

ACCESS TO JUSTICE: THE CONTRIBUTION OF DRAFTERS

Chapter 1

Introduction

“To no one will we sell, to no one will we refuse or delay, right or justice.”-Magna Carta, 1215

In any legal system, an effective judicial system safeguards the respect for and protection of human rights. For this reason, the ability to bring a claim before the court for adjudication is definitely of fundamental importance¹. Access to justice is recognized as a fundamental human right by various international human rights agreements and in the constitutions and legislation of most of the countries. Article 8 of the Universal Declaration of Human Rights provides for the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted to a person by the constitution or by law. This right is significant because it is a mechanism for the actualisation of rights and furthers the rule of law,² a critical precondition for social and economic development.³

In the recent past, access to justice has also been the subject of discussion in many countries including the England, Canada⁴, Australia⁵, South Africa, India and the

¹ Francesco Francioni, 'The Rights of Access to Justice under Customary International Law', in Francesco Francioni (Ed.) *Access to Justice as a Human Right*, (Oxford University Press, 2007) 1

² Ross Cranston, 'Access to Justice in South and South East Asia' in Julio Faundez (Ed.) *Good Government and the Law: Legal and Institutional Reform in Developing Countries*, (Macmillan Press, 1997) 233

³ Sandra C. Markman, 'Legislative Drafting: Art, Science or Discipline?' *The Loophole* November, 2011 5,11

⁴ see Roderick Macdonald, *Access to Justice in Canada Today: Scope, Scale and Ambitions* in Julia Bass, W. A. Bogart and Frederick H. Zemans, *Access to Justice for a New Century: The Way Forward*, (Law Society of Upper Canada, 2005) 19

Also see Roderick Macdonald, *Access to Justice and Law Reform #2* (2001), 19 *Windsor Yearbook of Access to Justice* 317, 319

USA. In fact, the topic of access to justice has also recently featured on the agenda of several Meetings of Commonwealth Law Ministers and Senior Officials, a trend that attests that the significance of access to justice is appreciated and is an indication of the establishment of the right of access to independent and impartial tribunal or forum within a reasonable time.⁶

Many initiatives have been undertaken by states to ensure that human rights are respected and protected through effective judicial remedies. However, problems of access to justice hamper these efforts. In the continuing pursuit for improved access to justice especially in criminal cases, states have attempted to enhance access to justice by providing some form of legal assistance to accused. However, the enjoyment of the right to access justice to the civil justice systems is in most countries impeded by cost, delay, inaccessibility to courts, procedural difficulties arising out of the incomprehensibility of the law and rules of evidence and procedure, ignorance of the law and the quality of legal aid provided⁷. Concerns are being raised on the manner and extent which rules, costs, lack of comprehension, and legal services hindering the member of the public from pursuing justice from getting what they are entitled to⁸ and how they should be addressed. While most Commonwealth states have enacted legislation that give accused the right to legal representation, grave concerns relating

⁵ G. L. Davis, 'Civil Justice Reform in Australia', in A. Zuckerman (Ed.) *Civil Justice in Crisis: Comparative Perspectives of Civil Procedure*, (Oxford University Press, 1999) 166

⁶ Commonwealth Legal Education Association, 'Access to Justice in the Commonwealth: Some Current Trends', (2004) 30 Commonwealth Law Bulletin, 552

⁷ For more details on initiatives undertaken to enhance access to justice see Commonwealth Legal Education Association (n6) 552-553

⁸ J. B. Grossman and Austin Sarat, 'Access to Justice and the Limits of Law' (1981) 3 Law and Policy Quarterly 125, 127

to dispute resolution in the civil courts especially the processes through which people present themselves to the courts.⁹

The initiatives undertaken to enhance access justice, including the establishment of various legal aid schemes, the provision of *pro bono* legal services, public interest litigation and alternative dispute resolution have not eliminated challenges of access to justice. There is no the doubt that lingering problems are to some extent evidence that the initiatives taken are not comprehensive and therefore there is need for further discussions and more action geared towards the creation of new, cheaper and effective means of boosting access to justice.¹⁰

The responsibility of enhancing access to justice falls on the various governments. In order to fulfil this responsibility, the adoption of the promotion of access to justice as government policy would be the first step towards the fulfilment of this responsibility. However, since the expression of the policy in statement of policy would not compel the both citizens and the government officials to comply with that policy, the government would definitely need to express the policy as law in order to endow the policy with legitimacy.¹¹ Could legislation therefore be a means of promoting access to justice? If the answer is yes, if yes, what kind of legislation and how?

⁹ Commonwealth Law Bulletin (n6) 552

¹⁰ *ibid*

¹¹ A. Seidman, R. Seidman and N. Abeysekere, *Legislative Drafting for Social Democratic Change: A Manual for Drafters*, (Kluwer Law International, 2001) 13

Whenever Government policy is to be implemented through legislation, the policy objective cannot be achieved if the legislation is not properly drafted and effective.¹² Legislative drafters play a crucial role in the formulation of legislation and bear the responsibility of maintaining the rule of law¹³. They are obliged to ensure that the policies have legal effect and are expressed in a manner that is accurate and expresses the intention of the Government.¹⁴ In as much as legislation is mostly the preferred means of achieving policy objectives, the achievement of policy objectives is not entirely responsibility the drafter because the legislative process is a mere stage of the wider policy process.¹⁵ As one of the players in the policy process where joint effort is required for the achievement of a policy objective, drafters are just like the rest of the actors required to render quality performance of their duties in the legislative process.¹⁶ What would quality performance in the case of a drafter entail? How will the quality performance promote access to justice?

The objective of this research is to examine and determine the manner and the extent to which a legislative drafter can contribute to access of justice. It is based on the Access to Justice Report by Lord Woolf on the Civil Justice System in England and Wales, of July, 1996,¹⁷ where Lord Woolf, acknowledged the existence of challenges in dispute resolution by the civil courts in most common-law jurisdictions and

¹² Stephen Laws, 'Giving Effect to Policy in Legislation: How to Avoid Missing the Point', (2011) 32 Statute Law Review 1

¹³ Seidmans (n11) 255

¹⁴ V. Crabbe, *Legislative Drafting*, (Cavendish Publishing Limited, 1993) 21

¹⁵ H. Xanthaki, 'On Transferability of Legislative Solutions: The Functionality Test', in C. Stefanou and H. Xanthaki (Eds), *Drafting Legislation: A Modern Approach*, (Ashgate Publishing Limited, 2008) 5

¹⁶ Ibid

¹⁷ Lord Woolf, 'Access to Justice: Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales' (Lord Chancellor's Department, 1995) 4

proposed radical reforms that extended to court control and procedural matters that are obviously beyond the scope of this dissertation. The challenges revolve around the processes that lead to the decisions of court rather than the decisions. He identified the high costs, the slow pace or delay and complexity of the procedures and the manner the civil procedure rules that result in inadequate access to justice and an inefficient and ineffective system. He also attributes the problems to, some extent to the manner both substantive and procedural legislations is expressed.

The aim of this dissertation is to assess whether the drafters can contribute to the promotion of access to justice through the good quality of legislation and by examining the England Woolf Report and the resultant civil procedure rules, which are already being used ‘as an exemplar for civil procedural reform around the world’.¹⁸ In recognition of the efforts of England to consistently enhance the quality of its legislation based on the Renton Report and the Good Law Report, and as a reflection of the possibility of the transferability of the drafting principles that enhances access to justice to other jurisdictions.

There may be useful lessons to be learned from England’s initiative to improve the quality of legislation as a means of enhancing access to justice. Can other countries learn from the approach taken by the England and transfer it to their jurisdiction in order to boost any other initiatives already in order to enhance access to justice?

¹⁸ Deidre Dwyer (Ed.) ‘Introduction’, in D. Dwyer, *The Civil Procedure Rules Ten Years On* (Oxford University Press, 2009) 5

The paper is premised on the England as one of the jurisdictions that has been constantly evaluating and focusing on the condition of and the quality of legislation. This has indeed been the focus of various inquiries and significant progress and efforts geared towards improving the quality of legislation.

HYPOTHESIS AND METHODOLOGY

This dissertation intends to examine and discuss access to justice, the problems of access to justice and the promotion of access to justice and analyse and consider the possible impact of better quality legislation on access to justice and the contribution that the legislative drafter can make towards the promotion of access to justice through improving the quality of legislation by the application of techniques that they have been taught and learnt. The question the dissertation is seeking to answer is whether a drafter can contribute to the promotion of access to justice and how?

