



ACCESSIBILITY OF LAW IS A DYNAMIC FACET OF THE RULE OF LAW

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Abstract: The law and judicial decisions construing legal norms and principles are inaccessible to the common man. The general public comes to a grinding halt trying to come to terms with the law that is intended to govern them. They are completely besieged advising themselves on legal issues. There is a predisposition that the law is a mystifying discipline that should only be exposed to those who are initiated. But is this justifiable in a modern democratic social order? The pervasive accessibility of legal knowledge and materials online has enlarged and stretched its readership by presenting it even to the common man in the *Pangani* bus. These ordinary readers legitimately expect the law to be decipherable by them when they run into it. This is important because law affects every citizen's mundane right to choice, liberty, equal opportunity, owning property, physical safety, health etc. However, available matter-of-fact backs a conclusion that legislation is a nightmare, intricate to read if not perplexing to understand to most citizens. The mechanics of contemporary legislative drafting has been labelled to be, at its worst, a subject of fashion as against that of essence. This paper argues that readability of law is a democratic compulsion as understanding the legal requirements, rights and duties aids the process of governance. It concludes by positing that unwarranted complication of law hampers economic action, building up stumbling blocks for individuals, businesses and communities. It impedes good governance and subverts the rule of law. After all, modern life in a democratic nation is intricate, and we employ the law to manage various aspects of it. So it is not unforeseen that statutes and their subsidiary regulations are composite; and it is conceivably logical to suppose that citizens will require professional mind or direction in appreciating the raw material of law.

Key words: Kenya, Law, language, rule of law, governance, democracy.

When words are many, transgression is not lacking¹ for there are many words which increase futility. What then is the advantage to a man?"² "From their verbosity, their endless tautologies, their involutions of case within case and parenthesis within parenthesis, and their multiplied efforts at certainty by saids and aforesaid, by ors and by ands, to make them more plain, do really render them more perplexed and incomprehensible, not only to common readers but to the lawyers themselves.³ What willing allegiance can a man owe to a canon of obligation which is not even conceived in such a form as to be understood?"⁴

¹ Holy Bible, English Standard Version, Proverbs 10:19.

² Holy Bible, New American Standard Version, Ecclesiastes 6:11.

³ Thomas Jefferson, "Autobiography of Thomas Jefferson," Dover Publications Inc., New York, (2005) p.40.

⁴ As cited in Plain English and the Law, Victorian Law Reform Commission 2017, p.46.

@https://www.lawreform.vic.gov.au/sites/default/files/Plain%20English%20and%20the%20Law-republished_forweb.pdf. Visited last on 22/03/2023.

I. Introduction

The citizen all over the globe is entrenched in a complex labyrinth of legal rules. Law is everywhere allied with matters of everyday life so much that the precinct between what is law and what is not becomes a futile hair splitting exercise. Law is invasive in society. Yet the common man on the street is at sea trying to decipher what and where those rules really are. At times, commonsense awareness programmes or explicit guidance is necessary like traffic safety campaigns or drives for efficient waste disposal to facilitate in the process of appreciating and obeying the mandates of law. County governments readiness to arrest for parking violations cost more, than for instance, encouraging cooperative compliance through media and other campaigns intended to effectively inform and educate the public regarding available parking spaces in towns and cities.

Frequently substantial expenditure is invested in peeling the many extraneous layers of law to the common man: such as through authorized government information as an ‘appurtenance’ to legislation, or through private ventures in legal services. In a democratic nation, ‘*We the People*’ regularly need to discern, and are at liberty to be conversant with the law which affects us all because in such a culture, legislative process ought to be the product of consultative processes in which the maximum wisdom of the whole nation is captured. The diverse voices, interests and views of the members that make up a social order must be accorded suitable safeguards and effective appreciation.

