

Structure

- The context & relevance of lawmaking
- How can good laws be drafted?
- What is the role of the drafter
- The drafting process
- Elements to consider when drafting
 - Title
 - Structure
 - Content
 - Accessibility

The context

We live in the golden age of
Legislation / Regulation

Is this a problem?

- The legal system has become **impenetrable** even for professional users

But what is a good law?

Case study : Mozambique Building Code

- Mozambique Building Code sets demanding standards for new buildings
- requires brick or cement block walls, reinforced concrete beams

However,

- The country has no history of tremors
- The prescribed materials are costly and not easily available to all

Result?

- **Requirements exclude low and middle income households**
- **Lack of compliance due to inadequate consideration of local incomes, building techniques, and materials**

Case study : “Right of use and enjoyment” of land in mozambique

- In Mozambique land belongs to the state and citizens can acquire only a “right of use and enjoyment” (*direito de uso e aproveitamento das terras*; DUAT)
- According to the Urban Land Regulations, DUATs can be issued after the land has an urban development plan
- BUT plans in most cases do not exist and low-income households live in informal arrangements

Understanding 'good' and 'bad' laws

'Bad' laws

- Unclear or ambiguous laws
- Inaccessible laws
- Poorly implemented laws
- High compliance costs
- Unwanted effects
- Complex laws
- Gaps in protection/overlaps
- Too many laws

'Good' laws?

- Quality is a broad, vague and non-static term
- No absolute standards of quality of legislation
- Perceptions of quality differ depending on
 - Actors and their role,
 - legal traditions,
 - the type of polity,
 - drafting traditions and practices
 - social and political context

Three values for good laws

- **Efficacy** = the capacity of a piece of legislation to achieve the regulatory aims it aimed to address – capacity to contribute to policy goals
- **Effectiveness** = the extent to which legislation introduces adequate mechanisms to produce the desired regulatory results – capacity to achieve results
- **Efficiency** = minimum costs for maximum benefits – most financially appropriate solution – cost effective solutions

Ways to improve quality

- Improve the **content** of the law
 - Evidence based lawmaking – ‘intelligent’ legislators
 - Involving people - legitimacy and trust
 - Simplifying legislation – facilitating compliance
- Improve the **form** of the law
 - Drafting guidance, manuals and checklists
 - Codification and consolidation
- Improve **effectiveness** of the law
 - Effectiveness as a guiding value in the entire life cycle of the law

Legislative drafting is...

The logical application of theoretical principles and the process of evidence-based decision making in the process of designing a specific legislative text!

- Who drafts the law?
- What is their role?

The role of the legislator...

- To **establish** and **delimit** the law
- To draft effective laws = laws that work
- To **communicate** the law to society and those affected by it (**lawmakers, those concerned or affected by the law, judiciary**)

Law is communication of a special kind and the role of the legislator is to **put policy in legislative shape.**

To this aim ...

- They follow a drafting **process** that allows an insight on all relevant topics
- They make decisions backed by evidence & uses evidence based tools
- They take account of the needs of the target audiences

Drafting process

Thornton identifies 5 stages in the process of drafting legislation:

- (1) Understand the proposal
- (2) Analyse the proposal
- (3) Design an effective law
- (4) Compose and develop the draft
- (5) Verify the draft

(G. Thornton, *Legislative Drafting*, 4th ed, 1996)

Phase 1: Understand the proposal

Drafting (policy) instructions

= **data** provided by **policy makers** with **background information** for the comprehension of all aspects of legislation and **the choice of means** for the **achievement of government policy**.

Purpose = to determine what the draft bill is to contain.

Legislative drafters

as

“policy translators”

Identify policy vs legislative statements

- To address and eliminate corruption
- To establish procedures for denouncing corruption
- To remedy the effects of climate change
- To provide remedies for unlawful discrimination
- To promote gender equality

“As Minister for Justice I have been committed to doing all we can as a state to disrupt and prevent crime... and to make our streets and our communities safer”

Source: <http://www.justice.ie/en/JELR/Pages/SP16000097>

Example: Human rights commitments in the new urban agenda

- The New Urban Agenda includes a number of commitments on human rights

12. We *aim to achieve* cities and human settlements *where all persons are able to enjoy equal rights and opportunities, as well as their fundamental freedoms*, guided by the purposes and principles of the Charter of the United Nations, including full respect for international law.