The dissertation is based on the England's civil justice system, particularly the findings and recommendations of the Woolf Report that identified the status of both substantive and procedural legal rules as a barrier to access to justice and the Renton Report and the Better Law Report 2013 which focus on quality of legislation. It is widely acknowledged that the common problems of access to justice have been identified in most common law countries, therefore the England approach of improving the status of legislation in order to improve access to justice can, based on Xanthaki's¹⁹ proposition that drafters and those dealing with legislation can and ought to learn from each other and the fact that drafters in the European Union,

¹⁹ Xanthaki (n15) 16-18

Commonwealth and beyond pursue effectiveness as a common value, benefit other countries.

Further, because the problems of access to justice are more prevalent, in countries under the common law system which that has its origins in England and is modelled after the England legal system. England has also made radical reforms that had not been taken elsewhere and has been very proactive and the matters regarding quality of legislation have been discussed for a long time.

While there is no doubt that the promotion of access to justice requires the joint efforts of government, legislators, judicial systems, lawyers, the members of the public and other stakeholders, the dissertation is limited to the possible contribution of drafters. Despite the other initiatives to promote access to justice already undertaken, problems regarding access to justice still linger. The lingering gives rise to the need for more ideas and initiatives in order to improve the situation. The improvement of the quality of substantive and procedural rules would boost the efforts to promote access in a cost-effective way. The hypothesis of this dissertation is that drafters can contribute to the promotion of access to justice by improving the quality of the legislation.

In order to prove my hypothesis, I would consider the findings and recommendations of Woolf Report, the Renton Report and the Good Law Report, 2013 and analyse the findings of the reports regarding quality of legislation and any other literature on the quality of legislation and access to justice.

Chapter 2 of this dissertation examines literature relating to access to justice and its significance as a human right and an aspect of the rule of law, the problems of access to justice based on the Woolf Report and the initiatives that have already been undertaken to address those problems and the need for more initiatives especially for the England which already has one of the best funded legal aid schemes in the world and how these would benefit other countries, especially developing countries which cannot adequately fund legal aid schemes.

Chapter 3 deals with quality of legislation. Consider the attributes of good legislation, the significance of each attribute and the consequence of failing to adequately address with meet the criteria to show why each criteria is significant.

Chapter 4 discusses the relationship between the quality of civil procedure rules and access to justice. It considers how each aspect of quality legislation applied to the civil procedure rules and how they can contribute to the promotion of access to justice and finally consider the impact of the civil procedure rules that were proposed by Lord Woolf.

Chapter 5 will consist of the conclusion.

Chapter 2

Access to Justice

Definition of Access to Justice

The importance of a civil justice system in any legal system cannot be underestimated. In fact a civil justice system is crucial for the maintenance of a civilised society²⁰ because the presence of such a system guarantees the respect for and protection of human rights²¹ and is a mechanism for dispute resolution. While access to justice is a subject that has been discussed in various international and national forums, the meaning and significance of access to justice may not be very obvious since the term access to justice has become a term of art that raises different concerns and means various things to different people,²² depending on the context.

The lack of a common definition for access to justice may be attributed to the attempts to define access to justice in the context of the evolution of perceptions of what the meaning of access to justice ought to be or what it entails.²³ Within this context, access to justice is defined through the phases that reforms aimed at promoting access to justice have undergone since they began in the 1960s. Cappelletti²⁴ identifies three phases namely the provision of legal aid phase, the phase of providing legal representation for collective interests and the phase of promoting access to justice by

²⁰ Lord Woolf (n17) 4

²¹ Francioni (n1) 1

²² For more on different meanings of access to justice see *Ibid* and Marc Galanter, 'Access to Justice as a Moving Frontier' in Julia Bass, W. A. Bogart and F. H. Zemans (Eds), *Access to Justice for a New Century: The Way Forward*, (Law Society of Upper Canada, 2005) 147 and Grossman (n8)128

²³ Macdonald, (n4) 19

²⁴ M. Cappelletti and B. Garth, (Eds), *Access to Justice Volume I: A World Survey Book 1*, (Alphen aan den Rijn ; Milan : Sijthoff and Noordhoff : Giuffrè Editore-Milan, 1978) 21

addressing the challenges of access to justice through articulate and comprehensive reforms which is directed beyond activism, the courts or lawyers. Macdonald identifies five phases. The phase of access to lawyers and courts, the phase of institutional redesign, the phase of demystification of law, the phase of preventive law and the phase of proactive access to justice.²⁵ Despite the variance in the number of phases, the waves of access to justice in both instances are concerned with ‘social access’, which essentially is facilitating of the awareness of persons or groups of persons of their legal rights and empowering them to get legal services to invoke these rights.²⁶ From the perspective of an ordinary person, the term access to justice is ordinarily perceived to be the right to seek a remedy before a court or tribunal that is able to assure them of independence and neutrality in the application of law.²⁷

According to Grossman,²⁸ access to justice may also be perceived as both a slogan and an avenue for important interaction between citizens and the law which is a key component of the liberal democratic state. Francioni,²⁹ summarises the meaning of access to justice generally as the reference to the right to seek a remedy before a court of law or tribunal which is constituted in accordance with the law and can ensure independence and impartiality in the application of law. This is basically the ability to bring a matter before a court for adjudication.

²⁵ Macdonald (n4) 20-23

²⁶ Cranston (n2) 233

²⁷ Patricia T. Rickard-Clarke, ‘Access to Justice: Accessibility’, (2011) 11 Legal Information Management, 159-164

²⁸ Grossman (n8) 126

²⁹ Francioni (n1) 3

Access to justice may sometimes be presumed to be synonymous with the achievement of substantive justice.³⁰ However, access to justice primarily focuses on improving people's chances of achieving substantive justice for themselves by first gaining access to the justice system before they can even have a chance of achieving justice.³¹ Apparently, despite the necessity of access, access is neither a basis for nor an assurance for obtaining justice through the legal system. However, access is and will remain a symbol of justice and a significant element of democratic legitimacy.³² Hence the significance of 'access' cannot be overlooked because it is the essence of access to justice.

Therefore after taking into consideration the different perspectives of access to justice, the meaning of access to justice may be summarised as the ability to bring a matter before a court for adjudication.

Access to Justice and Human Rights

Access to justice has been widely recognised as a right in various international human rights instruments³³ including the 1948 Universal Declaration of Human Rights³⁴, the African Charter on Human and People's Rights³⁵, the Charter of Rights of the

³⁰ Grossman (n8) 125

³¹ Roy Sainsbury and Hazel Glenn, 'Access to Justice: Lessons from Tribunals' in A. Zuckerman and Ross Cranston (Eds), *Reform of Civil Procedure: Essays on 'Access to Justice'*, (Oxford University Press, 1995) 413, 421

³² Grossman (n8) 129

³³ For more on access to justice as a fundamental right see Winluck Wahiu, 'The Fundamental Right of Access to Justice', (2005) 3 East African Journal of Human Rights and Democracy 43

³⁴ Universal Declaration of Human Rights, 1948: Article 8 'Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.'

³⁵ The African Charter on Humans and People's Rights, Article 7.1. Every individual shall have the right to have his cause heard. This comprises: (a) the right to an appeal to competent national organs against acts of

European Union³⁶, ICCPR³⁷, the constitutions of many Commonwealth countries also recognize this right³⁸ and as a very significant avenue to the protection and enforcement of human rights.³⁹ In light of the foregoing, access to justice may in addition to the rule of law be considered as an essential and supporting framework for the realization of human rights which cannot be fully actualised without a possibility of their enforcement.⁴⁰ However, this also requires the awareness of the citizens of their rights under the law before they can be able to invoke the under the law before a court.

ACCESS TO JUSTICE AND THE RULE OF LAW

Access to justice is one of the pillars of the principle of the rule of law. The ‘rule of law’ is a phrase with several meanings and a principle that is from the perspective of

violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force; (b) the right to be presumed innocent until proved guilty by a competent court or tribunal; (c) the right to defense, including the right to be defended by counsel of his choice; (d) the right to be tried within a reasonable time by an impartial court or tribunal.

³⁶ Charter Of Fundamental Rights of The European Union (2000/C 364/01), Article 47: Right to an effective remedy and to a fair trial Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.

Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.

Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.

³⁷ The International Covenant on Civil and Political Rights: Article 3. Each State Party to the present Covenant undertakes:(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

³⁸ Including Kenya, most of the EU members States

³⁹ Francioni (n1) 1.

⁴⁰ Commission on Legal Empowerment of the Poor, “Making the Law Work for Everyone” Vol 1, Report of the Commission on Legal Empowerment of the Poor, (the Commission on Legal Empowerment of the Poor and United Nations Development Programme, 2008) 27 accessed from http://www.undp.org/content/dam/aplaws/publication/en/publications/democratic-governance/legal-empowerment/reports-of-the-commission-on-legal-empowerment-of-the-poor/making-the-law-work-for-everyone---vol-i---english/Making_the_Law_Work_for_Everyone.pdf on 03/07/2013.

