and values falling within the 'established milieu'[39] or by reference to their legitimacy leading to compliance;[40] the economic legal model that includes cost-efficiency as the measure of efficacy;[41] and international relations models that call for clearer distinctions between efficacy, implementation and compliance.

Taking into account the role of the drafter as a mere unit in the many actors of regulation (namely in the policy, legislative and drafting processes),[42] efficacy from the narrow point of view of legislative drafting can be defined as the capacity of a piece of legislation to achieve the regulatory aims that it is set to address.[43] Efficacy, as a measure of quality of legislation for the purposes of achieving the desired regulation, is not a goal that can be achieved by the drafter alone.[44] A wonderful draft may be capable of producing the desired regulatory effects, but bad implementation[45] and bad judicial application may interfere with its actual results.[46] Of course one has to accept that the extent of the margin for incorrect implementation and judicial application is directly linked to the quality of the draft,[47] but it is quite possible that the error in the draft may be attributed to a fault in the content of the pursued policy or in the calculations of the regulatory impact assessment made for the allocation of resources for implementation.

Within the umbrella of efficacy the drafter pursues effectiveness in legislation.[48] The term is used widely but often without a definition. For example the EU calls for accountability, effectiveness and proportionality as

[39] See I Jenkins, *Social Order and the Limits of Law: A Theoretical Essay* (New Jersey, Princeton University Press, 1980) 180.

[40] See TM Franck, 'Legitimacy in the International System' (1988) 82 *American Journal of International Law*, 705.

[41] See OK Young and MA Levy, 'The Effectiveness of International Environmental Regimes' in OR Young et al (eds), *The Effectiveness of International Environmental Regimes* (Massachusetts, MIT Press, 1999) 1, 4–5; also see OECD, 'Regulatory Policies in OECD Countries; from Interventionism to Regulatory Governance' (n 18); and also 'Background Note to the OECD Reference Checklist for Regulatory Decision Making' of OECD, 'Recommendation of the Council on Improving the Quality of Government Regulation' (n 4)

[42] See AE Black, *From Inspiration to Legislation: How and Idea Becomes a Bill* (New Jersey, Pearson Education Ltd, 2007) 123.

[43] See N Gunningham and D Sinclair, 'Designing Smart Regulation' 18 www.oecd.org/dataoecd/18/39/33947759.pdf; and also R Baldwin, 'Is Better Regulation Smarter Regulation?' (2005) *Public Law* 485, 511.

[44] See JP Chamberlain, 'Legislative Drafting and Law Enforcement' (1931) 21 *American Labor Legislative Review* 235, 243.

[45] See D Hull, 'Drafters' Devils' (2000) *Loophole* www.opc.gov.au/calc/docs/calc-june/audience.htm.

[46] See U Karpen, 'The Norm Enforcement Process' in U Karpen and P Delnoy (eds), *Contributions to the Methodology of the Creation of Written Law* (Baden-Baden, Nomos, 1996) 51, 51; also L Mader, 'Legislative Procedure and the Quality of Legislation' in Karpen and Delnoy (eds), *Contributions to the Methodology of the Creation of Written Law* 62, 68.

[47] See G Teubner, 'Regulatory Law: Chronicle of a Death Foretold' (1992) 1 *Social Legal Studies* 451.

[48] See C Timmermans, 'How Can One Improve the Quality of Community Legislation?' (1997) 34 *Common Market Law Review* 1229, 1236–37.

a means of achieving better law-making, but the term is not defined at all.[49] Similarly, the UK's Office of Parliamentary Counsel repeats its aspiration to effectiveness as a contribution to or in balance with accuracy, but does not define the term.[50] Mader defines effectiveness as the extent to which the observable attitudes and behaviours of the target population correspond to the attitudes and behaviours prescribed by the legislator.[51] Snyder defines effectiveness as 'the fact that law matters: it has effects on political, economic and social life outside the law—that it, apart from simply the elaboration of legal doctrine'.[52] Teubner defines effectiveness as term encompassing implementation, enforcement, impact and compliance.[53] Muller and Ulmann define effectiveness as the degree to which the legislative measure has achieved a concrete goal without suffering from side-effects.[54] In Jenkins' socio-legal model effectiveness in the legislation can be defined as the extent to which the legislation influences in the desired manner the social phenomenon which it aims to address.[55] Voermans defines the principle of effectiveness as a consequence of the rule of law, which imposes a duty on the legislator to consider and respect the implementation and enforcement of legislation to be enacted.[56] Mousmouti describes effectiveness as a measure of the causal relations between the law and its effects: and so an effective law is one that is respected or implemented, provided that the observable degree of respect can be attributed to the norm.[57]

For the purposes of drafting in its narrow sense, therefore, effectiveness is the ultimate measure of quality in legislation.[58] It simply reflects the extent to which the legislation manages to introduce adequate mechanisms capable of producing the desired regulatory results.[59] If one subjects effectiveness

[49] See European Commission, 'European Governance: Better Lawmaking' (Communication) COM(2002) 275 final; also see High Level Group on the Operation of Internal Market, 'The Internal Market After 1992: Meeting the Challenge—Report to the EEC Commission by the High Level Group on the Operation of Internal Market' SEC (92) 2044.

[50] See Office of Parliamentary Counsel, 'Working with OPC' (6 December 2011); and Office of Parliamentary Counsel, 'Drafting Guidance' (16 December 2011).

[51] See L Mader, 'Evaluating the Effect: a Contribution to the Quality of Legislation' (2001) 22 *Statute Law Review* 119, 126.

[52] See F Snyder, 'The Effectiveness of European Community Law: Institutions, Processes, Tools and Techniques' (1993) 56 *Modern Law Review* 19, 19; also F Snyder, *New Directions in European Community Law* (London, Weidenfeld and Nicolson, 1990) 3.

[53] See G Teubner, 'Regulatory Law: Chronicle of a Death Foretold' in L Lenoble (ed), *Einfuhrung in der Rectssoziologie* (Darmstadt, Wissenschaftliche Buchgesellschaft, 1987) 54.

[54] See G Muller and F Uhlmann, *Elemente einer Rechtssetzungslehre* (Zurich, Asculthess, 2013) 51–52.

[55] See I Jenkins, *Social Order and the Limits of the Law: a Theoretical Essay* (Princeton, Princeton University Press, 1981) 180; also see R Cranston, 'Reform through Legislation: the Dimension of Legislative Technique' (1978–79) 73 *Northwestern University Law Review* 873, 875.

[56] See Voermans, 'Concern about the Quality of EU Legislation' (n 7) 230.

[57] See Mousmouti (n 7) 200.

[58] See Xanthaki, 'On Transferability of Legal Solutions' in Stefanou and Xanthaki (n 27) 6.

[59] See Office of the Leader of the House of Commons, *Post-legislative Scrutiny—The Government's Approach* (March 2008) para 2.4.

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Aristotle also distinguished practical wisdom (*phronesis*) from the expertise (*techne*) needed to apply technical knowledge (*poiesis*) when making things.[122]

Is law *phronesis*? It can be.[123] And it predominantly is considered to be such.[124] Law as *phronesis* encourages continued uniform application, and thus supports certainty and the rule of law in the civil law tradition. Law as *phronesis* supports prudence or appropriateness, and hence stare decisis in the common law tradition. *Phronesis* can serve as a concrete guide to anyone wishing to ameliorate justice by urging the subject to answer the following questions: where are we heading to? Who wins and who loses, and by virtue of what mechanisms? What are desirable consequences? What can be done on this topic?[125] *Phronesis* supports probabilistic reasoning, as opposed to deductive reasoning, which can be defined as the selection of solutions made on the basis of informed yet subjective application of principles on set circumstances.[126] *Phronesis* is 'practical wisdom that responds to nuance and a sense of the concrete, outstripping abstract or general theories of what is right. In this way, practical wisdom relies on a kind of immediate insight, rather than more formal inferential processes'.[127] *Phronesis* provides the means to achieve the purpose.[128] And *phronesis* accommodates both legal *episteme* and *techno*-law.[129]

So, what is the nature of legislative drafting, as a sub-discipline of law? The debate between drafting as art and drafting as science seems to be false. It ignores relativity as the essence of legal science. Law, and consequently drafting as its discipline, is not part of the arts, nor is it part of the sciences[130]

[122] See Griffiths and MacLeod, 'Personal Narratives and Policy' (n 97) 126.

[123] But it can also be craft: see esp Scharffs, 'Law as Craft' (n 86) 2245; or art: see esp SG Pollock, 'The Art of Judging' (1996) 71 *New York University Law Review* 591; or science: see esp P Schlag, 'Law and Phrenology' (1997) 110 *Harvard Law Review* 877, 897.

[124] See SJ Burton, 'Law as Practical Reason' (1989) 62 *California Law Review* 747; also, WN Eskridge Jr and PP Frickley, 'Statutory Interpretation as Practical Reasoning' (1990) 42 *Stanford Law Review* 321, 353; DA Farber, 'The Inevitability of Practical Reason: Statutes, Formalism, and the Rule of Law' (1992) 45 *Vanderbilt Law Review* 533; B Leiter, 'Heidegger and the Theory of Adjudication' (1996) 106 *Yale Law Journal* 253; R Mohr and D Manderson, 'From Oxymoron to Intersection: an Epidemiology of Legal Research' (2002) 6 *Law Text Culture* 159, 174.

[125] See M Deschamps, 'L'acces a la justice, l'affaire de chacun' (2009) 50 *Cahiers de Droit* 248, 253.

[126] See E Engle, 'Aristotle, Law and Justice: the Tragic Hero' (2008) 35 *Northern Kentucky Law Review* 1, 4.

[127] See C Rideout, 'Storytelling, Narrative Rationality, and Legal Persuasion' (2008) 14 *Legal Writing: Journal of the Legal Writing Institute* 53, 75.

[128] See J Moss, 'Virtue Makes the Goal Right: Virtue and Phronesis in Aristotle's Ethics' (2011) 56 *Phronesis: A Journal for Ancient Philosophy* 204.

[129] See P Cserne, 'Introduction: Legislation, Legal Episteme, and Empirical Knowledge' (2013) 1 *The Theory and Practice of Legislation* 387, 391.

[130] For an analysis of the contra argument on law as a science, see M Speziale, 'Langdell's Concept of Law as Science: The Beginning of Anti-Formalism in American Legal Theory' (1980) 5 *Vermont Law Review* 1.

in the positivist sense.[131] Law, and consequently drafting is neither *episteme* nor *techne*. It is *phronesis*, an arty science, with principles and rules that may well apply, but only in principle. This is because *phronesis* supports particularity.[132] In other words, law, and consequently drafting, is a liberal discipline where theoretical principles guide the drafter to conscious decisions made in a series of subjective empirical and concrete choices. And, as it is phronetic, law is context dependent, in the sense that it can only inform on what might work in certain circumstances, but the decision about what to do in any specific circumstance will always depend on normative judgements that have to be made by those who are there.[133] It is also subject to revision as new perspectives are encountered: it is always revisable.[134]

In applying the description of phronetic social science and its distinction from *techne* and *episteme* onto legislative drafting, phronetic legislative drafting is centrally about decisions on how things can and should be done, and actually how to perform the task. It is not theoretical knowledge (*episteme*) because it is not about only what is true, but also about what would be good under the circumstances. It differs from technical knowledge (*techne*) in that it is concerned with evaluating and prescribing goals, and setting the means to achieve them.[135]

In other words, the art of drafting lies with the subjective use and application of its science, with the conscious subjective Aristotelian application and implementation of its universal theoretical principles to the concrete circumstances of the problem.[136] Being aware of these principles, the drafter has to decide in a conscious and informed manner how to apply them to the concrete future choices[137] that form part of their trade. And this can only be done if the drafter is aware of the theoretical principles that need to be applied, and of their hierarchy in the pyramid of principles.

Take for example, the notorious question of limits in the extreme use of plain language: do we need to substitute the term 'mens rea' in modern English in rules of criminal procedure or criminal evidence? If one refers to the hierarchy of principles in drafting, then plain language is clearly a tool

[131] See RR Formoy, 'Special Drafting' (1938) 21 *Bell Yard: Journal of the Law Society's School of Law* 3, 3; but see contra C Langdell, 'Harvard Celebration Speeches' (1887) 3 *Law Quarterly Review* 118, 123–24.

