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The Role of Parliamentary Counsel in Legislative Drafting

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INTRODUCTION

This article seeks to delineate the role Parliamentary Counsel play in the enactment of legislation. It is a role which is important in the Ghanaian parliamentary system of government. In the modern world today the government cannot effectively govern if that government does not have the ability to pass legislation.

Legislation is thus the framework by which governments of whatever persuasion seek to achieve their purposes. For politicians, as well as for administrators legislation becomes the means by which they attain their cultural, economic, political and social policies.

It is significant to know that even tyrants and dictators hate the restraints which the law imposes upon them. Nonetheless, even they enact legislation which strengthens their hold on society. If administrators could, they would operate in the absence of law. They would much prefer to do their tasks in contrast to the impositions of the law.

Yet fortified by the knowledge that there would be legislation were it necessary, these self same administrators would venture out into the arena of public administration. Legislation then becomes the tools of their trade. The facultative aspect of legislation is often not immediately appreciated by administrators until they hit against the wall. There is then the search for an applicable law which they look upon as a kind of magic wand or master key. But, then there must be fetters on the exercise of powers and legislation in a large measure imposes those fetters.

In the Ghanaian parliamentary system of government there is a loose distinction between the powers of the executive, the powers of the legislature and the powers of the judiciary. The powers of administrative authorities, be they Ministers or departmental officials, must be derived from legislation by which their conduct must be regulated. All these assume the existence of a machinery as a part of government to deal with the drafting of laws. That is where Parliamentary Counsel come in. They are the officers in government and of the government who have the required expertise and experience to see to it that government policies are effectively translated into law for the benefit of society as a whole.

They are the architects in a large measure of social reform, of social structures being experts in the design of frameworks of collaboration for all kinds of purposes. They are specialists who weigh the past, consider the present and as much as possible project their minds into the future so that a piece of legislation placed on the statute book is of great assistance to those who govern as well as those who are governed.

This publication follows from a joint ILI-Uganda/UNITAR workshop on Legislative Drafting for lawyers from East, West and Southern African countries which was organized in Kampala, Uganda between 20 and 31 March 2000. We thank the International Law Institute - Uganda for partnering with UNITAR for this important initiative in regards continuing legal education for lawyers involved in financial management issues. Our special thanks go particularly to Honourable Justice V.C.R.A.C. Crabbe for sharing his vast experience in Legislative Drafting issues in this concise publication.

We hope that this document will be useful and challenging for the readers.

Marcel A. Boisard
Executive Director of UNITAR

THE ROLE OF PARLIAMENTARY COUNSEL

The Genesis

In Exodus Chapter 31, we read that the Ten Commandments were written with the finger of God.[1] When Moses found that the Israelites were worshipping the golden calf, in his anger, he threw down the tablets, shattering them.[2] In time came the command to hew another set of tablets. In the process, for about forty days, Moses inscribed the tablets.[3] The Commandments written by Moses were kept in the Ark of the Covenant.[4]

There are thus two versions of the Ten Commandments: the one that only Moses read, and shattered it, and the one that he wrote for our benefit. The first set of the Commandments stated, among others, that,

> **Thou shalt not covet thy neighbour's house, thou shalt not covet they neighbour's wife, nor his manservant nor his maidservant, nor his ox, nor his ass, nor anything that is thy neighbour's.[5]**

That uses thirty-two words. The second version reads,

> **Neither shalt thou desire thy neighbour's wife, neither shalt thou covet thy neighbour's house, his field, or his manservant, or his maidservant, his ox, or his ass, or any *thing* that *is* thy neighbour's.[6]**

One cannot say that we have here evidence of copy-drafting or that Moses did his best to remember what the Lord had first said. Whatever it is, the second version is an improvement on the first. It uses thirty-four words to the thirty-two of the first version. Yet the second version makes it quite clear that "covet" is the appropriate word to use in relation to property and that "desire" is better placed with wife. Thus we have a distinction between our desires and our covetousness. There are certain things we should not *covet*. There are certain things we should not *desire*.[7]

We could improve upon the earlier drafts by providing that,

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[1] V. 18

[2] Chap. 32 V. 19

[3] Cap. 34 V. 27 –28. It is a pity that present day Parliamentary Counsel cannot have all that time to draft a simple Bill of ten clauses.

[4] Deuteronomy chap. 10, V. 1 – 5

[5] Exodus chap. 20 V. 17

[6] Deuteronomy chap. 5. V 21

[7] It is also an example to present day Parliamentary Counsel to read over their drafts for as many times as it is possible to do so, in order to improve upon the quality of the draft.

> **Thou shalt not desire nor covet anything that is thy neighbour's.**

and thus use eleven words where the first version used thirty-two words and the second version used thirty-four words.

The word "desire" in our draft would more appropriately relate to matters like "wife". The word "covet" would cover property. But is a wife a thing, having regard to the use of the word "thing"? Even in Moses' day? Perhaps not. Perhaps yes. But in our modern concepts? Certainly not! Thus the brevity here is misleading and an expansion is required:

> **Thou shalt not desire the wife, the manservant or the maidservant, nor shalt thou covet the property of thy neighbour.**

Does this mean that a woman could desire the husband of her neighbour? Moses did not have the benefit of an Interpretation Act, so far as Holy Writ goes, to counsel him that the masculine gender includes the feminine gender and – perhaps – the feminine gender includes the masculine gender. Or shall we rely on what is often referred to as the biblical man?

