

LEGAL DRAFTING AND WRITING (Adv. B. Nyalusi)

LEGISLATIVE DRAFTING.

Legislative drafting: may mean an art of drafting a bill, it is a part of legal drafting, legislative drafting is done by the legislative drafts man, it is a process by which policies, manifestos or proposal are put in form of the bill for presentation in the legislature to be passed in the form of the Act, a law, regulation or by law and the conditional precedent for it to become law it has to be assented. *“The process of drafting bill”*

For the subsidiary legislation to exist the parent Act might provide that, so the Act will not become operative if there are no regulations and Rules, so the Act provides only the skeleton, if it provides it is in the schedule.

The custodian of legislative power in Tanzania is the legislature, so the qualities of the bills passed are totally dependent on the quality of the parliamentary draftsman. After the bill drafted it is tabled to the parliament and passed after being passed it will be sent to president for assent and once it is assented it become a law.

Difference between legislative process and legislative drafting.

1. Drafting process is done by drafts man who makes sure that such draft is tabled before the legislature while legislative process is done by legislative assembly
2. The legislative drafting starting with receiving instruction to draft a bill, so legislative process cannot comment before the legislative drafting.
3. Legislative process requires the knowledge of constitutional law
4. Legislative requires process like 1st sitting, 3rd

5. The bill is not an Act until it is assented by the President.

Legislative power in Tanzania it is vested in the parliament by the virtual of *Article 64 (1)* of the constitution. When a law it is proposed to the national assembly it is called a bill, a bill may either be proposed by the government (*an official bill*) or by individual member of the parliament (*private bill*) legislative power in Tanzania is limited in four ways:

1. Parliament cannot make law and apply into Zanzibar if it does not concern the union matter. As per *Article 64 (3)* of the constitution.
2. The parliament cannot make law which is contrary to constitution; such law will be declared null and void.
3. The parliament is bound to follow strict procedures that are stipulated in the constitution in making laws.
4. The parliament cannot change essential features and basic structure of the constitution.

Quality of good legislative draftsman

According to one of the Nigerian writer Adobe “the danger posed to the society by an in-competent draftsman is more danger than those imposed by the fake doctors”. So to avoid that there are some quality of the good legislative draftsman -:

1. Good knowledge on constitution law and legal drafting
2. Good in linguistics
3. Good knowledge of law
4. High level of concentration
5. Ability to work under pressure or little supervision
6. Good knowledge of sociology, politics.

Assignment: what are the challenges facing a draftsman in Tanzania

1. Usually un notice & un heard
2. Non

Sources of material in drafting a bill

1. Constitution: draftsman must understand the constitution and its provisions, the provision is either *self-executing*, this is where it exclusively covers the field of the subject matter or *non-self-exulting* where it provides general principal without covering the field of the subject matter but requires further legislative by legislature.
2. Electoral promises: electoral promise made by the parties during election campaigns and the ruling party turn it into law to implement them.
3. Party manifesto: which represent the party intention to the public
4. Resolution of the legislature: which are discussed by the MPs, resolution them self does not have the power of law unless they turned into law.
5. Law reform commission: in Tanzania it is formed under s. 3 and function under s. 4 of the Law Reforms Act of Tanzania. And their recommendations are very important for sources of material.
6. Professional bodies & civil society reports
7. Judicial decisions:
8. Editorial and newspapers minister's reports

The main function of the

- i. Legislative drafting section: is charged with the following activities, head of this is executive director
 1. To study proposal and concert ministry and executive agencies which require taking all administrative measures.
 2. To coordinate research on relevant legislation and propose consequential amendment
 3. To draft legislative proposal into bills
 4. Advising the chairman of legislative committee of the cabinet, members of ...
 5. Assisting the minister and AG in presentation of new law in the cabinet and new law.
 6. Drafting and vetting all legal document like affidavit sent to the AG office
 7. Oversea printing and distribution of the legislative document
- ii. Law translation section: translate both legislature
- iii. Revision section:
 1. to revise laws and assign chapters to enactment of parliament
 2. to codify and indexing legislation
 3. To in cooperate and consolidate all legislation.