[132] See S Schwarze, 'Performing Phronesis: The Case of Isocrates Helen' (1999) 32 *Philosophy & Rhetoric* 78, 78.

[133] See Griffiths and MacLeod (n 97) 129.

[134] See H Arendt, *The Human Condition* (London and Chicago, University of Chicago Press, 1958) 129.

[135] See S Schram, 'Phronetic Social Science: an Idea whose Time has Come' in B Flyvberg, T Landman and S Schram (eds), *Real Social Science: Applied Phronesis* (Cambridge, Cambridge University Press, 2012) 15, 19.

[136] See W Eskridge Jr, 'Gadamer/Statutory Interpretation' (1990) 90 *Columbia Law Review* 609, 635.

[137] See M Curtis, 'A Better Theory of Legal Interpretation' (1950) 3 *Vanderbilt Law Review* 407, 423–24.

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post-legislative scrutiny is becoming crucially important as a tool for the updating of the ever-increasing statute book, spelling out the regulatory aims sought offers drafters an understanding of what it is that they must achieve, and allows them to express them in the legislation as tangible criteria of its quality in the pre-and post-legislative monitoring cycles. Any comments on the possible scenarios for the achievement of the regulatory aims offer the drafter the opportunity to understand the rationale behind the legislative proposal, to question and hopefully confirm the selection of the policy choices made by the instructing officers, and to take any existing impact or cost/risk analysis into account when drafting purpose clauses, objectives provisions and monitoring provisions. Within the element above it is always useful to alert the drafter to legislative solutions drawn from other jurisdictions, their impact and possibly comments on their transferability to the jurisdiction served. Although borrowing from abroad has become increasingly popular amongst instructing officers and drafters, the practice does carry dangers of ineffectiveness, if the two jurisdictions do not share adequate commonality of needs and usefulness in the legislative solutions.

- Danger points must be raised in drafting instructions thus ensuring that the drafter does not miss them, and that consequently the end result does not introduce them haphazardly:
  - politically or ethically sensitive issues must be raised, thus inviting the drafter to deal with them adequately in the end result;
  - extra-territoriality as a departure from the norm must be raised clearly; and
  - similarly, commencement issues can be discussed at this early stage with specific reference to the date of entry into force, especially when the sponsoring department envisages commencement on a specified day, or on a day dependent on a specific event (eg the coming into force of another Act), on a day to be fixed by delegated legislation, with gradual or measured entry into force, retroactive or retrospective effect, or transitional arrangements.
- Following on from the point above, drafting instructions must raise any administrative or judicial review considerations, any decisions of an administrative character reviewable and by whom and any consultations with the Attorney-General.
- Legal opinions of the sponsoring department or any other legal officers must be attached, thus preventing duplication of effort, and informing the drafter on expert evaluations and interpretation.[44]

[44] See Office of Parliamentary Counsel UK, 'Working with Parliamentary Counsel' (n 15) para 139.

- Similarly, consultations with other departments are useful, especially when a legislative proposal impacts on another department's competence, or when a legislative proposal involves policy considerations for which another department is solely or jointly responsible.
- Affected provisions and consequential amendments must be raised, as early as at the first stage of drafting;[45] of course, the list cannot be final or exhaustive at this stage but identifying a basic list of consequential amendments and affected provisions enhances the drafter's awareness of the mischief, and informs them in their choice of the most appropriate drafting tool: lengthy amendments may call for repeal and re-enactment whereas a short list of amendments may direct the drafter to a simple amendment.
- Drafting instructions must also include procedural information on policy authority and legislative priority, thus pacifying the drafting office that the request must be included in their timetable with immediate effect.
- And finally, practical details, such as the name of instructor, contact details, planned leave etc offer a personal touch, which facilitates the required dialogue between instructing officers and drafters.

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It is worth noting that the UK Office of Parliamentary Counsel requests the following points of content from drafting instructions,[46] which correspond to the mischief rule in *Heydon's Case*:[47]

- A brief introduction setting out:
  - the factual and political context in which legislation is being proposed;
  - the general purpose of the changes that are being proposed; and
  - the principal reasons for legislating.
- A description of the relevant existing law and of its application in practice.
- A description of the respects in which, and extent to which, the existing law prevents the implementation of the department's policy ('the mischief').
- A full description of the legal changes to which the Bill is to give effect in order to provide a remedy for the mischief ('the remedy').
- A description of the incidental and supplemental provisions needed to support the remedy.

[45] See Office of Parliamentary Counsel, Australian Government, 'Working with the Office of Parliamentary Counsel—A Guide for Clients' (n 39) paras 87–88.
[46] See Office of Parliamentary Counsel UK, 'Working with Parliamentary Counsel' (n 15) para 165.
[47] (1584) 3 Co Rep 7a20.

homeless who now train and re-enter the job market. Thus, the legislative plan acts as the Bill's early quality control mechanism.

Secondly, a complete legislative plan identifies all elements of the proposed legislation, thus preventing disruption of drafting.[17] Before drafting is even attempted, the legislative plan offers prominence to the central elements of the proposed legislation, thus ensuring that central concepts are not missed, that the meanings attributed to them by all members of the drafting team are agreed upon and that the relationship between the requested Bill and Acts already in the statute book are exactly how the instructing officers envisaged and expected them to be. For example, in response to a request for legislation making trade in human organs an extra-territorial offence, the legislative plan will reveal that there is already legislation regulating transplants of human organs, that there is already a signed UN Convention on Trade in Human Organs that has been ratified and implemented by the jurisdiction and that the only point of law reform remaining for the drafter to deal with is the declaration of extra-territoriality of the existing offence. And so the policy goal may well begin as the eradication of the exploitation of the foreign poor by the citizens of the jurisdiction, the substantive law may call for a criminalisation of the extra-territorially committed offence and the drafter may well propose putting the policy and law reform into effect by an amendment to the existing Act adding the clause 'Utopia or abroad' in the definition of the existing offence. And, going back to the first point, this is the perfect stage of the process for the drafter to confirm that the legislative solution put forward is not only technically correct but also effective in its serving of the policy goal. The instructing officers may, and indeed must, argue that the mere amendment of the existing Act does not serve them very well, as users of the legislation may well miss the crucial change of law effected by the drafter, and that it may be more effective for the prevention of the extra-territorial offence but also for the investigation of the new offence to actually set it out in a separate section with a heading alerting them to extra-territoriality. Whichever view prevails at the end of the drafting process, it makes much more sense for this discussion to take place in stage two, rather than in stage five of the process, which will inevitably signify embarking on a new drafting effort, following stages two, three, four and five all over again.[18]

Thirdly, a complete legislative plan encourages the drafter to identify all elements of the requested legislation, and allows them to analyse each one separately and in turn. Logical structures and complete solutions are encouraged. By identifying the main elements of the legislation early on,

[17] Sir G Engle, '"Bills are Made to Pass as Razors are Made to Sell": Practical Constraints in the Preparation of Legislation' (1983) 4 *Statute Law Review* 7, 14 ff.

[18] See R van Gestel and J Vranken, *Kwaliteit van beleidsanalytische wetgevingsadviezen van de Raad van State* (The Hague, Boom Juridische Uitgevers, 2008) ch 2.

the drafter can alert their instructing officers to aspects of the legislation that may have been neglected or that may have been erroneously added in the drafting instructions. For example, a request for legislation regulating transport of goods via the sea needs to be evaluated in order to ensure that it is strictly sea transport that instructing officers aim at, rather than perhaps transport by sea and by the land's internal waterways. And at the same time, the identification of all possible elements of the requested legislation requires their prioritisation in the structure of the Bill. For example, robbery may also include armed robbery; and it makes sense at this early design stage for instructing officers to confirm whether they envisage that the legislation will address both robbery and armed robbery, whether they envisage a single Act dealing with both and whether they agree, as they should, that the section on armed robbery will follow the one on robbery. In fact, the drafting team may, at this point, decide to only deal with one element of the legislation or may decide to divide the legislation into distinct parts set in a rational sequence. And so, the legislative plan assists with the division of long instruments into distinct parts; with the introduction of a logical relationship between the parts and the whole; and with the identification of a rational sequence of normative provisions focusing only on the questions within the scope of the problem.[19] One caveat here: as the legislative plan is simply a first attempt of the drafter to deal with the request, there is absolutely nothing binding in its contents. There is nothing that can guarantee that the plan will not change with the further elaboration of the concepts: for example, upon the drafter's suggestion that both robbery and armed robbery may be included in the requested legislation, further analysis of statistics by the instructing officers may well lead to their decision to offer armed robbery a separate legislative solution with a specific policy objective driven by evidence-based analysis on the types of weapons used or the repeat offence policy of the instructing department.

Fourthly, by identifying the elements of the legislative solution, the design ensures that the drafter examines all relevant evidence and facts and that these facts are classified logically.[20] In jurisdictions where drafting instructions take a narrative form with multiple attachments of policy studies and policy and legal opinions it is possible that the drafter misses a document or piece of evidence. The legislative plan, which can briefly explain how each document has been used, or which may simply list the received document, can ensure that the drafter uses all documents sent by the instructing officers. In jurisdictions where drafting instructions are brief and without a

[19] See JC Dernbach, RV Singleton II, CS Wharton, JM Ruhtenberg and CJ Wasson, *Legal Writing and Legal Method* (Austin, Wolters Kluwer, 2007) 62.

[20] See A Seidman, RB Seidman and N Abeyesekere, *Legislative Drafting for Democratic Social Change—A Manual for Drafters* (The Hague, Kluwer, 2001) 88.

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4. Exceptional provisions, temporary provisions and provisions relating to the repeal of legislation should be separated from the other provisions and placed by themselves under separate headings.
5. Procedure and matters of detail should be set apart by themselves and should not, except under very special circumstances, find any place in the body of primary legislation.

CONCLUSIONS

The second stage in the process of legislative drafting is 'understanding the proposal'. It refers to the drafter's elaboration on the drafting instructions, an intellectual process that begins the tri-alogue between policy, legal and drafting officers. This is the drafter's opportunity to ask questions, to fill in gaps, to bring to the table initial thoughts, to confirm and to receive feedback.[77] This is the drafter's opportunity to ensure that they understand fully the drafting instructions or, alas, to place the drafting process back into the straight and narrow after a bad start with laconic instructions or lay drafts.

At the centre of the drafter's consideration lies of course the legislative solution. This refers to the policy option put forward by the policy officers, as translated into substantive law by the legal officers. The drafter's task here is to confirm the accuracy of the translation and to translate the legal concept further into legislative expression. This is far from a technical task: translation here encapsulates creativity that can, and often does, fine-tune or change the underlying policy.[78]

In the process of this analysis, the drafter also considers the current legal status in the field of law under review as a means of identifying the mischief, the necessity of the legislation that can only be used as a solution of last resort, and the constitutional, legal and practicable constraints within which the drafting team must act.

All these elements are recorded in a self-addressed memorandum known as a legislative plan, or a legislative scheme or a research report. Whatever its designation, the legislative plan aims to assist the drafter in the organisation of thoughts, concepts and solutions in a manner that can be, if they so wish, shared within the drafting team.

The foundations of the architectural building of the requested legislation are set at this early stage before the drafter starts drafting. But of course nothing is written in stone, and all these thoughts, concepts and ideas are subject to continuous internal verification, and to the formal internal and external verification of stage five of the drafting process.

[77] Office of Parliamentary Counsel, *Working with the Office of Parliamentary Counsel: A Guide for Clients*, 2nd edn (n 9) 42, para D3.
[78] D Hull, 'Drafters' Devils' (2000) *Loophole* http://www.opc.gov.au/calc/docs/Loophole/Loophole_Jun00.pdf.

4

Structure of a Bill

HAVING UNDERSTOOD THE drafting instructions and analysed the proposal via the compilation of a legislative plan the drafter proceeds with stage three of Thornton's drafting process, namely with designing the law. This entails the early[1] identification of the appropriate legislative structure for the Bill as a whole in as much detail as possible, even down to the internal organisation of each particular clause or Schedule. As Sir George Engle states, 'it is not too much to say that good design, in this sense, is the essence of a well-drafted Bill'.[2]

At this point it would be necessary to state that the stages of the drafting process are neatly distinguished and classified for the purposes of their academic examination and study. However, they are not equally neatly distinguishable in practice: understanding and analysis are ongoing processes that continue throughout the drafting process even past the verification stage; and issues of design are conceived in stage three but they continue to spread into composition[3] and of course verification. Within the realm of fluidity of intellectual engagement with the legislative text, structure is considered mainly in stage three (design): but it cannot be amputated from stage four (composition) of which it forms an integral part.