However, if we do away with the archaic expression "thou shalt not", and its ilk we may end up with a preliminary draft, subject to polishing of the text:

> **1. A person shall not desire the spouse nor the employee, nor shall a person covet the property, of that person's neighbour; Which can be rendered as,**
>
> **2. Regarding a neighbour, a person shall not desire the spouse nor the employee nor covet the property of that neighbour; And further still reduced to**
>
> **3. A person shall not desire the spouse, an employee, nor covet the property, of a neighbour.**

The "neighbour" in the context of draft 3 is likely to be interpreted by reference to Lord Atkin's definition of "neighbour" in *Donoghue V. Stevenson*:[8]

> **Who then is my neighbour? The answer seems to be – persons who are so closely and directly affected by my act that I ought to have them in mind as being affected when I am directing my mind to the acts or omissions which are called in question.**

If that is understood, then the expression "a neighbour" at the end of draft 3 is preferable to the expression, "any other person". And we have reduced the original thirty-two words to sixteen words.

Back to the little history of legislative drafting, we also know that the *juris prudentes* of Rome drafted legislation with the help of the *scribae.*

[8] [1932] AC 562

The "jurists left the drafting of the statutes to the *scribae*, who neither desired to give up their involved style nor were capable of doing so"[9] Tribonian also appears to have had a great deal to do with Justinian's *Institutes* and other pieces of legislation.

But the Laws of Manu predate the Romans and the Greeks. The Code of Manu is described as, in the original,

> **Written in verse and is divided into twelve chapters., In most parts, the rules are so clearly and concisely stated that nothing can be gained by attempting to summarise or condense[10]**

The Codes of Hammurabi – 1752 B. C. – are the "completest and most perfect monument of Babylonian Law"[11] The Codes were carved into a basalt pillar consisting of 282 statutes – all preserved in tact to this day. In India, Ashoka also issued edicts carved in rock and metal which,

> **Spread out all over India are still with us and conveyed his messages not only to his people but to posterity.[12]**

In Africa, early Egyptian legislation took the form of decisions or decrees by the Pharaohs, tailor made to suit their wishes and the way they wanted their Kingdoms built – in response to the problems of their Kingdoms. Among their achievements was the development of writing which took the form of hieroglyphs, a system of writing which extended to the whole of the Middle East as a result of the spread of Egyptian civilization. Thus the first recorded laws in the world are to be found in the records of the ancient civilizations of Egypt, Mesopotamia and the Yellow River of China. The first of the Codes of Law that appeared in Mesopotamia were the laws of Eshuna in sixty sections written in Arcadian.[13]

It can thus be seen that Legislative Drafting is of ancient lineage – and perhaps of divine inspiration.

The Problems

It is the lot of Parliamentary Counsel to perform an extremely difficult task. There is much that is beyond their control. There are many pressures on them. The nature of the task requires them to think of the past, the present and the future. The conduct of society in the past, the present particular problems of society have to be taken into

[9] Shutz *Principles of Roman Law* 1936 p. 80. That may well explain the origin of the involved style of legislative drafting which has attracted so much criticism

[10] S. Allen, *The Evolution of Government and Laws*, 1916 p. 1005. It will pay present day Parliamentary Counsel to study the style of drafting of the Code of Manu

[11] *Enclypedia Britanica* 1968 Vol. 11 p. 41

[12] Nehru, *The Discovery of India* p. 79

[13] A. S. Diamond, *Primitive Law* (1971)

account. The resulting law is prospective in character by laying down rules of conduct for the guidance of society.

Parliamentary Counsel have to think of the problems involved from as many different angels as possible – the simple as well as the complex. It is not just a question of changing a few ideas around. They have to think of the legal practitioners who will try to read the law – even if in bad faith – to suit a particular case and who will take advantage of a loophole.

Legal practitioners are known to split hairs, to continually try to misunderstand legislation. In addition there are the judges who criticise Parliamentary Counsel for ambiguities or for the complexity of an Act of Parliament. MacKinnon L. J. said that,

> **If the Judges now had anything to do with the language of Acts they are to administer, it is inconceivable that they would have to face the horrors of the Rent and Mortgage Interest Restrictions Act – horrors that are hastening many of them to a premature grave.[14]**

Social reformers need to have their day and may condemn a piece of legislation. Parliamentary Counsel may appear radical to the conservative and as reactionary to the radicals. Often there is insufficient time to draft a piece of legislation. Time is the enemy when there is so little of it. Time is a friend when the bell rings.

Legislative drafting is an intellectual labour requiring hours of intellectual concentration, planning and strategy. Requests for legislation come with *urgent, immediate* flags. Far reaching constitutional amendments may be done over the counter. In times of emergency orders, directives, notifications affecting life and liberty are drafted at top speed. Parliamentary Counsel may work round the clock and with an heavy heart for fear of a hasty, rash draft.

They usually prepare a number of drafts before the final draft. They study their preliminary drafts, conference after conference. They revise the drafts. They re-write them again. "The inspiration of genius is seldom in final form in first form …The pride of authorship means sweating blood."[15] There may be calls for further clarification from the sponsoring Ministries.