THE GUIDE TO THE LEGISLATIVE TDAFTING

The Art of legislative drafting:

According to Bowman, legislative drafting is more an art than a science; different drafters may be draft the same subject but came up with different draft. Each exercise of drafting a bill is a unique, drafters should be very creative. Every draft starts with the workout direction. The job of drafters only makes a possible solution but no making a new policy.

Drafting process is said to involve interactive process, this implies that in analysis stage in order to come up with the work there should Drafting is said to be an art because in its composition a consideration must be heard in legislation audience and the nature of legislation, so far as legislative audience is concern, there must be an element of compromise and balance between the audience and the expectation of the audience and this means involve a good deal of judgment, compromise and balance to the audience should be considered. An act cannot employ the usual techniques of composition, the language of art is tight and spare and every word is presumed to have a meaning.

Legislative process

- i. It begins with formulation of government policy it is usually undertaking by the responsible legislative action. Policy can be defined as the strategy that rises down plan action for instruction in plan action objectives, plans are found in policy. Policy is very important in foundation of a bill. The ministry is required to formulate the policy because the ministry would conduct a research of the subject matter; the research may be done through internal division consultation, stake holder or independent consultation
- ii. Table instruction to the legislation department in AG chamber, instruction should contain a clear details account of the policy to be implemented by the legislation, existing legislation that relate to the policy, any relevant judicial decision,

Stages of drafting a bill

1. Receive and understand information [to know sufficient background, objective and means of achieving objectives of the bill]
2. Analysis [potential danger area, practability, existing law]
3. Design [where information are structures so as to get the clear way to make an understandable to the reader,]
4. Composition [stage at which drafting a bill is done, provision which are compatible to the purpose of the bill]
5. Scrutiny [ending stage where proof reading is done]

Distinctive features of the legislative process:

There are three major distinctive features

1. There is distinction that is drawn between the functions of formulating the policy and drafting primary legislation that will make implementation of the policy
2. There is strong tradition of quite vigorous, detail parliamentary consideration of legislative text during enactment process
3. There is an emphasis on not only legislation but judicial decision as important source of law, judicial decision is basis of significant of law either solely or in conjunction with subsequent legislation. Authors say judicial decision are not solely as they depend on interpretation on the judicial decision.

The wording of the bill

There are no hard and fast rules that bill should be worded however there are some standard rule that must be followed in wording a bill:

1. *Use plain language*: it does not mean simple language or attractive language but it indicates that language which is precise, clear and simple as subject matter will allow proper tenses and proper grammar.
2. *Length of sentences*: bills must be drafted in short sentences whereby should at least 20 -25 not more than 30 words, you should not let a verb and a subject be separated by a length phrase. Example: a person who: a) conceal criminal property b) disguises criminal property c) convert criminal: commits an offence, the best construction of a bill will be a person commits an offense if he a) conceal criminal property b) disguises criminal property. Sentences should be shorter.
3. *Positive and negative*: positive sentences are easier to understand than negative sentences. Positive sentences are more direct and strait than a negative sentence this means that you should avoid negative sentences Example: a tenant who does not have a lease for more than three years (negative), a tenant who have a lease for more than three years must register his rights (positive)
4. *Active voice than passive*: because passive conceive the actor, active is more understood than a passive voice.
5. Should avoid ambiguity as much as possible:
6. *You should observe changing a language*: as for other kind of language statutory language changes so the change and improvement of language should be observed.
7. Use punctuation as aid to clarity
8. *Statutory rule*: In legislative process gender and numbers are implied and their meanings are interchangeably as per *section 8* of the interpretation of laws Act. The danger of not implying the gender and

numbers, in writing repetition of words could be occur, so this is to avoid unnecessary repetition.

9. *Legislative clarity and coherence*: you must adopt contemporary and ambiguous vocabulary, avoid those words which are ambiguous, adopt consistence structure for legislation, you must adopt a good drafting styles.

Assignment: legislative drafting style and what are the rules of those styles.

