

A GLOBAL PERSPECTIVE OF STANDARDISING STATUTORY WRITING: LESSONS FROM THE DEVELOPING WORLD

Elizabeth M. Bakibinga⁴⁶

ABSTRACT

This article tackles some of the issues affecting the evolution of standards for statutory writing (or legislative drafting), drawing examples from the developing world, in jurisdictions that the author has worked. It contains a brief history of legislative drafting standards in Uganda, Sudan, Kosovo and South Sudan.

The article contains a discussion of the geo-political, cultural, socio-economic and other factors that have affected the evolution of statutory writing in the four territories mainly; colonialism/ imperialism by the British and the Ottoman Empire, the struggle for and achievement of self-determination, appreciation of rule of law, the unique characteristics of customary law, cross linguistic interference, the impact of regional integration and or globalisation, including the role of the United Nations (and its peacekeeping operations) and the European Union, the effect of development assistance programmes, law revision, the drafting styles of individual consultants and the persuasive influence of leading experts in the field of statutory writing or legislative drafting.

The article concludes that there is no common standard, developing common standards is costly and time-consuming and that there is need to address other challenges that affect the work of legislative drafters in the developing world.

Efforts to strengthen rule of law including through legislative strengthening programmes, in many parts of the developing world, remain high on the agenda for international development assistance. Rule of law practitioners have realised that standardising statutory writing remains one of the major challenges in implementing rule of law programmes. Developing standards in any policy area presupposes common

⁴⁶ Legal Advisor, Commonwealth Secretariat and former Vice President for the Commonwealth Association of Legislative Counsel. Ms. Bakibinga can be reached at: ebakibinga@gmail.com. This paper uses the World Bank definition for 'developing world'— Countries with a Gross National Income (GNI) per capita per year of US\$ 11,905 and less are defined as developing (specified by the [World Bank](http://www.worldbank.org), 2012). <http://www.isi-web.org/component/content/article/5-root/root/81-developing>

parameters, it being understood that the more homogenous a society is, the easier it is to enact legislation and develop common legislative standards. Building national consensus on common standards or even defining fundamental or core values is complex because the aspirations of different elements or clusters of a given society may not be at par when attempts are made to develop standards. R. B. Seidman was unable to identify common values in Zimbabwe, which in his view did not have value- consensus to guide the legislation, with a population characterised as follows,

"3% of its population have white faces, power, and privilege. 97% of the population have black faces, almost all are poor and vulnerable, have a rich, diverse culture, and speak mostly Shona and Ndebele, languages with which I have not a stammering acquaintance." ⁴⁷

Additionally, rule of law programming requires in-depth understanding of the political context and grounding in national assessments, needs and aspirations and equal application of the law to all, among others.

Parliamentary drafting manuals outline basic principles of statutory writing that require legislative counsel to make sentences simple and logical; use the positive rather than the negative; avoid double and triple negatives; and use the active voice rather than the passive, inter alia. ⁴⁸ with the move towards use of plain English and calls for modernisation of legal English, several parliamentary counsel and drafting offices have responded to the request to modernise legal English in general as a result of which, a number of drafting style manuals have been updated over the last two or three decades in line with the calls for change and drafters have generally complied with the new guidelines. ⁴⁹ Even where guidelines have been developed on how to write legislation, it is not automatic that these will be applied as these guidelines are only as good as the people who apply them, and are hard for judges to review.⁵⁰

⁴⁷ R. B. Seidman, "To What Extent Can We Use Experience to Decide What Is Just - A Case Study from Zimbabwe" Vol. 29: Iss. 1, Article 1 (*American Journal of Jurisprudence*) <http://scholarship.law.nd.edu/ajj/vol29/iss1/>, accessed 10/10/2014.

⁴⁸ New Zealand Parliamentary Counsel Office, 'Principles of clear drafting,' <http://www.pco.parliament.govt.nz/clear-drafting/>, accessed 10/10/2014.

⁴⁹ C. Williams, *Changes in the verb phrase in legislative language in English*, <http://www.ucl.ac.uk/english-usage/projects/verb-phrase/book/williams.pdf>, accessed 10/10/2014.

⁵⁰ P. Tiersma, *Legal Language*, <http://www.languageandlaw.org/LEGALLANG/LEGALLANG.HTM>, accessed 10/10/2014.

The territories under discussion in this article, notably Uganda, Sudan, Kosovo⁵¹ and South Sudan⁵² are pluralistic and have individually evolved in varied ways, thus the difference in the development of standards for statutory writing, if any. The interplay of traditional Africa, Islam and the West (including colonialism) in the continent's heritage, well-captured and propagated by A. Mazrui as "the triple heritage," cannot be ignored.⁵³ An example of this interplay, further discussed in this paper, is the influence of the English legal system. Resultantly, laws were imported into the relevant territories via India by the British administration during the colonial period. As such, the basic structure of the present legal system in most of these countries remains influenced by that in England in the 20th century. For Kosovo, the influence of the Ottoman Empire and the Socialist Federal Republic of Yugoslavia (SFRY) as well as that of the United Nations Interim Administration Mission in Kosovo (UNMIK) is notable. In all cases, the impact of the forces of regional integration and globalisation, culture, language and other internal and external actors remains critical at all times.

This article does not delve into the specific details of how statutory writing (here used interchangeable with "legislative drafting") has been standardised in the geographical regions under discussion, but briefly lays bare the status of the Statute Book and examines leading factors that affect the development of statutory writing standards as well as the challenges that arise and affect the process.

Standardising Statutory writing in Uganda

Uganda, located in sub-Saharan Africa, has a population of about 35.2 million clustered in three major ethnic and linguistic groupings: the *Bantu*-speaking majority, who live in the central, southern and western parts of the country; and non-*Bantu* speakers who occupy the eastern, northern and north-western parts of the country who may in turn be sub-divided into *Nilotic* and *Central Sudanic* peoples as well as a one

⁵¹ This designation is without prejudice to positions on status, and is in line with United Nations Security Council resolution 1244 and the International Court of Justice Opinion on the Kosovo Declaration of Independence.

⁵² The author has worked as a legislative counsel and legal officer respectively in the territories under discussion and has come face to face with the challenges to promoting rule of law in a developing world context.

⁵³ See Ali A. Mazrui, *The Africans: A Triple Heritage*, (U.S.A: Little Brown & Co (P), 1987)

percent minority comprising of Europeans, Asians and Arabs.⁵⁴ English is the official language while *Luganda* and *Swahili* are widely used in addition to other *Bantu* and *Nilotic* languages.

Over a period of 112 years, standards for statutory writing have developed, mainly based on the tenets of Uganda's British heritage through the legacy of colonialism, duplicating the practice in England and handed down through practice, and eventually through formal legislation.⁵⁵ In 1888, following the assignment by royal charter of control of the emerging British "sphere of interest" in East Africa to the Imperial British East Africa Company (IBEACo), administrative powers were vested in IBEACo. The various pieces of regulations passed by the company were the first written instruments for maintaining law and order in the territory.⁵⁶ Upon the IBEACo's withdrawal in 1893, its administrative role was taken over by a British commissioner (later designated "Governor" under the protectorate) and in 1894 Uganda formally became a British protectorate.

Between 1894 and 1902, the basic laws of the Protectorate consisted of applied Indian enactments, the common law, the doctrines of equity and the statutes of general application.⁵⁷ The introduction of a formal legislative regime directly applicable to Uganda commenced in 1902, when the British Crown passed the Uganda Order in Council in replacement of the Africa Orders in Council and the East Africa Order in Council. The Africa Orders in Council 1889, 1892 and 1893 extended Britain's extraterritorial jurisdiction to Africa and its adjacent islands. The East Africa Order in Council, 1897 applied Indian and British Acts of Parliament to East Africa.

The 1902 Uganda Order in Council, while providing for the establishment of a High Court with full jurisdiction over all persons and matters, also stated that such

⁵⁴ <http://www.africa.upenn.edu/NEH/u-ethn.html>, accessed 10/10/2014. Also see B. Nyeko, 1996. *Uganda*, (USA: Clio Press) and Rita M. Byrnes, (ed.), *Uganda a Country Study*, (U.S.A: Library of Congress, 1992) pp. 49-51, <http://www.dtic.mil/dtic/tr/fulltext/u2/a258662.pdf>, accessed 10/10/2014.

⁵⁵ Acts of Parliament Act, Cap 2 Laws of Uganda, 2000 edition.

⁵⁶ IBEACo was authorised, inter alia, "to undertake the duties of general administration, imposition and collection of taxes and administration of justice in areas under its control".