Neate,⁴¹ predominantly the best available system of organising a civilised society. According to Bingham⁴², the binding by and entitlement of all persons and authority within a state to the benefit of publicly made legislation, operating progressively and administered publicly by the courts is central to the existence of the principle of the rule of law. Neate,⁴³ defines the rule of law as the principle of the law being the supreme authority that rules and which everyone is subject to and governed by.

From the foregoing, it can be reasonably inferred that under the rule of law every person is bound by and entitled to equal protection of the law and that any person ought to be able to go to court for the enforcement of any civil rights and claims that they may have and which may be diminished in value in the absence of an enforcement mechanism.⁴⁴ In this respect, access to justice facilitates the law to rule. As an aspect of the rule of law, access to justice facilitates dispute resolution by having the court as a neutral arbitrator to facilitate the resolution of conflict, reduce abuse, and enable the poor to obtain redress.⁴⁵

Problems of access to justice

The establishment of courts as a means of resolving genuine civil disputes without high costs or unreasonable delay is recognition of the right of unhindered access to a

⁴¹ Francis Neate 'The Rule of Law-A Commentary on the IBA Council's Resolution of September, 2005' in Francis Neate (Ed.), *The Rule of Law: Perspectives from Around the Globe*, (LexisNexis, 2009) 9

⁴² Tom Bingham, *The Rule of Law*, (Penguin Books, 2011), 8

⁴³ Neate (n41) 10

⁴⁴ Bingham (n42) 85

⁴⁵ Commission on Legal Empowerment of the Poor (n40) 49

court as a basic right, protected by the law in most jurisdictions⁴⁶, and is also an aspect of the rule of law.⁴⁷ While the rule of law requires the accessibility of courts, most legal systems encounter challenges relating to expenses and delay in meeting this requirement.⁴⁸ While being cognisant that the justice system was not designed with the intention of excluding any category of persons, many of the poor are excluded.⁴⁹ The exclusion of certain categories of people from the civil justice system undermines the rule of law and its consequences may extend beyond the individual litigant.⁵⁰

While the importance of access to justice is acknowledged and access to justice recognized as a human right and an aspect of the rule of law, problems of access to justice linger with regard to the resolution of disputes through the civil courts in most legal systems in the common law countries.⁵¹ The common law countries practice the adversarial system where the parties, due to the traditional assumption that civil disputes involve private interests,⁵² determine the course and pace of litigation as opposed to the civil law systems where the inquisitorial system is practiced and the court not the parties leads the litigation process.⁵³

⁴⁶ Commonwealth Legal Education Association (n6) 552

⁴⁷ Bingham (n42) 77

⁴⁸ Bingham (n42) 86

⁴⁹ Karen A. Lasht Pauline Gee Laurie Zelontt', 'Equal Access to Civil Justice: Pursuing Solutions Beyond the Legal Profession', 1998-1999 17 Yale Law and Policy Review 489, 494

⁵⁰ Lasht (n49) 489, 493

⁵¹ Lord Woolf (n17) 4

⁵² Hector Fix-Fierro, *Courts, Justice and Efficiency: A Socio-Legal Study of Economic Rationality in Adjudication*, (Hart Publishing, 2003) 194

⁵³ See on the adversarial system L. Silberman, A. Stein, T. Wolff, *Civil Procedure Theory and Practice*, (3rd Ed.), (Aspen, 2009) 3

Also see Neil Andrews, 'Adversarial Principle: Fairness and Efficiency: Reflections on the Recommendations of the Woolf Report' in A. Zuckerman and R. Cranston (Eds.) *Reform of Civil Procedure: Essays on 'Access to Justice'* (Oxford University Press, 1995) 169, 171

Access to justice has featured prominently in justice reform agendas in common law jurisdictions where common concerns across jurisdictions about the extent of to which access to civil justice is hindered have been discussed.⁵⁴ It is widely acknowledged that many individuals especially those with limited resources continue to lack adequate access to legal assistance and legal proceedings. Regardless of their need for the legal system, most people who lack resources avoid the civil justice system, which they perceive as incapable of resolving their problems and where the system is believed to be capable of providing redress, slow pace, high cost and complexity that requires expertise that they lack⁵⁵ still discourages them.

According to Macdonald⁵⁶ their ability to access the civil justice system is hindered by barriers which may be physical/material, objective, subjective and sociological or psychological, but most significantly by objective barriers which include cost, delay and complexity. According to Cranston⁵⁷, while the problems of access to justice are several and include cultural, psychological, geographical, cost and structural barriers including procedures can make access difficult and disproportionately costly.

These views were confirmed by Lord Woolf who in his Report identified high costs, delay and complexity, as common interrelated problems of access to justice that countries in the common law world face. Apparently, these problems relate to the processes that lead to adjudication by the courts rather than the decisions of the

⁵⁴ Camille Cameron and Elsa Kelly, 'Litigants in Persons in Civil Proceedings: Part 1', (2002) 32 Hong Kong Law Journal 313, 314

⁵⁵ Commission on Legal Empowerment (n40) 33-34

⁵⁶ Macdonald (n4) 27-28

⁵⁷ R. Cranston, *How Law Works*, (Oxford University Press, 2006) 9

courts.⁵⁸ In fact, cost and delay are a cause of major concerns and have featured prominently in discussions regarding access to justice.⁵⁹

Cost

In the case of England, the cost of litigation has been viewed as unpredictable, excessive and disproportionate for various reasons. First and foremost, the high cost of litigation which is normally attributed to the cost of obtaining legal services in terms of advice and representation since court procedures that are generally perceived to be inaccessible for those who lack legal representation, and these costs are generally too expensive for the poor.⁶⁰ Other than the poor, middle income individuals, who are not eligible for legal aid, and small or medium-sized businesses, are denied effective access to the court because of the high cost of English litigation.⁶¹

The high costs of legal services may compromise access to justice for those who cannot afford to pay for lawyers because it deters them from taking matters to court for adjudication on the basis of the perception that legal assistance from lawyers results in expensive and complex proceedings. High costs may compromise access to justice for individuals who due to lack of resources to engage a lawyer are either

⁵⁸ Lord Woolf (n17) 4,7

⁵⁹ Clarke (n27) 159

⁶⁰ Access to Justice/Rule of Law/ Security Democratic Governance Group Bureau for Development Policy, Accelerating Access to Justice for Human Development -A UNDP Rule of Law Initiative- 2010 Global Programme Annual Report (UNDP, 2011) 5 accessed from [www.undp.org/content/dam/undp/library/Democratic Governance/RoL-A2J GP Annual Report 2010 DGG BDP.pdf](http://www.undp.org/content/dam/undp/library/Democratic%20Governance/RoL-A2J%20GP%20Annual%20Report%20DGG%20BDP.pdf) > on 03/07/2013

⁶¹ Lord Woolf (n17) 16

deterred from suing⁶² or pursuing their rights through the formal legal process or opt to litigate without representation.⁶³

However, the effects of the inability of an individual to access the civil justice system due to lack the resources to engage a lawyer to assist in the navigation of legal system may obviously extend beyond the individual.⁶⁴ Furthermore in cases where a party is unrepresented, the unrepresented litigant is usually disadvantaged in comparison litigants who are represented. This is because the presence of lawyers mostly results longer proceedings, more costly and complex hearing.⁶⁵ The response to this concern has been the establishment of civil legal aid schemes. It is obvious that access to justice is hindered when the costs is beyond the reach of citizens.⁶⁶

Complexity

The first level of complexity is in the substantive law that is often criticised for being too complex and inaccessible⁶⁷ and results in the lack of sufficient awareness by the citizens of their rights, especially among the poor and marginalized⁶⁸ The next level of complexity is what is contained in Lord Woolf's as complexity in the procedures and the manner they are expressed in the Civil Procedure Rules that result in high cost and delay. Lord Woolf attributes the complexity if the procedures to the state of the civil

⁶² Ross Cranston 'The Rational Study of Law: Social Research and Access to Justice' in A. Zuckerman and R. Cranston (Eds), *Reform of Civil Procedure: Essays on Access to Justice*, (Clarendon Press, 1995) 52

⁶³ Commission on Legal Empowerment of the Poor (n40) 64

⁶⁴ Lasht (n49) 489, 493

⁶⁵ Cranston (n62) 52-53

⁶⁶ Macdonald (n4) 27

⁶⁷ Cranston (n57) 9

⁶⁸ Access to Justice/Rule of Law/ Security Democratic Governance Group Bureau for Development Policy (n60)

procedure rules,⁶⁹ which he describes as an aspect of the civil justice system which both litigants in person and those who have legal assistance find difficult to understand and is further complicated by the ‘incoherent and illogical’ manner that the civil procedure rules have increased over time in the England, with different rules being applied in different courts.⁷⁰

The inquiry⁷¹ attributed the complexity to four main reasons. One, the sheer size and number rules that rendered the rules inaccessible to those not familiar with them and complicated and overwhelming to those familiar with them, two, the use of jargon, over-elaborated style of language, too many variations, different ways for doing the same or similar things, the attempt to give every word a definite meaning and to cover every eventuality, three, the sectoral approach of providing separate rules for special categories of business which was often complicated by the need to make changes in the procedures to accommodate each new class of business which resulted into more elaboration and complexity and which made compliance with the rule difficult and four, complex sentence structures, their length, number of words used that is an attempt to comprehensively cover every eventuality and give every word a definite meaning, repetition of phrase or cross referencing.

