

Course Introduction

The Course designated as Legislative Drafting should be viewed within the context of developing legal skill, which may consist of developing skills in legal writing, convincing, and in particular drafting that of legal instruments; and as such, Legislative Drafting is a species within the genus of all these. Developers can not yet claim the text is complete and in its final shape. It remains on you, Instructors and students, to contribute to its refinement.

The course Legislative Drafting is also designed to enhance students' skills in drafting process and tools. Professional writing, oral and reasoning skills necessary for success in the legal profession are some of themes of concentration in this Course. Students shall discuss the preparation of various documents such as provisions, proclamations, regulations, affidavits, memoranda, briefs, letters etc. supplemented by the required oral and reasoning skills.

Chapter I

General Overview

Content of the Chapter

- 1.1. Distinguishing Legislative Drafting from other Forms of Legal Writing.
- 1.2. What is the importance of Legislative Drafting?
- 1.3. Legislative Drafting as a Tool for Social Change
- 1.4. Policy Translation
- 1.5. Problem Solving Approach to Drafting.

1.1. Distinguishing Legislative Drafting from other Forms of Legal Writing

1.1. 1. Definition

- Legislative drafting is **one form of legal writing**. The term legal writing in general includes all forms of writing in the legal field including the drafting of individual contractual agreements, wills and the like inclusive of legislative drafting. Legal writing had been, for example, defined as "*the crystallization and expression in definitive form of a legal right, privilege, function, duty or status [and] .the development and preparation of legal instruments such as constitutions, statutes, regulations, ordinances, contracts, wills, conveyances, indentures, trusts, and leases.*"
- **Legislative drafting takes place at the stage when policy is converted into legislative provisions**. Legislative drafting involves the preparation of a legislative text in the appropriate form so that it will give effect to the policy as a coherent part of the written law in a legal system. The way in which it is written determines how effectively it communicates its requirements to those affected. It usually has to be drafted to comply with the local drafting standards, which in some jurisdictions are formally set out in written conventions or practice directions. But drafting is concerned with what is to be communicated, as well as with the way in which it expressed. Dick (*Legal Drafting in Plain Language*, 3rd ed., p. 5) suggests that "legal drafting is legal thinking made visible". We can suggest that legislative drafting is legislative policy made visible.
- Legal writing, as any other form of writing basically adheres to most rules of grammar and punctuation. The biggest difference from other forms of writing however lies **because it is a more formal form of writing**. This formality being expressed in; avoiding first person pronouns, contractions, abbreviations, idiomatic phrases, and punctuation marks like exclamation marks that might suggest informality

➤ Generally speaking, most people consider all forms of legal writing to be complicated, cumbersome and incomprehensible. Within this category, **legislative drafting is considered the most difficult form of legal writing**. This difficulty could be considered as having two aspects. From the point of view of the drafter the problems faced arise in trying to draft a comprehensive document and how the document would be understood by the lay person. Being able to present it in simple words, while, at the same time, being able to include all policy interests, following the rules of legal writing is necessary. These points raise the issues of ethics and language. They make us question what exactly the role of the drafter is. Who is responsible for and in what manner (what type of language) is to be employed to communicate the idea. This will be dealt with in detail later when looking at the difficulty of legal drafting.

1.2. What is the importance of Legislative Drafting?

- Even if there could be a difference on the following of codified laws or not exists we could all agree that it is important to have written proof of what we believe is right and wrong or our agreements and disagreements on the basis of which violators are to be held liable and face the consequences of their acts.
- The importance of written law is highly associated with the idea: “ignorance of the law is no excuse”. The use of this idea necessarily leads to the primary obligation of the state to make the laws available (known) to its citizens. That is what we call giving prior notice. And the best way to do that is to publish the laws and this is where the topic of legislative drafting comes to existence.
- Once we start talking about legislative drafting our focus would be the drafter. To talk about importance of legislative drafting is to talk about the importance of the role the drafter is to play. Usually the drafter is not himself/herself the authoritative arbiter or maker of the policies to be embodied in the provisions he/she draws.