⁵⁷ N. Rubin, *Government Publications relating to Uganda 1900-1962*, (United Kingdom: Microform, 1973) 9 <http://www.microform.co.uk/guides/R96924.pdf>, accessed 10/10/2014. Also see H. F. Morris and James S. Read, *Uganda: the Development of its Laws and Constitution*. (United Kingdom: Stevens and Sons, 1966)

jurisdiction was to be exercised in accordance with certain scheduled Indian enactments and that, in so far as these did not extend or apply, jurisdiction was to be exercised in conformity with the common law, doctrines of equity and statutes of general application in force in England. Statutes made by the Crown, the common law and doctrines of equity, as well as statutes of general application in force in England on 11 August 1902 were law applicable in the Protectorate.⁵⁸ The Order in Council, however, also permitted the continued application of African customary law to the extent it was not repugnant to morality and natural justice, a test that has not escaped criticism. According to Kanyeihamba, the Order-in-Council whittled down the role of native customary laws by providing that, "in all cases, civil or criminal to which natives are parties, every court shall be guided by native laws so far as it is applicable and is not repugnant to justice and morality or inconsistent with any Order-in-Council ordinances."⁵⁹ In effect, the 1902 Order in Council established a system of legislation through the promulgation of personal decrees by the representatives of the British Crown, namely the Commissioner. This system remained in place until 1920, when upon establishment of the Legislative Council; laws were enacted by the Governor and later in 1954 when the laws were enacted by the legislature of the Uganda Protectorate.⁶⁰

These developments subsequently led to a more formal law making system. As a result, statutory writing, for both principal and subsidiary legislation, increasingly became standardised at national level through the adoption of precedents of laws

⁵⁸ Article 12 of the Order in Council empowered the Commissioner to make ordinances for the administration of justice, raising of revenues and generally for the peace, order and good government of all persons in Uganda and to decree those laws of England, India or any other colony were to be applied in Uganda subject to stated exceptions.

⁵⁹ Prof. G.W. Kanyeihamba, *The constitutional order that anchored colonial rule in Uganda*, <http://www.newvision.co.ug/mobile/Detail.aspx?NewsID=635112&CatID=417> , accessed 10/10/2014. Also see J. Ntambirweki, *The Evolution of Policy and Legislation on Wetlands in Uganda Case Study prepared for the Technical Consultation on Designing Methodologies to Review Laws and Institutions Relevant to Wetlands* Gland, Switzerland 3-4 July 1998. www.ramsar.org/doc/wurc/wurchbk3cs6.doc , accessed 10/10/2014.

⁶⁰ N. Rubin, *supra*.

drafted in England in accordance with the practice developed over the years⁶¹ and other common law jurisdictions, namely British India.

The First Parliamentary Counsel in the Ministry of Justice and Constitutional Affairs⁶² and the Directorate of Legal and Legislative Services at the Parliament of Uganda⁶³ have developed standards which are reflected in legislative drafting manuals. Additionally, legislative counsel in Uganda draw lessons from counterparts in other legislative drafting offices across the Commonwealth, sometimes based on the use of legislative transplants,⁶⁴ a system previously much favoured across the Commonwealth of Nations, and the guidance set out in the *Acts of Parliament Act*.⁶⁵ The *Acts of Parliament Act* provides elaborate preliminary guidance on how to go about drafting a Bill; specifically provides for the form and commencement of Acts of Parliament, for the procedure following the passing of bills and for other related matters. Concerning the form, the Act specifies with exactness, that every Act shall be prefaced by the words of enactment specified in the First Schedule, "*Be it enacted by Parliament as follows:*" which is the standard enactment clause. Whatever remains unwritten is provided by adoption of precedents. It is important to note that the *Law (Revised Edition) Act 1994* empowered the commissioners to omit all words of enactment.⁶⁶

Customary law in Uganda has remained unwritten and as such there is no standard form applicable to it, which can be attributed to the diversity of Uganda's population among other factors. The colonial government introduced statutory law to

⁶¹ The office of the First Parliamentary Counsel was established for the first time in England in 1869. Lord Macaulay drafted the Indian Penal Code in 1860. The Penal Code of 1930 was based on the Nigerian Criminal Code and the Queensland Criminal Code.

⁶² Government of Uganda- Ministry of Justice and Constitutional Affairs, First Parliamentary Counsel, *Manual on the Legislative Process in Uganda*, www.jlos.go.ug/index.php/.../doc.../326-legislative-process-in-uganda, accessed 10/10/2014.

⁶³ Government of Uganda- Parliament of Uganda Department of Legislative and Legal Services, *Working Manual*.

⁶⁴ See H. Xanthaki, 'Legal Transplants in Legislation: Defusing the Trap,' (2008) Vol. 57, No. 3 (*The International and Comparative Law Quarterly*), pp. 659-673. Also see A Seidman and R. B Seidman, 'Law in Aid of Development: Hasty Legal Transplants and the Fatal Race,' (2006)1 *J. Comp. L.* 282

⁶⁵ Acts of Parliament Act, Chapter 2, Laws of Uganda 2000 edition.

⁶⁶ Section 4, Law (Revised Edition) Act 1994 <http://www.ulii.org/ug/legislation/consolidated-act/1994>

govern critical issues concerning social relations, such as marriage, divorce and succession by enacting the *Marriage of Africans Act 1904*,⁶⁷ the *Marriage Act*,⁶⁸ the *Marriage and Divorce of Mohamedans Act 1906*,⁶⁹ the *Hindu Marriage and Divorce Act 1961*,⁷⁰ and the *Succession Act, 1906*.⁷¹ In 1973, the *Customary Marriage (Registration) Act 1973* was enacted to provide for the registration of customary marriages.⁷² Other aspects of customary law were not ascertained and, to date, remain unwritten.

Presently the law applicable in Uganda⁷³ is written law and insofar as the written law does not extend or apply, in conformity with the common law and the doctrines and principles of equity, justice and good conscience; any established and current custom or usage (customary law) which is not repugnant to natural justice, equity and good conscience and not incompatible either directly or by necessary implication with any written law. Notably, some of the written laws derive directly from common law principles. Uganda's *Contract Act 2010*, is one example of a consolidation of common law principles reduced into statute. Common law principles are further integrated in the law applicable, based on the doctrine of judicial precedent or *stare decisis*, the principle under which the lower courts must adopt and take into consideration the decisions of the higher courts, rather than statutory laws.⁷⁴ When judicial officers make decisions in accordance with their individual interpretation, the precedents they set become part of the law. Under the common law system, judges are required to interpret texts narrowly and literally with the consequence that if a particular phrase or expression has been deemed acceptable by judges in the past there is little incentive to change it which has led to the conservation of a number of archaic terms and expressions.⁷⁵ On the other hand, judge-made law may in turn find its way into the Statute Book if legislators enact

⁶⁷ Now Chapter 253, Laws of Uganda 2000 edition.

⁶⁸ Chapter 251, Laws of Uganda 2000 edition.

⁶⁹ Chapter 252, Laws of Uganda 2000 edition.

⁷⁰ Chapter 250, Laws of Uganda 2000 edition.

⁷¹ Chapter 162, Laws of Uganda 2000 edition.

⁷² Chapter 248, Laws of Uganda 2000 edition.

⁷³ Sections 14, 15 and 47 Judicature Act, Chapter 13 Laws of Uganda 2000 edition.

⁷⁴ See Randy J. Kozel, *The Rule of Law and the Perils of Precedent*, <http://www.michiganlawreview.org/articles/the-rule-of-law-and-the-perils-of-precedent> accessed 10/10/2014.

⁷⁵ Williams, *supra*

these positions into law. Legislatures may learn from the techniques judges use, and adapt their approaches to them, and vice versa.⁷⁶ To a certain extent, quality control on the interpretation by judicial officers of legal principles are interpreted is effected through the Chief Justice's Guidance/Practice Notes or Directions which are instructive but not legally binding.

Further, the provisions of some Acts⁷⁷ enacted in the United Kingdom, as amended prior to the 11th August, 1902, continue to apply to and have effect within Uganda, subject to adaptations and modifications.

Standardised statutory writing in Sudan

Sudan has a population of about 45.7 million spread across a land mass of 1.8 million sq. km⁷⁸ Arabic and English are the languages used for official communication. For a long time, there was a clear distinction between the peoples of the northern and the southern parts of Sudan. The northern part was Arabised and Islamised and the southern part was African and largely traditionalist, resulting in the Sudan has being epitomised as the 'bridge' or cross roads between Arabs and Africans and as such a microcosm of Afro-Arab relations.⁷⁹

The influence of the Ottoman Empire, the 64 year period of Egyptian rule, until 1885, the emergence of the Anglo-Egyptian condominium from 1899 to 1955 and the annexation of Darfur, which had been under Ottoman suzerainty with British approval, to Sudan following the termination by the British of the Fur Sultanate in 1916, all left a deep mark on Sudan's political and economic systems as well as on its legislative

⁷⁶ P. L. Strauss, Statutes That Are Not Static – The Case of the APA, http://www2.law.columbia.edu/faculty_franke/Thursday%20Lunch/Strauss.pdf accessed 10/10/2014.