Writing is the instrument through which parliaments and courts connect with the public. As such, the appeal of law making just as judicial lettering is a vital constituent of the legal organism as it determines the simplicity of the web of laws that we live by. Yet there is little light on this plane as it is full of darkness. The public and the legal profession are becoming gradually more uncharitable of antiquated and gratuitously intricate legal tongue. But the test is not only before the legal craft alone. Not only is hapless legal language losing lawyers their regulars, but businesses that use outmoded speech in their credentials are losing clientele to their counterparts who make use of easy language. The inability to employ basic language costs society as a unit an unwarranted sum of time and capital. Pathetic legal language drags the profession, and the law itself, into contempt and discredit. Various people in the legal field and the larger business community have established that simple language is economical and an excellent marketing device. The exploitation of uncomplicated language in legislation saves unnecessary consumption of time and money and also makes the law openly applicable to those who are touched and are in need of it the most.

The advent of digital platforms like the internet has altered the manner in which the public engages with the law. It has modified the way in which legal experts access the law. As extensively, it has stretched and transformed the citizens accessing and evaluating legislation. It is now understood and accepted that public legal information is digital common property and the common heritage of mankind. Thus, law should be available and obtainable by all at zero cost and on a not-for-profit basis.⁵

⁵ The Montreal Declaration on Free Access to Law (2002)

@ [http://www.hkllii.org/eng/Free_Access_to_Law\(eng\).pdf](http://www.hkllii.org/eng/Free_Access_to_Law(eng).pdf). Visited last on 21/03/2023.

II. Legitimacy for the Right to Know the law

The justification for the ability to know the law lies behind the hypothesis that it is unjust for a citizen to be required to discharge legal duties for which he has no knowledge.⁶ This validation aims on human and societal morals. Secondly, the intention of the legislator is to accomplish conformity with law, and therefore he desires it to be known widely. From this perspective, the regulator's proximate concern in governmental good organization and competence is a stimulus for guaranteeing access and knowledge. While legal jurisprudents and courts set out the theory that laws ought to be patent or comprehensible as an ingredient of the rule of law, its paucity does not automatically produce any tangible respite from legal disadvantage, it may result to an ethical standard whose consequence in law is vague.

It is here that there is a call for the subsistence of a right to access the law i.e. having knowledge of the law based on the underpinning that the doctrine of the rule of law, access to information, and values of human rights such as the right to freedom of speech and expression to the availability of an effectual relief from legal harms entail the basic right to understand and know the law. This understanding is imperative since legal drafting is very essential as it is the condensation and expression in an authoritative figure of legal rights, privileges, functions, obligations, or rank through the advancement and groundwork of legal tools such as constitutions, statutes, regulations, ordinances, contracts, wills, conveyances, indentures, trusts, leases etc.

III. The World View

Unadorned legal tongue is vital since it facilitates communication. Enhanced communication multiplies information and minimizes the necessity of translators. In any legal arrangement, embracing of a readable style and advance to legislative drafting carries with it twin fundamental returns. Primarily, it would commit the legal system to the premise of rule of law by diminishing the possibility of involuntary violations of the law, and of legal necessities and liabilities ensuing from lack of knowledge or misconstruction. In addition, it would cut the overheads related with the running and purpose of legislation and other legal testaments. Laws bestow pleasure and pain on people. If they are drafted ambiguously, vaguely and puzzlingly those who fall into their net may be stripped of those good things that enhance their well-being or their efforts may be found wanting while trying to fulfill their legal responsibilities.

But statutory language is seldom laid bare unclothed from shades, mirrors and thickets of mystifying, baffling tautology and verbosity. In the middle of the 20th century, Lord Radcliffe remarked on legal jargon by decrying the developments:

*"A sort of hieratic language has developed by which the priests incant the commandments. I seem to see the ordinary citizen today standing before the law like the laity in a medieval church: at the far end the lights glow, the priestly figures move to and fro, but it is in an unknown tongue that the great mysteries of right and wrong are proclaimed."*⁷

⁶The foundation of the antiquated legal positions such as the Latin Maxim '*Ignorantia legis neminem excusat*' meaning '*ignorance of the law does not excuse*' or '*ignorance of the law excuses no one*,' as a general rule that ignorance of fact can be an excuse as far as it negatives *mens rea* or fault, whereas, ignorance of law cannot be an excuse has been shaken under the modern democratic notions which require that the law must be known well in advance.