Structure is not merely a technical concern. Prioritising the provisions within the legislative text ensures that the prime message of the communication that is drafting can be placed at the very beginning of the text, where the reader's attention is at its prime. This is not a novel concern. Drafting has a lot to learn from advertising in the techniques used to ensure that, whatever the abilities of the audience, they come out with one clear message. Similarly, in drafting the drafter needs to ensure that, whatever the abilities of the users, the prime message of the legislative text as an expression of the regulatory choice comes out loud and clear. If the message is a prohibition, then this is exactly what the user needs to take away from the legislative text; if the message is a declaration, then

[1] See AG Mackay, 'Some General Rules of the Art of Legal Composition' (1888) 32 *Journal of Jurisprudence (TT Clark)* 169, 178–79.
[2] See Sir G Engle, '"Bills are Made to Pass as Razors are Made to Sell": Practical Constraints in the Preparation of Legislation' (1983) 20 *Statute Law Review* 7, 14–15.
[3] See A Seidman, RB Seidman and N Abeyesekere, *Legislative Drafting for Democratic Social Change—A Manual for Drafters* (The Hague, Kluwer, 2001) 210.

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MARGINAL REFERENCES

Marginal references are introduced in the text to provide the user with the reference to another price of legislation mentioned in the Act; or to indicate which part is found in the page. Marginal references carry an inherent risk of confusing the user, since they are not found in non-legislative texts. As a result, they are of doubtful value for lay users, and should be introduced in the simplest possible manner:

27 of 1968 Or 1968 c. 27	NOT	Cap.27 of 1968 or 1968 Chapter 27

TABLE OF ARRANGEMENTS OR ARRANGEMENT OF SECTIONS

This is a practice followed in some jurisdictions where marginal notes or headings are placed as a table of contents. The practice is highly recommended, as it provides a clear guide to the legislation in the form of a roadmap. Its success in serving effectiveness via clarity depends greatly on the accuracy of the headings or marginal notes that form the table's constituting elements.

REAL INNOVATION: THE LAYERED APPROACH[44]

But all these techniques seem to address the problem of approachability of legislation by means of structure influenced by the content and nature of the provision at hand. And so structure of legislative texts, as things stand, is decided on the basis of primary versus secondary regulatory messages, substantive provisions versus administrative provisions, or substance versus procedure. On what basis was this approach selected? Without empirical evidence to show its theoretical basis, one could fault it as haphazard. Admittedly, this is an approach based on logic, and philosophical and linguistic approaches to language and thought structure. But is it the only, or the best way, of approaching structure?

[43] But see contra, J Hartley and M Trueman, 'A Research Strategy for Text Designers: the Role of Headings' (1985) 14 *Instructional Science* 99, 149–51.

[44] The term, and to a certain extent, the concept is attributed to John Witing, Tax Director at the Tax Simplification Office. I am very grateful to John for his inspiration and the generosity with which he has shared it with me.

The 2013 Good Law Initiative of the UK's Office of Parliamentary Counsel in cooperation with the National Archives has offered an empirically led and methodologically sound insight into the profiles of legislative audiences. And so, finally, the profile of users of legislation has been revealed, to a great extent. Legislation is read by three main groups of users: lay persons seeking information on their rights and obligations; non-lawyers seeking guidance for the performance of their professional duties; and lawyers and judges interpreting and applying the law. This study can and must revolutionise the way in which legislation is drafted. Structure can now be approached by use of the people to whom it must speak. And so content of provisions must bow down to the profile of users.

This leads us to the concept of a layered approach to legislative drafting. So far, drafters have been lodged and squashed between the clashing stones of inherent legislative complexity and increasingly loud demands for simplicity of expression. An alternative, less rigid, approach to the drafting of legislative texts could be offered if one breaks free from the requirements of a unique and standard legislative language: this would allow drafters to imitate oral communication, and pitch the legislative text to the specific abilities and requirements of the precise audiences of each provision. The layered approach promotes the division of legislation into three parts, corresponding to each of the three profiles of legislative users identified eloquently by the Good Law Initiative. Part one of the legislation can speak to the lay persons: the content is limited to the main regulatory messages, thus conveying the essence of law reform attempted by the legislation, focusing gravely on the information that lay persons need in order to become aware of a new regulation, to comply with new obligations or to enjoy new rights. Part two of the legislation can speak to non-lawyers and other professionals who use the legislation in the course of their employment. Here one can see scope for further detail in the regulatory messages introduced, and for language that is balanced (technical, yet approachable to the professionals in questions). Part three of the legislation can then deal with issues of legislative interpretation, issues of procedure and issues of application, in a language that is complex but not quite legalese, as there is nothing to prevent all groups from reading all parts.

The layered approach is revolutionary, as it shifts the criterion for legislative structure from the content and nature of provisions to the profile of the users of each provision. And so when drafting, drafters have to decide to whom they are speaking in each case, and then place that provision to the relevant part. The layered approach is revolutionary because it offers a humanistic aura in drafting, making structure user-centred, and thus promoting a link between policy and effecting legislative text, but also enhancing

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of overlap of the terms used: use of a number of overlapping vague terms can allow the user to acquire precision and indeed clarity in the semantic field of the concept transmitted by sheer reference to the concrete area of overlapping semantic fields of the vague terms. Precision in spatial reference may be achieved through the overlapping of circles and the focusing of attention on the area which the several intersecting circles have in common.[29]

And finally, vagueness can serve in the very rarely justifiable cases where the drafter may wish to sneak into the legislation a degree of discretion for judges or enforcers. Judges are often called up to decide on a case by case basis issues that have not been possible to draft clearly in the legislative process.[30] The danger here is that judges may be ultimately called to legislate rather than apply: but there is always scope for specification via application, an action legitimately within the competence of the judiciary. And when it comes to vagueness allowing discretion to government officials and enforcers, the danger of inviting corruption is enhanced: but it often unavoidable to allow for example the Minister enhanced discretion to decide if naturalisation of a foreign citizen is acceptable. Whatever the reason behind vagueness in legislation, it is served much better when the law-makers and the courts are not antagonistic with each other.[31]

It is notable that in all these cases it is vagueness that seems justifiable, or even desirable,[32] but not ambiguity.[33] In order to explain why this is the case, it is necessary to define the two terms.

AMBIGUITY AND VAGUENESS[34]

Although there is widespread agreement that clarity, precision, and unambiguity should be pursued, their meaning, application and hierarchy (if any) in current drafting dilemmas is not equally clear. Clarity is defined as 'clearness or lucidity as to perception or understanding; freedom from indistinctness or ambiguity'.[35] The Law Reform Commission of Victoria argued that precision

[29] See I Richards, *The Philosophy of Rhetoric* (Oxford, Oxford University Press, 1965) 69–78.

[30] See A Miller, 'Statutory Language and the Purposive Use of Ambiguity' (1956) 42 *Virginia Law Review* 23.

[31] See Note, 'The Void-for-Vagueness Doctrine in the Supreme Court' (1960) 9 *University Pennsylvania Law Review* 67.

[32] See R Dickerson, 'Some Jurisprudential Implications of Electronic Data Processing' (1963) 28 *Law and Contemporary Problems* 53, 62.

[33] But see contra A Miller, 'Statutory Language and the Purposive Use of Ambiguity (1956) 42 *Virginia Law Review* 23; G Fraser, 'In Praise of Ambiguity' (2000) *Policy Options* 21, 25; and P Thomas, 'Legal Skills and the Use of Ambiguity' (1991) 42 *Northern Ireland Legal Quarterly* 14, 22–23.

[34] For a detailed analysis, see R Dickerson, 'The Diseases of Legislative Language' (1964) 1 *Harvard Journal on Legislation* 5.

[35] See C Soanes (ed), *Compact Oxford English Dictionary* (Oxford, Oxford University Press, 2003) 193.

and clarity are not competing goals: in its true sense, precision is incompatible with a lack of clarity.[36] For Gérard Caussignac 'clear' means easy to understand, intelligible, unequivocal or unambiguous.[37] And so Majambere is right in stating that that 'it is not possible to separate, clarity, precision and ambiguity when drafting'.[38] Kabba clarifies this point even further: in juxtaposing the definitions of clarity and unambiguity, one finds that the latter is part of clarity, as they share similar characteristics.[39] If one goes back to the pyramid depicting the hierarchy of drafting virtues, it becomes clear that clarity, precision and unambiguity all serve as techniques used for effectiveness, which have equal standing. And so in a dilemma, the drafter will implement whichever of these virtues best serves effectiveness based on the type of legislation that is being drafted, and the audience that it is drafted for.

Perfect words express a semantic field, namely a well defined, well described meaning. They can be pictured as perfect circles, with clear boundaries, and generally agreed semantic elements known as referents. Having clear boundaries and agreed referents offer perfect words the luxury of serving as tools of perfect communication: the message conveyed by the person who utters them is identical to the message received by their recipient. If one applies this to drafting as a form of communication, the use of perfect words by the drafter ensures that the reader and user of legislation attribute to legislative words the exact meaning intended by the drafter. And so the use of the word 'tree' conveys the message of a tall plant with leaves. And it distinguishes it from the concept of a bush or an animal. When established, this perfect communication detracts from the drafter's need to define, as the definition would be superfluous, and the judge has no need to interpret. But, unfortunately, perfect words do not really exist: it is not the word that defines the meaning, it is people who define a meaning.[40] And perfect communication in legislation is an even rarer phenomenon:[41] legislation is an expertise;[42] the high number and diversity of recipients leads to inherent possibilities of misunderstanding; and legislation as a form of written communication lacks the luxury of gesture and elaboration often afforded in oral face to face communication.

[36] See Law Reform Commission of Victoria, Report No 9, *Plain English and the Law* (1987) para 65.

[37] See G Caussignac 'Clear Legislation' (The International Cooperation Group, Department of Justice of Canada, 2005) 1 www.justice.gc.ca/eng/abt-apd/icg-gci/cl-lc/cl-lc.pdf.

[38] See Majambere, 'Clarity, Precision and Unambiguity (n 3) 419.

[39] See K Kabba, 'Gender-neutral Language: an Essential Language Tool to Serve Precision, Clarity and Unambiguity' (2011) *Commonwealth Law Bulletin* 427, 431.

[40] See J Waldront, 'Vagueness in Law and Language: Some Philosophical Issues' (1994) 82 *California Law Review* 509, 510.

[41] See L Del Duca, 'Introduction Symposium on the UCC, SEC, ALI, Federal Rules and Federal Government Simplification Experiences—Is It Time for a Model Set of Drafting Principles?' (2001) 105 *Dickinson Law Review* 205, 211; also see J McBaine, 'The Rule Against Disturbing Plain Meaning of Writings' (1942–43) 31 *California Law Review* 145, 147.

[42] See F Bennion, 'The Readership of Legal Texts' www.francisbennion.com.

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and treats women and men equally. Traditionally, in our society, men have been the dominant force and our language has developed in ways which reflect male dominance, sometimes to the total exclusion of women. Gender-neutral language, also called non-sexist, non-gender-specific, or inclusive language, attempts to redress the balance.[93]

Admittedly, the mere reference to gnd seems to bring many a drafter around the Commonwealth to covert amusement.[94] It is often ridiculed as one more feminist invasion in legislative drafting, and it is often justified by reference to the provision common in many Interpretation Acts which foresee that '"he" includes "she"'.