⁷⁷ *Admiralty Offences (Colonial) Act of the United Kingdom, 1849. 12 and 13 Vict. c. 96. Colonial Courts of Admiralty Act of the United Kingdom, 1890. Conveyancing (Scotland) of the United Kingdom Act, 1874. 37 and 38 Vict. c. 94. Merchant Shipping Act of the United Kingdom, 1894. 57 and 58 Vict. c. 60.*

⁷⁸ 728,215 sq. miles

⁷⁹ D. A R. Deng, *The Politics of Two Sudans -The South and the North 1821 - 1969* (Sweden: Nordiska Afrikainstitutet, 1994), <http://www.diva-portal.org/smash/get/diva2:273475/FULLTEXT01.pdf>, accessed 10/10/2014.

developments.⁸⁰ In the 1850s, the Egyptian rulers introduced legislation to be administered in the secular courts in Sudan. Overall, the principles of the Maliki School of Islamic law⁸¹ were applicable. From 1875, judicial officers applied the Napoleonic Code.⁸² Britain was in charge of legislation in the newly established Anglo Egyptian Sudan and resultantly, the current legal system remains a legacy of that system.⁸³ The first penal and criminal procedure codes, introduced in 1899 and amended in 1925, effectively constituted the first codification of criminal laws in modern Sudan and remained in force until the early 1970s. The penal code adapted the Code drafted by Lord Macaulay for India to the needs of the Sudan. The British administration tried from the outset to make laws compatible with the social and religious values of the Sudanese people by integrating local culture and values such as permitting payment of *dia/diyat* (blood money) in settling homicide cases.⁸⁴ The status of precedents was similar to the system followed in other common law countries.

An executive council was established in 1910 whose approval was required for all legislation and for budgetary matters. Typical of the *modus operandi* in other parts of the British Empire, the penal and criminal procedural codes in force in British India were adopted. Later, a Sudan Legislative Assembly was launched in December 15, 1948 with 13 appointed members from the South, 76 from the North and six British administrators to enact legislation. After independence in 1956, legislation in Sudan still complied with English standards albeit the influence of Sharia'a on the substantive law. Attempts by the Nimeiri regime (1969-1985) to support Arab nationalist tendencies through law reform based on standards applicable in Egypt, were challenged. Largely as a result of

⁸⁰ Sanderson Beck, Egypt, Sudan, and Libya 1700-1950, <http://www.san.beck.org/16-7-Egypt,Sudan,Libya.html#a5> accessed 10/10/2014. See Anglo-Egyptian Rule http://en.wikipedia.org/wiki/History_of_Anglo-Egyptian_Sudan , accessed 10/10/2014.

⁸¹ <http://www.al-islam.org/inquiries-about-shia-islam-sayyid-moustafa-al-qazwini/five-schools-islamic-thought> accessed 10/10/2014.

⁸² S. Beck, *supra*.

⁸³ Article 5 of the Anglo Egyptian agreement. <http://www.redress.org/downloads/country-reports/HISTORY%20LAW%20REFORM%20FINALFeb08.pdf>

⁸⁴ E. Guttman, 'The Reception of Common Law in the Sudan' (1957), Vol. 6 (International and Comparative Law Quarterly) 407.

this, the experiment was short-lived and the government repealed these codes in 1973, returning the country's legal system to its pre-1970 common-law basis.⁸⁵

Following Turabi's appointment as attorney general of Sudan in November 1981, which resulted in Islamising the legal system proceeded in earnest.⁸⁶ In September 1983, Nimeiri issued several decrees, known as the September Laws that made the Sharia'a the law of the land and the People's Assembly approved without debate enabling legislation to facilitate the implementation of the Sharia'a. *The Sources of Judicial Decisions Act 1983* specifies that all matters not explicitly governed by legal codifications were subject to Sharia'a principles. Notably, that had been the intention of all the Northern dominated governments that came into power after independence, to impose upon the South the policy of national integration by Arabisation and Islamisation.⁸⁷

Although the Muslim influence on Sudanese law remained important, the long years of British colonial rule left the country with a legal system derived from a variety of sources. To date, the procedural aspects of the law remain similar to those introduced by the British colonial administration but the substantive law remains Sharia'a-based. All law is drafted in Arabic and any versions in the English language are just for the ease of reference. Presently, the Ministry of Justice in Sudan has a standard drafting manual, funded by the European Commission and the German Ministry of Foreign Affairs, which provides guidance on how to handle statutory writing at the national level.⁸⁸ Sudan's legislative landscape, to date, remains greatly influenced by adopted practices developed in England.

Standardising Statutory writing in Kosovo

Kosovo, part of the Balkan peninsular of Eastern Europe, has a population of approximately 1.8 million divided into the following ethnicities in descending numerical

⁸⁵ <http://www.redress.org/downloads/country-reports/HISTORY%20LAW%20REFORM%20FINALFeb08.pdf>

⁸⁶ The Legal System Sudan <http://countrystudies.us/sudan/65.htm>, accessed 10/10/2014.

⁸⁷ Deng, *supra*

⁸⁸ Max Planck Institute, *Max Planck Manual on Legislative Drafting on the national level in Sudan*, <http://www.cmi.no/file/1892-Max-Planck-Manual-on-legislative-drafting-on-the-national-level-in-Sudan.pdf>, accessed 10/10/2014

order- Albanians, Serbs, Muslims, Bosniaks, Gorani, Montenegrins, Croats, Yugoslavs, Romani, Ashkali, Egyptians, Turks, Macedonians, and others who remain unspecified.⁸⁹

As stated before, a review of statutory writing in Kosovo would be incomplete without a brief discussion of Kosovo's politico-legal history, which has influenced the style of legislative drafting and statutory writing, among others.

Presently, the applicable law in Kosovo stems from different sources and as such, one cannot strictly speak about standardised statutory writing across the board as each set of statutes conforms to the writing and drafting standard applied by each legislative body. The law applicable in Kosovo⁹⁰ with the following order of precedence includes:

- i. Laws passed by the Kosovo Assembly after the constitution came into force in June 2008⁹¹.
- ii. United Nations Mission in Kosovo (UNMIK) Regulations (with supporting Assembly laws) passed between June 1999 and June 2008;⁹²
- iii. Laws enacted prior to 22 March 1989;⁹³ and
- iv. Laws enacted between 22 March 1989 and 10 June 1999 which are not discriminatory.⁹⁴

⁸⁹ H. Brunborg, Report on the size and ethnic composition of the population of Kosovo, 2002 http://www.icty.org/x/file/About/OTP/War_Demographics/en/milosevic_kosovo_020814.pdf, accessed 10/10/2014. Also see Kosovo Demographics Profile 2014 http://www.indexmundi.com/kosovo/demographics_profile.html

⁹⁰ W. Theiss, *The Legal Guide to Kosovo: Corporate, Tax and Employment Law and Other Regulations*, 2009. http://www.wolftheiss.com/tl_files/wolftheiss/CSC/Guides/The%20Wolf%20Theiss%20Guide%20to%20Kosovo%20-%20Corporate,%20Tax-%20and%20other%20Regulations_3rd_edition.pdf, accessed 10/10/2014.

⁹¹ Not recognised by the United Nations which is status-neutral.

⁹² <http://www.unmikonline.org/regulations/> accessed 10/10/2014.

⁹³ Law enacted by the Socialist Republic of Serbia and adopted by the Assembly of the Socialist Autonomous Province of Kosovo.

⁹⁴ <http://www.eulex-kosovo.eu/training/?id=13>, accessed 10/10/2014.