- In the modern state, much social and institutional change has to be made through written law. This is both a democratic expectation, confirmed by state Constitutions, particularly provisions guaranteeing fundamental rights and freedoms, and a practical necessity. We can no longer look to courts or to custom alone to adjust the legal system to the fast changing demands made upon it.
 - Legislation is central to the process of change, for example in a move from one form of economic system to another or from one form of government to another. It is the vehicle by which countries respond to the increasing demands that arise from membership in the international order, as for example the changes introduced through the World Trade Organisation (WTO) and international agreements on environment
 - **The goal of legislation in a constantly changing environment is**
 - to provide a framework for settled legal relationships,
 - to reduce the potential for conflict and
 - to establish effective machinery for resolving the disputes that inevitably arise. Success rests in large part upon the quality of the legislation, which in turn depends upon the competence, skills and

➤ The drafter, in order to be effective, must participate closely and as early as possible in the policy-making process, not, to be sure, as a sponsor of policy, for a draftsman who would seek to substitute his judgment for that of the policy-maker on significant issues would not only run afoul of professional ethics but would also jeopardize his own effectiveness. Participation of the drafter in the policy-making process is that of a researcher and expert technical consultant, who can help the policy-maker arrive at sound decisions by providing data to evaluate the effects of particular policies, by calling attention to policy alternatives, and by aiding him in weighing their relative merits. The phases of the drafting process are neither sharply distinguishable logically, nor are they strictly chronological, for each phase is likely to give rise to new policy issues, requiring research or additional policy consultation with the policy-maker.

- The drafting process begins with the obtaining the objectives for a legislative proposal from either the legislator who is sponsoring the bill or from the legislator's authorized agent. The drafter then converts the sponsor's request into proper form, style and legal terminology and fits the proposal into the framework of existing statutory law. The drafter reviews pertinent provisions of the Constitution, existing laws, and other relevant sources and advises the legislator of any known problems or conflicts.

1.3. Legislative Drafting as a Tool for Social Change

- Ann Seidman a renowned legislative drafting writer and educator whose lectures have been translated in so many languages and whose books has served as manuals for so many countries says
 - the role of the drafter is
 - to bring about social ,political and economic transformation.
 - to bring about development and social transformation our legislation should promote good governance.

- According to her poverty and riches aren't directly proportional to the availability of resources but rather their allocation and use. Hence if we are going to bring about development or/and social problem our law should be able to pin point the basic social problems and see how to resolve those and for this good governance is considered the most basic aspect. To quote directly from her, *"A country's institutions shape, not only its resource allocations, but the quality of that country's governance. The institutions of governance define a government's capacity to manage social and economic resources to facilitate development or transition. Poor governance consists of ineffective, arbitrary government decision-making processes – that is, ineffective decision-making by non-transparent, non-accountable, non-participatory (and frequently corrupt) processes."*
- **Good governance** is defined as *"the manner in which power is exercised in the management of a country's economic and social resources for development."*

Four elements characterize those processes:

1. **Governance by rule**: decision-makers decide, not pursuant to the decision-maker's intuition or passing fancy, but according to agreed-upon norms grounded in reason and experience;
2. **Accountability**: decision-makers justify their decisions publicly, subjecting their decisions to review by recognized higher authority, and ultimately by the electorate;
3. **Transparency**: officials conduct government business openly so that the public and particularly the press can learn about and debate its details; and
4. **Participation**: persons affected by a potential decision — the stakeholders — have the maximum feasible opportunity to make inputs and otherwise take part in governmental decisions.

Together, these characteristics tend towards maintaining the rule of law, and ensuring representativeness and

➤ Definitions of 'institution' differ. Some emphasize the rules that govern the behaviors of the people who constitute the institution, some the participants' mental orientation towards those rules. All include the concept of repetitive patterns of social behaviors. "Institution" means a set or interrelated sets of repetitive patterns of social behaviors. Defining an 'institution' as its constitutive sets of repetitive patterns of social behaviors focuses attention on the central problem: through their society's repetitive patterns of behavior – their institutions – people shape the uses of their country's resources. Banks, schools, courts, family structures, prisons, farms, social clubs, legislatures, industries, welfare systems: these and a myriad of other institutions make up your country's political, social and economic system. Historically-shaped institutions define a country. Their institutions and how they work distinguish one country from the other. A country's institutions determine the relative wealth and income levels of its population, and of the groups and classes within it. They also determine the quality of its governance.