All this involves time and concentration. There is a constant battle between urgency and limited time. After days of hard labour when the draft is finished, a sense of relief, if not of satisfaction, pervades the atmosphere. There is a sigh. But too soon. After a few days doubts may arise as to the accuracy of the draft, its perfection, its sufficiency.

[14] (1946) 62 L. Q. R. 34

[15] Pride of Authorship, Editorial 37 American Bar Association Journal, 209 (1951)

There is then the passage of the Bill in the Legislature. Every Lycurgus and Solon sitting on the back benches will denounce the Bill "as a crude and undigested measure, a monument of ignorance and stupidity".[16] Amendments may come. Committee stage amendments may be a headache. They may or may not be ill-considered, ill-conceived. Parliamentary Counsel has to deal with all these situations. Unpredictable sometimes as they are. Then there is a final reading, and a second sigh of relief because the ordeal is over Parliamentary Counsel work extremely hard.

But, as has been demonstrated by the attempt to redraft one of the commandments of the Ten Commandments legislative drafting is not that easy.

The Qualities

The skills of Parliamentary require facility in the use of language, a critical, enquiring, imaginative, and systematic mind, as well as an orderliness in the formulation of thoughts and the ability to pay meticulous attention to detail.
Counsel must also have an analytical and an original mind capable of conceiving distinctly the general purpose of a statute and its subordinate provisions and the ability to express that general purpose and these subordinate provisions in a language perfectly adequate and not ambiguous. The ability to write short simple sentences devoid of ambiguity and distracting surplusage is a pre-requisite as well as a style that is both concise and simple leaving a minimum of opportunity for individual difference of opinion.

These qualities for legislative drafting are not hard to come by. Yet few there are who are willing to undertake the arduous and highly skilled tasks that legislative drafting imposes. It demands the ability to work with colleagues and those skilled in other disciplines. It requires the ability graciously to accept criticism, whether in bad faith or in good faith. It commands a temperament of rigid self-criticism. Even though no monument has as yet been erected in honour of a critic, Parliamentary Counsel need to pay heed to criticism.

Common sense is a prerequisite. A sense of humour is desirable. So is the awareness of the cultural, economic, political, and social factors that create the problems that will have to be dealt with – and it is hoped solved – by legislation. Accuracy and precision of language may proceed from an innate habit of mind.

These faculties can be acquired. However, if, as Ilbert said, " a parliamentary draftsman is to do his work well, he must be something more than a mere draftsman. He must have constructive imagination, the power to visualize things in the concrete, and to foresee whether and how far a scheme will work out in practice."[17]

[16] Lord Thring, *Practical Legislation,* p.8.
[17] *The Mechanics of Law Making*, University of Columbia Press, New York; 1914 p. 110

In fine Parliamentary Counsel must be

> **An architect of social structures, an expert in the design of frameworks of collaboration for all kinds of purposes, a specialist in the high art of speaking to the future, knowing when and how to try and bind it and when not to try at all.**[18]

Thus those who seek to practice "the art of the Parliamentary Counsel" should be persons genuinely interested in legislative drafting with every likelihood of making legislative drafting a career.

But what is it?

The nature of Legislative drafting makes it a discipline. It has been likened unto a game of Snakes and Ladders. Snakes and ladders is a game of chance. Legislative drafting is a game of skill. It demands continuous training and experience. It demands hours and hours of concentrated intellectual labour.[19] Driedger considers that its skills are acquired over a period of time.[20] It can be onerous and exacting, exciting and yet tedious. Its nature nurtures natural abilities of clear, cogent, concise thinking into a habit of restrained writing.

The audience for whom legislation is drafted varies from the learned in the law to the simple and the curious From the specialist to the lay. There are those who would try in good faith to understand legislation. There are those who would try in bad faith to misunderstand legislation. To consider "that the rules of good drafting are simply the rules of literary composition, as applied to cases where precision of language is required, and that accordingly any one who is competent to draw in apt and precise terms a conveyance, a commercial contract, or a pleading, is competent to draw an Act of Parliament" [21] is a superficial view. Martin Mayer has said that,

> **Intellectually, the draftman's skills are the highest in the practice of law. Judges at bottom need merely reach decisions …. negotiators and advocates need understand only as much of a situation as will gain a victory for their clients; counsellors can be bags of wind. But the documents of [legislative drafting] survive, and to draw them up well requires an extraordinary understanding of everything they are supposed to accomplish ..Probably the greatest compliment a lawyer can receive**

[18] Adapted from H.M. Hard and A. M. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law*, Cambridge: 1958, 2000

[19] Sir Granville Ram, a former First Parliamentary Counsel in the UK, sates that 'only men and women of first class ability can do the work' *Journal of the Society of Public Teachers of Law*, NS 1951, P. 444.

[20] In a conversation with the author at a seminar at the Commonwealth Secretariat in June 1975. Driedger suggested a minimum of 10 years.

[21] Ilbert, *The Mechanics of Law* Making, University of Columbia Press, New York: 1914, 109

from his profession (a compliment never publicized) is an assignment to draft a major law.[22]

The Role

That governments need legislation cannot be gainsaid. That the governed need well drafted readable, understandable legislation is equally important. The arm of the government extends to control every aspect of the lives of the governed. Legislation of one type or another binds us. In whatever sphere one may lay a claim the tentacles of government are evident. There are Acts of Parliament to guard and to guide. There is subordinate legislation to regulate and to rule.