⁷ Lord Radcliffe, "*Some Reflections on Law and Lawyers*" (1950) 10 Cambridge LJ 361, 368. As cited in David St. L. Kelly, "*Legislative Drafting and Plain English*" p.411.

@<http://classic.austlii.edu.au/au/journals/AdelLawRw/1986/6.pdf>. Visited last on 22/03/2023.

In the United Kingdom, the Office of Parliamentary Counsel is following a 'Good Law' proposal, whose underlying purpose is to formulate more usable law. Towards that goal, the United Kingdom opening Parliamentary Counsel stated:

*"Legislation affects us all. And increasingly, legislation is being searched for, read and used by a broad range of people. It is no longer confined to professional libraries; websites like legislation.gov.uk have made it accessible to everyone. So the digital age has made it easier for people to find the law of the land; but once they have found it, they may be baffled. The law is regarded by its users as intricate and intimidating."*⁸

The Counsel seizes cognizance of the fact that whereas in the past readers of United Kingdom's law appeared to be legally skilled, that does not remain to be the case in the modern-day era. They account for an audience swell of up-to two million exclusive visitors each month for the legislation.gov.uk site.⁹ Correspondingly in New Zealand, users of legislation have expanded in range and scope as the government legislation portal accounted for 30,000 exclusive search operations each month.¹⁰

*"It seems once to have been supposed that law was the preserve of lawyers and judges, and that legislation was drafted with them as the primary audience. It is now much better understood that acts of Parliament (and regulations too) are consulted and used by a large number of people who are not lawyers and have no legal training."*¹¹

In 2008, the New Zealand Law Commission and the New Zealand Parliamentary Counsel's Office jointly conducted an inquest into the Presentation of Law beginning from the suggestion that it is a primary principle of any legal scheme that the law ought to be easily available to the public. Their investigation recognized three elements of access to law: accessibility by the public using say, hard copy or electronic access; navigability - the quality of knowing and reaching the relevant legal rule suitably; and lastly convenience in the good judgment of the law i.e. once established it should be readily comprehensible to the end consumer. The issues paper which preluded their testimony put it more concisely:

*"Citizens should be able to know and understand the law that affects them. It is unfair to require them to obey it otherwise. This is an aspect of the rule of law."*¹²

Law making process down-under (Australia) has also had its critics, even if they have not regularly been as blunt as their British mates. Experts in Australia have pointed to the shoddy, repetitive and irrelevant usage of legal language and on some instances some of them have exclaimed with disapproval over the drafting prowess in terms of trying to uncover the true meaning of particular statutes. They have characterized such legislative drafting as "a thing of shreds and patches" looking like "a kind of statutory Joseph's coat,"¹³

⁸ When Laws Become Too Complex A review into the causes of complex legislation, Office of the Parliamentary Counsel Cabinet Office (March 2013) : Foreword at p.1.

@https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/187015/GoodLaw_report_8April_AP.pdf. Visited last on 21/03/2023.

⁹ Ibid

¹⁰ Ibid

¹¹ Presentation of New Zealand Statute Law in Conjunction with Parliamentary Counsel Office, Report/Law Commission, Wellington, (2008), p.14.

@<https://www.lawcom.govt.nz/sites/default/files/projectAvailableFormats/NZLC%20R104.pdf>. Visited last on 21/03/2023.

¹² Presentation of New Zealand Statute Law in Conjunction with Parliamentary Counsel Office Issues Paper /Law Commission, Wellington 2007, Introduction, p.8.

@<https://www.lawcom.govt.nz/sites/default/files/projectAvailableFormats/NZLC%20IP2.pdf>. Visited Last on 21/03/2023.

¹³ Mr. Justice Rich on the Commonwealth Income Tax Law, As cited in David St. L. Kelly, "Legislative Drafting and Plain English" p.411.