Although it is quite tempting to ask whether the male of our species would accept a conversion to '"she" includes "he"', the main concern with gender-specific language is clarity and unambiguity.[95] With reference to clarity, it is any woman's right to consider that the statute does not apply to them if it is written in the male form: and although the Interpretation Act may say otherwise,[96] how many non-lawyers are aware of it or have read it in detail? And, after all, it is a consequence of the rule of law that women are clear in their understanding of which statutes apply to them and which do not. With reference to ambiguity,[97] 'he' can be both 'he' and 'she' in a great number of statutes, but equally 'he' is only 'he' where gender-specific language is actually appropriate.[98] For example, in jurisdictions where the military is exclusively male, one wonders whether the application of '"he" includes "she"' could lead to the admission of women in the army by broad interpretation of the male pronoun under the Interpretation Act, especially where there is no express provision to the contrary. And so within the modern drafter's striving to achieve clarity and minimise ambiguity, gender-neutral language is a much pronounced demand. Mary Jane Mossman, a Canadian legal academic explains the reasons for non-discriminatory language in law as being important to promote accuracy in legal speech and writing; to conform to requirements of professional responsibility; and to satisfy equality guarantees in laws and the constitution.[99]

[93] See UNESCO, 'Guidelines on Gender-Neutral Language' (1999) http://unesdoc.unesco.org/images/0011/001149/114950mo.pdf.
[94] See WB Hill Jr, 'A Need for the Use of Non-sexist Language in the Courts' (1992) 49 *Washington & Lee Law Review* 275.
[95] See DT Kobil, 'Do the Paperwork or Die: Clemency, Ohio Style?' (1991) 52 *Ohio State Law Journal* 655; KW Graham Jr and CA Wright, 'Commenting on Gender Neutral Amendments to a Federal Rule of Evidence' (Federal Practice and Procedure, para 5231.1) (Suppl 1998).
[96] See eg UK Interpretation Act 1978, s 6.
[97] See WP Statsky, *Legislative Analysis and Drafting* (St Paul, MN, West Publishing Company, 1984) 183.
[98] See GG Corbet, *Gender* (Cambridge, Cambridge University Press, 1999) 21.
[99] See MJ Mossman, 'Use of Non-Discriminatory Language in Law' (1995) 20 *International Legal Practice* 8.

But, is it possible to draft in gnl? Gnl has been adopted by the New South Wales Office of Parliamentary Counsel in 1983, by New Zealand in 1985, by the Australian Office of Parliamentary Counsel in 1988, by the UN and the International Labour Organization roughly around 1989, by Canada in 1991, by South Africa in 1995 and by the US Congress, albeit not consistently, in 2001. In the UK gnl has been applied to all government Bills and Acts since 2007.[100] And so gnl is possible. It is also practicable,[101] provided that 'it comes at no more than reasonable cost to brevity or intelligibility'.[102] In fact, there is no technical reason why legislation should not be drafted in a way that avoids gender-specific pronouns.[103]

But what exactly does a switch to gnl entail? According to the guidance of the UK Office of Parliamentary Counsel it entails abandoning gender-specific pronouns to refer to a person who may be either male or female or neuter; and avoiding nouns that take a form that appears to assume that a man rather than a woman will hold a particular office, do a particular job or perform a particular role.[104]

From the point of view of terminology choices, the term 'man' is to be avoided. Originally, it meant 'human being' or 'person', but over the years it has come to mean only male humans. For many people, the generic use of 'man' causes ambiguity as to which of the two concepts it conveys: 'person' or 'male human'? Similarly, the term 'Chairman' generates distaste. 'Chairperson', 'convener', 'coordinator', 'moderator' or 'president' are possible alternatives, but the term 'chair' has emerged as the most accepted alternative in government, universities and business. If reference is made to the person chairing a meeting, 'the Chair' is a good choice. 'Madam Chair' or 'Mr Chair' defeat the object of gender neutrality and are best avoided. So, this type of gender-specific terminology can be avoided by a number of competing drafting techniques. The drafter can use neutral terms such as 'person' or 'individual', and can adopt neutral alternatives for masculine-based nouns[105] such as 'drafter', 'fire fighter', or 'chair'.[106]

[100] See Statement by Leader of House of Commons, HC Deb 8 March 2007 col 146 WS.
[101] See S Petersson, 'Gender Neutral Drafting: Recent Commonwealth Developments' (1999) 20 *Statute Law Review* 35, 57.
[102] See Office of the Parliamentary Counsel, 'Gender-Neutral Drafting Techniques' (Dec 2008) Drafting Techniques Group Paper 23 (final).
[103] See D Greenberg, *Craies on Legislation* (London, Sweet and Maxwell, 2008).
[104] See Sir S Laws, 'The Implementation of a Policy of Gender-neutral Drafting' (19 June 2007) RRDrafting note.fm.
[105] See UNESCO, 'Guidelines on Gender-Neutral Language' (n 92) 9.
[106] See eg the Pensions Act 2008, sch 1, and the Child Maintenance and Other Payments Act 2008, sch 1. But the use of 'chair' remains controversial: the New Zealand Law Commission *Legislation Manual Structure and Style* (1999), 48 (NZLC IP2, 2007), suggests 'chairperson' while avoiding 'chair'. In 2007 Conservative MP Ann Widdecombe declared: 'A chair is a piece of furniture. It is not a person. I am not a chair, because no one has ever sat on me': see T Branigan, 'Straw: Future Laws to be Gender Neutral' *Guardian* (9 March 2007) www.guardian.co.uk/gender/story/0,,2030075,00.html.

example, 'Succession takes place after the heir's eighteenth birthday'. And so, although the future tense is rarely appropriate in drafting legislation, it is sometimes necessary: but the temporal point of reference is the time at which the law is applied, not when it is written and not when it takes effect. In any case, 'shall' does not convey the future tense.

This is an established drafting convention, at least in principle. The innovation brought in by the plain language movement concerns the increasing use of the present tense in legislation as a means of conveying an obligation, a 'shall' of the past.[62] For example, instead of stating that 'The Commissioner shall consult...' the drafter can simply state 'The Commission consults'. This is not an expression with great acceptance in the drafting world. Objections mainly refer to the need for the drafter to state the obligation in the provision. But is it really necessary? Legislation is compulsory, it introduces commands that must be complied with anyway.

The use of 'shall' other than as an expression of a concrete obligation—in which case it must be substituted by 'must'—is therefore superfluous.[63] And not just that: it creates the legitimate impression that where 'shall' is not used, the provision in not binding. One can only dread the time when the bindingness of a statute becomes a point of discussion, doubt or debate. Moreover, the inherent ambiguity of 'shall' would lead any open-minded drafter to the conclusion that the present tense as its plain language equivalent is a far better choice. With one caveat: as is the case with any unilateral departure from a drafting convention, the transfer from the dreaded 'shall' to the desirable, innovative and plain language present tense must be done consciously and in a manner offering the text predictability, for example with a clear, well published memorandum of the drafting office. The transfer may be burdensome in the beginning, and will inevitably invoke criticism from the traditionalist drafting and legal community, but it is certainly a project worth undertaking. Lay persons are not aware of the legal meaning of the term, whilst lawyers and judges are very much aware of the compulsory nature of legislation. Superfluous words distract the reader from the essence of the message, whist ambiguous words lead to lack of clarity. Why take that chance with a word that can be classified as both superfluous and ambiguous?

Positive Style

A drafting practice, still prevalent in most of Africa but thankfully increasingly rare in Europe, involves the use of the negative style of expression. For example, 'If a member does not send their payment by

[62] See L Dodova, 'A Translator Looks at English Law' (1989) 10 *Statute Law Review* 69, 77.
[63] See MM Asprey, 'Shall Must Go' (1992) 3 *Scribes Journal of Legal Writing* 79, 82.

the end of the month, the Board does not renew their membership of the scheme'. Or 'Persons other than the primary beneficiary may not receive these dividends'.

The problem here is that the negative style of expression complicates the sentence unnecessarily. It is much clearer to say 'Membership is renewed upon payment of membership fees before the end of each calendar month'. Or 'Only the primary beneficiary may receive these dividends'. And a double negative does not necessarily mean a positive. To quote from Sir Geoffrey Bowman: 'The appeal may proceed only if the tribunal has not certified that the appeal is not validly made' is not the same as 'The appeal may proceed only if the tribunal has certified that the appeal is validly made'.[64]

THE DEBATE: CONCERNS WITH PLAIN LANGUAGE

Concern 1: Plain Language Lowers the Standards of Good Writing

This concern stems from the view that plain language consists of monosyllabic words, very short sentences and a complete rejection of complex words or sentence construction. If this were true of plain language, then the criticism could be valid. It would certainly not be useful to draft statutes and legal documents in simplistic monosyllabic words. However, as other commentators have pointed out, this is to misunderstand plain language. As the Law Reform Commission of Victoria notes:

> Plain English involves the use of plain, straightforward language which avoids defects and conveys its meaning as clearly and as simply as possible[65], without unnecessary pretension or embellishment. It is to be contrasted with convoluted, repetitive and prolix language. The adoption of a plain English style demands simply that a document be written in a style which readily conveys its message to its audience.[66]

But, would it really be detrimental, if plain language did lower the standards of good writing? Is it that crucial for legislation to be drafted in an elegant and grammatically correct style? At the end of the day, language is simply a tool serving clarity and in turn effectiveness. More often than not, grammatical correctness enhances predictability of the text, thus promoting a common understanding of the concept as communicated and received. In that sense grammar is an ally for the drafter. However, given the choice

[64] See G Bowman, 'The Art of Legislative Drafting' (2005) 7 *European Journal of Law Reform* 3, 12.
[65] See Hon Mr Justice Nazareth, 'Legislative Drafting: Could our Statutes be Simpler?' (1987) 8 *Statute Law Review* 81, 92.
[66] See Law Reform Commission of Victoria, *Plain English and the Law* (1987) 39.

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Whatever the need may be, the drafter's task is to introduce the commencement date in a simple and clear manner. It is imperative that the user understands very clearly when their rights and obligations begin, and when they need to amend their behaviour in order to comply with the new legislation. The formula of the UK Crimes and Courts Act 2013 manages the complete opposite. Before proceeding further, it is important to note here that the Act is a technical piece of legislation addressed mainly to lawyers and judges, hence the drafter's slip towards complexity. The example, unfair as it may be, is very valuable to illustrate exactly what wording is to be avoided in legislation addressed to lay users.

But even simple commencement provisions manage to confuse the users. Drafters have long hidden behind the practicalities of the legislative process. Admittedly it is almost impossible for the drafter to foresee when assent to the Act will take place or when the administrative arrangements for the law will be completed. But these arguments, much as they stand true, tilt the burden to the drafter's or the government's convenience rather than towards the need for clarity, precision and unambiguity. Effectiveness of the legislation can no longer be compromised simply because whatever Parliaments vote cannot be changed before commencement. At the end of the day, allowing the drafter to add the specific start date is not an addition against what Parliament voted: far from it; it is simply a clarification of Parliament's will. After all, a clerk in the Public Bill Office changes references to the year in cases where the Bill concludes its passage in the year subsequent to that in which it was introduced;[59] and so a change of commencement date is not unknown to parliamentary practice. As for commencement provisions that reflect the need to wait for a delegated instrument expressing ministerial confirmation that the administrative arrangements have been introduced or that delegated legislation has been completed, again this cannot be an obstacle to clarity, precision and unambiguity of commencement dates. Governments may choose to offer the whole package to Parliament thus facilitating precision in commencement dates. 'No Bill should be promoted if commencement is neither definite nor likely within a reasonable time'.[60] Or, perhaps more realistically, the drafter can replace the vague commencement provision with a precise one as soon as ministerial confirmation is offered. An ideal form for commencement would be: This Act comes into force after 31 December 2013.

Whatever form is used, there must be certainty whether an enactment is or is not in force. And in order to achieve this admirable aim the drafter has to reconsider whether the term 'commencement' is understood by lay users or not. The Good Law survey shows clearly that the term is not understood

[59] See F Bennion, 'Modern Royal Assent Procedure at Westminster' (1981) 2 *Statute Law Review* 133, 137.

[60] See A Samuels, 'Is it in Force? Must it be Brought into Force?' (1996) 17 *Statute Law Review* 62, 65.

by users. Perhaps it is not time to replace it with the plain language equivalent 'start date'.

APPLICATION PROVISIONS

Application provisions clarify the extent of the new regulation introduced by the legislative text: they can explore who, what, when and where the legislation regulates. Answering 'who' may refer to the persons to whom the law applies: the Crown, or specific circles of persons such as diplomats, residents, members of a profession etc. Answering 'what' may refer to specific areas of regulation, for example services as opposed to goods, or inland waterways as opposed to the sea. Normally the question 'what' requires the drafter to weed out of the legislation a part of the genre to which it applies. The question 'when' may refer to the points in time that are regulated by the legislative text, for example the past, the future, or a transitional period. And the question 'where' refers to the geographical extent of the legislative text's bindingness, for example, the UK or Northern Ireland.