Common law drafting practice in drafting style

- i. The common law practice is to draft in direct and positive style in this is to use a present tense in operative ... indicative rather than imperative and active rather than passive voice, and non-use of nominalization
- ii. Another common law practice is a provision or sub provision of legislation will be usually be limited to a single sentence
- iii. To adopt narrative style: the drafter assumes that in using X a subsequent to X will be implied to the same context.

NOTE: *There is no thumb rule in wording the bill.*

Components of the bill

A bill consists of the different component and each component has different function, as a drafter you must understand each component and their own functions. These components are of unique nature and function.

1. *Long title*: is useful in determine the scope and the interpretation of legislation, however the word of enactment is plain and an ambiguous it cannot be ...

Features of the long title:

- i. Is usually drafted in Bold
- ii. Should be drafted after the whole bill is drafted (common phrase “for matters connected to it” makes the bill to be applicable to all matters in the bill that are related to subject in the bill)

Basically there are three part of long title i) *introduction* (this is an Act) ii) *the part stating the function* iii) *ending part (and related matter)*. When the law seeks to repeal or amend the law should be stated in the long title.

2. **Preamble**: is not regarded as part of legislation but can be resulted to the interpretation of legislation, the purpose and function of **preamble is to states the reasons for legislation**, preambles are not very common in normal legislation, and where there is explanatory note preamble are not needed, in modern drafting preamble are only used in drafting constitution, international treaty
3. **Commencement**: this states when the legislation comes into effect, commencing date should not be confused with the date of passing date, usually commencing date is fixed in future dates. Example: the Act may come into effect when the ministers publish in Gazette. Part III of the law of interpretation of laws Act provides for the commencement of Act, **section 14** of the Act provides. There are two ways of drafting commencement date:
 - i. Commencement date stated expressly in the provision of the Act: e.g. this Act shall be operating from 12/12/2012.
 - ii. The Act shall come into operation after published in gazette

4. *Enacting formula*: it is a compulsory part of the bill; it gives information about enacting or constitutionally empowered authority to enact the law.
5. *Establishment of the bill*: this part is used when a body is to be established in the bill and usually it states the function, qualification of members, composition, appointing authority, duties, officers etc. e.g. *section 9* of public service Act
6. *Interpretation clause or section*: this is the section that gives the meaning of frequently use of words, it assigns the meaning of the used words in the context of the Act. It can be used to extend the limit or narrow meaning of any words in the Act, the word “means” is used as a connected word, defines exclusive and exhaustive to those things, while include it means the words is not exhaustive.
7. *Short title*: the purpose is to identify describe and site the law as provided in the case of *Vacher v London (1913) AC 107* by Lord Moulton, it removes the stress of referring, it used as statutory nick name. usually it is in section 1 of the Act (this Act may be sited as ...)
8. *Application*: this provision is necessary where the application of the law is not every part of the country, or not every person or to subject matter. If the legislation is for general application there is no need of application clause.
9. *Duration*: provides for life span of the legislation, the law may provide for the duration of its self or may empower to fix the duration, this is for specific legislation.
10. *Savings*: used to preserve certain laws refers to existing law, that otherwise could be repealed without being served. Example section 103 of the ELRA

11. *Repeal*: it is the way to bring legislation to an end, it can be provided specifically or impliedly
12. *Schedule*: to burnish technical.... It act as aid to clarity and provide aid to the reader so as to avoid destruct the readers, general rule schedule are not part to the legislation with exception of CPC, *AG v Lamplough (1875) EXD 214*
13. *Explanatory notice*: usually excluded when the bill is passed into the law, the essence of it is to explain legislation in easy and simple form, they are not part of Act as a general rule.

Intentionalism- intention

Pragmatism- both [broad]

Texualism- literal meaning of the words

Stages of passing a bill

(Topic 2) STATUTORY INTERPRETATION

The art of seeking to a rival and discover the meaning of statutes, or the process where the nudges interpret the Acts of the parliament by reading and apply statutory provision, by doing this the judges will find the intention of the parliament in making the law; the process by which judges interpret Acts of parliament so it is a process of reading and applying statutory words, the wording of statutes may be ambiguous when it is interpreted in more than one way or vague when it is unclear then judicial will have to interpret the law. In the case of *Twining v Myers*, the court has to interpret whether roll skater is a vehicle

The inherent power to make law is vested to the parliament as per *Article 64* of the constitution, the law maker they have no duty to interpret

the law, there are specific organ which vested the power to interpret the law which is judiciary as per *Article 107 A* of the constitution.