@<http://classic.austlii.edu.au/au/journals/AdelLawRw/1986/6.pdf>. Visited last on 22/03/2023.

a “dark jungle, full of surprises and mysteries”.¹⁴ Concerned with the developments of verbosity, more lately a Chief Justice there in that country stated,

*“The luxuriant growth of this legislative jungle abounds in ambiguities, inconsistencies, incoherences and lacunae and it is too much to hope that every judge who has had to consider these proceedings would choose to enter the jungle at the same point, still less to emerge from it by the same route.”*¹⁵

Another lawmaking bureau in Australia has pressed the need for readability of legal text thus:

*“We also have a very important duty to do what we can to make laws easy to understand. If laws are hard to understand, they lead to administrative and legal costs, contempt of the law and criticism of our Office. Users of our laws are becoming increasingly impatient with their complexity. Further, if we put unnecessary difficulties in the way of our readers, we do them a gross discourtesy. Finally, it’s hard to take pride in our work if many people can’t understand it.”*¹⁶

Evolution was no healthier in the United States of America. John Adams criticized legal language and the “useless words” in the colonial charters. He hoped that “common sense in common language” would become trendy.¹⁷ Thomas Jefferson, the American draftsman and celebrated lawyer, greatly revered for his role to the United States Declaration of Independence bemoaned in an epistle written in 1817 about lawyers who had a habit of:

*“Making every other word a ‘said’ or ‘aforesaid’ and saying everything two or three times, so that nobody but we of the craft can untwist the diction and find out what it means.”*¹⁸

The crisis is not restricted to remote requirements or to certain categories of legislation. It is distinctive of a great deal of the law manuscript, predominantly as it dwells with intricate themes. As a corollary, several laws are meaningless to the immeasurable mass of commons. Nevertheless it is not only the everyday citizen who endures with such obscurity. Much legislation is inconceivable to skilled professionals in the pertinent turf. In various matters and issues, even judges and lawyers themselves are evicted and divorced from the ceremonial standing often leading to frustration against such tendency from the bench and bar.

IV. Legal Language in Kenya

Legislative drafting in Kenya is no different. Our allegiance to the colonial bequest of the common law has left a mark on how the republic of Kenya makes its law known to the people even after independence. A number of specific evils that should be handled instantly consist of forsaking stretched and protracted titles, citations to monarchical times, the antiquated variety of the enacting expressions, and the employment of *French* and *Latin* languages, the inclusion of a purpose passage at the commencement of all Bills, the simplification of initiation requirements, the amputation of redundant caveats like “*notwithstanding anything contained in this Act or any other law*” and “*unless inconsistent with the context or the subject matter*” “*except to the extent that they are inconsistent with this chapter*” etc, avoidance of disproportionate sentence span, pitiable arrangement of constituents, unrelenting replication, over-dependence of the passive voice, the utilization of antediluvian language and the over-use of definitions.¹⁹

¹⁴ Mr. Justice Kitto on the Succession and Probate Duties Act 1892, Ibid.

¹⁵ Bray CJ observed of the Planning & Development Act 1967 (SA) and regulations made under it. See, David St. L. Kelly, “*Legislative Drafting and Plain English*” p.411. Ibid
@http://classic.austlii.edu.au/au/journals/AdelLawRw/1986/6.pdf. Visited last on 22/03/2023.

¹⁶ Australian Government Office of Parliamentary Counsel, Plain English Manual was released in 1993. P.5.

¹⁷ John Pease, “*Plain English A solution for effective communication*,” November 2012, p.7.

¹⁸ Thomas Jefferson, “*Autobiography of Thomas Jefferson*,” Dover Publications Inc., New York, (2005) p.40.