The general rule is that legislative texts normally apply to all persons within the jurisdiction, to all parts of the regulatory field, to all prospective periods of time (now and in the future), and to the whole area of the jurisdiction of the state. Any departure from it must be clearly introduced and signposted to allow the reader to focus their attention and imprint it in their brains. The question is whether there is any scope in repeating the general rule in the legislative text. There is a persuasive argument supporting the view that even the general rule is worth repeating, simply because the user is not necessarily aware of it. It is doubtful whether the drafter needs to state that this Act applies to all persons in the UK, the whole of the UK, now and in the future. This would be superfluous. But clarifying any possible legitimate doubts for the user is a commendable practice. In the UK, post devolution, it does not harm to state where the Act applies to, simply because the complexity of the devolved constitutional structures may leave the user wondering whether the Act applies to them or not. Similarly, in legislation related to immigration it is worth stating that the Act applies to nationals and residents alike: the topic itself sheds doubt over this rather simple question. The subjective, phronetic decision of the drafter is required once again. But the answer must derive from the needs of the users rather than the drafter's legal training and expertise.

INNOVATIONS FOR THE FUTURE

The expression and layout of preliminary provisions are crucial for the user friendliness and accessibility of the legislative text. First impressions matter, and often the reader is discouraged from continuing owing to the current

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consequences; or when the proposed solutions are controversial politically. Another factor in favour of primary legislation refers to the characteristics of the proposed measure: a wide circle of addressees; general application;[63] or legal bindingness. The main factor in favour of delegated legislation is an enabling clause. The constitution or constitutional principles must not prohibit the delegation. The enabling clause must be introduced in primary legislation. The clause must delimit precisely the scope of the delegation. The clause must determine the aim and the means of the delegated instrument. Another factor in favour of delegated legislation is the characteristics of the proposed measure, namely the need for flexibility of regulation, the technical or detailed nature of the normative matter or the need for repetitive acts. What is surprising and therefore noteworthy is that the choice of primary legislation as a means of transposition does not delay the process at all.[64] But, whatever the choice on the form of the national measure, the drafter as an agent of the state cannot draft 'any measure which would conceal the Community nature and effects of any legal provisions from the person to whom it applies'.[65] And as a result, there must be visibility of the connection between the EU and the national legislative texts.

THE CHOICE OF LANGUAGE, SYNTAX AND STRUCTURE

The task of national authorities does not end with the choice of form of the national implementing measure. The EU has turned its attention to quality of EU and national implementing measures, and now requires that national legislative texts adhere to its rules for quality of legislation.[66] Unfortunately, there is no magic formula for achieving quality in legislation.[67] Each country has its own rules that are affected by the type of its legal system (is it a civil or a common law system?), the type of its polity (federal state?) and

[63] The wide circle of addressees and the wide application of the measure are judged on the basis of its true characteristics and not on the basis of its title. See Case T-17/00 *Willy Rothley and Others v European Parliament* [2002] ECR II-579, [61]; the mere fact, however, that the number and even the identity of the persons to whom a measure applies can be determined in no way implies that those persons must be regarded as individually concerned by that measure, where that measure applies to them as a result of an objective situation of law or fact specified by the measure at issue: see Case 6/68 *Zuckerfabrik Watenstedt v Council* [1968] ECR 409, [415]; see also Case C-10/95 P *Asocarne v Council* [1995] ECR I-4149, [30].

[64] See E Borghetto, F Franchino and D Giannetti, 'Complying with the Transposition Deadlines of EU Directives—Evidence from Italy' (2006) 1 *Rivista Italiana di Politiche Pubbliche* 7.

[65] See *Amsterdam Bulb BV v Produktschap voor Siergewassen* (n 37).

[66] See W Robinson, 'How the European Commission Drafts Legislation in 20 Languages' (2004) 53 *Clarity* 4, 6.

[67] Nevertheless, national drafting guidelines introduce similar standards of quality: see H Xanthaki, 'The Problem of Quality in EU Legislation: What on Earth is Really Wrong?' (2001) 38 *Common Market Law Review* 651.

the main aim of its legislators (to promote economic development, in which case legislation must serve corporations, or to protect its citizens, in which case legislation must be simple and approachable by all?).[68]

However, the EU has gone a long way in defining quality in legislation in a manner that is acceptable and receivable by all Member States.[69] Jean-Claude Piris has stated that there are two aspects to the issue of quality: quality in the substance of the law and quality in the form of the law. Quality in the substance of the law refers mainly to issues of legislative policy and covers tests of subsidiarity and proportionality, choice of the appropriate instrument, duration and intensity of the intended instrument, consistency with previous measures, cost/benefit analysis and analysis of the impact of the proposed instrument on other important areas of policy, such as SMEs, environment, fraud prevention etc. Quality in the form of the law concerns accessibility, namely transparency in the decision-making process, and dissemination of the law.[70] EU drafting rules can be classified into three categories: rules concerning the substance of the legislative text, rules related to the legislative process which leads to their passing and rules relevant to technical drafting issues.

As for the substance of the legislative text, EU legislation must be an essential and effective means of achieving the aim of the law in question: thus, alternative means of regulation, such as inter-trade agreements, must be encouraged, and so is abstinence from regulation in areas which do not fall within priority policy issues.[71] EU legislation must be proportional to the aim to be achieved,[72] and consistent with existing legislation. Moreover, it must take into account the particular needs of the users of the final texts: thus, it must determine the new rights and obligations introduced by it in

[68] See Rt Hon Lord Renton, 'The Preparation and Enforcement of Legislation in the Enlarged Community' (1996) 17 *Statute Law Review* 1, 3.

[69] See Commission, 'European Governance: Better Lawmaking' (Communication) COM (2002) 275 final; see also H Xanthaki, 'The SLIM Initiative' (2001) 22(2) *Statute Law Review* 108–18.

[70] See JC Piris, 'The Quality of Community Legislation: the Viewpoint of the Council Legal Service' in A Kellermann et al (eds), *Improving the Quality of Legislation in Europe* (Nijmegen, Martinus Nijhoff Publishers, 1998) 28.

[71] See 'General Guidelines for Legislative Policy': Communication of 9 January 1996 by the President of the Commission SEC (95) 2255; Commission, 'Towards A Reinforced Culture Of Consultation And Dialogue—General Principles And Minimum Standards For Consultation Of Interested Parties By The Commission' (Communication) COM (2002) 704 final; Commission, 'Updating And Simplifying The Community Acquis' (Communication) COM (2003) 71 final; Commission, 'Impact Assessment Guidelines of the European Commission' SEC (2005) 791; Interinstitutional Agreement of 16 December 2003 On Better Law-Making [2003] OJ C 321/1; Commission, 'On The Outcome Of The Screening Of Legislative Proposals Pending Before The Legislator' (Communication) COM (2005) 462 final; Commission, 'Implementing The Community Lisbon Programme: A Strategy For The Simplification Of The Regulatory Environment' (Communication) COM (2005) 535 final.

[72] Proportionality is defined as appropriateness to meet the needs; see Case C-84/94 *UK v Council* ECR [1996] I-5755, [47], [55], [57] and [58].

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text. Transitional provisions are 'directions governing (the) application (of the new law) in time'.[15] They foresee how these issues are to be dealt with, by dissolving any confusion as to which regime applies and how. They smoothen the transition from the existing legislation to the new legislation, hence their name. They are necessary in tying up the loose ends that would otherwise be left dangling. What happens to cases already in the pipeline when a new system of appeal is instituted? How are licences granted under the old legislation to be affected by the new? What happens to the assets and liabilities of a body corporate whose constitution is being changed from a private company to a statutory corporation? A classic example of a transitional provision is one regulating the transfer of functions, property and staff from a now abolished agency to a newly established one:

> Sec. B-43. Transition provisions. The following provisions govern the transition of the Maine State Museum Bureau to the Maine State Museum.
>
> The Maine State Museum is the successor in every way to the powers, duties and functions of the former Maine State Museum Bureau.
>
> All existing rules, regulations and procedures in effect, in operation or adopted in or by the Maine State Museum Bureau or any of its administrative units or officers are hereby declared in effect and continue in effect until rescinded, revised or amended by the proper authority.
>
> All existing contracts, agreements and compacts currently in effect in the Maine State Museum Bureau continue in effect.
>
> Any positions authorized and allocated subject to the personnel laws to the former Maine State Museum Bureau are transferred to the Maine State Museum and may continue to be authorized.
>
> All records, property and equipment previously belonging to or allocated for the use of the former Maine State Museum Bureau become, on the effective date of this Act, part of the property of the Maine State Museum.
>
> All existing forms, licenses, letterheads and similar items bearing the name of or referring to the 'Maine State Museum Bureau' may be utilized by the Maine State Museum until existing supplies of those items are exhausted.[16]

Other examples of transitional provisions would be those dealing with the transfer of assets and liabilities, pending proceedings or interim arrangements. In view of the common content of these types of provisions with saving provisions, it is obvious why these transitional provisions are often confused with saving provisions. The Australian Office of Parliamentary

[15] See E Edinger, 'Retrospectivity in Law' (1995) 29 *University of British Columbia Law Review* 5, 5.
[16] See Legislative Council, Maine State Legislature, 'Main Drafting Manual' (2009) 20 www.maine.gov/legis/ros/manual/Draftman2009.doc.

Counsel states that there are many types of transitional provisions, since they can:

- modify the effect of the 'new' law; or
- modify the effect of the 'old' law (as it continues to apply by virtue of an application provision); or
- override the presumption against retrospectivity; or
- ensure that an amendment does not affect the interpretation of the 'old' law; or
- ensure that the repeal of an amending Act, or of amending provisions, does not affect the operation of amendments made by the amending Act or amending provisions.[17]

Transitional provisions deal with the passage from the previous regulatory regime to the new one. By definition therefore they have a limited life expectancy. And it is precisely this notion of limited time that they attempt to convey. As a result, transitional provisions come to an end, whereas saving provisions continue their life indefinitely, or at least until repealed. This is their main difference, and so this is the criterion for a classification of a provision under saving or transitional. But this is not always undertaken successfully. For example, section 24 of the Enterprise and Regulatory Reform Act 2013 has completely misnamed saving provisions as transitional. The provisions refer to the exclusion from the scope of the Act of disclosures, requests for information, proceedings and contracts of employment starting before the start date. This is not a transitional provision, it is a saving: these objects continue to be excluded indefinitely, and this is particularly evident in subsection (3).

> 24 Transitional provision
> (1) Section 10 does not apply in relation to a disclosure, or a request for information, made before that section comes into force.
> (2) Section 12 does not apply in relation to proceedings that are in the process of being heard by the Employment Appeal Tribunal when that section comes into force.
> (3) Section 13 does not apply where the effective date of termination of the contract of employment in question is earlier than the date on which that section comes into force.[18]

But inability or difficulty of classification of a provision as a saving or transitional is no excuse for dropping them under one section titled 'Saving and transitional provisions'. This may well salvage the drafter's professional dignity, but it creates ambiguity for the users including judges.

[17] See OPC Drafting Manual (Oct 2012) 12–13 https://www.opc.gov.au/about/docs/Drafting_manual.pdf.
[18] See Enterprise and Regulatory Reform Act 2013, s 24.

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may provide immediate answers, but their complexity and volume make the law inaccessible to those who are bound by it.[52]

However, a closer analysis of the drafting conventions in Austria,[53] Belgium,[54] France,[55] Germany,[56] Italy,[57] the Netherlands,[58] Portugal,[59] Spain[60] and the UK[61] draws a very different story, one of commonality and similarity where drafting style is actually not defined by legal tradition. Clarity, simplicity, precision, accuracy and plain language are common standards of good quality of legislation both in the common and in the civil law drafting styles.[62] Moreover, consideration of the circle of persons which are the main users of the legislative text in question,[63] consideration of the interpretative problems which may arise from the text,[64] the need for consistency with existing legislation, avoidance of irrelevant provisions within the legislative texts and the use of uniform terminology within the text are all rules of drafting which are common within the legislative guidelines of European common and civil law jurisdictions.[65]

A closer comparative analysis of specific drafting conventions confirms our initial finding. The selection of legislation as a regulatory tool only as a solution of last resort, and provided that there is adequate justification for

[52] See L Campbell, 'Drafting Styles: Fuzzy or Fussy?' (1996) 3 *E Law—Murdoch University Electronic Journal of Law*, para 18 http://www.austlii.edu.au/au/journals/MurUEJL/1996/.