In the parliamentary system of government practised in most Commonwealth countries the Cabinet is drawn from Parliament.[23] In that set up the Cabinet is in essence the Executive. In the nature of things the Executive controls the legislative programme of Parliament. Thus an Act of Parliament, in a very large measure, is the work of the Executive. In other words government policy motivates legislation.[24] Parliament in the main gives its stamp of approval to the legislative policy expressed in an Act determined and settled by the government of the day

Most politicians, of whatever hue or persuasion, believe that legislation can be used to achieve great changes in society. That idea is very attractive to politicians. They seem to believe that anything can be achieved by legislation. To them, "A parliament can do anything but make a man a woman, and a woman a man."[25] It is hard for them to realise that not all social ills can be cured by legislation.

Centuries of social behaviour cannot be laid to rest at the stroke of a pen. Society did not start with a statute book in its hands. Legislation is but a mirror of society. It reflects the development of society as a whole. Thus government and the body politic need to guard against the consequences of misguided legislation.

In all these, Parliamentary Counsel have a vital role to play. It is a role that should start with the conception and the birth of an Act of Parliament. It is their primary function to express legislative policy in a language free from ambiguity. Transforming government policy into law is thus the prime function of Parliamentary Counsel.

In the performance of that function, governments expect Parliamentary Counsel to ensure that the governments' policies are given legal effect. Equally, a government expects Parliamentary Counsel to express legislative intention as accurately as

[22] *The Lawyers*, Harper & Rowe, London 1967 p. 50
[23] This is not so with the United States of America where the members of the Administration are not members of Congress, except the Vice President who is the presiding officer in the Senate.

[24] This does not rule out the system of the Private Members Bill. But Private Members Bills are few and far in between.

[25] 2nd Earl of Pembroke, quoted by the 4th Earl of Pembroke on 11th April, 1648

possible, capable of one interpretation, delineating the intention that the government intends that law to have.

The governments also expect that Parliamentary Counsel will ensure that a Bill as drafted is in conformity with all existing legislation. The Bill as well should not be in any conflict with the Common Law or the Customary Law. Least of all with the Constitution. An Act of Parliament should not stand on its own. It should form part of the law as a whole. That accounts for the reference to it as a chapter in the Statute Book. Bills as drafted should also comply with parliamentary procedure.

That raises the issue of the other audience, Parliament and the body politic. The expectations of Parliament in regard to a Bill require that the Bill is self explanatory and that it is arranged in a manner that allows for orderly debate. The primary function of Parliament is to pass legislation for the public whose affairs, approaches and aspirations will be governed by the legislation. That public, the people of the jurisdiction have their expectations. They, too, expect the Act to be intelligible, precise, and free from ambiguity.

The expectations of the public stem from the fact that there are interests other than those of the government concerned with the quality and the vitality of legislation. The policy of a piece of legislation may have its genesis from the public through the manifestoes of political parties. The manifesto of a political party is an undertaking that, should it gain political power, it would introduce legislation to give effect to its policies and philosophies, cultural, economic, social or otherwise. The election of the members of a political party to office is considered an endorsement of the philosophies that motivate that political party. The public expects to see legislation that reflects the policies and philosophies it has endorsed.

Departmental officials administer legislation passed by Parliament. They thus become another source of legislative policy. In the implementation of the law departmental officials discover defects and discrepancies in the law. A piece of legislation may have become obsolete. It may have become unworkable. There may be gaps in the existing law which need to be filled in. Departmental officials make recommendations as to how the defects and the discrepancies require alteration.

An existing law may require an amendment. Situations, may have arisen that call for a new Act. The Zambian Intestate Succession Act, 1989, purported to give jurisdiction to subordinate courts to hear matters in relation to succession.[26] On its coming into force it was discovered that the Act did not contain provisions relating to the procedure by which the courts would exercise their jurisdiction.

Interest or pressure groups may also be the source for the initiation of legislative policy. They would seek to use legislation as a means to an end for the achievement of their purposes. Commissions of Inquiry and Committees of Inquiry are also sources of the origin of policy.

The classic theory is that Parliamentary Counsel do not initiate policy. They are only technicians whose function it is to translate policy into law. Policy issues are the

[26] No. 5 of 1989

preserves of others. But it is important to appreciate that the translation of policy into law requires a vivid understanding of the policy. Herein lies the inevitability of Parliamentary Counsel getting involved in policy considerations. The training given to Parliamentary Counsel, their vast knowledge of the existing law, their experience of the probable consequences of a piece of legislation, all these matters place them on a pedestal from which they have to be consulted on policy issues and from which they need to advise and to warn.[27]

Parliamentary Counsel are not glorified amanuenses.[28] Yet the ability to discern the thin dividing line between policy and implementation, between practice and procedure, between the motive and the motivation, between the problem and the solution of the problem make Parliamentary Counsel candidates for early participation in the policy issues that lead eventually to the drafting of legislation.

In this participation, it is important that Parliamentary Counsel do not usurp the role of a policy maker. They have an interest in substantive policy. They have the requisite expertise. While all that is conceded, Parliamentary Counsel must appreciate their own limitations. They should not seek to dictate policy. Only thus can they, as seasoned legal advisers, help to shape policy. In that exercise, tact must tend talent as their duty demands diplomacy. Purposes must be measured by philosophical pragmatism. Causes and cures must be considered on the anvil of effectiveness and common sense. These are the fields open to Parliamentary Counsel to contribute in improving substantive policy.