¹⁹ Write as much as possible in plain, simple English, very much as you would explain it to your next door neighbour who is not a lawyer. Whenever you can express yourself in plain language, devoid of verbiage, repetition and technical terms, do so. Where

These reforms must be looked at as the initial footstep in the ultimate transformation process of law making in Kenya. There needs to be a process whereby the legislatures draft Bills and legislation officers outline subsidiary law from the beginning in simple, readable and understandable legal language. This calls for a far-reaching deviation from convention and a split with the philosophy of the not-so-good earlier period. It necessitates mind's eye, a spirit of exploration and bravado usually not allied with the ritual of law making or with the moulding of judgment drafting, legislation or subsidiary legislation. Equally important is the suggestion that simple drafting as a process of judicial law making and legislation need to be carefully integrated into law courses taking into account the desirable content and substance. This way, considerable amount of common evils with the construction and technique of colonial vintage will find no or little room in Kenya's statute books.

Just as many common law countries, there is universal consensus in Kenya, that the current legislative drafting fashion is gravely flawed. It impairs understanding not only by the everyday commoner but also by experts like lawyers and judges. As a result it imposes gratuitous overheads on the exchequer.

Accordingly, the Constitution of Kenya through the Preamble recognizes the aspirations of all Kenyans for a government based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law.²⁰ Indeed, without simplicity and accessibility of the law, the mere recognition of such national values and principles would be devoid of meaning. Judicial recognition of the importance of civic education and public participation as indispensable tools of constitutional and law making processes underlines the essence of accessibility of legal information as a national common good.

The endeavor to constitutionally entrench knowledge of law is buttressed by the purpose and object of the Access to Information Act, 2016 which is to give effect to the right of access to information by citizens²¹ as provided under Article 35 of the Constitution; provide a framework to facilitate public education on the right to access information under this Act.²² The people's law vows that information shall be disseminated taking into consideration the need to reach persons with disabilities, the cost, local language, the most effective method of communication in that local area, and the information shall be easily accessible and available free or at cost taking into account the medium used.²³ Article 48 calls on the state to ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice. In this regard, knowledge of law aids access to justice.

possible avoid legalese and foreign language. Where, however, you use legitimate terms of art i.e. words or phrases that either cannot be easily translated because the original language triggers a doctrine that lawyers might not recognise by any other name e.g., "*habeas corpus* or *estoppels*"; these terms may be used. Avoid the use of legal jargon whenever possible. See, Justice Lee G. Muthoga, '*Guidelines For Judgement Drafting*' October 18, 2012. This is a paper presented during the Induction Training Course for newly-appointed Judges of the High Court of Kenya @<http://kenyalaw.org/kenyalawblog/guidelines-for-judgement-drafting/>

²⁰ The rule of law is a political ideal that all citizens and institutions within a country, state, or community are accountable to the same laws, including lawmakers and leaders. It is sometimes stated simply as "no one is above the law." As a result, Article 2 of the Constitution of Kenya provides "This Constitution is the supreme law of the Republic and binds all persons and all State organs at both levels of government. No person may claim or exercise State authority except as authorised under this Constitution."

²¹ The Access to Information Act, 2016, Section 3(a)

²² The Access to Information Act, 2016, Section 3(f). This may include public and social awareness programmes intended to make the law accessible to the public.

²³ The Access to Information Act, 2016, Section 5(2)

The Kenya Law Reform Commission Act, 2013 lists the roles and functions of the Kenya Law Reform Commission (KLRC) in the Legislative Process as ensuring that the law is, among others, consistent, harmonized, just, simple, accessible, modern and cost-effective in application. This role gives the pride of place and space for simplicity as well as readability of law in Kenya. Initiatives by the government of Kenya such as the open data²⁴ by the Kenya ICT authority and setting up of semi-autonomous State Corporation like the Kenya Council for law Reporting²⁵ whose mission statement it is to provide universal access to Kenya's public legal information by monitoring and reporting on the development of jurisprudence for the promotion of the Rule of Law have no doubt aided in sliding the law from heaven to earth and therefore bridging the gap between the common man and the law maker in terms of promoting mass propagation, diffusion and scattering of legal knowledge yet a lot more direct effort has to be made towards making the law readable, understandable and accessible to all Kenyans as a common property and heritage of all.