[53] See *Legistische Rechtlinien* (1990); also see A Shaefer, *Abkürzungen, Begriffe, Zitiervorschläge (Akronyme—internationale Einführung und umfangreiche Abkürzungssammlung)* (Vienna, Verlag Österreich, 2008).

[54] See Conseil d'Etat, *Technique législative* www.raadvst-consetat.be/?lang=fr&page=technique_legislative.

[55] See *Guide de légistique* (2013) www.legifrance.gouv.fr/Droit-francais/Guide-de-legistique.

[56] See Bundesministerium der Justiz (Hrsg), *Handbuch der Rechtsförmlichkeit* (Cologne, Bundesanzeiger, 2008) and online http://hdr.bmj.de/vorwort.html; also see H Kirchner, *Abkürzungsverzeichnis der Rechtssprache* (Berlin, De Gruyter Recht, 2008).

[57] *Formulazione tecnica dei testi legislativi* (2001) http://www.senato.it/application/xmanager/projects/senato/file/repository/istituzione/regole_testi_legislativi.pdf; also *Regole e suggerimenti per la redazione dei testi normativi* (2007) http://leggi.regione.abruzzo.it/docs/qualitaNorm/Regole_sugg_testi_normativi.pdf.

[58] See Circular of the Prime Minister, 'Guidelines for Legislation' (18 November 1992) http://wetten.overheid.nl/BWBR0005730/geldigheidsdatum_29-11-2013.

[59] See Deliberation of the Council of Ministers of 8 February 1989 on the approval of the general principles for the elaboration of projects for normative acts.

[60] See Spanish Guidelines on the form and structure for the schemes of projects of laws (1991); also *Normas sobre regimen de asesoramiento a las Comisiones del Congreso de los diputados y del Senato* (1989).

[61] See Consolidation of Enactment (Procedure) Act 1949, 41 *Statutes* 741; also Statutory Instruments Act 1946, 41 *Statutes* 717; Interpretation Act 1978, 41 *Statutes* 899.

[62] See R Pagano, *Introduzione alla legistica: l'arte di preparare le leggi* (Milan, Giuffrè Editore, 1999) 26–30.

[63] See M Ainis, *La legge oscura* (Bari, Laterza, 1997) 103.

[64] See V Fronsini, *Lezioni di teoria dell' interpretazione* (Rome, Bulsoni, 1993) 93; also see WA Leitch, 'The Interpretation Act: Ten Years Later' (1958) 16 *Northern Ireland Legal Quarterly* 215, 236–37.

[65] See Pagano, *Introduzione alla legistica* (n 59) 37–39.

the necessity and the timing of the legislative solution within the actual text is introduced in Belgium, France, Germany, Portugal and the UK. Equally common to European jurisdictions across the board is the principle of legality. Germany and Portugal expressly regulate that new legislation must comply with existing provisions, whereas in the UK legality is introduced in the form of a presumption.

Consultation as a form of pre-legislative scrutiny is introduced in Belgium, France, Germany, the Netherlands, Spain and the UK; although in the civil law tradition this usually involves the discussion of the draft law either by specialists in the field, or before the Constitutional Courts.[66] Regulatory Impact Assessments can be traced in the Finnish,[67] French, Dutch and UK[68] traditions, where the process of the cost and impact analysis is compulsory.[69]

As for rules related to the technical side of drafting, clarity of legislation is a principle common in Austria, Belgium, France, Germany, the Netherlands, Portugal, Spain and the UK. Unambiguity is required from Belgian, German, Italian, Portuguese, Spanish and UK drafters. Simplicity is a rule of drafting in Austria, Belgium, Germany, Portugal and Spain. It must be noted that in the UK simplicity is indeed pursued,[70] but not to the detriment of certainty in the law.[71] Plain language, namely consideration of language accessible for the main users of the particular legislative text, is expressly introduced in the Netherlands, Portugal and the UK.[72]

[66] See Belgian *Circulaire de Premier Ministre* (23 April 1982) art 28; French Circular of 2 Jan 1993 on the rules for the elaboration, signature and publication of texts in the Official Journal and to the coming into force of the particular procedures of the Prime Minister, art 1.7; German *Gemeinsame Geschäftsordnung der Bundesministerien* (15 Oct 1976) as modified, art 40; Dutch *Aanwijzingen Voor de Regelgeving* (1992) art 269; Spanish *Normas sobre regimen de asesoramiento a las Comisiones del Congreso de los diputados y del Senato* of 26 June 1989; for the common law approach to consultation, AD Jergensen, 'The Legal Requirement of Consultation' (1978) *Public Law* 290; also *Agricultural, Horticultural and Forestry Industry Training Board v Aylesbury Mushrooms Ltd* (1972) 1 All ER 280, (1972) 1 WLR 190; *R v Secretary of State for Social Services, ex p Association of Metropolitan Authorities* (1986) 1 All ER 164.

[67] For an analysis of the relevant Finnish tradition, see S Arkio, 'Assessment of Draft Legislation in Finland' in A Kellermann, G Ciavarini-Azzi, S Jacobs and R Deighton-Smith, *Improving the Quality of Legislation in Europe* (The Hague, Kluwer Law, 1998) 227.

[68] See Department of Trade and Industry, *Checking the Cost to Businesses: A Guide to Compliance Cost Assessment* (1999).

[69] See the French Circular of 21 Nov 1995 relating to the conduct of an impact study for projects of laws and decrees at the Council of the State; also the Dutch *Aanwijzingen Voor de Regelgeving* (1992) art 331.

[70] See BR Atre, *Legislative Drafting* (Delhi, Universal Law Publishing, 2006) 12.

[71] See *Report of the Renton Committee on the Preparation of Legislation* (Cmnd 1975, 6033) (Renton Report) ch XI, art 14; also see D Greenberg (ed), *Craies on Legislation* (London, Sweet and Maxwell, 2004) 307–08.

[72] See the Dutch *Aanwijzingen Voor de Regelgeving*, arts 54 and 218; also see Portuguese Deliberation of the Council of Ministers of 8 Feb 1989 on the approval of the general principles for the elaboration of projects of normative acts, art 7a; for the UK, see M Faulk and IM Mehler, *The Elements of Legal Writing* (London, Macmillan Press, 1994).

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organism is injured each and every time part of it, big or small, is being changed expressly or impliedly. And so the duty of the drafter, and the main criterion of effectiveness of the drafter's technical expertise in amendments, is to ensure that the injury takes place with surgical precision thus resulting in minimal bleeding. In other words, the quality of the amending laws depends gravely on the smoothness of their integration with the existing legal system. And the aim of the drafter in the process of drafting amending legislation is to maintain a coherent structure even after the amending legislation: amend in logical order, amend coherently.

INITIAL CONSIDERATIONS

But this is not the only consideration when amending legislation. Policy considerations are crucial to the amending project. It is crucially important for the drafter to apply Thornton's five stages of drafting in the case of amendments also. And this is so, because at the point of receiving the drafting instructions (hopefully in a narrative format), the decision on the legislative drafting tool to be used has not been made. It is important for the drafter to understand what policy is being pursued, what purpose the amending law is to serve, what the content of the proposed changes are, what is the existing law, and what mischief is to be addressed by the proposed legislation.[4]

Understanding the policy to be pursued is an integral part of the first stage of legislative drafting, and allows the drafter to be on the same page with the instructing officers in the drafting team. It conveys to the drafter the full picture of the aim to be achieved without any prejudiced filtering of information: this guarantees a conveyance of the whole picture without drafting pre-selections and pre-decisions made by the members of the drafting team who have not been trained in legislative drafting. Understanding the policy behind the request for amendment of the law includes a detailed understanding of the purpose to be achieved by the proposed amending legislation: in turn, this requires a description of the current law and the identification of the mischief to be addressed.[5]

It is only after the drafter considers all this detailed information that an informed decision can be made as to the necessity of legislation as a regulatory tool and the appropriateness of amendment as a drafting tool. Deciding on an amendment before this process has taken place, and much

[4] See JAL Bell, 'Extremist Drafting of Federal Statutes' (1990) 1 *Scribes Journal of Legal Writing* 31, 38.

[5] For an example of the goal pursued in the Florida constitutional amendment, see J Uhlfelder, 'The Machinery of Revision' (1978) 6 *Florida State University Law Review* 575, 577.

more so without the participation of the drafter, leads to haphazard quality of legislation and haphazard effects.[6]

Moreover, a request for amendment of existing legislation, even when the draft amendment is not included, is a form of lay draft. All arguments against lay drafts raised in the chapter on drafting instructions apply here too.

EXPRESS AND IMPLIED AMENDMENT

Statutes can be amended either expressly or impliedly. Express amendment is undertaken by replacing the existing provision with a new or updated one. This occurs by an Act or by subsidiary legislation based on an enabling clause in primary legislation. Express amendment promotes clarity, which of course contributes to effectiveness.

Amendment of statutes may also take place impliedly, namely as a consequence of inconsistences arising from an express amendment of an existing statute. Implied amendment is a result of statutory interpretation: it reflects the clash between two provisions, and requires the application of principles of interpretation in order to resolve the confusion. Implied amendment presupposes a drafting error: the drafter has failed to identify a consequential amendment and has failed to express this in the Act.

As a result, the user and the courts have the difficult task of trying to accommodate the parallel existence of two competing statutes. This can be achieved through the identification of a difference in the field of application of the existing and the amending provision, as a means of justifying the parallel existence of them both. The presumption is that the drafter intended to keep both statutes; otherwise they would and should have repealed the original provision. If the attempt to keep both statutes in parallel cannot work, then the users and the courts have no other option but to attempt to prioritise the competing statutes. This can be achieved through the application of statutory interpretation principles, such as the maxim that newer general provisions do not repeal older specific ones and so newer general provisions do not readily construe an implied amendment.

The tools are there, and the legal system will in the end find a way to settle the confusion caused by the implied amendment. But this is a clear transfer of the task and power to legislate from the legislature to the judiciary. And so implied amendments are a breach of the principle of separation of powers. This may be tolerated if the intent of the instructing officers and the legislature was to allow lengthy application to real cases to formulate the precise fields of application of the two statutes. This is an

[6] See VRAC Crabbe, *Legislative Precedents—Volume II* (London, Cavendish Publishing Ltd, 1998) 15.

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Union.[11] And of course penal provisions derive from the rich loins of EU criminal law, and its increasingly complicated relationship, at least in the UK, with domestic law.

And thirdly, international (or is universal a better term?) standards are taken into account. And these relate to two different dimensions. On the one hand, instructing officers must take into account substantive criminal law instruments at the international level. UN conventions, bilateral and multilateral treaties, and other instruments of international law form an ever-increasing chunk of international regulation that applies to domestic legislative drafting. And, on the other hand, instructing officers can no longer neglect to apply the rule of law principles as these are expressed by certainty in the law, especially the criminal law. This enhanced notion of certainty in the law is promoted by clarity, precision and unambiguity of criminal laws, qualities that are both crucial and neglected in modern criminal laws.[12]

THE LEGISLATIVE PLAN

In order to cope with the task of drafting effective penal laws the drafter must begin with the legislative plan. Perhaps the most important question to be addressed in the plan is whether legislation is indeed necessary as a method of regulation and, if so, whether penal legislation is the most effective way forward. The drafter's instinct is to say no to both questions. And so they have to be persuaded by the instructing officers, preferably on the basis of evidence-based studies,[13] that other regulatory tools have been discussed and rejected. And that all lighter types of legislation, from soft law to civil legislation, have been studied and rejected as unable to meet the purpose set by the instructing officers: having said that, penal provisions must be introduced exclusively in primary legislation.[14]

Once the necessity of penal legislation is addressed, the drafter continues with an initial sketch of the main elements of the new penal provision. This details the objective and subjective elements of the proposed offence, focusing on the substantive penal law know-how transferred via the drafting instructions.