- It is therefore under the definition given above that a country's legislative institution falls with all its elements. Hence legislators must devise ways to change the institutions that fasten poverty and vulnerability, and poor governance onto fellow-citizens. The kinds of laws that legislators enact can play a principal role in ensuring good governance that facilitates transition and development. Even if as a legislator you can not resolve all the problems that are present in the country, still you can enact laws to create an enabling institutional environment, one which facilitates the efforts of relevant social actors to develop and use resources in more desirable ways.
- As a legislator, you may enact laws designed to facilitate development or transition by different kinds and degrees of state intervention:
 - **Direct government management of an agency** – for example, the post office, prisons, the courts;

- Through the creation of a framework of rules within which individual actors supply the moving force — for example, contract laws.
- What degree of intervention the law should adopt in a particular circumstance depends not on ideology but the specific facts of the particular social problem the law attempts to solve.
- To facilitate democratic social change, you as a legislator, must do more than pronounce inspiring policies. You must enact effective legislation
- That task requires you to perform three law-making jobs:
 - enacting legislation,
 - overseeing its implementation, and
 - communicating with constituents.
- Whether you contribute to all three tasks depends on your capacity to assess a bill in the public interest. To assess a draft in the public interest requires that you as a ‘trustee for the public interest’ assess it on the basis of reason informed by experience. To do that – and thus to exercise the legislative power effectively – you must answer a central question:
- Why do people behave as they do in the face of a rule of law? This is a question we are going to answer in the next part of the problem solving approach. But even before we have to answer “Why must governments use law to induce deliberate change? Can it use the legal order to do so?”

- “A law” means a rule promulgated by the state and implemented by officials. A law may take many forms: statutes, local ordinances, subsidiary legislation, ministerial rules, administrative regulations, a military junta’s decrees;
- “The legal order” means the entire normative system in which the state has a finger. It includes, not only the laws themselves, but also the institutions that make the laws (legislatures, independent agencies, ministries, and courts) and that implement the laws (courts, ministries, the police) (others sometimes call this ‘the legal system’).

Contrarian’s argument #1: Society makes law; law constitutes an artifact of society. How can society’s artifact change the society that made it? ***Answer:*** ‘Society’ does not make law. Law-makers – like yourself – make law. Within the limits of law, law-makers can use law to bolster existing institutions, or to change them.

1.4. policy Translation

- The idea that drafters are only concerned with form not policy or substance is outdated, wrong and cannot be sustained in modern day policy process particularly because drafters are overtly sought to contribute to the substance of policy. The truth is, drafters have skills, experience and the authority to challenge policy which most often elicits policy refinement that enables greater certainty and practicability of the end product.
- legislation is important for the existence of every society, is an understatement. Perhaps, this is better appreciated when one imagines what happens in a lawless society-chaos, jungle justice, survival of the fittest. The mere fact that, legislation exist, the citizens know, and machineries are established by it, law and order are easily maintained. Crabbe said, "Governments need legislation. The governed need well drafted, readable and understandable legislation."

1.4.1. Policy

- Policy is the general principle by which a government is guided in its management of public affairs.
- It is a means through which government usher in change of any kind therefore, **policy is the starting point for government to adopt a line of action.**
- Essentially, when government adopt a policy, it has no effect until it is implemented and one of the major means through which that is done is through legislation. As Crabbe noted, “government policy motivates legislation. The legislative policy expressed in an Act is first determined and settled by the government.”
- The policy process are stages a policy must go through to be complete. The stages are policy initiation, policy formulation, policy implementation, policy evaluation and policy decision.
- Traditionally, the role of the drafter was restricted to