There is no doubt that complexity in procedural rules can compound both cost and delay by prolonging litigation and expanding the range of potential the matters in

⁶⁹ Lord Woolf (n17) 15

⁷⁰ Robert Dingwall and Tom Durkin, ‘Time Management and Procedural Reform: Some Organizational Questions for Lord Woolf’, in A. Zuckerman and R. Cranston (Eds), *Reform of Civil Procedure: Essays on ‘Access to Justice’*, (Oxford University Press, 1995) 371, 376

⁷¹ Lord Woolf (n17)

dispute between the parties.⁷² Complexity may also decrease the effectiveness of the procedural rules⁷³ thus result in lengthy trials which consequently increase the cost of trials.⁷⁴ For the parties who are represented by lawyers, the unnecessarily complicated and cumbersome nature of litigation structures that burden litigation are a source of concern, due to the resultant increase of costs. For the unrepresented litigant, the complications lead to disempowerment and substantive injustice.⁷⁵ Apart from the Civil Procedure Rules, complexity of cost rules that are not clear promote the rise of numerous technical defences and endless legal argument by some lawyers for their gain and complexity or uncertainty in some areas of law may also contribute to costs a classic example is the law relating rented housing in regard to housing claims.⁷⁶

Delay

Delay was also attributed to complexity of the rules that facilitate the use of adversarial tactics, which are often regarded as 'necessary' but results in delay and uncertainty in the direction and pace of civil proceedings.⁷⁷ Delay is undesirable because delay postpones the remedies sought by a litigant⁷⁸ thereby deny a claimant meaningful access to justice and result in higher legal representation costs that

⁷² Paul Michalik, 'Justice in Crisis', in A. Zuckerman (Ed.), *Civil Justice in Crisis*, (Oxford University Press, 1999) 117

⁷³ Cameron (n54) 336

⁷⁴ Macdonald (n4) 28

⁷⁵ *ibid*

⁷⁶ Lord Justice Jackson, *Review of Civil Litigation Costs: Final Report*, (The Stationary Office, 2010) 45

⁷⁷ A.A.S. Zuckerman, 'Lord Woolf's Access to Justice: Plus ça change' (1996) 59 *Modern Law Review* 773,775

⁷⁸ Dingwall (n70) 375

obviously increase as the trial prolongs.⁷⁹ Delay increases cost directly, since the longer the matter takes the more it costs and may affect the credibility of the outcome of the case resulting to injustice to the poorer litigant and be exploited by a litigant whose interests would not be served by speedy resolution of the case⁸⁰ or lawyers who may spend more time in litigation than is necessary to increase litigation costs.⁸¹

As a contribution to higher costs, delay in dealing with civil matters prevents people who do not have adequate resources from taking matters to court for adjudication.⁸² Delay may also hinder access to justice by making the determination of facts more difficult as time goes by and discouraging parties from pursuing their claim or forcing them to settle their claim below the value due to the higher costs.⁸³ Ultimately delay may erode the effectiveness of judgement irrespective of its soundness and result in injustice not because of its incorrect in fact or law but because it may be too late to correct the wrong.⁸⁴

Legal Aid and the Challenges

The main response to the problems of access to justice in England was the establishment of publicly funded legal aid schemes, which focused on the provision of legal assistance through lawyers acting as advisers and advocates to people who lack

⁷⁹ Colleen M. Hanycz, 'More Access to Less Justice: Efficiency, Proportionality and Costs in Canadian Civil Justice Reform' (2008) *Civil Justice Quarterly* 98, 99

⁸⁰ Davis (n5) 167

⁸¹ Michalik, (n72) 118

⁸² Dingwall (n70) 371

⁸³ Dingwall (n70) 375

⁸⁴ A.A. S. Zuckerman, 'Justice in Crisis: Comparative Dimensions of Civil Procedure' in A. Zuckerman (Ed.) *Civil Justice in Crisis* (Oxford University Press, 1999) 6

the resources to engage legal assistance for their normal legal problems. Legal aid focuses on assisting poorer individuals cope with the routine legal problems through lawyers acting as advisers and advocates.⁸⁵ In this respect such legal aid furthers the rule of law by promoting access to justice which is a critical aspect of equality before the law.⁸⁶

However, legal aid is not a right and is not available to all litigants⁸⁷ especially because, the legal aid schemes are as in most countries that have them, are under financial strain.⁸⁸ As a result of the fiscal pressure on state funded legal aid, in England where one of the best legal aid schemes in the world exists, the high cost of litigation has reduced the number of people who are eligible for legal assistance and led to strict eligibility requirements. Meanwhile, many who are ineligible for legal aid still lack adequate resources to pay for legal assistance and as a result, the number of unrepresented litigants in civil proceeding has increased

The increase may strain the resources and operations of the courts,⁸⁹ interfere with the efficiency of the courts, and strain judges, lawyer, and court officers because of the limited legal knowledge and skill of the unrepresented litigants in the application of procedural and substantive law regarding their claim and may result in more delay.⁹⁰ Further, complex procedures pose a challenge to and greatly disadvantage the

⁸⁵ Cranston (n2) 236

⁸⁶ Cranston (n57) 41

⁸⁷ Rabeea Assy, 'Revisiting the Right to Self-representation in Civil Proceedings' (2011) 30 Civil Justice Quarterly 267, 276

⁸⁸ Cranston (n2) 236

⁸⁹ Dingwall (n70) 376

⁹⁰ Assy, (n87) 279

unrepresented litigants who, owing to their lack of legal skills and knowledge,⁹¹ cannot effectively represent themselves due to their lack of capacity to navigate through the procedures.⁹² In the end the litigants may be deprived of the benefits of the court process except in the most direct and simple cases.⁹³

Whereas it could be argued that true access to justice goes beyond merely overcoming delay, high cost and complexity that limit the ability to use formal institutions to resolve legal challenges,⁹⁴ concerns still arise when the inability to use legal institutions effectively deprives citizens of their rights and about the impact of rules, costs, comprehension, and legal services in hindering citizens who seek justice from getting what they are entitled to.⁹⁵ Within the England the establishment of the civil legal aid scheme brought legal services within reach of the less well-off⁹⁶ but partly addressed the concern of costs. Can more be done with respect to legislation and rules as a source of complexity? Can legislation contribute to access and how?

Legislation

The manner in which rules are communicated is also significant for the protection of the legal rights of the citizen.⁹⁷ In fact the rule of law requires legislation to be accessible to all and that everyone should be equal before the law. Therefore legislation must not be the cause of the impediments to the ability of an individual to exercise their rights under the law especially because costs will exist even when the

⁹¹ Assy, (n87) 268

⁹² Cameron (n54) 318-319

⁹³ Assy (n87) 281

⁹⁴ Macdonald (n4) 320

⁹⁵ Grossman (n8) 127

⁹⁶ Lord Bingham (n42) 77

⁹⁷ Peter Blume, 'The Communication of Legal Rules', (1990) 11 Statute Law Rev 189, 204

society is obliged to reduce them to the extent practicable to uphold the rule of law.⁹⁸ In this respect, legislation must be certain, clear, available in advance and readily known.⁹⁹ According to Bingham,¹⁰⁰ the law must be accessible and in so far as is practicable, intelligible, clear and predictable. However, it must be noted that accessibility is not restricted to the availability of the legislation but extends its ability to be read and understood.¹⁰¹ The availability of legislation in a form that is accessible and clear is important for the orderly functioning of the society and promotes the rule of law.¹⁰²

Since unnecessary complexity in the procedure of litigation is the source of cost, delay and disempowerment and substantial injustice mostly for the unrepresented litigant, the drafter can contribute to the promotion of access to justice through drafting good law in a language and style that is intelligible to the audience¹⁰³ not unnecessarily complex or cumbersome. Would result in the progressive leap towards greater access and efficiency of process thus reduce the cost and delay.