[11] See H Xanthaki, 'The UK Human Rights Act: a True Excuse for Judicial Law-making by the Law Lords?' (2012) 18 *Jura* 244, 246–47.

[12] See J Spencer, 'The Drafting of Criminal Justice Legislation—Need it be so Impenetrable?' (2008) 67 *Cambridge Law Journal* 585.

[13] See M Bohlander, 'Vicarious Criminal Liability of Parents for Offences Committed by Their Children' (2013) 177 *Criminal Law and Justice Weekly* 791, 792.

[14] See Law Commission, *Criminal Liability in Regulatory Contexts* (Law Com No 195, 2010) www.lawcom.gov.uk/docs/cp195-web.pdf.

It is again on the basis of the analysis offered by the instructing officers that sanctions are set, at least in principle. Instructing officers have an understanding of the penal system and a comparative awareness of what type and level of penalty similar or relevant offences currently carry. Proportionality can lead them to a good estimate of what the law should be.[15] A further issue to address at this point is the need to foresee additional sanctions, perhaps supplemental to the primary one, or sanctions imposed under special circumstances.

Once the basic plan of the provision is set, the drafter identifies the points already covered by the Interpretation Act or by general penal provisions. This could be the case with issues related to amnesty, early release or procedure. And so the next challenge is to decide whether there is any scope for deviation from the general penal procedures. Normally, deviation is to be justified by reference to effectiveness of the provision *in concreto*. But a change of policy may be creeping into the penal law thus requiring a departure from the current norm. The drafter's duty here is to alert the members of the drafting team that any deviation from the current norm is of surprise to the user, and needs to be expressed in a very clear manner. Which leads to a question: if there is no departure from the norm, must the drafter repeat the general provisions or is this superfluous? The question is not as straightforward as one might expect: there is little doubt that repeating the general provisions allows the Act to be self-sufficient. But Acts are meant to be read in conjunction with relevant Acts anyway. And so the bottom line is that paraphrasing the general provisions is an invitation to ambiguity, which is impossible to defend.

As for verbatim repetition or referential repetition, this may not cause harm but carries dangers: by referring to selective general provisions the user may acquire the legitimate impression that all other general provisions are inapplicable; and also repetition leads to a longer Act which may well detract the user's attention from the main regulatory message. The final answer to this dilemma can only be offered by reference to effectiveness. In principle, penal Acts envisaged as used by citizens without necessarily the need for legal advice are best presented with the general provisions thus ensuring that the user is aware of all relevant law: an example could be a Citizen's Arrest Act. But Acts designed to be used with a legal counsellor do not need to repeat or even refer to the general provisions: a typical example could be rules of criminal evidence.

[15] See ME O'Connell, 'Debating the Law on Sanctions' (2002) 13 *European Journal of International Law* 63; also see R Frase, 'Excessive Prison Sentences, Punishment Goals, and the Eighth Amendment: Proportionality Relative to What' (2004–05) 89 *Minnesota Law Review* 571, 624; and A von Hirsh, 'Proportionality in the Philosophy of Punishment' (1992) 16 *Crime and Justice* 55, 56 and 68–69.

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these regulations three years post enactment, and any such regulations suffer a procedural invalidity. In other words, the authorisation to exercise the power to legislate via delegated legislation must exist legitimately at the time that the power is exercised. If the primary legislation authorising the delegation has been repealed, the delegated legislation arising from it will suffer a serious procedural defect. Similarly, primary legislation authorising the delegation must not be amended at the time of exercise of the power. This can occur when primary legislation has been amended either by an amendment of the enabling primary legislation, or impliedly via other primary legislation. But interpretation legislation may under conditions allow limited power to proceed with delegated legislation based on primary legislation that has been passed but has not yet come into force: this is the case with section 13 of the UK Interpretation Act 1978. Or it may keep into being delegated legislation hanging from a repealed and re-enacted Act:[44] this is the case with section 44 of the Canadian Interpretation Act. Moreover, primary legislation may allow a timeframe for delegated legislation whose beginning and end is clearly determined and delimited. Thus, public officials may utilise delegated legislation to regulate matters within their *in materiae* authority within, and only within, the performance of their official duties within the time limits of their term of office. The person exercising the power must be the person to which the enabling clause transfers legislative power. In view of the sensitive role of delegated legislation, the law usually delimits the persons that may utilise the power to legislate via delegated legislation. Most jurisdictions follow the UK model, thus allowing the exercise of the power to pass delegated legislation exclusively to holders of public office. However, the use of sub-delegation is common[45] as a means of addressing urgent government needs for regulation of detailed or technical matters.[46] As the determination of the persons who can be entrusted with the power to legislate even though they do not form part of the legislature is an issue of constitutional importance, the drafter must be clear and precise in naming those who can delegate and sub-delegate.[47]

[44] See R Duperron, 'Interpretation Acts—Impediments to Legal Certainty and Access to the Law' (2005) 26 *Statute Law Review* 64.

[45] Sub-delegation by an administrative body to yet a further administrative or other body gives rise to grave concern as it 'may lead to a further multiplication of bodies which exercise legislative functions, but which have been selected for this important task by an administrative body and not by Parliament': see A Rabie, 'When Delegated Powers Become Plenary Powers' (1989) 5 *South African Journal on Human Rights* 440, 443.

[46] But sub-delegation of legislative powers remains unconstitutional: see House of Lords Select Committee on the Constitution, *Legislative and Regulatory Reform Bill (Eleventh Report)* (n 40) para 61.

[47] On restrictions to sub-delegation see JF Northley, 'Sub-delegated Legislation and *delegatus non potest delegare* (1953) 6 *Res Judicatae* 294, 303; also see J Willis, *Delegatus non potest delegare* (1943) 21 *Canadian Bar Review* 257; and SA De Smith 'Sub-delegation and Circulars' (1949) 12 *Modern Law Review* 37.

A distinction must be drawn between sub-delegation and signification: in the first case the person authorised has the power to legislate,[48] whereas in the latter case the policy decision is taken elsewhere and the person authorised may sign on behalf of the higher authority.

Although delegated legislation must be flexible and therefore some concessions from normal legislative process are possible, nevertheless statutory procedural requirements must be met. These may refer to consultation;[49] approval, consent or confirmation; or printing and publication of the delegated legislation.[50] Even where defects occur, they may not affect the validity of delegated legislation if they do not contravene mandatory provisions essential to the validity of the legislation.

Defects in the content of delegated legislation may refer to the source of the power[51] or the construction of delegated legislation. The first issue, known as ultra vires,[52] is extensively analysed in constitutional law. The second issue related to drafting techniques and requires extensive analysis here.

CONSTRUCTION

The construction of delegated legislation involves two levels of consideration: drafting the enabling clause in the primary legislation; and drafting the delegated text.

The enabling clause is a substantive provision, and therefore the chapter on substantive provisions, and indeed those on legislative drafting techniques,

[48] See D Greenberg, *Craies on Legislation—A Practitioner's Guide to the Nature, Process, Effect and Interpretation of Legislation* (London, Sweet and Maxwell, 2004) 123.

[49] See *Rollo v Minister of Town and Country Planning* [1948] 1 All ER 13; also see *Port Louis Corporal v Attorney-General of Mauritius* [1965] AC 1111; A Jergensen, 'The Legal Requirements of Consultation' (1978) *Public Law* 290; J Garner, 'Consultation in Subordinate Legislation' (1964) *Public Law* 105; G Crave, 'Consultation in Subordinate Legislation—a Victorian Initiative' (1989) 15 *Monash University Law Review* 95.

[50] Publication is highly advantageous for delegated legislation: see R Mkuye, 'Controls and Safeguards of Delegated Legislation: a Case Study of Tanzania (2007) 9 *European Journal of Law Reform* 205, 241; also see DJ Lanham, who argues that publication of delegated legislation is required not just by law but also by the maxim of non-ignorance of law in relation to delegated legislation: DJ Lanham 'Delegated Legislation and Publication' (1974) 37 *Modern Law Review* 510, 510; and See H Xanthaki, *Thornton's Legislative Drafting* (West Sussex, Bloomsbury Professional, 2013) 412–13.

[51] The doctrine of ultra vires basically posits that all administrative power is exercised within the limits of legitimacy: see D Tan, 'An Analysis of Substantive Review of Singaporean Administrative Law' (2013) 25 *Singapore Academy of Law Journal* 296, 298. But ultimately the deciding issue for ultra vires lies in the purposes of the governing statute: see E Ip, 'Economic Structure of Hong Kong Administrative Law: Efficiency and Legality of Government Decision-making since China's Resumption of Sovereignty' (2013) 12 *Washington University Global Studies Law Review* 227, 243.

[52] On the principle of ultra vires with specific reference to local authorities' decisions, see C Aguma, 'The Principle of *Ultra Vires* and the Local Authorities' Decisions in England' (2013) 15 *European Journal of Law Reform* 267.

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streetwise non-tax professionals and the lay persons. It is argued that tax complexity arises as a result of the organic development of the system that makes piecemeal reform difficult; as a result of governments' use of exogenous factors into the technical or objective system's design process; or as a result of the political costs of pursuing policy objectives openly thus leading to the covert use of the tax system.[6]

In order to address this complexity, even at the stage of analysis but perhaps more so at the design stage, the drafter focuses on two concerns: first, what must remain in primary legislation, what goes into delegated legislation, and what could be left to explanatory notes, policy documents or guidance; and second, how can the new legislative text fall into place within the existing complex legislative and regulatory framework. Let us begin with the first issue, that of arrangement.

DESIGNING THE LAW

Tax legislation is difficult to understand. The dilemma between placing provisions in primary or secondary legislation is always a balancing exercise between the constitutional need for increased parliamentary legitimacy for the introduction of new taxation obligations to citizens[7] and the need to strip the primary legislative text of unnecessary details that detract user attention from the gist of the regulatory message. It would be difficult to find support for exclusively delegated legislative solutions for taxation: apart from the constitutional aspect above, delegated legislation is by definition unapproachable to most users: this endangers citizen awareness of the new regulation, its implementation and ultimately the effectiveness of the regulation itself. But the length of detail required for most taxation laws render them prime candidates for unapproachable texts of technical detail at distasteful length. However, the need for lengthy analysis of new tax regimes, and the provision of numerous examples and scenarios of the application of taxation legislation is loud, and the practice would clearly serve approachability of legislation, as requested by policy-makers.

It is not usually considered appropriate to try to provide all the necessary details of tax legislation in the statute for reasons of accessibility; lack of the ability to foresee all the situations in which tax laws will be applied; and the need for flexibility often addressed by delegated legislation. And so, the answer to the problem lies in the extensive use of explanatory documents of various kinds that provide legislators, tax officials and taxpayers with an

[6] See M James, 'Tax Simplification: the Impossible Dream?' (2008) *British Tax Review* 392, 393.

[7] See D Morris, '"A Tax by any other Name": Some Thoughts on Money, Bills and other Taxing Measures: Part 1' (2001) 22 *Statute Law Review* 181, 205.

understanding of their purpose and intended operation. For example, the UK tax authorities issue extra-statutory concessions, explanatory booklets and statements of practice. Further guidance is offered by the Interpretation Act, at least for users who are aware of its existence and have access to it. And of course detailed explanatory notes are invaluable.

As for the smooth receipt of the new legislation by existing complex taxation laws, this does not differ much from other fields of legislation. Adherence to the local drafting style promotes compatibility between new and older laws. Holistic understanding of the tax law in its entirety allows for the identification of gaps, or overlaps, leading to the choice of the appropriate drafting tool: new legislation; amendment of the old legislation; or repeal and re-enactment. The use of solid terms and the avoidance of new terminology encourage certainty and understandability, but also compatibility. Good legislative quality fertilises effective taxation legislation. But what makes a tax law a good one? Thuronyi identifies the following criteria for a well drafted taxation law:

1. understandability, namely making the law easier to read and follow;
2. organisation, namely internal organisation of the law and its coordination with other tax laws;
3. effectiveness, namely the law's ability to enable the desired policy to be implemented; and
4. integration, namely consistency of the law with the legal system and drafting style of the country.[8]

These criteria are, of course, interrelated and overlapping. Organisation is important for understandability. Integration contributes to understandability. And all the criteria contribute to Thuronyi's notion of effectiveness. Moreover, Thuronyi's concepts play a different role in each of the first, second and third and fourth stages of drafting taxation legislation: as a prism of analysis of the drafting instruction they are relevant to stage two; as general concepts they direct the initial design of the draft in stage three; and of course as subjective drafting choices they are applied in stage four.