14. To achieve our vision, we resolve to adopt a New Urban Agenda guided by the following interlinked principles:

(a) Leave no one behind, by ending poverty in all its forms and dimensions, including the eradication of extreme poverty, *by ensuring equal rights and opportunities, socioeconomic and cultural diversity*, and *integration in the urban space, by enhancing liveability, education, food security and nutrition, health and well-being*, including by ending the epidemics of AIDS, tuberculosis and malaria, *by promoting safety and eliminating discrimination and all forms of violence, by ensuring public participation providing safe and equal access for all, and by providing equal access for all to physical and social infrastructure and basic services, as well as adequate and affordable housing*;

26. We commit ourselves to urban and rural development that is **people-centred**, **protects the planet**, and is age- and gender-responsive **and to the realization of all human rights and fundamental freedoms, facilitating living together, ending all forms of discrimination and violence, and empowering all individuals and communities while enabling their full and meaningful participation.** We further commit ourselves to **promoting culture** and **respect for diversity and equality** as key elements in the humanization of our cities and human settlements.

Policy vs legislation

policy goals are broad

- Legislation is only one means to achieve policy goals
- Legislation has more limited scope

Drafting (policy) instructions

What are they?

= **data** provided by **policy makers** with **background information** for the comprehension of all aspects of legislation and **the choice of means** for the achievement of government policy.

Purpose = to determine what the draft bill is to contain.

Content of drafting instructions

- background information on the **context**, **facts** and **problems** to be addressed
- **Objectives** of the legislation
- **Means** for achieving the stated objectives
- Known **legal implications and difficulties**.

Phase 2: Analyse the proposal

Before starting, compile a **legislative research report**

= brief or longer report on the basic elements of the response to the instructions

Focus:

- ✓ Existing law
- ✓ Special responsibility areas
- ✓ Practicality

Why is this useful?

- forces the drafter to think the problem through
- helps determine whether source material is exhausted
- saves valuable time
- A tool for breaking down a complicated problem smaller, manageable ones

Components of a legislative report

- Analysis of the existing law
- Evaluation of the constitutional context of the legislative solution
- Evaluation of the legal context of the legislative solution
- Evaluation of the parliamentary context of the legislative solution
- Analysis of the necessity of legislation
- Analysis of potential danger areas
- Analysis of the practical implications of the legislative proposal including an analysis of matters for which secondary legislation is likely to be needed to implement the draft law

Phase 3: Design an effective law

Stage 3 involves **designing** the law, namely **structuring the legislative text** in a manner that facilitates understanding and implementation.

- Opportunity to look at the material as a whole
- Weigh up the relative importance of topics & their interrelations
- think of the best way to present them
- Design the overall structure with the greatest level of simplicity

Issues to consider in design

- Purpose of the law
- Title
- Structure
- Content of rules
- Language



The title of legislation and article
headings

Example

The Patriot Act (USA) - acronym for Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act

Can you spot the problem?

Examples (2)

- [Data Protection Act 1998](#)
- [Human Rights Act 1998](#)
- [Mental Capacity Act 2005](#)
- [Equality Act 2010](#)
- [Law on Foreigners](#)
- Earth's Crust Act
- Loi n° 2016-1547 du 18 novembre 2016 de modernisation de la justice du XXI^e siècle
- Conditions and procedure for classification of proprietary medicinal products

Example (3)

