. Field officers in some departments may take decisions or refrain from doing so subject to consultation with the legal officers in the department or the office of the Attorney General.

Simplicity may prevent unnecessary litigation and help reduce costs in legal fees in cases where all that is needed is to read and understand a legal provision.

Interpretation of the law affects its enforcement in any society. How well the subjects of a law understand what is required of them greatly impacts on its enforcement. Law enforcement officers should be able to appreciate what the objective is; the extent of their mandate and the proper procedures to follow in executing that mandate. This can be made easy by having simplicity in drafting. Enforcement becomes easier when both the subject of the law and those charged with enforcement are in a better position to understand its provisions.

Anticipated readership influences the decision whether to have simple language or not. What is familiar to one category of readers may be far-fetched to another. The concept of clarity is subjective to the extent that it depends on the knowledge, abilities, experiences and state of mind of the person to whom the information is addressed.<sup>3</sup> For example in Uganda, the *Marine Insurance Act, 2002* (Act No.11 of 2002), which uses many technical words and expressions which the legislative counsel may find difficult to exchange for simpler ones, is a good example. Legislative counsel cannot afford to have a genre (media through which members of professional or academic communities communicate with each other) since the law is expected to have a broad readership. Foreign phrases such as *mutatis mutandis* should be discarded in favour of the English translation. A quick glimpse at the Civil Procedure Rules of Uganda reveals that legal practitioners are the anticipated readers. The ordinary man or woman on the street may fail to make sense of the contents of such legislation let alone what is expected of them. If legislative counsel have an attitude to drafting that puts the ultimate reader's interest ahead of all others, an immense problem is overcome and the issue becomes what steps can be taken to make difficult concepts easier to understand.<sup>4</sup> Byelaws are and should be drafted in simpler language most probably in consideration of the people at local government level whom the law affects directly.

### **The quest for simplicity: conceptual and practical difficulties**

Ideally, the law should at all times be expressed in the simplest terms in such a way as to ensure that the intended audience should be able to comprehend it. The poet Boileau said, "What is clearly thought out is clearly expressed, and the words to say it come easily."<sup>5</sup> However, a multitude of difficulties arise to hamper the attainment of simplicity. These difficulties are further exacerbated by conditions prevailing in developing countries. Uganda, as an example of a developing country, has 69 % literacy rate and a ranking of 145 on the Human Development Index. Some areas are hard-to-reach even through improved telecommunication. This affects the possibility of getting timely advice from the offices of the Attorney General (Principal Legal Adviser of the Government) on pertinent issues.

As already pointed out before, the legislative counsel is faced with a number of challenges both conceptual and practical, which make achievement of simplicity a major challenge.

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<sup>3</sup> Gérard Caussignac, *Clear Legislation*, The International Co-operation Group, posted at [www.justice.gc.ca/en/ps/inter/caussignac/notes.html](http://www.justice.gc.ca/en/ps/inter/caussignac/notes.html)

<sup>4</sup> David Elliot; *Using Plain English in Statutes*, Clarity's submission to the Hansard Society for Parliamentary Government, June, 1992 [www.davidelliott.ca/papers/usingplain.htm](http://www.davidelliott.ca/papers/usingplain.htm)

<sup>5</sup> Nicolas Boileau, *L'Art Poétique*, 1674

The principles governing legislative drafting demand that a legislative counsel ensures clarity and avoids ambiguity, the use of archaic language, complex grammatical structures, lengthy sentences and punctuation that makes the sentence incomprehensible. These demand that the legislative counsel should conform to certain principles and should not simplify legislation beyond a point that may jeopardise the whole process. Clarity is preferred at all times even if this may result in lengthy sentences.