On the receipt of drafting instructions, Parliamentary Counsel must examine and analyse the legislative proposals. Are the proposals capable of implementation? How harmoniously will the proposed legislation fit into the scheme of existing legislation? What are the alternatives? Would an amendment be appropriate rather than a new piece of legislation? What are the legal difficulties inherent in the proposals?

Is there constitutional legitimacy? What are the implications in the proposals for personal rights and for vested interests? These, and more, are the questions with which Parliamentary Counsel should concern themselves. Those pertinent questions will raise pertinent issues. The resolution of the pertinent issues involves considerations which affect the policies behind the proposals. They lead to informed policy decisions.

Conferences with departmental officials, and, with the permission of the Minister, other interested persons will make it possible to iron out areas of difficulty. It is in this area that Parliamentary Counsel will deal with the precise details of the policy behind the proposals. Here is the area where Parliamentary Counsel ensure that matters overlooked are dealt with so that the Bill, as finally drafted, will not only reflect the wishes and aspirations of the sponsors but will also be a workable piece of legislation.

[27] Like Walter Bagehot's sovereign.

[28] James Peacock, *Notes on Legislative Drafting*, p. 17.

Matters likely to lead to litigation should be dealt with at this stage. *In Roe v. Russel*[29] there was a

> **failure to provide for such obvious incidents of tenancy as death with or without a will, bankruptcy, power to assign and power to sub-let in whole or in part of the demised premises.**

That led Scrutton L.J. to regret that he could not order the costs of the action to be paid by the draftsmen of the Rent Restriction Acts, 1920 - 1938.[30]

Parliamentary Counsel thus have a duty to foresee all possible eventualities that are likely to occur. If the law is drafted to specifically exclude dogs, then cats, even tigers are not so excluded. In these circumstances, "animal" as appropriately defined would be what is required. And what about the blind man who has to rely on a dog? These are matters for Parliamentary Counsel to fill in. Once the salient questions are asked and the relevant answers are supplied, the gaps in the broad policy will be filled. Exceptions to the general rule may be required.

To adapt Hart and Sacks, [31] again, a Parliamentary Counsel is

> **An architect of social structures, an expert in the design of framework of collaboration for all kind of purposes, a specialist in the high art of speaking to the future, knowing when and how to try and bind it and when not to try at all. The difference between a legal mechanic and a legal draftsman turns largely on an awareness of this point.**

In drawing up the legislative scheme for a Bill, Parliamentary Counsel may include matters that had not been foreseen at the conference table, or in the Drafting Instructions. Ideas crop up which would add to the practicability and sufficiency of the legislation. These ideas and other like matters would demand, as well, interstitial policy decisions which would require the approval of the sponsors of the Bill. Here again is an area in which Parliamentary Counsel contribute to improving substantive policy. In translating the substantive policy into a Bill additional policy matters may arise. They may not have been readily apparent before the actual drafting had begun.

The ultimate responsibility for the larger policy decisions is that of the sponsors of the Bill. Yet, the success of a piece of legislation depends upon the skill and competence with which Parliamentary Counsel draft that legislation. There is, almost invariably the need to provide for sanctions. Parliamentary Counsel may need to look at alternative provisions. These approaches of Parliamentary Counsel will give the requisite direction in fulfilling the wishes of the sponsors. The manner in which a Bill is drafted contributes to an improvement to the substantive policy.

In other words, a failure to properly translate the substantive policy into the appropriate law adversely affects the policy. The wishes of the law giver in those

[29] [1928] 2 KB. 117, [1928] All E.R. 262

[30] *Ibid* . 130

[31] *The Legal Process: Basic problems in the Making and Application of Law, 1958 p. 200*

circumstances may not have been achieved. "The most determined will in the lawgiver, the most benevolent and sagacious policy, and the most happy choice and adaptation of means, may all, in the process of drawing up the law, be easily sacrificed to the incompetency of a draftsman"[32]

A law which provides that

> **when two trains approach each other at a crossing, they shall both stop, and neither shall start up until the other had gone.**[33]

has as its substantive policy the avoidance of railway accidents at railway junctions. When studied properly it does appear that the intention of the sponsors of that piece of legislation has been frustrated. The provision is incapable of implementation.

Rights are generally pursued against the background of political reality. At times that raises issues of a purely political nature for Parliamentary Counsel. The resolution of political problems of that kind requires purely political considerations rather than legal considerations. But policy makers may wish to have a legal solution to a purely political proposal. A simple issue of a reasonable time would involve an appraisal of conditions which are economic, political or social rather than legal.

It is then a matter purely for the sponsors of the legislation to determine whether, as an example, thirty days form a sufficient period within which to file nomination papers for the purposes of an election. It is, however, within the competence of Parliamentary Counsel to determine whether thirty days form a sufficient period within which to bring an election petition. Counsel's knowledge of procedure – both of the civil law and of the criminal law – will be called in aid in determining the issue.