- Transposition of Directive 2000/43/EC on the application of the principle of equal treatment independently of racial or ethnic origin, the Directive 2000/78/EC on the formulation of a general framework for the equal treatment in employment and occupation and the Directive 2014/54/EE on measures to facilitate the exercise of the rights of workers in the framework of free movement of workers, II) adoption of necessary measures for compliance with art. 22, 23, 30, 31 par. 1, 32 and 34 of Regulation 596/2014 on market abuse and the repeal of Directive 2003/6/EC of the European Parliament and the Council and the Guidance of the Commission 2003/124/EC, 2003/125/EC and 2004/72/EC and transposition of the Directive 2014/57/EE on criminal sanctions for market abuse και the implementing Directive 2015/2392, III) transposition of Directive 2014/62 on the protection of the euro and other currencies against counterfeiting by criminal law, and replacing Council Framework Decision 2000/383/JHA and IV) Establishment of a National Mechanism for the Investigation of incidents of arbitrariness in security bodies and the officers of detention centers

Example (4)

- Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA

Analysis

- Type of instrument and identifier = Directive (EU) 2016/680
- Issuing authority = European Parliament & Council
- Date = 27 April 2016
- Overall topic = protection of natural persons
- Subject matter = processing of personal data
- Main actors = competent authorities
- Field/ Scope = prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data
- Relation to other instruments = repealing Council Framework Decision 2008/977/JHA

Main problems with titles

- Misleading
- Incomprehensible
- Vague
- Too long
- Too complicated / detailed
- **Do not forget! Their main function is to communicate the regulatory message of the law!**

Function of headings

- Headings - intended to save users' time
- How? Help them to find their way about the legislation

Attributes of headings

- Descriptive
- Clear
- Brief
- Language consistent with the content

**“Good design ... is the essence of a well-drafted
Bill”**

- Structure is **not** a technical concern

Structure is crucial for...

- the **prioritisation** and **organisation of the provisions**
- for ensuring that **the message of the law is placed at the heart of the text!**

- In an effective draft, the **main regulatory message has to come out loud and clear**
- The structure of the law is of paramount important to achieve this!
 - Prohibition ?
 - Declaration?
 - **Place the prime message of the law in a position of importance!**

Lord Thring's 5 rules

- **Rule 1:** Provisions **declaring** the law should be separated from, and take precedence of, provisions relating to the **administration of the law**
 - state the law, and then
 - state the authority to administer the law, and then
 - state the manner in which the law is to be administered”.
- **Rule 2:** The **simpler proposition** should precede the more complex
- **Rule 3: Principal provisions** should be separated from subordinate provisions.
 - principal provisions occupy a central position
 - subordinate provisions towards the end of the Act

- **Rule 4:** Exceptional provisions, temporary provisions and provisions relating to the repeal of Acts should be separated from the other enactments, and placed under separate headings
- **Rule 5:** Procedure and matters of detail should be set apart, and should not, except under very special circumstances, find any place in the body of the Act.

Bergeron's Rules

- Bills must be arranged in a **logical order**
- The provisions of the statute that are of a **permanent** nature precede those expected to have a limited life
- The statute is preceded by a **table of provisions** showing the headings and the section titles
- The statute is divided into **parts** only when the number of sections and the possibility of arranging them in conceptual units justifies this
- Only codes and other major statutes are divided into **chapters**.

Tools to support structure

- **Parts** = aim to make the bill more accessible to the reader
- **Headings** = intended to save users' time by helping them navigate legislation
- **Parts** = Parts, subparts, sections, and schedules should have a unity of purpose
- **Sections** = An Act can be divided into numbered sections with a unity of purpose
 - long sections are difficult to read – keep length manageable
 - Subsections must be relevant to the theme of the section.

An example: structure in the UK

- **Preliminary provisions**
 - Long title
 - Preamble
 - Enacting clause
 - Short title
 - Commencement
 - Duration/Expiry
 - Application
 - Purpose clause
 - Definitions
 - Interpretation
- **Principal provisions**
 - Substantive provisions
 - Administrative provisions
- **Miscellaneous**
 - Offences and provisions ancillary to offences
 - Miscellaneous and supplementary provisions
- **Final Provisions**
 - Savings and transitional
 - Repeals
 - Consequential amendments

Phase 4: Compose and develop the draft

Stage 4 = the actual drafting of the text

During this phase substantive provisions are drafted, provisions are formulated, rules for words and grammar are applied to ensure clarity and intelligibility.

Best practice also encourages good presentation of the draft in a way that it is easy to work with.