Analysts have concluded that the challenges law drafters in Kosovo are faced with are unique, particularly in harmonising various laws, reconciling competing sources of legal authority, and producing legislation that is clear and easily implemented.⁹⁵

For approximately 500 years, Kosovo was part of the Ottoman Empire from the 15th to the early 20th century which led to the widespread conversion of many to Islam. Kosovo was integrated into Serbia upon the defeat of the Ottomans in the first Balkan war in 1912-1913 and became part of the SFRY in the 1940s as an autonomous province within socialist Serbia, with legislative powers.⁹⁶ Historically, at federal level, SFRY civil law was statute-based and belonged to the Germanic family of the continental legal system which was greatly influenced by codification.⁹⁷ Under the 1974 Constitution of SFRY, the Federal government had legislative competence in some areas while others were addressed at constituent State level. The drafting style of statutes in Kosovo was shaped by the practice in the SFRY and Serbia as the Kosovo Assembly adopted SFRY and Socialist Republic of Serbia legislation. It is highly doubtful that the rules for drafting in Kosovo as a semi-autonomous province were formalised. The situation is more likely to have been similar to that in Bosnia and Herzegovina which did not have formal rules on drafting and where the practice was influenced by older lawyers, foreign experts and the legislative powers of the High representative of Bosnia and Herzegovina, thus the lack of uniformity in legislative drafting styles.⁹⁸

In March 1989, Kosovo's autonomy was abolished and Serbia assumed full control over the territory which resulted in enactment of legislation applicable in Kosovo by the Legislative Assembly in Serbia and ten years of conflict.⁹⁹ In June 1999, Kosovo

⁹⁵ USAID; Legislative Drafting Manual- A Practitioner's Guide to Drafting Legislation in Kosovo, <http://www.drejtesia-ks.org/repository/docs/Legislative%20Drafting%20Manual.pdf> accessed 10/10/2014.

⁹⁶ V. Stojarová, The emergence and the development of the federal state of Southern Slavs Political systems in South-Eastern Europe, [http://is.muni.cz/el/1423/podzim2013/POL482/um/2.The Socialist Federal Republic of Yugoslavia .pdf](http://is.muni.cz/el/1423/podzim2013/POL482/um/2.The%20Socialist%20Federal%20Republic%20of%20Yugoslavia.pdf) , accessed 10/10/2014.

⁹⁷ <http://jurist.law.pitt.edu/world/yugocor2.htm>

⁹⁸ USAID, Manual for Legislative Drafting (Technical requirements and Style) for Bosnia and Herzegovina, USAID Justice Sector Development Project, Sarajevo, February 2006, p.4 http://www.usaidjsdp.ba/old_page/en/dokumenti/Components/Component3/legislative_drafting/Manual%20for%20Drafting%20Legislation.pdf accessed 10/10/2014.

⁹⁹ W. Theiss, *supra*

was placed under an international protectorate, pursuant to United Nations Security Council resolution 1244 (1999) under the administration of UNMIK.¹⁰⁰ UNMIK assumed full competencies in the legislative, executive and judicial branches of government.¹⁰¹ UNMIK regulations were introduced in order to fill the legislative gap created between 1989 and 1999 and a substantial number of them remain part of the law applicable. Even with Kosovo's declaration of independence in 2008, some laws of the SFRY remain applicable to date. Further, three Serb-majority municipalities in North Kosovo, namely North Mitrovica, Gračanica, and Štrpce are in practice largely controlled and influenced by institutions of the Republic of Serbia or parallel institutions in Kosovo funded by Serbia.¹⁰²

With the assistance of the United States Agency for International Development (USAID) Kosovo Justice Support Program, implemented under contract by the National Center for State Courts, a legislative drafting manual has been developed and this provides standards.¹⁰³ This Manual aims at facilitating uniformity and consistency in the drafting of laws, also ensuring compliance with European Union (EU) law and the production of high quality legislation. The Manual is expected to guide Kosovo authorities in the process of policy analysis and drafting laws and the court officials and executive authorities who are responsible for applying laws under specific circumstances by providing a broader understanding of how legislation is prepared and adopted in Kosovo.

Standardised statutory writing in South Sudan

South Sudan has a population of between eight to ten million divided into three major ethnic groupings: Sudanics, Nilo-Hamites and Nilotes.¹⁰⁴ The official languages are English and Arabic whilst Juba Arabic, Dinka and others are predominantly used.

Legislative developments in the newly independent South Sudan have been influenced by the circumstances that shaped politico-legal developments in the whole of Sudan, such as the rise of a British colony following the defeat of Napoleon in Egypt in

¹⁰⁰ <http://www.unmikonline.org/Pages/1244.aspx>, accessed 10/10/2014.

¹⁰¹ http://www.unmikonline.org/regulations/1999/re99_01.pdf , accessed 10/10/2014.

¹⁰² The Rule of Law in Independent Kosovo, Europe Report N°204 19 May 2010
International Crisis Group

¹⁰³ *Supra* ,at Note 50

¹⁰⁴ Deng, *supra*

1804, the need for the British to control the Nile Valley, the extension of the Anglo-Egyptian Condominium mandate to Sudan, the subsequent independence of Sudan in 1956, the civil wars and finally the independence of South Sudan in 2011. Presently, the South Sudanese legal system is built on the combination of statutory and customary laws which are largely unwritten.

From the beginning of the Anglo-Egyptian condominium, southern Sudan, comprising of Equatoria, Bahr al Ghazal, and Upper Nile provinces did not feature high on the list of priorities for the colonial administrators who were only interested in controlling the Nile valley. The contest for control of the Nile by the great European powers rendered Southern Sudan important.¹⁰⁵ Southern Sudan was used as a barrier to curtail further external influence and the cultural and economic penetration of the Arabs, mass spread of Arab culture and Islam further south, in black Africa was partially curtailed by the presence of the Europeans there from the fifteenth to the twentieth centuries and European colonisation did, at any rate, arrest the spread of Islam in East Africa.¹⁰⁶ Accordingly, no service could be provided in the South beyond what was necessary for the maintenance of government personnel and hence law and order.¹⁰⁷

From 1930, the British, through indirect rule, implemented a "Separation policy" which outlined that: all administrative staff speaking Arabic, whether Arab or Black, were to be gradually eliminated in favour of the local recruits from the missionary schools; Greek and Syrian traders were to be encouraged rather than the *Jallaba* whose permits ought to be decreased 'unobtrusively but progressively', leaving only the best type whose interests were purely commercial; British administrators were to avoid speaking Arabic and try to use local languages and, if impossible to do so, to use English; Arabic language, names and dress were strictly forbidden and the traders were instructed to make clothing in the European fashion and tribalism was to be accentuated and every existing tribal institution enhanced including the creation of tribal institutions where there had been none. The 1930 Southern Policy was revised in 1945, and in 1946 it was completely reversed to ensure that the people of southern Sudan were empowered to compete in a united Sudan.

¹⁰⁵ <http://www.britannica.com/EBchecked/topic/202270/Fashoda-Incident>, accessed 10/10/2014. <http://www.britishempire.co.uk/maproom/sudan.htm>, accessed 10/10/2014.

¹⁰⁶ Ali A. Mazrui, 'Black Africa and the Arabs,' <http://www.foreignaffairs.com/articles/24579/ali-a-mazrui/black-africa-and-the-arabs> , accessed 10/10/2014.

¹⁰⁷ http://www.larouchepub.com/eiw/public/1995/eirv22n24-19950609/eirv22n24-19950609_047-britains_1930s_apartheid_policy.pdf , accessed 10/10/2014.

As noted before, due to the seclusion of the south, over 60 tribal, non-state systems of justice operated in South Sudan, alongside a struggling state legal system which was influenced by the limited reach of State authority and governance structures. To date, this situation poses significant challenges as to how to incorporate customary law, given the diversity of the more than 60 customary law systems amidst conflicting value sets, and demographic changes in the population of South Sudan. Although some scholars argue that South Sudan is more homogenous than it appears,¹⁰⁸ the reality indicates otherwise.

The civil war and the emergence of the Sudan Peoples' Liberation Movement (SPLM) as a unifying force as well as the subsequent independence of South Sudan further influenced legislative developments. Following the SPLM Convention in 1994, the SPLM passed resolutions initially to govern the military but later, also to regulate the conduct of civilians in Southern Sudan.¹⁰⁹

Following the signing of the Comprehensive Peace Agreement (CPA) and establishment of the Government of National Unity, the legislative drafting styles begun to evolve due to the increased role of development partners and legislative consultants. Concurrently with the signing of the CPA in 2005, the Interim Constitution of Southern Sudan granted Southern Sudan regional autonomy and vested some legislative powers in the Government of Southern Sudan. However, there are many challenges affecting the legislative drafting offices as a number of the legal counsel in the Directorate of Legislation, attended law school in Khartoum and studied Shari' a law in Arabic and are rather challenged by the English language; very few public servants can actually read or write it Arabic.¹¹⁰ The Government of the Republic of South Sudan has adopted English as its language of government and business and embraced the English common law.

Technical assistance was offered by USAID, the Government of Kenya and the International Finance Corporation of the World Bank in the form of direct drafting in the early years but later evolved into just reviewing and editing the Bills and training government officials in legislative drafting.

¹⁰⁸ O. B. Albino, *The Sudan: A Southern Viewpoint*. (United Kingdom: Oxford University Press, 1970).

¹⁰⁹ The Punitive Law was enacted to regulate and govern the conduct of the armed forces; the 1994 SPLA Act, the 2003 SPLA Act, the Penal Code and Criminal and Civil Procedures were also enacted.