⁹⁸ Neate (n41) 15

⁹⁹ *ibid*

¹⁰⁰ Bingham (n42) 67, 69

¹⁰¹ Daniel Greenberg, 'Access to Legislation—The Legislative Counsel's Role', *The Loophole*, October, 2009, 7

¹⁰² Clarke (n27) 159

¹⁰³ Tiwonge Kayira, *Towards audience-based legislative drafting: What aspects of the language of the Malawi Penal Code Impede Communication* (2013) 39 *Commonwealth Law Bulletin* 373

CHAPTER 3: QUALITY OF LEGISLATION

Recently, the realisation that legislation impacts either positively or negatively the competitiveness and economic growth¹⁰⁴ has driven debates about the quality of legislation both at the level of the EU, with respect to EU legislation and EU members states with respect to national laws.¹⁰⁵ In deed the quality of legislation has been the subject of several inquiries in the England. The quality of legislation has been deliberated on in the Renton Report in 1975, the Woolf Report of 1996 and the Good Law Report of 2013.

In the Woolf report, the status of the then Civil Procedure Rules and substantive law was identified part of the cause complexity, high cost and delay, the three interrelated problems of access to justice. Though the report focused on Civil Procedure Rules which are subsidiary legislation, they are legislation made under the authority of an Act of Parliament and the general principles concerning quality of legislation ought to apply to them as well. The debates and inquiries have identified issues regarding legislation and propose different strategies and approaches for the improvement of the quality of legislation. However, what is 'good' legislation and how can a drafter contribute to the improvement of the quality of legislation?

The quality of legislation is not perceived in the same manner by governments, the citizens and commercial entities due to the 'vague and polysemous,' nature of the

¹⁰⁴ Maria Mousmouti, 'Operationalising Quality of Legislation Through the Effectiveness Test', (2012) 6 *Legisprudence* 191

¹⁰⁵ Wim Voermans, 'Concern About the Quality Of EU Legislation: What Kind of Problem, By What Kind of Standards?' (2009) 2 *Erasmus Law Review* accessed from www.erasmuslawreview.nl/files/ELR_issue6_004.pdf on 06/08/2013 59,60

concept of legislative quality.¹⁰⁶ The manner in which the quality of legislation is viewed depends on the nature, objective, actors, traditions and context of the legislation and the perspective of the stakeholders.¹⁰⁷

Quality of legislation may be viewed in terms of the quality in the substance of the legislation and quality in the form which is linked to accessibility of the legislation and is pertinent to the drafter.¹⁰⁸ Quality may also be viewed institutionally in terms of the legislative quality which relates to legality, constitutionality, effectiveness and legal certainty and instrumentally like in the European context where quality is viewed in terms of regulatory quality which reflects the impact of legislation in the promotion of economic development and in terms of market orientation including clarity, precision, simplicity and effectiveness while relying on a standard set of principles and tools to be applied in making legislation.¹⁰⁹ While for the European Court of Human Rights the ‘good’ quality of a provision of law, written or unwritten law, positive or judge-made, is perceived in terms of its inherent clarity, foreseeability, precision and accessibility¹¹⁰. The ‘goodness’ of law may be determined on the basis of its necessity, effectiveness, clarity, coherence and accessibility which depends on

¹⁰⁶ Alexandre Flückiger, ‘Concluding Remarks: Can Better Regulation Be Achieved By Guiding Parliaments and Governments? How the Definition of the Quality of Legislation Affects Law Improvement Methods (2010) 4 *Legisprudence*, 213, 214

¹⁰⁷ Mousmouti (n104) 192

¹⁰⁸ H. Xanthaki, ‘The Slim Initiative’, (2001) 22 *Statute Law Review* 108, 112

¹⁰⁹ Mousmouti (n104) 194-195

¹¹⁰ Nicola Lupo and Giovanni Piccirilli, ‘European Court of Human Rights and the Quality of Legislation: Shifting to A Substantial Concept of ‘Law’? (2012) 6 *Legisprudence* 229, 237

the content, structure, language and accessibility of the legislation. It is about the content of law, its architecture, its language and its accessibility.¹¹¹

Quality may also on one hand essentially refer to the process, the content, the structure and the effects of the law thereby portraying the legislative process as a rational process of applying legal principles so as to make democratic decisions or on the other hand also refer to the actual effects of legislation and the degree of achievement of its objective which essentially refers to effectiveness.¹¹² However, given that legislation is a means by which the governments of many countries transform their policies into law,¹¹³ to facilitate compliance by the citizen who would ordinarily not be compelled to comply with statements of policy without their expression as legislation,¹¹⁴ what would quality of legislation mean especially for a drafter and what is their contribution to it?

Given the fact legislation may be selected as the best means of implementing a government policy and the legislation is used after it is passed, to regulate the citizen's activities make legislation a instrument for regulation or governance which should ideally facilitate the achievement of the objectives of government by producing the desired or intended result, a practical perspective for quality should be efficacy, the ultimate goal of regulation.¹¹⁵ Since efficacy which Mader's¹¹⁶ defines as the extent

¹¹¹ Office of the Parliamentary Counsel Cabinet Office, *When Laws Become Too Complex: A Review into the Causes of Complex Legislation*, April 2013, accessed from <www.gov.uk/government/publications/when-laws-become-too-complex> on 31/08/2013

¹¹² Mousmouti (n104) 197

¹¹³ Crabbe (n14) 4

¹¹⁴ See Seidman (n11) 14

¹¹⁵ See H Xanthaki, 'Drafting Manuals and Quality in Legislation: Positive Contribution Towards Certainty in the Law or Impediment to the Necessity for Dynamism of Rules?' (2010) 4 *Legisprudence*, 111, 113

which the legislation achieves its objectives is not the sole responsibility of a drafter, but is shared by the drafters and all the other players in the policy process¹¹⁷ effectiveness has emerged as the universally recognized indicator of quality and especially with regards to the relationship between the law and its effects.¹¹⁸ In fact Seidman¹¹⁹ asserts that ‘a law that does induce its own effective implementation hardly merits the characterization ‘good law’.’

While the drafters cannot exclusively take credit for good legislation, they cannot be entirely blamed for defective legislation.¹²⁰ Similarly, while the perfect bill has never been written and will never be, the drafter largely contributes to the quality of draft legislation largely depends on the drafters contribution.¹²¹ Having determined the quality of legislation is ordinarily linked to its effectiveness,¹²² we can reasonably conclude that a drafter’s primary obligation is to draft legally effective legislation that will facilitate the achievement of the policy objectives in a clear and concise manner.¹²³ What is effectiveness and how can it be achieved?

Also for more details on the policy process see C. Stefanou, ‘Drafters, Drafting and the Policy Process’, in C. Stefanou and H. Xanthaki (Eds) *Drafting Legislation: A Modern Approach. In Memory of Sir William Dale*, (Ashgate 2008) 321-333.

¹¹⁶ L. Mader, ‘Evaluating the Effects: A Contribution to the Quality of Legislation’, (2001) 22 Statute Law Review 119, 125-127

¹¹⁷ Xanthaki (n15) 1, 5

¹¹⁸ Mousmouti (n104) 205

¹¹⁹ Seidman (n11) 125

¹²⁰ Ross Carter, ‘“High-quality” Legislation – (How) Can Legislative Counsel Facilitate It? 5 Views of “Quality” (Minister, Legislator, Judge, Legislative Counsel, Users)’ *The Loophole* October, 2009 41, 50

¹²¹ Elmer A Driedger, *The Composition of Legislation*, (2nd Edition), (Ottawa: 1976), xx.

¹²² Xanthaki (n15) 5

¹²³ OPC, Guide to Reducing Complexity in Legislation, 2011 4 accessed from <www.opc.gov.au/about/docs/ReducingComplexity.pdf> on 22/07/2013.