Generally, judges do not make law rather they seek to know the intent of the law maker as it way in the case of *Ephraim v Pastory* Mwalusanya J was in the views that when interpreting the statutes, it is necessary to discover the intention of the law make.

The traditional approach is that where the words of statutes are plain and unambiguous effect should be given to it without consider any injustice of hardship the just of the word, “judges should interpret the words as it is”; the Morden approach is now towards a purposive approach is where we look the true intention of the law maker.

Problem of statutes interpretation

Sometimes judges may mis interpret the statutes because they are human being are affected and influenced by the multiple factors; some of those factors are:

- i. Religious consideration:
- ii. Human Right: extremist in human rights.
- iii. Political influence

Result of these difficulties

1. These difficulties lead to the presence of dissenting judges,
2. courts over ruling the previously decisions.

As a drafts man you must use the words to ease the interpretation by the court, this use the plain and simple English.

HOW DO JUDGES DEAL WITH THE PROBLEM OF STATUTORY INTERPRETATION?

1. The use of presumption: judges will begin with the assuming of the certain circumstance unless there is a good argument, there various presumptions such as the law has not been change unless the Act specify.

Mens rea: is required in criminal offense/act, you must also presume that parliament has not change the law retrospectively; also presumption of language, words like *ejusdem generis* (of the same kind), in the case of *Powell v Kempton Park Racecourse*, the words other place where word to means other in door place because the house, office include other place.

Noscitur a sociis: means that known by company it keeps, words derive their meaning from other words surrounding them, this means words are generally interpreted in the context of sections and the Act as whole.

Expressio unius est exclusion alterius: the expression one exclude others, the express reference of one member of class may exclude other member of class.

Before beginning to interpret statutes there are some things that must be noted which are

1. Read the statute
2. Understand the client's goals.

Tools of interpretation/aids of interpretation

- i. The interpretation Act: this contains the definition of different legal terms; it is important when the statute does not contain the interpretation clause,
- ii. Definition clause: also known as the interpretation clause, defines words used in legislation, definition which are given are in accordance to the context of the section or Act.
- iii. Punctuations: are very important in interpretation of the statute, when they used properly they used to clarity,
- iv. Long title and preamble: use in determine the scope of the law, while preamble show the reasons for the reasonability of the section or Act
- v. Dictionary: law dictionary
- vi. Legal text:

Rules of interpretation

- i. Literal rule: literal meaning of the statute or plain meaning, it is a primary rule of interpretation, it is plain and ordinary meaning of the word of the statute, it was developed from the doctrine that the legislature says what they mean, one of the problem of this rule is that not all judges understand and apply in same manner they vary, but also it fails to recognize the status change of the statutes. Also if fails to recognize that the word has no core meaning but fringe meaning
- ii. Golden rule: depends on the application of literal rule, where literal rule led to absurdity, hardship or inconsistence, is nowhere the intention of the legislature needed, it recognize the application of literal rule but to be departed from when it led to the absurdity.

- iii. Mischief rule: judicial must seek to discover the mischief or error / remedy that the statute intends to cure, the court should consider the following in finding the mischief
 - i. What was the common law before making the statute?
 - ii. What the disease/ defect or error was available in previous law?
 - iii. What are the remedy or solution was introduced in the law to cure the defect by the parliament?
 - iv. What the rationale of the law.

The advantage of this rule is that it recognizes the change of law.

Critics

- i. It encourages judicial activism which lead to usurpation of power
- ii. It advances new policy especially where there exists no mischief

A WILL

Is defined as a legal *declaration of the intention of the testator* with respect to his property (s) which he desires to be carried out after his death. Other authors define will as a document in which a person specifies the methods to be applied in the management and distribution of his estates on his death. it is a legal instrument that permit a person or testator to make decision on how the estate will be distributed after his death.

At common law an instrument disposing a personal property was called testament, in case of real property is called a will. No the different has disappeared and it is called last will and testament.