¹¹⁰ W. E. Kosar, 'Legislative drafting in South Sudan,' https://www.opc.gov.au/calc/docs/Loop-hole_papers/Kosar_May2011.pdf, accessed 10/10/2014.

The present drafting manual provides for guidance on the basic standards of legislative drafting and solutions to particular drafting challenges.¹¹¹

Standardisation of statutory writing: influential factors and challenges

Having laid bare the basic/background concerning these territories, it is timely to address the general factors that affect the evolution of statutory writing standards and the challenges.

Akin to the much lauded persuasive influence of the ‘Founding Fathers’ in the development of the systems of governance in the United States of America, the imperialist tendencies of the British Crown, the Ottoman Empire as well as demands for self-determination for Kosovo and South Sudan were very influential in shaping the development of the resultant politico-legal regimes and systems.

The British Crown can rightly be referred to as the ‘Founding Father’ of the territories under its control because as a result of the template or blueprint that was availed, the politico-legal landscape in the respective territories was reshaped and redrawn. As a colonial power, the British imposed not only their language, but also their legal system on the territories they controlled.¹¹² The Ottoman Empire and Egyptian rule was critical in shaping how legislation developed and the rest of society in Sudan was governed. As pointed out earlier, the deliberate separation of Southern Sudan from the rest of Sudan resulted in the promotion of customary justice systems.

Further, the quest for self-determination and independence by the Albanian majority in the case of Kosovo led to the rejection of Serbia’s rule, the involvement of the United Nations as an interim administrator with executive, legislative and judicial powers¹¹³ and later the unilateral declaration of independence in 2008. All these developments impacted on the evolution of the law applicable in Kosovo.

The outright rejection of Arabic and Sharia’a-based legislation in favour of the use of English and adoption of common law in South Sudan following independence (South Sudanese viewed Islamic law as an extension of the oppressive regime in Khartoum) is clearly manifested in the present legal and legislative developments as

¹¹¹ Government of the Republic of South Sudan-Ministry of Justice, A Manual on Legislative Drafting, 2012

¹¹² Williams, *supra*.

¹¹³ UNMIK Regulation 1999/1, <http://www.unmikonline.org/regulations/1999/reg01-99.htm>, accessed 10/10/ 2014.

well as from the emphasis of the current government of the need for its human resources to be conversant with English as a working language. This was very much expected since originally, total Arabisation and Islamisation of the Sudan were of cardinal importance to the Sudanese Arabs for the purpose of perpetuating Arab dominance and control, especially under the Nimeiri regime.¹¹⁴

These political factors have to the greatest extent possible influenced legislative developments and can be seen to remain so in the near future. Notably, the colonial legacy set precedent so it is not easy to start afresh.

Socio-economic factors

Prevailing socio-economic factors have shaped and continue to shape the evolution of standards in statutory writing. These range from the cost of getting things done, appreciation of the basic tenets of rule of law which, inter alia, demands that there should be clear rules and procedures for making laws, and the influence of the most predominant customs and cultures and language, among others.

Revision of the Statute Book

Economic conditions dictate national priorities, including law reform and revision and the cost of law revision impacts on how long it would take to harmonise the Statute Book. Law revision is a costly exercise and when not timely, has a negative impact in the long run. For instance the law revision exercise in Uganda to update the 1964 edition of the laws took place after a long time (more than 30 years) due to the challenges posed by political strife and economic instability. The exercise was impeded by the long drawn search for copies of the laws as the Government Printer had stopped producing annual volumes in 1972. The copies kept in the Attorney General's chambers and other government offices had been looted during the civil war in 1979. At the time the law revision exercise was commissioned there was no single office with a complete set of the laws of Uganda. After gathering copies, the revisers compiled the available copies, made an inventory of enactments, compared with Assent copies, where available. These factors resulted in unnecessary delays in updating the Statute Book. Prior to the conduct of the revision exercise, the Acts of Parliament, the decrees and other legislative texts enacted between 1964 and 31 December 2000 lacked uniformity.

¹¹⁴ See O. Aguda, 'Arabism and Pan-Arabism in Sudanese Politics,' (1973) Vol. II. No. 2 (The Journal of Modern African Studies,) 180.

The commissioners were empowered, inter alia, to renumber sections and other subdivisions within amended Acts, Decrees, Statutes, Ordinances, statutory instruments and legal notices; substitute to the nearest reasonable unit metric denominations of measurement for imperial denominations of measurement; convert marginal notes to headnotes and to supply, alter and delete headnotes; correct cross references; correct grammatical and typographical errors, and for that purpose, to make verbal additions, omissions or alterations; correct punctuation; make capitalisation consistent; make such formal alterations as to names, localities, offices and otherwise as may be necessary to bring an Act, Decree, Statute, statutory instrument or legal notice into conformity with the circumstances of Uganda; provide editorial notes by way of amplification; add such indexes, tables and other editorial features as the commissioners consider appropriate; and to do all things relating to form and method which appear to the commissioners as necessary or useful for perfecting the Revised Edition.¹¹⁵ Following the revision of Uganda's Statute Book, decrees and some legal notices which had the status of principal laws and Statutes were termed Acts.

Customary Law: Characteristics and Application

It is generally accepted that customary law is a set of customs or rules that reflect a certain community's (definition of a community; its beliefs, habits and values is not standard) beliefs, habits and values, a 'mirror of accepted usage.' In societies where customary law remains dominant, standardisation will take some time as ascertainment and codification of customs for such pluralistic societies are long and tedious tasks. The case of southern Sudan remains noteworthy, with more than 60 traditional justice systems in application yet the law is not yet ascertained.

The African Parliamentary Knowledge Network (APKN) manual states that in reality, customary law simply develops from custom – the way people live daily, in which sense, customary law does not need to be drafted by a Parliament, although it can be, so that societies are clear on what practices are legal and which ones are not.¹¹⁶ The assumption in the manual may arise from the belief that customary law is drafted for a particular component of society. In most, if not all traditional African societies, custom is not written down, but is simply passed down through practice and oral tradition which becomes problematic as societies become less and less homogenous. What

¹¹⁵ Section 4 Laws (Revised Edition) Act 1994, Laws of Uganda.

¹¹⁶ Boston University School of Law, Prepared for the African Parliamentary Knowledge Network, Legislative Drafting Manual for the East African Legislative Assembly, May 2012

customary law entails is not easily discernible because of its characteristics. The concept of customary law is elusive and defies an authoritative definition although attempts have been made. In Sudan, a court set to define what custom was in a landmark case *Bamboulis v Bamboulis* in which Chief Justice CJ Lindsay held that:

‘Custom in [the context of customary law] refers to local custom originating by usage in the Sudan, and is not applicable to the imported rule of law of foreign origin.’¹¹⁷

Transitions in customs, norms and traditions as well as amendments to customary law are not as easy to capture yet with codified law, it is easy to know when laws have been amended in accordance with set procedures. To the extent that religious beliefs and moral principles form a basis for customary law and these are not standardised, it is not possible to have customary law apply harmoniously to a society that has lost its homogeneity.¹¹⁸ One issue to bear in mind is the degree of tolerance to be exercised towards members of other ethnic groupings or tribes, most especially if customary law is to be applied. Using religion, intra-sectoral differences or differences in interpretation of religious texts as baselines for the development of law limits the development of common standards in the substance and form of customary law.

Appreciation of Rule of Law and Impact of Culture

The predominant cultural mores of a given people impact on the development of standards. Cultural identities or backgrounds are very influential and determine how law develops. Most of these customs provide the canvas on which the rules and regulations are drawn. As stated earlier, customary law is largely unwritten and applicable to a particular ethnic grouping and therefore not standardised (both in substance and form) in application yet one cannot afford to ignore customary law in any discussion on standardising statutory writing. For illiterate societies without a proper law enforcement mechanism, codification is not of any measurable benefit. This commences with analysis of what a particular society considers to entail the rule of law.