Effectiveness

Effectiveness is defined by Mader's¹²⁴ as the extent which the attitudes and actions of the targeted population corresponds to the attitudes and actions prescribed in the legislation. Effectiveness is a reflection of the extent which legislation can introduce adequate mechanisms that can facilitate the achievement of the desired objectives.¹²⁵

Karpen, links effectiveness to compliance with the law therefore legislation is effective, if it is observed and accepted by the target audience.¹²⁶

However, legislation cannot achieve the objective of regulating behaviour unless it can be understood by the targeted audience.¹²⁷ Therefore legislation must be drafted to be understood by the target audiences and be communicated to them using a method that conveys adequate information in order to be effective and function in a just and efficient way.¹²⁸ In this regard, a drafter must always consider the needs of the ultimate users of legislation, who traditionally were mostly judges and in some occasions the members of the public, so as to satisfy the needs of the drafter's immediate clients, the politicians, and the needs of the legislative counsel's ultimate clients, the public.¹²⁹

¹²⁴ L. Mader, (n116) '125-127

¹²⁵ Xanthaki 115

¹²⁶ Ulrich Karpen, 'Good Governance Through Transparent Application of the Rule of Law' (2009) 11 *European Journal of Law Reform* 213, 218

Also more details on identifying the audience see Duncan Berry, 'Audience Analysis in the Legislative Drafting Process' *The Loophole* June, 2000 61

¹²⁷ Robert Eagleson, 'Efficiency in Legal Drafting' in David St Kelly (Ed), *Essays on Legislative Drafting In Honour of J Q Ewens*, (Adelaide Law Review Association, 1988), 13

¹²⁸ Blume (n97) 189

¹²⁹ Douglass Bellis, 'The Role and Efficacy of Legislative Drafting in the United States: An Update on the American Drafting Process' *The Loophole* November, 2011 13,14

As the person skilled in the expression of the law, a drafter owes the instructors the duty to facilitate the achievement of the objectives of the client through legislation that will facilitate the achievement of the objectives as efficiently as is possible.¹³⁰ Such legislation must be legally effective and in order to achieve the objectives of the client be clear and concise.¹³¹ Further, in order to uphold the rule of law, of which the drafter is a custodian, the drafter must draft legislation in a manner that as far as is practicable allows citizen to have prior knowledge of their obligations and their rights by ensuring clarity and precision in the legislation in order to make to make legislation predictable and certain.¹³² Berry¹³³ emphasises that ‘legislation can only be effective if it is effectively communicated to those readers whom it purports to affect’. Moreover, unclear, imprecise legislation can confuse the governed as well as cause expensive and time-consuming litigation for its interpretation.¹³⁴

First and foremost, certainty is very important for legislation because without certainty, the citizens would not be able to determine their rights, obligations or responsibilities under the legislation. Citizens are entitled to be able to determine their rights with as much certainty as possible, irrespective of whether they hire a lawyer to advise him thereby reducing the need for litigation in order to determine rights and the increase in legal expenses.¹³⁵ Secondly the ability to determine the status and content of legislation with certainty is critical for the implementers of the legislation as well as

¹³⁰ Reed Dickerson, ‘How to Write a Law’, (1995) 31 Notre Dame Lawyer 14,16

¹³¹ Office of the Parliamentary Counsel, (n123).

¹³² Seidman (n11) 255

¹³³ Duncan Berry, ‘Audience Analysis in the Legislative Drafting Process’ The Loophole June, 2000 61

¹³⁴ Duncan Berry (n133) 62

¹³⁵ I. M. L. Turnbull ‘Problems of Legislative Drafting’ (1986) 7 Statute Law Review 67, 70

those who are expected to comply with it.¹³⁶Thirdly, the number of cases being referred to court would significantly reduce if legislation was certain thus facilitated early negotiated dispute resolution through lawyers.¹³⁷Uncertainty in legislation exposes the legislation to the interpretation of the Court which may at times be different from the policy objective the Government wanted to achieve through the legislation.¹³⁸ Effectiveness is promoted by clarity, precision, and unambiguity which are in turn facilitated by gender neutral and plain language¹³⁹but may also be undermined by complexity.

Complexity

Complexity and obscurity are the main criticisms against legislation in the recent times.¹⁴⁰ Indeed the Renton Report, the Woolf Report and the Good Law report mention complexity as one of the main problems of legislation because it is argued that complexity often creates confusion, annoyance, high costs and inefficiency.¹⁴¹ The Renton Committee was particularly concerned about the complex language, structure and form of the legislative text and over-elaboration which was more common in common law drafting¹⁴² where the drafter aims for precision and

¹³⁶ Robert Dupperron, 'Interpretation Acts-Impediments to Legal Certainty and Access to Law' (2005) 26 Statute Law Review 64,68

¹³⁷ Sudha Rani 76

¹³⁸ Turnbull (n135) 70

¹³⁹ H. Xanthaki (n115) 115

¹⁴⁰ Turnbull (n135) 67

¹⁴¹ Doug Rendleman 'Simplification-A Civil Procedure Perspective' (2000) 105 Dickinson. Law. Review. 241

¹⁴² Renton David, 'The Preparation of Legislation: Report' Presented to Parliament by the Committee on Preparation of Legislation (HMSO, 1975) 27

accuracy.¹⁴³ However, complexity in legislation may mostly be attributed to complex legislative proposals and the pursuit of accuracy.¹⁴⁴

While it would be important to acknowledge that not all legislation would be understood by the citizens without the advice of a lawyer,¹⁴⁵ legislation significantly affects the lives of the citizens including their liberties, finances and their general wellbeing, hence the need for the legal effect of legislation to be certain.¹⁴⁶ In fact lack of knowledge of the law due to unclear and complicated legislation is prejudicial to citizens and violates the principles of equality before the law.¹⁴⁷ The expression of legislation in an unnecessarily complex manner denies the citizens of its benefits and puts on them a risk when they do not fulfil obligations imposed by legislation.¹⁴⁸ Complexity also hinders economic activity, burdens citizens, businesses and communities, obstructs good government and undermines the rule of law.¹⁴⁹ Complexity may be avoided through clarity, precision and plain language.

Clarity

Clarity refers to the quality of being clear or being easy to understand.¹⁵⁰ Clarity in legislation is important because it facilitates the elimination of ambiguity and vagueness¹⁵¹ and promotes effective communication between the legislator and the

¹⁴³ Xanthaki, 'Editorial: Burying the Hatchet Between Common and Civil Law Drafting Styles in Europe', (2012) 6 *Legisprudence*, 133, 135

¹⁴⁴ Turnbull (n135) 68

¹⁴⁵ Lord Renton (142) 37

¹⁴⁶ Lord Renton (n142) 36

¹⁴⁷ Karpen (n126) 219

¹⁴⁸ Eagleson (127) 15

¹⁴⁹ Office of the Parliamentary Counsel (n111)

¹⁵⁰ See Chambers 21st Century Dictionary (Updated Edition) Chambers Harrap Publishers, 1999) 253

¹⁵¹ Crabbe (n 14) 43

target audience.¹⁵² Communication is according to Greenberg,¹⁵³ is one of the two simultaneous actions of making and communicating the law the drafter engages in while drafting legislation.

Clarity in legislation is recognized as a fundamental obligation of a drafter and is recognized as an element of validity and effectiveness of the legislation¹⁵⁴ especially because legislation defines legal relations by outlining rights, obligations, powers, privileges and duties and also conveys a message.¹⁵⁵ The drafter must aspire to communicate the legislative message as clearly as possible¹⁵⁶ by first thinking clearly before writing in order to prepare legislation that is effective.¹⁵⁷

Since legislative text do not exclusively addressed people with legal skill and knowledge, a drafter must have regard to the intended readership of the legislation in order to achieve of the objective of clarity or intelligibility that meets the requirements the diverse audience.¹⁵⁸ Laws which are addressed to everybody must be clear and easy to perceive.¹⁵⁹

Ambiguity hinders clarity because ambiguity permits dual or multiple meanings leading to uncertainty¹⁶⁰ thereby reducing the effectiveness of legislation. Ambiguous

¹⁵² Sudha Rani, 'The Role and Efficacy of Legislation' *Loophole* 2011 73,76

¹⁵³ Daniel Greenberg, *Laying Down the Law: A Discussion of the People, Processes and Problems the Shape Acts of Parliament*, (1st Ed), (Sweet & Maxwell, 2011) 30

¹⁵⁴ Greenberg (n101) 10

¹⁵⁵ Crabbe (n14) 27

¹⁵⁶ Dickerson (n130) Notre Dame 17

¹⁵⁷ Doug Rendleman 245

¹⁵⁸ Francis Bennion, 'The Readership of Legal Texts' accessed from <www.franciscbennion.com/topic/intelligibilityoflegislation.htm> on 30/09/2013

¹⁵⁹ Karpen (n126) 219

¹⁶⁰ Robert Dick, *Legal Drafting in Plain Language* (3rd Ed), (Thomson Canada Limited, 1995) 20

sentences whose meanings are understood by neither the lawyers nor the laymen¹⁶¹ hinder clarity and can be avoided by establishing the intended meaning and choosing the right expression for it.¹⁶² Clarity in legislation is promoted by precision and simplicity.¹⁶³

Precision

Precision refers to accuracy.¹⁶⁴ Drafting with precision eliminates the risk of misinterpretation by a person who wishes to intentionally subvert the meaning of the legislation.¹⁶⁵ Therefore the drafter is required to predict the context within which the legislation being drafted will be applied and the types of situations and the audience it will address. Precision is critical to legislative drafting because legislation prescribes the relationships between people and citizen and the state therefore any errors would definitely affect the relationships. They establish rights and obligations and errors and uncertainty could result in losses¹⁶⁶ and ineffectiveness.