What is expressed in a will?

A will, will usually express the following:

- a. How the testator would like the property to be distributed among heirs
- b. A list of property is owned
- c. State a share each beneficiary entitled
- d. A list of creditors and debtors.
- e. State how his funeral arrangement is carried out.

If a person does not leave a will or the will is declared invalid is said to be died “intestate” such distribution shall be governed by the probate and estate administration Act because it recognizes both customary and Islamic ways of distribution of estate.

Formation of a will

Under common law a will is only valid when it is in writing and signed by the testator, signed by other person as a witness in the presence of testator by his signature the testator intends to give effect to the will. A will may be an oral or written will, however being written or oral all will must comply with the provision of the law relating to the drafting of the will, a will may be drafted by testator or testator may employ an advocate to draft a will on behalf of testator and such advocate must draft in accordance with the directions of testator and comply with the provision of probate and estate administration Act.

Book:

“Probate and administration of estate in Tanzania: by Urrio Alfonce and Janet Urrio. Page 40 -42”

Howard Hughes & the Mormon will.

Other types

1. ***Holographic wills***: is a written and signed will but it is written by hand written of testator such as a latter that specific discuss the intended distribution of estate after his death.
2. ***Nuncupative wills***: this is an oral will, though most of jurisdictions does not recognize the oral will. It must be made during the testator last sickness in expectation of imminence death, testator must ***also indicate to witness that he wants them to witness his oral will***.to show that he intended to make a last will. And oral will can dispose only personal property and not real property.
3. ***Soldiers and sailor's wills***: this is observed in some states. In this situation the testator oral or hand written will is capable of passing the personal property.

Nature of the will

- i. ***A will is said to be ambulatory***: means a will is only take effect after the death of maker, this imply that no effect until the testator dies, a will is capable of dealing with property acquired after make of will and death of testator, a will can only change before the death of testator. A status of a will before the death of testator is "a mere declaration of testator on the intention to dispose his property after his death" can be changed time to time as per GN No. 436/1963. The feature that a will is ambulatory distinct form other form of disposition like gift intervoves, sell agreement.
- ii. ***It disposes the testator's property***: this is a main purpose of the will, by writing a will the testator assures himself that his property could be in the safe hands after his death, in a will a testator state how his estate will be distributed and administered among his beneficiaries.

- iii. *It is revocable*: it may be revoked any time before the death of the maker, even if there is a binding contract not to revoke it, such power is only vested to the testator. No heirs or beneficiaries are empowered to revoke a will. Case of *Andrea Albert Makoi v Maria Albert Antony Makoi (2003) TLR no. 309*

Validity of a will

The local customary Order of 1963 GN no. 436 provides for guidelines for making wills, to be valid will must contain the following ingredients/element:

- i. *Testamentary capacity*: he must attain the age of majority and in sound mind, GN no. 436 prohibit the person under the age of 21 to make an oral or written will. A will made by minor is invalid until he attains the age of majority and he should re execute it by either making a new will or by court sill it. A person of unsound mind can only make a will at his lucid mind it should have capacity of understanding the will made. Barclays Bank v Good fellow
- ii. *Testator must have a knowledge of the contents of will*: if it is prepared by another person such will must be read the document to the testator to confirm that it is the will he intended to make.
- iii. *A will must meet the execution requirement of the law*
- iv. *It must be clear that the intention by testator to have legal effect of the will.*

Contents of the will

- i. Full and true names
- ii. May appoint the executor of his will
- iii. It must indicate the date it was made

- iv. It must contain a statement to the effect that the present will revokes all previous will made either orally or in writing. According to Rule 17 and 18 of the GN of 1963, if the testator does not revoke the previous will then the present will revokes all previous will only to the extent that it is inconsistent to the existing one.
- v. A will must be signed by the testator in the presence of his witness: witness should be persons who have no interest to the estate. Number of witness is two if the person knows to read, one from the clan and another from outside and if the person is illiterate witness should be four. Also wife of testator could be a witness
- vi. A will must be testified.
- vii. Testator may also wish to express on the will his capacity, that he has made a document with free will without inducement

Alteration of the will

- 1. By Codicil
- 2. By re- execution

Revocation of the will

It is an act of bringing to an end of the will, it may be revoked any time during the life of testator, any time before his death. the power of testator to revoke the will is non delegable, revocation of the will occurs when a person who has made a will takes some action to indicates that he doesn't want the provision in a will is no longer binding, for such revocation to be effective the intention must be expressed clearly either expressly or impliedly, this can be done either by codicil or by re-execution.