- Every bill owes its origin to a policy and policy may originate from departmental officials, political parties, non-governmental organizations, individual constituents, treaties and agreements, members of Parliament, science and technology, emergencies and pressure groups
- The drafter has been described as a midwife in the birth of laws, an architect of social structures, a social engineer, 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 and a wordsmith. These are just formidable words that shows the creative nature of the drafter's job and the many ways the drafter influences the policy or substance of legislation

1.5. Problem Solving Approach to Drafting

- The legislative problem-solving approach is a methodology that seeks to solve or prevent social problems based on reason (that is, looking at the facts as they are in the “real world”) and the experience of those who are connected with the social problem. The legislative problem-solving approach is simply away to explain problematic behavior in order better to understand the behavior. By better understanding the behavior, we can begin proposing precise legislative policy responses to change this behavior. Thus,
- the legislative problem-solving approach is a step by step method of finding effective legislative solutions to social issues or problems. The basic steps are
 - A, TO identify t problem as it exist
 - B, to analyze and explain the problem and create hypotheses based on the causes of the problem,
 - C, To propose solutions based on the these hypotheses, and
 - D, To create a system to monitor and evaluate the chosen policy in order to understand which hypotheses were incorrect

Step 1—Identify and describe the social problem and the persons and institutions involved in the problem.

- a) Identify and describe the main problem.
- b) What is the problematic behavior and who is responsible? Identify the persons and institutions (including current implementing agencies) that may contribute to the problem).
- c) What is the underlying problematic behavior? Identify the problematic behavior of these persons or institutions.
- d) Identify other persons that are affected by the problem (usually in a negative way).
- e) Identify possible implementing agencies: Any agencies that now have (or could in the future have) responsibility for implementing the legislative solutions to the problem.

Step 2—Analyze and explain the problematic behavior and create hypotheses (explanations) based on the causes of the behavior.

- A) Analyze the problematic behavior of the persons and institutions (possibly including current implementing agencies) that contribute to the problem in order to create hypotheses about why these persons and institutions act, or fail to act, as they do.
- B) Seven analysis factors to help determine the causes of problematic behavior, namely
- Rules.
 - Opportunity
 - Capacity.
 - Communication.
 - Process.
 - Interest.
 - Ideology.
- C) There may be multiple and overlapping explanations for problematic behavior.
- D) Create hypotheses or explanations as to the causes of the problem using the 7 analysis factors.

Step 3—Propose possible solutions based on these hypotheses.

A) Formulating solutions

- Finding solutions that address the causes of problematic behaviors.
- Explanations for problematic behavior dictate potential solutions.
- Where to look for solutions:
 - (a) foreign law and experience,
 - (b) professional literature, and
 - (c) your own country's past experience.

B) Designing implementation provisions.

i. General categories of solutions:

- direct measures,
- indirect measures, and
- educational measures.

ii. Choose an implementer from the following types of implementers:

- courts and tribunals,
- administrative agencies,
- public corporations, and
- private-sector organizations

C) Elaborating alternative solutions. d) Assess the costs and benefits of each of the possible solutions and choose the solution most likely to solve the problem in the most effective way.

i. Purposes of cost-benefit analysis.

ii. Monetary and non-monetary considerations.

iii. Basic methods of analyzing costs and benefits.

– Comparing the chosen policy with doing nothing (“status quo” analysis).

– Comparing the chosen policy with alternative policies.

E) Judging between alternative solutions.

F) Combining the provisions into a comprehensive policy.

Step 4—Create a system to monitor and evaluate the chosen policy in order to understand which hypotheses were incorrect (and why) and modify the policy accordingly.

➤ To further explain in detail the problem-solving approach to legislation, the essential job of a professional legislative drafter is to make sure that the legislation will solve the problem being addressed by the sponsor (proponent) of the legislation. It is very important to ask the right kinds of questions of the proponent of the legislation in order to understand the “actual” intent of the legislation, not just the “superficial” intent that may appear in the words of the draft. The problem-solving approach is a practical tool you can use to obtain (or seek) the information you and other policymakers will need to put together legislation that is actually effective in solving social problems in society.

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