With globalisation and the Information and Communication Technology (ICT) revolution that have reduced the whole world into a “global village”, it has become easier for writers and by more so legislative counsel to adopt and use words which originate from foreign phrases and adjusted to suit English language readers. The adoption of the use of foreign words and expressions introduce unnecessary and superfluous words and expressions, which in some circles are considered to result in an increase in slovenliness, vagueness, ambiguity and verbosity among others.<sup>6</sup>

The bill sponsor’s or requestor’s perception of what the law should read like can be a source of contention during the drafting process and impact on the quality of language used. David Hull captures this well in his observation that, for a law to work its legal spell, it must resort to incantation is surprisingly widespread and that people who are not lawyers sometimes become uneasy if they think a draft does not have a legal flavour<sup>7</sup> Hull concludes that it is not universally understood that the best way to give instructions, and to comment on drafts, is in everyday language.<sup>8</sup>

Another factor that arises during the drafting process is the nature of the subject matter. The choice of words is often dependent on the nature of the subject, simple versus complex especially in the areas of science and technology and procedural aspects. While the legislative counsel’s duty is to simplify even the most complex subject and make it comprehensible to the target audience, technical areas that cannot be over-simplified may have to be addressed in such a way as to ensure that accuracy and clarity are not lost.

Some subjects are technically complex and it may be impractical to use simple language. Many critics argue that complexity should reside in the subject matter but not in the language used. This position is not as easy to attain. If these cannot be drafted in a simple way, there is no choice but to resort to a method that best brings out the desired meaning. The question would be whether to draft in simple language the bare necessities and leave the details for inclusion in subsidiary legislation, most times targeting technical persons and practitioners. Complexity of subject matter encourages the use of purpose statements and preambles that may be wordy and ambiguous, resulting in inconsistency at times. Laws relating to new concepts usually have preambles and purpose sections to make it clear to the reader what the intention of the legislature and the Executive are. In Uganda examples of new concepts are environmental management, decentralisation and natural resources management among others.

To ensure that certainty and clarity are achieved, language will not be over-simplified. In the schedules to the Convention on the Ban of Trade, Transportation of Hazardous Wastes and related regulations passed in Uganda, under the National Environment Act, Cap. 153 of the laws of Uganda language specific to hazardous waste management is applied. It is difficult to

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<sup>6</sup> See George Orwell, “Politics and the English Language”, in *Shooting an Elephant and Other Essays*, Secker and Warburg, London, 1950, posted at [www.orwell.ru/library/essay/politics/english/e\\_polit](http://www.orwell.ru/library/essay/politics/english/e_polit)

<sup>7</sup> David Hull, “Draftsmen’s Devils”, *Jersey and Guernsey Law Review*, Volume 2 Issue 3, October 1998, posted at [http://www.jerseylegalinfo.je/Publications/jerseylawreview/Oct98/draftmens\\_devils.aspx](http://www.jerseylegalinfo.je/Publications/jerseylawreview/Oct98/draftmens_devils.aspx)

<sup>8</sup> Ibid.

imagine a local government council attempting to reduce these provisions in byelaws to be applied at district and sub-county level. The issue will be whether simplification would not result in change of meaning among others.

The directness that is a desired element of simplicity is greatly affected by mother-tongue influence. An example is drawn from Uganda where, although the official language of communication is English, there is a multitude of indigenous languages that are commonly used by the vast majority of the people. Most, if not all, indigenous languages in Uganda and East Africa as a whole<sup>9</sup> communicate largely in the passive voice. The use of passive voice introduces the use of many words and this serves to reduce the direct impact that a legislative sentence is intended to have on the reader, in addition to limiting the role of the actor or subject of the law.

Legislative timetables are most often over-crowded, usually hectic and high-pressured.<sup>10</sup> Most law makers are only in a position to handle legislative work during a particular session and have to divide their time between committee work, floor debates/plenary, question time, hearings, international commitments, obligations in the constituency among other activities. By necessary implication, legislative staff, including the legislative counsel, who is involved in these activities, may have great problems trying to handle different kinds of assignments, including ensuring that the tenets of simplicity in legislation are respected and applied throughout the legislative drafting process. In such conditions, it is very tempting for one to resort to precedents so that one does not exercise the right to draft simple laws. It is not uncommon to hear, “Why re-invent the wheel?”

When a State participates in regional integration initiatives, there are repercussions that most definitely affect the way of doing things at different levels. Uganda for example, is a member of the East African Community together with Kenya, Tanzania, Rwanda and Burundi. The Treaty establishing the Community provides for harmonisation and approximation of laws and policy and at that level it may not be easy to simplify beyond what will be acceptable.<sup>11</sup> The case would be different if common standards that address simplicity have been developed and are applied.