Understandability is an essential element of good taxation law. Complexity is the inherent weakness of legislation and it is much more pronounced in taxation legislation.[9] Identifying the sources of complexity of tax legislation is not simple. 'Neither tax simplification nor its mirror image, complexity, is

[8] See V Thuronyi, 'Drafting Tax Legislation' in *Tax Law Design and Drafting* vol 1 (International Monetary Fund, 1996) 1, 2 www.imf.org/external/pubs/nft/1998/tlaw/eng/ch3.pdf.

[9] But Donaldson argues that tax complexity is a necessary cost to providing an equitable taxing system: see SA Donaldson, 'The Easy Case Against Tax Simplification' (2003) 22 *Vancouver Tax Review* 645, 681; also see J Partlow, 'The Necessity of Complexity in the Tax System' (2013) 13 *Wyoming Law Review* 303, 306.

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contrast to this, foreigners have not offered authority to be regulated via extra-territorial legislation made abroad.[36] Normally this community has organised itself within a state, and its geographical extent coincides with state boundaries.[37] But if the community exceeds the boundaries of the state, legitimacy to regulate via legislation is conceded to the regional or international organisation formed by the regional or international community. This justifies and legitimises regional and international law accordingly. Where a community is formed by reference to a specific interest, for example the regulation of electrical power deriving from a river crossing the boundaries of three states, this community concedes power to the three states to regulate via cross-border legislation. This is a basis of a bilateral or multilateral agreement.[38] Now, if the specific interest of a community in one state concedes authority to regulate via legislation this interest located outside state boundaries, then what is needed is the formation of a new community that carries legitimacy to concede legislative power. One part of the new community is the community whose interests abroad are regulated; and the second part is the community of the location of the new regulation. The first needs to concede legislative power to regulate their interests by their legislature of origin, even though they would normally expect regulation to stem from the foreign legislature. And the second needs to concede legislative power to the legislating legislature, whose regulatory power they have not authorised by means of agreement in principle. In other words, extra-territorial legislation requires legitimacy from the own citizens and from the foreign citizens. Extra-territorial legislation is a departure from the norm, and its legitimacy hangs with either a bilateral legislative measure or a unilateral measure with inherent bilateral agreement.

EXTRA-TERRITORIALITY IN PRACTICE

In England criminal conduct outside a state's area of authority was quite simply without legal significance. This leads to a presumption of territoriality,[39] but there is no doubt that statute law can reverse this effect. But, in the absence of international agreement, the claim to exercise

[36] See JK Powell, 'Prohibitions on Campaign Contributions from Foreign Sources: Questioning Their Justification in a Global Interdependent Economy' (1996) 17 *University of Pennsylvania Journal of International Economic Law* 957.

[37] 'The authority and legitimacy of a majority to compel a minority exists only within political boundaries': see JHH Weiler, 'Does Europe Need a Constitution? Demos, Telos, and the German Maastricht Decision' (1995) 1 *European Law Journal* 219, 222.

[38] The EU seems to use extra-territoriality upon agreement with recipient states: see J Scott, 'Extraterritoriality and Territorial Extension in EU Law' (2014) 62 *American Journal of Comparative Law* 87, 87.

[39] See GR Sullivan and CJ Warbrick, 'Territorial Jurisdiction: Criminal Justice Act 1993' (1994) 43 *International and Comparative Law Quarterly* 460, 460.

jurisdiction abroad is subject to legal and practical problems. First, state sovereignty will normally nullify the effect of extra-territorial legislation applying to foreign nationals abroad. And the application of any such law in practice will meet unsurpassable practical difficulties in the collection of evidence during investigation, in prosecution, and ultimately in bringing persons affected by it within the jurisdiction for the purposes of a criminal trial or even punishment. But recently there have been indications that some of the natural resistance to extra-territorial or transnational jurisdiction is being broken down by the need to deal with conduct that is harmful to British interests but which is not located or not wholly located within the state.[40]

But extra-territorial legislation applying to the state's own subjects abroad has been in existence for many years. An early example is section 9 of the Offences against the Person Act 1861:

> Where .... murder .... [is] committed on land out of the United Kingdom .... every offence committed by any subject of Her Majesty .... shall amount to the offence of murder .... [and] may be .... tried .... in any court .... in England .... in all respects as if such offence had been actually committed in that country.

In respect of civil matters, English law recognises that certain civil matters have to be dealt according to foreign law.[41] Examples are the law governing immovable property outside the jurisdiction or the validity of a marriage outside the jurisdiction. This is of course the realm of private international law or conflict of laws.[42]

And so, in practice, extra-territoriality is claimed to regulate the activities of own nationals on national transport outside the jurisdiction; to regulate the activities of nationals or their property outside the jurisdiction; or to regulate the activities of foreign nationals outside the jurisdiction. With reference to activities of own nationals in transport abroad, it is worth noting that jurisdiction is recognised by the common law in respect of things done on the high seas. But in practice jurisdiction is claimed by statute both with respect to the ships on the sea and on artificial installations such as oil rigs, and in the air outside the airspace of the jurisdiction. In addition, jurisdiction for nationals abroad is claimed in relation to certain serious crimes and to taxation. The rationale for such a claim is that persons subject to legislation in the state cannot evade it by moving themselves or their property outside it in order to commit offences there: in other words,

[40] See G Mullan, 'The Concept of Double Criminality in the Context of Extraterritorial Crimes' (1997) 1 *Criminal Law Review* 17, 19.

[41] See S Dutson, 'The Conflict of Laws and Statutes: The International Operation of Legislation Dealing With Matters of Civil Law in the United Kingdom and Australia' (1997) 60 *Modern Law Review* 668, 668.

[42] See S de Peuter, 'The Application of Foreign Public Law in Conflict of Laws: an Outline' (1990) 13 *International Business Law Journal* 79, 79.

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CURRENT TECHNIQUES OF STATUTORY INTERPRETATION IN THE UK[7]

In the UK[8] there never was a sole and unique method of statutory interpretation.[9] Instead of going down the comforting certainty of a civil law route of concrete, exhaustive and written (albeit inflexible and inherently general) compilations of statutory interpretation rules,[10] the UK chose the familiar common law route of conventions. As these entered the system at various times historically, and were inevitably attached to specific cases, statutory interpretation rules tend to be exist in parallel.

Historically one can identify the literal, the mischief, the Golden and recently the purposive approaches to interpretation. Briefly the literal rule evident in the *Sussex Peerage* case[11] demands that, if the words in an Act are precise and unambiguous, judges must simply expound these words in their natural and ordinary sense. Where the language of an Act is clear and explicit, judges must give effect to it, whatever the consequences may be.[12] If the words of an Act are clear, judges must follow them even when they may lead to a manifest absurdity.[13] The court has nothing to do with the question whether the legislature has committed an absurdity.[14] 'It seems to this court that where the literal reading of a statute … produces an intelligible result, clearly there is no ground for reading in words or changing words according to what may be[15] the supposed intention of the parliament.'[16] As a response to the inequitable decisions[17] brought about by the strict application of the literal rule,[18] and the unattainable perfection demanded

[7] A first draft of this part appears in H Xanthaki, 'The UK Human Rights Act: a True Excuse for Judicial Law making by the Law Lords?' (2012) 18 *Jura* 244.

[8] For the Irish development of case law on statutory interpretation, see The Law Reform Commission 'Consultation Paper on Statutory Drafting and Interpretation: Plain Language and the Law' (LRC CP14–1999); and for the status of statutory interpretation in Singapore, see G Yihan, 'A Comparative Account of Statutory Interpretation in Singapore' (2008) 29 *Statute Law Review* 195, 196.

[9] See R Graham, 'A Unified Theory of Statutory Interpretation' (2002) 23 *Statute Law Review* 91, 134.

[10] On statutory interpretation in civil law jurisdictions, see G Carney, 'Comparative Approaches to Statutory Interpretation in Civil Law and Common Law Jurisdictions' (2014) 35 *Statute Law Review* 1.

[11] See (1844) 11 Cl & F 85; 8 ER 1034.

[12] See *Warburton v Loveland* (1832) 2 D & Cl (HL) 480, per Tindal CJ at 489.

[13] See *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129, per Higgins J at 161.

[14] See *R v City of London Court Judge* [1892] 1 QB 273, per Lord Esher MR at 290.

[15] See Editorial, 'Legislative Intention' (2008) 28 *Statute Law Review* iii, iii.

[16] See *R v Oakes* [1959] 2 QB 350, per Lord Parker CJ at 354.

[17] See *R v The Judge of the City of London Court* [1892] 1 QB 273 9 CA; also see Sir W Dale, *Legislative Drafting: A New Approach* (London, Butterworths, 1977) 296.

[18] See Sir F Pollock, 'Essays on Jurisprudence and Ethics' (London, MacMillan and Co, 1882) 85; also see Lord Reid, 'The Judge as Law Maker' (1972) 12 *Journal of the Society of Public Teachers of Law* 28; and *Stock v Frank Jones (Tipton) Ltd* [1978] ICR 347, 354; *Bulmer Ltd v Bollinger* [1974] Ch 401, 425.

from the drafter,[19] the mischief rule[20] demands that the judge identifies the mischief or problem which led to legislative intervention, identifies the remedy now provided by the law, suppresses anything that would lead to continuance of the mischief[21] and finally advances the remedy according to the true intent of the legislator.[22] 'When the purpose of an enactment is clear, it is often legitimate, because it is necessary, to put a strained interpretation upon some words which have been inadvertently used'.[23] Of course, the assessment of the true intent[24] and the true remedy could be undertaken in departure from the literal meaning of the text. This could be of benefit to a judge trying to avert a judgment that would prove inequitable yet religiously compliant with the letter of the text. But it could possibly disrupt legal certainty and legitimacy if applied by an activist judge.

> It is a cardinal principle applicable to all kinds of statutes that you may not for any reason attach to a statutory provision a meaning which the words of that provision cannot reasonably bear. If they are capable of more than one meaning, then you can choose between those meanings, but beyond that you must not go.[25]

And so a combination of the mischief and literal rule produced the more equitable Golden rule.[26] Lord Atkinson[27] declared that:

> In the construction of statutes their words must be interpreted in their ordinary grammatical sense, unless they be something in the context, or in the object of the statute in which they occur, or in the circumstances with reference to which they are used, to show that they were used in a special sense different from their ordinary grammatical sense.

So, when the literal rule produces inconsistency or absurdity, the more creative and activist mischief rule can be used to correct the error.[28] But,

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[19] See The Law Commission and the Scottish Law Commission, *Interpretation of Statutes* (Law Com No 21, 1969); (Scot Law Com No 11, 1969) 17.

[20] See *Heydon* (1854) 3 CoRep7a; 76 ER 637; also see *Corkery v Carpenter* [1951] KB 1, 102.

[21] See *R (McCann) v Crown Court at Manchester* [2003] 1 AC 787 (HL) [16]–[18].

[22] On legislative intent and mischief, see *R v Secretary of State for the Environment, Transport and the Regions, ex p Spath Holme Ltd* [2001] 2 AC 349 (HL).

[23] See *Sutherland Publishing Co v Caxton Publishing Co* [1938] Ch 174, per MacKinnon LJ at 201.

[24] See D Greenberg, 'The Nature of Legislative Intention and Its Implications for Legislative Drafting' (2006) 27 *Statute Law Review* 15, 28; also see RN Graham, 'A Unified Theory of Statutory Interpretation' (2002) 23 *Statute Law Review* 91, 134.

[25] See *Jones v DPP* [1962] AC 635, per Lord Reid at 668.

[26] See *Adler v George* [1964] QB 2, 7; also see *Warburton v Loveland* (1828) 1 Hud & B 623; for the prominent Irish cases see *People (Attorney General) v McGlynn* [1967] IR 232; *DPP v Flannagan* [1979] IR 265.

[27] In *Victoria (City) v Bishop of Vancouver Island* [1921] AC 384.

[28] Eg Case Comment 'Statutory Interpretation: Correction of Obvious Drafting Error' (2006) 170 *Justice of the Peace and Local Government Law* 623.