Since the primary aim of the drafter is to express the intention of the lawmakers,¹⁶⁷ a drafter must attempt to convert policies into texts that will give effect to them as precisely and unequivocally as is practicable¹⁶⁸ through the choice of words that

¹⁶¹ H. Xanthaki 'The Problem of Quality in EU Legislation: What on Earth is Really Wrong?' *Common Market Law Review* (2001) 38 *Common Market Law Review*, 651, 670

¹⁶² Robert Dick 20

¹⁶³ H. Xanthaki (Ed.) *Thornton's Legislative Drafting* (5th Ed.) Bloomsbury Professional Ltd, 2013)

¹⁶⁴ See Chambers dictionary 1091

¹⁶⁵ Seidman (n11) 261

¹⁶⁶ Paul Salembier, *Legal and Legislative Drafting*, (LexisNexis, 2009) 2

¹⁶⁷ Turnbull (n135) 67

¹⁶⁸ Salembier (n166) 2-3

accurately and unequivocally express the intended meaning and avoiding the use of unnecessary words.¹⁶⁹

Adequate precision in legislation facilitates the achievement of the intended objectives and minimises the risk of deliberate misinterpretation to suit ulterior objectives of those may wish to who misinterpret it. On the other hand, over precision must be avoided. In the quest for simplicity in legislation, a balance must be struck between the requisite level of precision using fewer words and in the case of any conflict between precision and simplicity, precision must prevail.¹⁷⁰ This requires a case by case determination on the balance of and precision.¹⁷¹

Plain Language

The clamour for the use of plain language is not new.¹⁷² In fact, plain language has been adopted as a policy in several countries around the world.¹⁷³ Plain language may be defined as a language that is clear and straightforward for the audience of legislation.¹⁷⁴ The use of plain language in legislative drafting is being advocated for as a remedy for complexity in legislation and the problems of communicating legal rules which include the use jargon, intelligibility and accessibility of the legislation.¹⁷⁵ The use of plain language is promoted as a tool for enhancing intelligibility of complex issues contained in a policy that is expressed in legislation without reducing

¹⁶⁹ Xanthaki (n163) 59

¹⁷⁰ J Barnes 'The Continuing Debate About 'Plain Language' Legislation: A Law Reform Conundrum' (1990) 11 Statute L. Rev. 161, 165

¹⁷¹ Barnes (n170) 174

¹⁷² Daniel Greenberg, 'The Three Myths of Plain English Drafting', *The Loophole* February, 2011 103

¹⁷³ See for adoption of plain language around the world Michelle Asprey, *Plain Language for Lawyers* (3rd Ed.) (Federation Press, 2003) 60-79

¹⁷⁴ Eagleson (n127) 14

¹⁷⁵ Blume, (n97) 189

important matters to simple statements for simplicity. However in the quest for simplicity, the policy to be expressed in legislation must never be sacrificed for simplicity.¹⁷⁶

Plain language drafting is based on the presumption that legislative messages can be understood by the targeted audience without the intervention of a legal expert and focuses on the understanding and response of citizens to legislation.¹⁷⁷ Contrary to misconceptions on plain language, it is the full version of English that focuses on expression of legislation in words and use of grammatical structures that are widely understood¹⁷⁸ and advocates for comprehensiveness and precision as well as legal soundness and intelligibility of legal documents.¹⁷⁹

The proponents of plain language argue that plain language is a tool for promoting clarity in writing and structural convenience of documents through the expression of legislation clearly in a language that is free of obscurity or convolution in order to enable the target audience to easily read and understand their rights and obligations.¹⁸⁰

Plain language focuses beyond the meanings of words and their perception by the audience to the sentence structure to the structure of legislation.¹⁸¹ Structural impropriety can cause complexity especially when important provisions are obscured by other details like procedural details provisions. However, a clear and logical

¹⁷⁶ Anthony Watson-Brown, 'In Search of Plain English—The Holy Grail or Mythical Excalibur of Legislative Drafting,' (2001) 33 Statute Law Review 7,9

¹⁷⁷ Roderick A. Macdonald, 'The Fridge-Door Statute', (2001) 47 McGill Law Journal. (2001) 11, 22

¹⁷⁸ Crabbe (n14) 54

¹⁷⁹ Robert Eagleson (n127) 15

¹⁸⁰ Crabbe (n14) 53

¹⁸¹ Asprey,(n173) 13

structure facilitates the reduction of complexity and makes drafting significantly easier.¹⁸²

First and foremost there is need to acknowledge that the use of plain language may not be easy when dealing with complex concepts or policies that cannot be simplified by the use of a reasonable number of words. Secondly, level of simplicity and intelligibility must depend on the target audience of the legislation. The expression of simple concepts and the imposition of simple rules, require drafting in a manner that is easily intelligible to any audience. For instance, the use of technical language may be the best option for expressing complex technical ideas, on the basis that the legislation is directed to an audience that is familiar with the subject of the legislation.¹⁸³ While simplicity desirable, it may not result in clarity in some instances.¹⁸⁴ This is because where law is simply drafted but imprecise is likely not to achieve its objectives due to the uncertainty that results from it.¹⁸⁵

Proponents of plain language advocate for the use of ordinary and common words that have a precise meaning and are arranged in a grammatical correct and logical order, the use of short simple sentences, the expression of a single idea in each sentence for clarity, avoiding unnecessary words and superfluous words. Arranging words in a grammatically correct logical order¹⁸⁶ They also propose the avoidance of unnecessary jargon, avoid unnecessary jargon, use active verbs and present tense with singular

¹⁸² OPC (n123) Guide 8

¹⁸³ Daniel Greenberg, *Craies on Legislation*, (10th Ed.), (Sweet & Maxwell, 2012) 391

¹⁸⁴ Crabbe (n14) 44

¹⁸⁵ Xanthaki (n163) 56

¹⁸⁶ Crabbe (n14) 55

nouns, putting the rule first, the exception last, and liberal use of headings and the consistent use of terms.¹⁸⁷ Consistency which Dickerson¹⁸⁸, refers to as a *sine qua non* of all effective communication can be achieved through consistent choice of words and terminology, without variation of terminology for same thing and not in a sense that significantly differs from usual understanding by the audience of the legislation. For instance ‘motor vehicle’ and ‘automobile’, ‘residence’ and ‘home’ should not be used interchangeably. Consistency of enables and facilitates faster interpretation and promotes understanding by the users by providing the reader with something that is familiar and easy both to navigate and to understand thereby avoiding confusion of the user.¹⁸⁹

¹⁸⁷ Rendleman (n141) 241

¹⁸⁸ Dickerson (n130) 24

¹⁸⁹ Stephen Laws, ‘Consistency versus Innovation’, *The Loophole* October, 2009, 25, 29

CHAPTER 4: PROMOTION OF ACCESS TO JUSTICE THROUGH BETTER QUALITY OF LEGISLATION

When appointed to the Inquiry, Lord Woolf terms of reference had various main objectives. The objectives were to improve access to justice and reduce the cost of litigation, reduce complexity and modernise terminology and remove unnecessary distinctions of practice and procedure. There is no doubt that substantive law and rules of procedure influence those approaching courts for the adjudication of their disputes, the matters and the outcomes. Complex substantive legislation in some areas, rules, and technicalities and inconsistencies in the proceedings can discourage people from referring matters to courts, facilitate delay by parties who have the intention to delay the proceedings or weaken claims or induce a party to lose interest and abandon the claim.¹⁹⁰ Would the aspects of quality of legislation identified in the preceding chapter facilitate the attainment of the objectives? Would the reduction of complexity and modernisation of terminology in the Rules of Court involving the production of a simpler procedural code to apply to civil litigation in both the High Court and the county courts enhance effectiveness?

The objective of the civil procedure rules is to facilitate the interaction of the litigants with the civil justice system and coordinate the interaction. They prescribe the conduct of the parties throughout the civil proceedings and are very fundamental in how matters are handled by the court.¹⁹¹ The complexity hinders the accessibility which in turn affects the effectiveness of the rules. Having determined the meaning and

¹⁹⁰ Cranston (n57) 122

¹⁹¹ Cranston (n57) 121

significance of access to justice and the problems to access to justice as identified by the Lord Woolf inquiry and attributed to the status of substantive law and civil procedure Rules, and determined the meaning, attributes and the tools of achieving good quality legislation, need to consider or test whether improving the quality of civil procedure rules could address the problems of access to justice identified by Lord Woolf.

While changes in rules of procedure are regularly proposed as solutions for the problems of access to justice, it must be acknowledged that the rules are definitely just a part of the problem costs and efficiency.¹⁹² The Woolf inquiry resulted in the enactment of the Civil Procedure Act, 1997 and the Civil Procedure Rules, 1998 in order to simplify the procedure and the rules and thereby reduce costs and expedited civil litigation proceedings.