In Kenya, an attempt must be made to simplify legal language. This could be achieved by translating the law to local languages. Kiswahili is the national language in line with Article 7(1) of the Constitution. Kiswahili so far has been a non prioritized language when it comes to legal drafting including judicial judgment writing. This is reflected in criminal matters where the law requires that charge sheets be written in a language that is simple for the accused to comprehend. The law goes further to provide that a charge sheet be read out in a language known and understood by the accused person. It's immaterial to emphasize that Kenya is home to almost 40 percent of illiterate citizens devoid of elementary education necessary to effectively participate in national development that is entangled in abstruse language.

V. Conclusion

This is alarming for without question we are adequately sensible to admit the verity that ours is a contemporary social order and therefore, common with all modern civilizations, the state has grabbed the initiative, and has assumed all varieties of new duties and responsibilities and as a result it is futile to suffer either sightless umbrage against government by commission, or a hygienic yearning for a golden history that never existed. Reflective fresh forces scream for innovative social conceptions, or unsullied adjustments of previous knowledge and practice. What is posited here, thus, is an understanding that law makers carry with them extraordinary responsibilities for developing a socio-legal eco-system in which the State or official power and the rights of the individual can be dispensed with in a manner that can accomplish fitting concretion and poise.

Coalescence and poise is the obvious by-product of clear, readable and understandable language in law. Simple language is the reverse of ambiguous, complicated, intertwined lingo. It's a converse of language that requires the investment of extreme exertion and oomph to comprehend and unstitch. It should not be likened with plain in the logic of simple minded. Nor should it be compared with easy in the good judgment of being self-indulgent or wrecked language, a breed of pidgin. Nor should it be contrasted with cut down communication in the understanding of a cheap manuscript that manages to deliver half-baked meaning. Readable language on the converse employs the full force of the all capital of the language. It's excellent,

²⁴ <http://www.opendata.go.ke/>. Visited last on 25/03/2023.

²⁵ <http://www.kenyalaw.org/kl/index.php?id=115>. Visited last on 25/03/2023.

standard language that mature men make use of each day of their lives. It allows the point to flow through with the least of obscurity.

The hypothesis of readability of statutory documents does not oblige that laws at all times be drawn in such a manner as to formulate them as intelligible as possible to the common citizen. Nonetheless, it does entail that ultimate endeavor be made to craft them lucidly to the largest achievable audience. There is no rationalization for the flaws in language and composition which piercingly diminish and condense the array of people able of appreciating the true import of a legal document. Many legal papers are crafted in such manner that not only the professionals to whom they are aimed at, but also adjudicators and trained lawyers face acute complexity in understanding. In such a scenario, it is not strangeness of the theme or a lack of expertise which creates the dilemma but the words and construction of the text itself. These should be enhanced, devoid of any optimism in making the document plain to the commons, but with the aspiration of making it readable and understandable to the largest possible citizens who are concerned with the germane activities.

Legalese on the other hand has been described as the tongue of lawyers that they would not otherwise employ in regular interactions but for the reality that they are lawyers. Legalese is a unique talk due to its lack of evolvement at par with contemporary common English. Language needs updating which comes with its regular usage. Unfortunately, legal language has not kept pace and therefore has remained old school and fairly stagnant. Its obsession with obsolete syntax and sentence formations; long-winded, pompous idioms; ancient expressions and an unwarranted utilization of patois and technical expressions exclusive of authoritative definitions that the ordinary citizen needs; Usage of ordinary words while ascribing to them strange connotations and meanings without clearly laying down the significance of those unusual meanings; the thirst for foreign words, especially *French* and *Latin* has more often than not drawn disquiet and contempt for the law which curtails the reach of good governance. It is until something is done to improve and enhance the nomenclature and language of law that the utilitarian function of good government will trickle down to the masses without whom the exercise of law making really remains corroded if not eroded by its own language. It goes without mentioning that accessibility, simplicity, clarity and predictability of law is an indispensable ingredient of the rule of law that needs to be nurtured and protected.