The aspirations of a people may present acute problems which border on the ethical. A political issue of the introduction of a one-party state clearly involves issues of fundamental human rights – the fundamental human rights of freedom of speech and expression, of freedom of thought, of conscience and belief, of academic freedom in institutions of learning, of freedom to practice a religion of one's own choice, of freedom to assemble and to demonstrate with others, of freedom of association. Human rights activists would argue that the step would whittle down the individual rights of freedom of speech and freedom of association. It could be argued on the other hand that, in order to achieve social cohesion and to build a national consciousness rather than promote ethnicity, a one-party state is desirable. How does a Parliamentary Counsel, taught to fearlessly defend human rights, deal with very serious situations which are against the grain of Counsel's training?

Events have shown that whilst a theory may be beautiful *in theory* the reality may be ugly. In those circumstances, what is the response of Parliamentary Counsel? However weighty the arguments about the rights and wrongs of a policy contained in Drafting Instructions, there comes a time when Parliamentary Counsel may have to say, 'No.' It is admitted that Counsel is not primarily concerned with policy matters.

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[32] Coode, quoted by Dridger, *The Composition of Legislation*, p. 321

[33] Taken from Gyles Brandeth, *The Law is an Ass*, Pan Books, 1984, p. 126

It is submitted that Parliamentary Counsel is in a position to advise on policy. By virtue of Counsel's expertise and independence much an be achieved especially when Counsel has to point out the implications and the dangers inherent in a particular policy proposal.

Perhaps it should be mentioned here that Parliamentary Counsel in young countries of the world should guard against importing concepts in one system of law into their own systems of law. This question of concept should not be taken lightly. In West Africa there is the concept of allodial and communal ownership of land. A customary right of occupancy of land is perpetual in duration. Yet it confers no ownership. It confers no right of property. There is only a right of possession. There is no power of disposal.

It "is no more than a tenancy creating certain rights and obligations between occupier as tenant and the grantor, and determinable upon certain conditions"[34] To provide for fee simple absolute in possession or freehold land is thus to create problems and litigation. As was stated by the Privy Council in the Gold Coast case of *Enimil v. Tuakyi*[35]

> **It seems clear from the authorities…… that the term 'owner' is loosely used in West Africa. Sometimes it denotes what is in effect absolute ownership; at other times it is used in a context which indicates that the reference is only to right of occupancy ….. this looseness of language is, their Lordships think, due very largely to the confused state of the law in (West Africa) as it now stands.**
>
> **As appears from the report made in 1898 by Rayner, C.J., on Land Tenure in West Africa…… there has been introduced into the customary law, to which the notion of individual ownership was quite foreign, conceptions and terminology derived from English law. In these circumstances it is not surprising that it is difficult to be sure what is meant in any particular case by the use of the expression owner.**

Enimil v. Tuakyi cited the Nigerian case of *Amodou Tijani v. Secretary Southern Nigeria*[36] in which the Privy Council said,

> **As a rule, in the various systems of native jurisprudence throughout the empire, there is no such full division between property and possession as English lawyers are familiar with. A very useful form of native title is that of a usufructuary right which is a mere qualification of or burden on the radical or final title.**

[34] B.O. Nwabueze, *Nigerian Land Law*, 1972 p. 27

[35](1952) 13 W. A. C. A 10 (Gold Coast)

[36] [1921] A. C. 399

> **Their Lordships have elsewhere explained principles of this kind in connection with the Indian title to reserve lands in Canada. But the Indian title in Canada affords by no means the only illustration of the necessity of getting rid of the assumption that the ownership of land naturally breaks itself up into estates conceived as creatures of inherent legal principle**
>
> **The notion of individual ownership is quite foreign to native ideas. Land belongs to the community, the village or the family, never to the individual …. This is pure native custom along the whole length of this coast, and whenever we find, as in Lagos, individual owners, this is again due to the introduction of English ideas.**

But even here, the Privy Council got it wrong as regards the concept of individual ownership. That concept is not foreign to the Customary Law. As Bentsi-Enchill[37] makes it quite clear,

> **The very notions of family, sub-family, and immediate family properly carry with them an acknowledgement of original individual acquisition by the founder of the family or branch of the family.**

Equally the terms, family, sub-family, and immediate family do not fully express the significance of the terms, *abusua or abusua panyin* the latter of which is equivalent to the Roman *paterfamilias*. For this purpose, Parliamentary Counsel need not be deterred from using terms which are readily understood in their jurisdiction. A Ugandan will readily understand the word *magendo* and what it imports rather than the word 'black market.

Whenever the British Crown took over the administration of a territory, the statutes of general application, the doctrines of equity and the rules of the common law as they stood in England became the basic law of that territory.[38] This led to the stifling of the development of the indigenous systems of jurisprudence. The indigenous laws were to be known as the Customary Law.[39]

The importation of English Law led to the dual administration of justice and its attendant problems. In Sri Lanka, for example, many different systems of law are now administered. They are Sinhalese Law,[40] Buddhist Law, Hindu Law, Tamil

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[37] *Ghana Land Law* (1964) p. 81

[38] In Zimbabwe, then Southern Rhodesia, it was the Roman-Dutch Law in force in the Colony of The Cape of Good Hope on 10th June, 1891. In Ceylon, the English Law became a gloss on the Roman-Dutch Law and the Customary Law.

[39] Particularly in Africa.