At the global level common tenets of what rule of law is, mainly aimed at State actors or entities, have developed yet, rule of law means different things to different components of a society. A cultural system can be disorganised in the sense that there are conflicts between values, norms and beliefs within a widely shared, dominant

¹¹⁷ Sudan High Court and Court of Appeal 1954

¹¹⁸ [Kenyan man arrested for breaking customary law of South Sudan; http://www.sudantribune.com/spip.php?article40798](http://www.sudantribune.com/spip.php?article40798) , accessed 10/10/2014.

culture.¹¹⁹ Law embodies the normative structure of the dominant cultural/ethnic group and law contains values, practices and norms which reflect mostly the values of the group(s) successful in achieving control of State power and legislative processes.¹²⁰ Conversely, conduct norms that mirror the socio-cultural values of the other, less influential groups often enter into conflict with the governing norms, either as a result of a process of group differentiation within a cultural system, or as a result of contact between norms drawn from different cultural systems.¹²¹

In South Sudan, each of the different communities have a different understanding of what rule of law entails, and aspects of given laws differ.¹²² What constitutes a crime in one community may not be considered as such elsewhere. For Sudan and Kosovo (with the influence of 500 years of Ottoman Empire rule and the introduction of Islamic religion and culture), aspects of rule of law and justice as understood under Sharia'a law, though increasingly fading out or becoming benign in Kosovo, are in application. The payment of blood money (diyat) in addition to serving a custodial sentence for committing homicide is applied yet the English legal system as introduced during the colonial era did not have an equivalent.

In the case of Kosovo, revenge killings which according to the Kanun Code embody the moral obligation to apply retaliatory attacks until the family honour is re- established¹²³ are identified as one of the various disturbing social phenomena behind increases in violent crime. This followed the expansion of Western legal norms in the Albanian territories resulting in a 'culture conflict' within the society, which has subsequently led to an increase in crime which argument may stand valid elsewhere. As Kosovo leans more and more towards practices of the European Union, the EU rule of law standards are influencing decision making and governance and moving further and further away from traditions such as execution of revenge killings and blood feuds.

¹¹⁹ J.M. Yinger, 'Contraculture and Subculture,' (1960) Vol. 25, 625-35 (American Sociological Review).

¹²⁰ J. T. Sellin, 'Culture conflict and crime', (1938) *Volume 41 Social Science Research Council. Bulletin*

¹²¹ *Ibid.*

¹²² See A. A. Jok, R. A. Leitch, and C. Vandewint, *A Study of Customary Law in Contemporary Southern Sudan*; A study commissioned by World Vision International and the South Sudan Secretariat of Legal and Constitutional Affairs, March 2004.

¹²³ T. Kaltcheva, Kosovo's Post-independence Inter-clan Conflict HUMSEC Journal, Issue 2, <http://www.isn.ethz.ch/Digital-Library/Publications/Detail/?ots591=0c54e3b3-1e9c-be1e-2c24-a6a8c7060233&lng=en&id=110405>

In South Sudan, with the limited reach of State authority over a vast territory and the weakness of centralised justice structures, traditional dispute resolution mechanisms that these societies have depended upon, including the use of revenge/ retaliatory attacks and killings remain the 'go to' options of first resort until the State provides alternate and working options. Notably, the mandate of the United Nations Mission in South Sudan (UNMISS) is presently restricted to the protection of civilians following the resumption of conflict and no State building activities are taking place.

For Uganda, after 52 years of centralised administration, international concepts of what "rule of law" entails have been inculcated into the system of governance in Uganda. Further, *Ubuntu*, a fundamental quality of African life, which emphasises essential virtues namely compassion and humanity underlies most, if not all, political and legislative debates and informs to a certain extent the evolution of law and decision making in the public sector.

That said, any plans to reduce customary practices or to introduce standard dispute resolution mechanisms by statute as the colonial governments did in Africa and elsewhere or the unilateral actions of leaders such as Enver Hoxha in Albania to outlaw cultural practices by the stroke of a pen will not be possible due to the deviation in beliefs across different communities for each community adheres to different standards and ways of retribution in addition to the mechanisms imposed by the government. Enver Hoxha described the blood feud as a legacy of feudalism and under his regime, it was strictly forbidden to 'defend the honour of the family' and offenders were severely punished and their families driven into isolation.¹²⁴ Further, to the extent that customary law remains unascertained and unwritten, one cannot attempt to wholly address questions of uniformity or standardisation.

Cross-linguistic Influence

A language is important for communication and the influence of 'mother- tongue'¹²⁵ or first language that a person learned acquired in the early years and which

¹²⁴ J. Arsovska and P. Verduyn, 'Globalization, Conduct Norms and Culture Conflict Perceptions of Violence and Crime in an Ethnic Albanian Context,' *Brit. J. Criminol.* (2008) 48, 226 – 246

¹²⁵ D. A. Oluwole; The Impact of Mother Tongue on Students' Achievement in English Language in Junior Secondary Certificate Examination in Western Nigeria (2008) *J. Soc. Sci.*, 17(1), 41-49 <http://www.krepublishers.com/02-Journals/JSS/JSS-17-0-000-000-2008-Web/JSS-17-1-001-08-Abst-Text/JSS-17-1-041-08-590-Oluwole-D-A/JSS-17-1-041-08-590-Oluwole-D-A-Tt.pdf>

eventually becomes their natural instrument of thoughts and communication vis a vis other languages in communicating legislative intentions and shaping the legislative drafting or statutory writing styles and standards cannot be undermined. Cross linguistic influence, defined as the different ways in which different language systems in the mind interact and affect either the linguistic performance (during legislative drafting or statutory writing) or the linguistic development (or both) of the individual concerned through one set of entrenched language habits imposing themselves on the developing language and causing non-native forms (errors) to occur influences use of language including in statutory writing.¹²⁶ This occurs when, the language user's first language habits (patterns, systems or rules) interfere or prevent him/her, to some extent, from acquiring the patterns and rules of the second language and even applying these in their day to day communication.¹²⁷ Olsen observed that the students' native language knowledge influenced their English writing sometimes resulting in orthographic, morphological, syntactic and lexical errors.¹²⁸ It is difficult to accomplish common standards while drafting legislation in local languages vis a vis the official languages (which for formerly colonised territories is usually the language of the colonial master), for instance English for Uganda, English and Juba Arabic for South Sudan, and Arabic for Sudan.

Legal language, developed naturally, under the influence of diverse languages and cultures, as well as the growing complexity of the legal system and the shift from predominantly oral to mainly written communication.¹²⁹ The nature of common law drafting, which is based on conciseness of expression, is different from the continental style, which is based on statements of general principles.¹³⁰ Legislative languages, just like legal language borrows from many languages, and for legislative counsel, cross-linguistic interference cannot be totally eliminated. For South Sudan, returnees from the diaspora, who form a great portion of the civil service, may have a different interface with "mother-tongue" unlike those who stayed behind in Sudan. There must be a

¹²⁶ M. Sharwood Smith, 'Cross linguistic aspects of second language acquisition,' (1983) *Applied Linguistics* 4: 192-199.

¹²⁷ S. P. Corder, 'Idiosyncratic errors and Error Analysis', (1971) Vol. 9 Iss. 2 (*International Review of Applied Linguistics*) 147-159.

¹²⁸ S. Olsen, 'Errors and compensatory strategies: a study of grammar and vocabulary in texts written by Norwegian learners of English' (1999), Volume 27, Issue 2, 191-205 <http://www.sciencedirect.com/science/article/pii/S0346251X99000160>, accessed 10/10/2014.

¹²⁹ <http://www.languageandlaw.org/LEGALLANG/LEGALLANG.HTM> accessed 10/10/2014.

¹³⁰ <http://www.linguistics.fi/julkaisut/SKY2006/Yankova.pdf> accessed 10/10/2014.

medium, primarily language, through which the law produced by the government of a particular country is communicated to the people of that particular country and such a language must be very precise, as the consequences of misunderstanding the message of the legislators might have serious consequences.¹³¹

The advocates of the Plain English Movement urge the drafters of legal documents to avoid using passives yet on the contrary, the passive is the predominant voice in legal English because it promotes impersonality, objectivity and non- involvement.¹³² Legal language is also plagued with lengthy noun phrases, heavy use of passive voice, multiple negatives, and complex grammatical structures, including multiple embedded clauses and unusually placed subordinate clauses.¹³³

Whereas basic rules of legislative drafting encourage and demand the use of the active construction versus the passive construction, in which the agent is often not expressible, in reality a good number of "mother-tongues" of the drafters to a certain extent, may influence the drafter's thought process and reflect in the syntactic structure of legislative sentences through the application of different rules as explained above. Studies on world languages reveal that passive constructions occur in 44 % of the languages sampled.¹³⁴ There are two areas in Africa in which Verb-Subject order is common: one of which is an area in eastern Africa extending up into Sudan, representing languages in various branches of Eastern Sudanic within the Nilo-Saharan grouping, including a number of Nilotic languages.¹³⁵ Passive constructions are also common among the predominant languages of Kosovo, Sudan, South Sudan and Uganda, which belong to the Indo-European family, the Nilo-Saharan languages and the Niger-Congo language groups respectively.

The Arabic language learners may also encounter difficulties related to the syntactic structures of sentences. In Arabic, the sentence structure is Verb-Subject-Object while English sentences are built following the Subject-Verb-Objective

¹³¹ K. Skwarlová, Passive voice and its meaning in legal English, http://is.muni.cz/th/75216/ff_m_b1/Diploma_Thesis.txt accessed 10/10/2014.