Furthermore, the proponents of globalisation have spearheaded drives for uniform laws and thus propagated model laws. These laws if not drafted in simple format may have effect on what is drafted at national level for those countries that choose to adopt them. Examples of such model laws include the UNCITRAL Model Law on International Commercial Arbitration, 1985, the United Nations Model Terrorist Financing Bill, 2003 (for common law systems), the United Nations/International Monetary Fund Model Legislation on Money Laundering and Financing of Terrorism 2005, (for civil law systems), the Model Franchise Disclosure Law (2002), the United Nations Model Bill on Money Laundering, Proceeds of Crime And Terrorist Financing (2003) and the United Nation Model Law on Competition to mention but a few.

Since the art of legislative drafting is acquired over time, central and local governments are handicapped if the number of staff dedicated to that task is inadequate. Most governments worldwide lack adequate numbers of legislative counsel at different levels of government most

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<sup>9</sup> Acholi and Luo in the Nilo-Saharan category and others in the Niger-Congo category, predominantly the Bantu language group of Central, Eastern and Southern Africa.

<sup>10</sup> See Kaare Strom, *Parliamentary Governments and Legislative Organisation*, posted at [http://www.uni-potsdam.de/u/ls\\_vergleich/Publikationen/Parliaments/chapter02.pdf](http://www.uni-potsdam.de/u/ls_vergleich/Publikationen/Parliaments/chapter02.pdf)

<sup>11</sup> Treaty establishing the East African Community posted at [http://www.iss.co.za/Af/RegOrg/unity\\_to\\_union/pdfs/eac/EACTreaty.pdf](http://www.iss.co.za/Af/RegOrg/unity_to_union/pdfs/eac/EACTreaty.pdf)

especially at local council level. At international level, the Commonwealth Association of Legislative Counsel has about 800 members, of whom 27 are from Uganda (10 in the Parliament, 7 at the Ministry of Justice).

Political machinations arise from the desire to promote political interests usually at all costs and such considerations usually affect how law is drafted, interpreted and enforced. This is sometimes manifested through laws drafted to promote a particular political agenda such that questions of simplicity or complexity do not arise. Politicians prefer politically attractive laws. This is worse at local government level where district councillors are closer to the people and very much involved in the law-making and decision making process.

Increased public participation and the demands of democracy mean that lobby groups and other categories of people have a greater interest in how the final text of a law comes out. The increasing involvement of lobby groups and other external interested parties can mean that changes in particular provisions of a Bill may be sought to emphasise the importance of a range of varying agendas can lead to certain provisions being developed in amore expansive style.<sup>12</sup>

In Uganda, the draft Domestic Relations Bill (an amalgamation of all domestic related laws, namely marriage, divorce, separation, inheritance and property rights) is one such law that has attracted tremendous attention from all corners of society. To make the law more acceptable it may be tempting to have purpose statements to justify and explain the law sometimes in a lengthy and wordy manner or, indeed, to have separate bills instead of an omnibus one. The international community, mainly the development partners such as the International Monetary Fund, the World Bank also have an impact on the development of a law.

If judicial interpretation of statutes, whether strict or liberal, is taken into consideration, there is a tendency of legislative counsel consciously or not, to err on the side of caution and draft provisions that leave no shadow of doubt as to the meaning. Writing legislative discourse in terms of simple principles without adequate specification of the required scope, on the other hand, means giving wider powers to the judges and the courts to interpret the intentions of the legislature, which is not considered highly desirable in parliamentary democracies.<sup>13</sup> In such instances the legislative counsel labours to clearly bring out the purpose of the legislation so as to counter unfavourable interpretation by the judiciary and so may choose to resort to lengthy explanations and purpose statements.