[40] This is more commonly referred to as Kandyan Law, a term introduced by the British to describe what was originally the law of the Sinhalese. By the time the British took over Ceylon the Maritime Provinces had already been under the Dutch and were thus subject to the Roman-Dutch Law. The operation of Sinhalese Law was limited to those who could trace their ancestry to the Kandyan Provinces.

Law, Islamic Law, Roman-Dutch Law[41] and the English Law. A Tamil living in the Jaffna district of Sri Lanka would inherit property on his father's or mother's death according to Tamil Law. He might be called upon to be a trustee of a Hindu temple. He would thus be subject to principles which originated in the English Courts of Equity, and to Hindu religious law which may be relevant in determining his powers, his rights, his duties.

He would mortgage his property according to the principles of Roman-Dutch Law. He has a choice whether to contract a marriage according to statute law or the Customary Law. His capacity to marry would be determined by statute law. If he brought an action for divorce he would, to some extent, be subject to the principles of English Law. His claims to the custody of his children would depend on Roman-Dutch Law. His wife's right to retain property which she had brought into the marriage community and any property she may have acquired subsequently would be governed by Tamil Law.[42]

This type of situation leads to difficulties. It creates problems for Parliamentary Counsel. It highlights the dangers in importing a concept of jurisprudence in one system of law into another system of law. And Parliamentary Counsel should guard against that sort of incorporation.

An Overview on Training[43]

Development objectives

The need to train more and more Parliamentary Counsel has never been greater. There is always a shortage of experienced Parliamentary Counsel. In some countries, if outside assistance is withdrawn there would not be a single Parliamentary Counsel to draft legislation for the government. It is still an area of critical need. Nor has it been possible for many a young independent country to provide, in the absence of formal training in the classroom, the requisite supervised in-service or on-the-job training and apprenticeship, due to the shortage of experienced Parliamentary Counsel and the demands made on those who are experienced.

There is equally the need for more and more original legislative drafting. As young countries of the world move further and further into local solutions for the cultural, economic, political, and social problems that confront them, they will move further and further away from the models of legislation fostered in these countries before their independence. In this regard their legislative drafting services would have to be

[41] The British recognised the Roman-Dutch Law as the 'common law' of Ceylon. In its application, however, the English judges introduced English ideas of law into the Roman-Dutch Law.

[42] The Thesawalamai Law applies to the Malabar inhabitants of the province of Jaffna, that is the Jaffna Tamils. Other Tamils are governed by the Roman-Dutch Law.

[43] This part is culled from an article by the author in the *Statute Law Review* 1998 Vol. 19, published by the Oxford University Press for the Statute Law Society, London.

prepared to rely more on their own resources than had been the case in the past. Parliamentary Counsel in these countries must be technically, professionally, and maturely equipped to respond to the new challenges that confront their respective countries.

Parliamentary offices in these countries must attain a reasonably high measure of technical proficiency. It means that Parliamentary Counsel should have more opportunities to specialize and to gain more legislative drafting knowledge and experience. That would lead to a greater measure of proficiency in the technical and professional features of legislative drafting. This should take account of the technological advances now available, particularly in the field of computer competency, for legislative drafting.

Acquiring the necessary technical proficiency through specialization, is in economic terms, a cost factor of the legislative process. But it must be emphasized that the acquisition of the requisite technical and professional proficiency does not depend upon the mere addition of legal officers to the legal staff. It also demands acquiring from within the local community the technical experts necessary for the legislative process.

Outputs and Activities

The objectives to be achieved by the training here advocated, are immediate as well as long term. They are direct as well as indirect. The direct and immediate objectives are related to the continuation of the training of a core of Parliamentary Counsel. They would form the cadre for the progressive development of legislative drafting techniques in their respective countries.

The skills to be acquired in response to this relate, primarily, to three functions of Parliamentary Counsel: the amanuensis function, the professional function, and the composer function. Under the amanuensis function, Counsel learn to appreciate the limitations on Counsel's responsibilities. Policy decisions are for the policy-makers. Parliamentary Counsel should not dictate policy. They should not distort policy. They should not divert policy. Their responsibility in this regard is to comprehend the policy and translate the policy into legislative form.

The task here is to inculcate in students for legislative drafting and the participants at seminars and workshops on legislative drafting, an appreciation of the thin line that divides legal assistance from officious meddling. They should be taught to curb enthusiasm, dampen personal importance, and reach for an understanding of the policy issues involved in a given proposal for legislation. Here tact tends talent, duty demands diplomacy. These are qualities which they must imbibe if they are ever to approach the status of competent Parliamentary Counsel.

Policy issues are often not clear however much they pretend, even to the administrators. Thus Parliamentary Counsel must learn to distil from the mass of verbiage the problems that call for legislation, to foresee the pitfalls in the policy proposals, and thus be able to bring difficulties legally and administratively to the attention of the policy-makers. They must learn also to present the relevant choices

that sooner or later those responsible for policy must make. But Counsel must bear in mind that,

> **There are often good reasons, political or tactical, sometimes more easily appreciated by the politician than the lawyer, but in many cases very sound and cogent, against the adoption of counsels of perfection urged, and properly urged, by the draftsman from the legal point of view.**[44]

Under the professional function, the students and the participants should be taught to anticipate the legal difficulties and the pitfalls, the inadequacies in the policy, and the relationship of the policy to the existing body of the law. This function permeates – and supplements – the amanuensis and the composer functions. The danger here, as far as the professional function is concerned, is that time is often the enemy. So students and participants must learn to work under pressure. That is what obtains in a Parliamentary Counsel Office. It is in this regard that we seek to inculcate in students and participants the task of seeking to attain perfection – even under trying conditions.