¹³² R. Hiltunen, Chapters in Legal English-Aspects Past and Present of the Language of the Law. (1990) Helsinki: Suomalainen Tiedeakatemia.

¹³³ Tiersma, *supra*.

¹³⁴ A. Siewierska, 'Passive Constructions', In: M. S. Dryer & M. Haspelmath (eds.) The World Atlas of Language Structures Online. Leipzig: Max Planck Institute for Evolutionary Anthropology. <http://wals.info/chapter/107>, accessed 10/10/2014.

¹³⁵ B. Heine and D. Nurse (eds.), A Linguistic Geography of Africa, <http://en.calameo.com/books/0003653904e6073d56647> accessed 10/10/2014

structure.¹³⁶ These language groups have a distinct characteristic of use of passive constructions. The United States Supreme Court regularly references grammar rules when interpreting statutory language¹³⁷ and has acknowledged that the passive voice obscured the identity of the statutory actor who was authorised or deemed to take the action described in the provision and also noted that the passive voice creates interpretive ambiguity.¹³⁸

Influence through Development Assistance Initiatives

Assistance from development partners, through programmes which have been the norm in the developing world for years, comes with conditions which include demands to adhere to international standards for human rights and rule of law, inter alia. This often results into changes in the substantive law drafting to address the rights of the minorities, among others. This is obvious in South Sudan¹³⁹ and Uganda too. Due to the imposition of sanctions by the international community and the influence of other geo-political factors, Sudan has not explicitly opened up to influences of the western world in the post-colonial era which therefore limits external influences in its drafting style. However Sudan has not been spared from external influence as can be seen from the role of legislative consultants such as those commissioned by Max Planck Institute in contributing to capacity building.

Development assistance-driven initiatives at times do not reflect local standards and competition amongst development partners leads to the introduction of different standards within entities of the same government. The United Nations, USAID, World Bank, Department for International Development of the United Kingdom and others all create impact by the standards they introduce, the goals they set and the consultants they recruit to execute the rule of law and justice reform programmes. USAID, through

¹³⁶ N. Abisamra, An Analysis of Errors in Arabic Speakers' English Writings, <http://abisamra03.tripod.com/nada/languageacq-erroranalysis.html>. Also see C. G. Voicu, Overusing Mother Tongue in English Language Teaching, http://www.ijcr.eu/articole/84_30_IJCR%203-2012.pdf

¹³⁷ A. S. Krishnakumar, Passive-Voice References in Statutory Interpretation, http://scholarship.law.stjohns.edu/faculty_publications/67

¹³⁸ http://practicum.brooklaw.edu/sites/default/files/print/pdfs/journals/brooklyn-law-review/volume-76/issue-3/blr_v76iii_1.pdf

¹³⁹ United Nations Development Programme (UNDP); UNDP focus on Customary Law in South Sudan, http://www.ss.undp.org/content/south_sudan/en/home/library/focus_on_results/dem_gov/customary-law-in-south-sudan/

its Justice project was highly influential in Kosovo. The use of American consultants as well as the very active role played by the American Bar Association's CEELI¹⁴⁰ programme resulted in the introduction of some elements of American approaches to legislative drafting and policy development or writing, legal ethics and persuasive advocacy, which is in contrast to the previous practice when Kosovo was still part of the SFRY.¹⁴¹ In 2005 and 2006, a team of America-based lawyers, through a programme on providing legislative drafting assistance and legal training in Kosovo, assisted working groups composed of local judges and prosecutors to draft two new laws creating the Kosovar court system and system of prosecution based on the decisions reached by working group participants.¹⁴²

Similarly, the United States Institute of Peace (USIP) launched a project in South Sudan aimed at facilitating the development of a long-term justice strategy in South Sudan, specifically regarding the role of customary law through facilitating ascertainment of customary and community laws, *inter alia*.¹⁴³ Although the UN's role in South Sudan does not directly involve legislative strengthening, it is foreseen that the Rule of Law support will result in legislative developments and the recruitment of legislative consultants to bring these changes to bear. Prior to the resumption of conflict in December 2013, the United Nations had authorised a fully-fledged capacity building programme under the auspices of UN Security Council resolution 1996 (2011) through which UNMISS would support the Government of the Republic of South Sudan, in accordance with the principles of national ownership, and in cooperation with the UN Country Team and other international partners, in developing its capacity to provide security, to establish rule of law, and to strengthen the security and justice sectors through: supporting the development of strategies for security sector reform, rule of law, and justice sector development, including human rights capacities and institutions; among others.¹⁴⁴

¹⁴⁰ http://www.americanbar.org/advocacy/rule_of_law/where_we_work/europe_eurasia/kosovo.html.

¹⁴¹ <http://www.newperimeter.org/our-work/access-to-justice/kosovo-law-reform.html>

¹⁴² *Ibid.*

¹⁴³ C. Leonardi, L. N. Moro, M. Santschi and D. H. Isser; *Local Justice in southern Sudan-A joint project of: United States Institute of Peace Rift Valley Institute* <http://www.usip.org/sites/default/files/PW66%20-%20Local%20Justice%20in%20Southern%20Sudan.pdf>

¹⁴⁴ http://www.un.org/en/peacekeeping/missions/past/unmis/documents/sres1996_2011.pdf

The Commonwealth Secretariat has developed guidelines on legislative drafting by encouraging the development of common standards and best practices, among others.¹⁴⁵ It has also taken the lead in supporting the training of legislative counsel all across the 53 Commonwealth of Nations which at global level leads to development of standards in curriculum, training and methods of work. Through the Commonwealth Fund for Technical Cooperation, the Secretariat provides consultants who also deliver training and capacity building which in itself impacts on the quality of legislative drafting in supported offices.¹⁴⁶

Development of model laws by the UN and other international organisations

The UN has taken the lead in emerging areas of international law by codifying and developing model laws. When the model laws are domesticated, they may fully comply with the model or be adjusted to the style prevalent in the specific jurisdiction but at a bare minimum, standards are set, which minimises legal conflicts in international casework between cooperating countries from different legal traditions. The Commission on International Trade Law (UNCITRAL),¹⁴⁷ United Nations Office on Drugs and Crime (UNODC)¹⁴⁸ and United Nations Environment Programme (UNEP)¹⁴⁹ are examples of UN entities that have drafted and circulated Model Laws as tools of technical assistance,¹⁵⁰ to assist governments translate their obligations under international treaties into national legislative provisions. The model laws which focus on the substantive obligations arising from the international treaties than on the form ought to be tailor-made to the needs and hopefully to the statutory writing standards of each State model laws facilitate the review and amendment of existing legislation as well as the adoption of new legislation. They have an impact on domestic standards since they serve as examples of best practices.

¹⁴⁵ <http://thecommonwealth.org/media/news/communique-commonwealth-law-ministers-meeting-2014#sthash.trHe4ZET.dpuf>

¹⁴⁶ <http://thecommonwealth.org/history-of-the-commonwealth/commonwealth-fund-technical-co-operation-cftc-set>

¹⁴⁷ http://www.uncitral.org/uncitral/en/uncitral_texts.html

¹⁴⁸ <http://www.unodc.org/unodc/en/legal-tools/model-treaties-and-laws.html>

¹⁴⁹ <http://www.unep.org/delc/EnvironmentalLaw/tabid/54403/Default.aspx> is primarily to ensure the progressive development of environmental law across different environmental sectors and levels of governance.

¹⁵⁰ http://www.uncitral.org/uncitral/en/technical_assistance_coordination.html

Regional integration and Globalisation

The influence of regional and global bodies, through regional integration and globalisation, remains a crucial factor in governance and legislative development. a continent-wide Africa Parliamentary Knowledge Network (APKN)¹⁵¹ established by African parliamentary assemblies under the auspices of the Pan-African Parliament and supported by the United Nations had adopted Legislative Drafting Guidelines¹⁵² largely modelled on the "*Joint Practical Guide of the European Parliament, the Council and the Commission for Persons Involved in the Drafting of Legislation within the Community Institutions.*" These guidelines include provisions based upon the AKOMA NTOSO which is the African standard for digital parliamentary and legislative documents.¹⁵³ With a view to standardising Legislative Drafting, the Africa i-Parliaments Action Plan presented Akoma Ntoso XML standard, meant to better support the digital exchange and re-use of parliamentary documents, and the "APKN Legislative Drafting Guidelines", that define common structural elements of legislation according to principles of good legislative drafting. The guidelines are meant to provide African parliaments and law makers with a better and shared approach to drafting, aiming at supporting harmonisation of legislation in Africa. How effective these tools are remains dependent upon the wide adoption, application and use of the guidelines by African parliaments. Adoption will also lead to the application in African parliamentary assemblies of European Union (EU) standards on which the guidelines were based.