A codicil may revoke some provisions of the will and the court is supposed to recognize the new will as the valid will. Revocation may also

occur by destruction of existing will or by operation of law for example in case of marriage or divorce, and destruction of the will either by burning of the will and this must be done by the intention of the testator to destruct the will. Methods must be used in destruction of the will

- i. ***There must be sufficient destruction***: that means it must be total, and beyond redemption, partial destruction is not considered as destruction of the will. In the case of *Cheese v Lovejoy (1877) 2 P&D* the testator drew with the pen two line and write this is revoked after eight years upon the death of testator the court held that the will was not revoked.
- ii. ***There must be intention of the testator***: testator must have necessary intention to destroy the will this is known as “*Amino Revocandi*” in the case of *Perks v Perks (1106) ER 740*, the destruction will insufficient in case the testator was incapable of destruction.

Classes of revocation

- i. Voluntary revocation: this requires the intention of testator to be cleared stated
- ii. Involuntary revocation: this does not require the intention of testator but it occur by the operation of law.

Doctrine of relative revocation:

When a new will is made automatically the old will is revoked, however Amino Revocandi has condition such as a will is not revoked until the condition is revoked.

Advantages of the will:

1. It excludes the application of intestacy law: laws which regulates the distribution and administration of estate of the deceased who died without the will
2. Enable the testator to decide how and who will manage his estate after his death and this is by choosing an executor.
3. A will enable testator to make preparation and provision for his burial
4. It is cheaper where there is a will to administer the estate of testator than when the testator died without a will.
5. A will ensures continuity and administration of estate of testator in the event of executor death by operation of law it shall be continue to other executor
6. It allows testator to make a gift to charity to the person who is not a part to the family
7. In will a guardian to the dependents can be appointed

Executor

Is a person who appointed and vested the power by the testator to carry out the wish of testator in accordance of the will.

How is appointed?

May be appointed by express provision of the will or by implication from the testator's will, by statutory provision or by exercise power of nomination conferred by the testator to the will. Failure to appoint executor may not invalidate a will, he may be appointed for general purpose or specific purpose and the appointment may also be under condition. An executor may also be given a power of trustee in a will. Any adult at a full capacity can be appointed as an executor

Difference between trustee and executor

- i. An executor cannot appoint another executor but a trustee can
- ii. A trustee must strictly comply with the terms of the will but executor may deviate from the term of a will.

Factors in appointing an executor

- i. Goodness and capability of an executor
- ii. Availability of an executor
- iii. Any conflict of interest
- iv. Integrity and good standing in the society.

When it is better to make a new will

- i. When there are many codicils
- ii. When the testator is married.
- iii. Where a testator is divorced
- iv. When testator change a place of domicile because the law applicable may be different
- v. Where testator has acquired more properties

Custody of the will

A will or codicil is executed in several copies and kept in the following places:

- i. With a relative
- ii. With an associate

- iii. Testator personal safe
- iv. In the court with the seal of the court.

Ground for Challenge of valid will

Under the English law they can decide to leave the will to any person whom he wish, however un popular that decision may be with disappointed relatives,

- i. Lack of due execution: normally will must be in writing and signed by the testator or by anyone else with the presence of testator and direction of testator. And with witness and be signed by witnesses with capacity, so without observation of that the will can be challenged.
- ii. Lack of testamentary intention: that the testator has no intention to make a will.
- iii. Lack of testamentary capacity: this is the mental illness, that means testator was not in a sound mind. Testator has to be capable of deciding to make a valid will.
- iv. Lack of knowledge and approval:
- v. Undue influence: burden of proof lies on the person who claim
- vi. Fraud or forgery
- vii. Revocation