The composer function is the test of Parliamentary Counsel's competency. That test is the ability to communicate the law to the audience: to the policy-makers, to Parliament, to the prudent man of the law, to the reasonable man of the law whose life is affected by the law, and, finally to the courts. Here student and participants learn that the difference between a legal mechanic and a legal draftsman turns largely on an awareness of social structures, the design of frameworks of collaboration for all kinds of purposes, a specialization in the high are of speaking to the future, knowing when and how to try and bind, and how not to try at all.[45]

The long-term and indirect objectives relate to the law-making element, the interpretation element and the communication element. The law-making element requires of Parliamentary Counsel the ability to identify the authority who or which has the requisite competency to instruct on policy matters. This is done in order to identify the interests concerned and thus assure the clearest and most complete line of communication. Counsel must of necessity deal with the Cabinet, the Cabinet Committee on Legislation, Ministers of the Government, civil servants, and a whole body of pressure groups who seek to use the machinery of the state in order to achieve a personal or a particular political purpose.

The interpretation element has two aspects: legal and political. The political aspect of a proposed piece of legislation could provoke debate, controversy, and political passion sometimes bordering on the fanatic. Parliamentary Counsel must learn to deal with matters of that kind from a distance – at an arm's length. Awareness of this is essential. If only because it leads to the legal effects of a proposed measure. There is obviously an overlap here. Counsel must learn to be a lawyer first, and Parliamentary Counsel second. There are preliminary questions of a purely legal nature that must be answered. Would the proposed measure be unconstitutional? If constitutional, what problems of fundamental human rights are involved? What

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[44] *The Mechanics of Law Making*. University of Columbia Press, New York 1914 at p. 19 - 19
[45] Hack v. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law*, Cambridge, 1958 p. 200

would be the harmonious relationship of the proposed legislation with the existing body of law? What values of the society would be at stake?

It is under the communication element that the incompetency of Parliamentary Counsel would sacrifice the intention of the law-giver. It is an important element in the legislative drafting process. Language is the vehicle of the law. It is the medium of communication. A command of the language of the law is essential. A command of the language to express the law becomes absolutely essential. It is not just a question of style and legal language. It is a question of the ability to be clear and concise, concrete and cogent. Without the ability to communicate – and to communicate effectively – the whole edifice cracks. It will eventually tumble to the ground. The relevant legislation will face a very unwelcome reception by its audience.

The Essence

In essence legislative drafting should be likened unto a focus, a stream of technical knowledge of a special kind that unites the interplay of many minds to produce a unity of thought enunciated as a command – a law that has a beneficial effect for the audiences that are subject to the law's demands.

It requires the cultivation of detachment as a necessary qualification. Legislative drafting cannot hold its audience captive. It can consistently captivate its audience to the ideals behind the policy decisions that motivate legislation. In these lie its purpose, its strengths, its value.

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    c) Drafted the Guiding Principles for UNESCO in the field of Educational, Scientific and Cultural Exchanges.

    d) First Parliamentary Counsel and Constitutional Adviser to the Ugandan Government;

    e) Chairman, Constituent Assembly for the drafting of the 1979 Constitution for Ghana.

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About UNITAR

UNITAR is an autonomous body within the United Nations which was established in 1965 to enhance the effectiveness of the UN through appropriate training and research. UNITAR's programmes in the legal aspects of debt, financial management and negotiation are among a wide range of training activities in the field of social and economic development and international affairs carried out, generally, at the request of governments, multilateral organizations, and development cooperation agencies. UNITAR also carries out results-oriented research, in particular research on and for training, and develops pedagogical materials including distance learning training packages.

UNITAR's **Training and Capacity Building Programmes in the Legal Aspects of Debt, Financial Management and Negotiation** are conducted for the benefit of over 35 partner countries mainly from sub-Saharan Africa and Vietnam. These programmes aim at meeting the priority training needs of senior and middle-level government officials through a wide range of seminars, workshops, and training of trainers workshops. In parallel to training activities, the programme also assists in strengthening local capacities of governmental and academic institutions through distance learning training packages, up-to-date publications as well as networking activities.

During 2001, the programme will focus on:

- Training government officials through short-duration regional seminars and workshops on various aspects of debt, financial management and negotiation;
- Developing On-line Training Courses (in parallel with its traditional regional training) with a view to tapping a wider audience and reducing cost of training per participant;
- Strengthening existing ties with regional training centres and offering joint courses with partners in the field;
- Creating awareness among senior government officials of the importance of the legal aspects in the borrowing process and of putting together a multidisciplinary team for loan management and public administration;
- Providing in-depth training and skills development for accountants, economists, financial experts and lawyers coming from government ministries and departments involved in negotiation, financial management and public administration; and
- Developing and disseminating training packages and 'best practice' materials directly related to the practicalities of legal aspects of debt and financial management, with a view to strengthening existing human resources and institutional capacities at the national level.

A description of UNITAR's latest activities and training programmes in the area of debt and financial management is available on its website at: www.unitar.org/dfm.

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