There are challenges to simplicity in legislation that are brought about by weaknesses arising from the socio-economic limitations of a developing country. For developing countries, challenges extend from lack of access, lack of communication resources, weather vagaries, political unrest (a case in point is Northern Uganda, which has been at the centre of conflict for the last 20 years or so) to limitations of low average income, a limited industrial base, low adult literacy rates and low levels of human development, the effect going to lower levels for subsidiary legislation. John Wilson correctly points out a multitude of challenges, including physical and organisational and lack of scrutiny facing legislative counsel in the developing world, which challenges,<sup>14</sup> make it very tempting to depend solely on precedents picked from

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<sup>12</sup> Brian Hunt, *Plain Language in Legislative Drafting: An Achievable Objective or a Laudable Ideal?*, posted at <http://www.plainlanguagenetwork.org/conferences/2002/legdraft/legdraft.pdf>

<sup>13</sup> Vijay K. Bhatia; *The Power and Politics of Genre*, v16 n3 p359-71 Nov 1997, Blackwell Publishers Ltd. p.366

<sup>14</sup> John Wilson, *Contrasts – The Challenges of Drafting in a Developing Country* [A paper given at the Triennial Conference of the Commonwealth Association of Legislative Counsel (CALC) London, September 2005] posted at <http://www.lawdrafting.co.uk/lighter/contrasts.php>

whatever place that these can be obtained, which by all means affect how well a legislative document turns out. Even with a literacy rate of 69% in Uganda, things are not very optimistic. The United Nations Educational Scientific and Cultural Organisation has defined literacy as the ability to identify, understand, interpret, create, communicate and compute, using printed and written materials associated with varying contexts and involves a continuum of learning to enable an individual to achieve his or her goals, to develop his or her knowledge and potential, and to participate fully in the wider society.<sup>15</sup> The question is whether the people with basic literacy are capable of comprehending material that is developed within the legislative context.

Other limitations at local government level are a direct result of weaknesses in implementing the decentralisation policy. The Government of Uganda has decentralised power with the intention of bringing services closer to the community and increasing efficiency, innovation and accountability. However, it is clear that as issues rise through the sub-county and district levels there is more politics involved which affects the quality of law making at that level.<sup>16</sup>

## The way forward

Each country should develop standards and a model that promotes simplicity and use of plain language so that legislators at all levels of government have a point of reference.

The relevant governments have to increase capacity building efforts so that there are more legislative counsel available to handle legislative drafting tasks countrywide, especially in the most crucial offices.

In particular it is necessary for the working conditions of legislative counsel to be improved and kept under constant review as far as training, remuneration, privileges and status are concerned in order to ensure that the right calibre of dedicated persons are employed and their services are retained and they are thus not attracted by higher remuneration and more favourable conditions to the other branches of the public service or to private legal practice. Continuous training will ensure that the legislative counsel are kept abreast of developments and best practices in legislative drafting. In short, legislative drafting should be promoted as a good career.

The other factor closely related to training is the computerisation of the legislative drafting office. Whereas the UK has adopted software to assist in the efficiency of the drafting office, Uganda is still lagging behind. The availability and active use of computer programs and software to aid drafting is urgently required if a drafting office is to improve on its efficiency.

Information and Communication Technologies (ICT) applications can be used to deliver all kinds of services in a wide range of sectors including health, agriculture, education, public administration and commerce. With the assistance of International Telecommunications Union, Multipurpose Community Telecentres projects have been deployed in a number of countries, providing access to communication facilities and enabling the delivery of services for health, education and agriculture, enhancing business activities, as well as facilitating access to government services.<sup>17</sup> There is need to apply ICT to the legislative drafting so that those in

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<sup>15</sup> Education for All Global Monitoring Report 2005, posted at [http://portal.unesco.org/education/en/ev.php-URL\\_ID=35964&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/education/en/ev.php-URL_ID=35964&URL_DO=DO_TOPIC&URL_SECTION=201.html)

<sup>16</sup> An Assessment of Civic Literacy in Uganda's Local Government, posted at <http://www.royalroads.ca/NR/rdonlyres/4864D118-CD0F-43A5-8F1F-2F331FA8F3A1/0/CanadaCorpReportFinal.pdf>

<sup>17</sup> Multipurpose Community Telecentres and Multipurpose platforms; posted at <http://www.itu.int/ITU-D/e-strategies/MCTs/>

remote or hard to reach areas can be assisted with drafting and interpretation through online mechanisms. Through the same medium, the quality of legislation can be controlled.

There is urgent need to address the problems that generally affect the society such as illiteracy and lack of access to basic services such as communication.

Generally, simplicity can be achieved if the challenges that stand in the way are minimised. This has to come through deliberate attempts, programmes and plans of action.