With the process of globalisation in Europe seen through the influence of the EU and the Council of Europe in particular, new laws emerging from the dominant Western value system have been steadily imposed on Albania, Kosovo (also influenced by the

¹⁵¹ APKN was formally established at the International Conference on Africa Parliamentary Knowledge Network which took place in Cairo, Egypt, on 4 and 5 June 2008 and brought together delegations from the Pan-African Parliament and the Parliaments of Algeria, Angola, Botswana, Burundi, Cameroon, Chad, Comoros, Congo, Democratic Republic of the Congo, Egypt, Ethiopia, Ghana, Kenya, Lesotho, Liberia, Libya, Malawi, Mali, Mauritania, Morocco, Mozambique, Namibia, Nigeria, Rwanda, Senegal, Seychelles, Sudan, Swaziland, Tanzania, Togo, Tunisia, Uganda, Zambia, Zimbabwe as well as delegations from the SADC Parliamentary Forum and the East African Parliamentary Assembly. <http://www.apkn.org/apkn-in-detail/context> accessed 10/10/2014.

¹⁵² http://www.apkn.org/lrp/guidelines/guidelines/leg-guidelines?set_language=en accessed 10/10/2014.

¹⁵³ <http://www.akomantoso.org/> accessed 10/10/2014.

presence of UNMIK) and Macedonia and, as such, did not emerge naturally from within the society.¹⁵⁴ The governments have ratified Western laws in order to align their countries closer to the EU or the North Atlantic Treaty Organisation (in what is known as the ‘hour of Europe’);¹⁵⁵ however, there is common belief that in some instances they have not always understood the values behind such moves. UNMIK’s regulations also placed responsibility on the Provisional Institutions of Self-Government to align their legislation and practices in all areas of responsibility with relevant European and international standards and norms, with a particular view to facilitating closer economic, social and other ties between the people of Kosovo and other Europeans, and in awareness that respect for such standards and norms will be central for the development of relations with the Euro-Atlantic community.¹⁵⁶ Remarkably, the European Convention on Human Rights is introduced in the Bill of Human Rights into the Constitution of Kosovo because of the demands arising from the desire to join the European Union. Although Kosovo is currently not a member of the Council of Europe, the Constitution enshrines the European Convention on Human Rights in Kosovo law, and gives it primacy over any domestic Kosovo laws.¹⁵⁷

Individual consultants’ drafting styles

In some cases, individual consultants impose their drafting style on the client jurisdiction. For instance, in Uganda a set of natural resources management laws were drafted by one consultant between 1995 and 1998. As a result, a new legislative drafting style developed, through which a part containing the principles of the National Environment Bill was inserted immediately after the section on interpretation.¹⁵⁸ The consultant justified this alteration on the basis of the novelty and evolution of environmental management principles and the importance not to pre-suppose that all

¹⁵⁴ J. Arsovska & P. Verduyn, *supra* note 79.

¹⁵⁵ J. Rupnik (ed), *The Western Balkans and the EU; The Hour of Europe*, [http://www.iss.europa.eu/uploads/media/cp126-The Western Balkans and the EU.pdf](http://www.iss.europa.eu/uploads/media/cp126-The_Western_Balkans_and_the_EU.pdf), accessed 10/10/ 2014.

¹⁵⁶ <http://www.unmikonline.org/regulations/2001/reg09-01.htm>

¹⁵⁷ <http://www.assembly-kosova.org/common/docs/Constitution1%20of%20the%20Republic%20of%20Kosovo.pdf>

¹⁵⁸ http://faolex.fao.org/cgi-bin/faolex.exe?rec_id=005754&database=faolex&search_type=link&table=result&lang=eng&format_name=@ERALL

stakeholders were conversant with them and that the best position to place them was at the beginning of each and every Act of Parliament. This resulted in a divergence in standards of the legislation drafted by other consultant's vis a vis those by the said consultant, concerning the same thematic areas of natural resources management. In the course of revising the statute under the revision process, the drafting style was retained by the Commissioners in the *National Environment Act*.¹⁵⁹

Persuasive influence of legislative drafting gurus

Legislative drafting, like any other distinct field of law, is influenced by views of the leading practitioners in a given era. Remarkably, leading practitioners such as Garth Thornton,¹⁶⁰ Vincent Crabbe,¹⁶¹ William Dale,¹⁶² Daniel Greenberg,¹⁶³ and Ruth

Sullivan,¹⁶⁴ who provide consultancy services, serve as faculty in schools on legislative drafting and write authoritative texts on the subjects of legislative drafting, plain language and writing and statutory interpretation among others have shaped and continue to shape the legislative and statutory writing landscape. The faculty of leading institutions such as Sir William Dale, Athabasca, and International Law Institute, among others, continue to shape the future of statutory writing. The influence of the proponents of the Plain Language movement, in this regard is worth noting. From the Americas, Profs Ann and Bob Seidman,¹⁶⁵ have introduced institutional legislative theory and methodology (ILTAM) which emphasises the need to draft evidence-based legislation and not the "legal transplants approach" which uses precedents in jurisdictions where at times, institutions are not suited for such obligations or whose social problems are not

¹⁵⁹ <http://www.ulii.org/ug/legislation/consolidated-act/153>

¹⁶⁰ http://www.law.tulane.edu/uploadedFiles/Institutes_and_Centers/International_Legislative_Drafting_Institute/Garth%20Reflections%20Full%20Text.pdf

¹⁶¹ <http://dfcentre.com/wp-content/uploads/2012/10/DFC-Promoting-Government-Integrity-Anti-Corruption-Leaflet-May-2014.pdf>

¹⁶² http://ials.sas.ac.uk/postgrad/docs/Amicus3_Sir_William_Dale_profile.pdf

¹⁶³ http://www.danielgreenberg.co.uk/?page_id=170

¹⁶⁴ http://www.commonlaw.uottawa.ca/index.php?option=com_content&task=view&id=5680&Itemid=78

¹⁶⁵ UNDP Consultants

fuelled by similar factors rendering such ‘transplanted’ legislation inadequate and not fit for purpose.¹⁶⁶

General challenges and the way forward

The impact of other challenges to legislative development cannot and should not be ignored. The specific capacity gaps such as the lack of strategic vision and managerial skills, qualified professional staff, capacity building initiatives for legislators, value-added information services, information management applications and tools, coordination of Parliamentary Development Assistance and interoperability standards as well as poor inter-parliamentary cooperation and the weak role of Parliaments¹⁶⁷ in promoting the Information Society have to be addressed.

Further to other challenges affecting the operations of legislative drafting offices, lack of adequate supervision of legislative counsel as they deal with assignments, in time results in individual drafting styles and preferences creeping into the Statute Book. The lot of legislative counsel has been discussed elsewhere¹⁶⁸ and it is common knowledge that in most developing world jurisdictions, legislative drafting offices are understaffed and under-resourced and these pressures can potentially impact on the products of these offices, most especially if quality control is compromised in any way.

In conclusion, the above discussion reveals that standardising statutory writing is not an easy task given the factors that affect the process and the challenges they present. There is no common standard as each territory has inherited a style of statutory writing that has evolved over the years in light of unique circumstances. For these societies, it may be easier and cheaper to keep things as they are, while working on fitting domestic practices into the standards introduced and recommended by proponents of regional integration and globalisation, to the extent that the resultant policies and legislation meet the needs of the given society. It becomes very clear that before proposing standards, it is important to understand how the society got to where it is in terms of legislative style and standards. As has been aptly put elsewhere, these

¹⁶⁶ A. Seidman and N. Abeyesekere, *Legislative Drafting for Democratic Social Change: A Manual for Drafters*, Kluwer Law International 2000

¹⁶⁷ <http://www.parliaments.info/rationale/gap-analysis>

¹⁶⁸ E. Bakibinga, 'Behind-the-Scenes Actors? Enhancing the Visibility of Legislative Counsel in Developing Countries' ;The Loophole, CALC 12/08/2011 http://www.opc.gov.au/calc/docs/Loophole_papers/Bakibinga_Aug2011.pdf

societies are not legislative deserts and as dynamic entities, all things remain a work in progress.¹⁶⁹

¹⁶⁹ J. M. Otto, W. S. R, Stoter & J. Arnscheidt, Using legislative theory to improve law and development assistance, In: J. Arnscheidt, B. van Rooij & J.M. Otto (Eds.), Lawmaking for Development. Explorations into the Theory and Practice of International Legislative Projects (Law, Governance and Development) (pp. 53-74). Leiden: Leiden University Press, 2008).