Simplification of the rules

The main theme in Lord Woolf's report is simplification which is defined by Bennion¹⁹³ as putting into a form which is as clear, that is intelligible and free from elaboration, to the intended reader as feasible having regard to the limitations of the English language, the need to carry out the relevant purpose(s), and the need to be understood by the audience. Lord Woolf's proposed new rules on the basis that simple rules promote the understandability while the complex rules facilitated lawyers aggressive tactics.¹⁹⁴

¹⁹² Cranston (n 57) 148

¹⁹³ Francis Bennion, 'The Readership of Legal Texts' accessed from <www.francisbennion.com/topic/intelligibilityoflegislation.htm> on 30/09/2013

¹⁹⁴ Lord Woolf (n17) 7

Simplification of the rules was also a mechanism for accommodating the unrepresented litigant and facilitating the use of procedural rules by the litigants who lack legal knowledge and skills.¹⁹⁵ In reality, many other laws would have also qualified to qualify for simplification because their language may be lagging behind¹⁹⁶ and are still known to cause difficulties, expense and consume time for people to understand their legal rights and obligations, burden businesses and restrict access to justice..¹⁹⁷

Simplification was achieved by the unification of procedure rules applying to the High Court and county courts and the simplification of particular procedures for instance, substitution of the various ways of commencing an action by one through a claim form, the reduction of the volume of the rules, adopting plain language techniques of shorter adoption of a simpler structure and drafting the rules in simple and clear language would promote effectiveness of the rules.¹⁹⁸ Effective rules would without doubt reduce delays in litigation.

The unification of rules reduced the difficulties users of the rules encountered and increased as the rules increased.¹⁹⁹ In fact having a single piece of rules to govern the procedure in civil courts enhances both accessibility and understandability as opposed

¹⁹⁵ Assy (n87) 272

¹⁹⁶ Rendleman (n141) 242

¹⁹⁷ Clearer Laws Committee, Causes of Complex Legislation and Strategies to Address These (Office of the Parliamentary Counsel, 2006) accessed from <www.opc.gov.au/clearer/docs/ClearerLaws_Causes.PDF> on 20/07/2013

¹⁹⁸ Lord Woolf Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales (HMSO, 1996) 281

¹⁹⁹ Lord Renton (n142) 34

to having various fragmented rules.²⁰⁰ While it could be reasonably argued sectoral rules were necessary because they were addressed to many audiences with different understanding abilities, the language should vary for every category, this approach could undoubtedly result in complexity and inconsistency within the legislation.²⁰¹

Consistency in the procedures and terminology may reduce of delays and avail effective remedy to citizens which inconsistency in procedures could be a major cause and hindrance.²⁰² Consistency in terminology and language used in expressing legislation also facilitates comprehension which is necessary. Under the former rules, different terms were used to refer to the person for the person who makes an application to court, including ‘plaintiff’ (in many proceedings for money compensation), ‘petitioner’ (in company law and family proceedings), and ‘applicant’ (in judicial review cases). Similarly, the terms used for initiating civil proceedings vary depending on the context and depending on the Court. For example the variety of terms include ‘writ’, ‘originating summons’, ‘originating motion’, ‘petition’ in the High Court’, and the ‘summons’, originating application, petition and notice of appeal in the county courts. To add to the confusion a summons also could vary in different contexts and different courts. Such inconsistencies introduced complexity right from the beginning and resulted in uncertainty and would cause confusion that could result in delay.²⁰³

²⁰⁰ Clarke (n27) 161

²⁰¹ Peter Bloom 200

²⁰² Lord Woolf (n198) 116

²⁰³ Lord Woolf, (n17) 208

The reduction of procedures as in the case of commencing proceedings to one as Lord Woolf proposed significantly simplified the procedure as compared with the system under the old rules.²⁰⁴ Finally, just as the usage of delegated legislation could hinder accessibility of the legislation to the ultimate user because it undoubtedly results in the location of legislation on a particular subject in different pieces of legislation²⁰⁵ sectoral procedural rules also hinder accessibility and uncertainty. The reduction of the volume of Rules and the number of propositions in them, using clearer and simpler language enhances effectiveness²⁰⁶ thereby facilitate the achievement of effective remedy which complexity, delay and cost hinder, the procedures and processes ought to be accessible and effective.

Language and structure of the rules

Previously, civil procedure rules were drafted with lawyers and judges in focus as the primary audience thus the expression in complex and technical language. However, in addition to the lawyers and judges the audience of civil procedure rules has now expanded to also include court administrators, both litigants who are represented and those who are not and advice workers who assist litigants who are unrepresented.²⁰⁷ Imposing on the drafter a greater responsibility to consider the needs the different categories of users who are likely to use the rules for different purposes and approach them differently.²⁰⁸

²⁰⁴ Michelle Bramley and Anna Gouge, *The Civil Justice Reforms One Year On: Freshfields Assess Their Progress*, (Butterworths, 2000) 48

²⁰⁵ Rick Bigwood (Ed.), *The Statute: Making and Meaning*, (Lexis Nexis, 2004) 88

²⁰⁶ R. Cranston (n57) 150

²⁰⁷ Dick Greenslade, 'A Fresh Approach: Uniform Rules of Court', in A. Zuckerman and R. Cranston (Eds) *Reform of Civil Procedure: Essays on Access to Justice*, (Clarendon Press, 1995) 122

²⁰⁸ *ibid*

It is well known that other than complicating understanding and interpretation, the expression of legislation in complex verbose language that is full of jargon and legal constructs, over-elaboration and unnecessary specialist terminologies may also irritate the audience and result in additional cost that arises from the increase in the need for legal and administrative explanation thus become expensive to use.²⁰⁹ In the cases of unrepresented litigants, complex language may reduce efficiency of the courts, by causing delays and overburden court officials because on their lack of knowledge and familiarity of the rules.²¹⁰ The use of plain language which promotes understandability would particularly be of great benefit to unrepresented litigants who are required understand and adhere to the rules.²¹¹

Indeed plain language has been used by the drafter to enhance simplicity is commendable in light of the different audiences of the rules especially because it would promote effectiveness since the technique has been proven through statistical evidence that proves to save costs, time, and is effective because it improves comprehension, comprehensibility and readability.²¹² The breaking of material into paragraphs and subparagraphs conveying different ideas make reading easier and the information more absorbable²¹³ and the white spaces in between more inviting. Long sentences that appear require more time and care to read thus may tire the reader.²¹⁴

²⁰⁹ Wim Voermans, 'Styles of Legislation and Their Effects' (2011) 32 Statute Law Review, 38, 40

²¹⁰ Assy (n87) 279, 280

²¹¹ Dick Greenslade, (n207) 119

²¹² Asprey (n173) 33, 36, 59

²¹³ Asprey (n173) 100

²¹⁴ Asprey (n173) 107

In addition the use of example to provide helpful illustrations for complex provisions²¹⁵ as in the case of Rule 2.8 facilitates the understanding of computation of time.

Clarity and Precision

Clarity is pertinent for subsidiary legislation of which the Civil Procedure Rules are just as it is for Acts of Parliament in fact it can be argued that as subsidiary legislation, their provisions often concern and directly affects the members of the public and the activities they regulate more than the Act of Parliament that under which they were made.²¹⁶ The use of plain language and the use of explanatory material and examples promoted clarity and simplicity.

Precision is very important for the Rules as in any other legislation because it enhances certainty. The importance of certainty in the civil procedure rules was emphasised by Moore-Bick L.J.²¹⁷ who stated that-

‘Certainty is as much to be commended in procedural as in substantive law, especially perhaps in a procedural code which must be understood and followed by ordinary citizens who wish to conduct their own litigation.

In the case of the civil procedure rules, while more fullness and detail may be desirable, to instruct and guide the parties and assist the course of litigation, they

²¹⁵ Peter Butt and Richard Castle. *Modern Legal Drafting: A Guide to Using Clearer Language* (2nd Edition) (Cambridge University Press, 2006), 198

²¹⁶ Greenberg (n183) 393

²¹⁷ *Gibbon v Manchester City Council* [2010] EWCA Civ 726, [2011] 2 All E.R. 258, at 263

ought not be full of jargon as taxation rules may be. A drafter must ensure a degree of precision in drafting and that can be interpreted without much flexibility in its interpretation for the effectiveness of the rules.²¹⁸ While the structure of legal rules is always attributed to the quest for precision,²¹⁹ the use words in order to comprehensively provide for every possible eventuality and give every word a definite meaning, resulting in unnecessary repetition or cross referencing²²⁰ may lead to over-elaboration and unnecessarily long sentences resulting in more complexity and intelligibility. One of the guiding doctrines of England Parliamentary Counsel has always been that unnecessary material in statutes tends to turn septic. England drafters have traditionally sought to avoid the inclusion of anything in legislation that goes beyond a legal change, or which distracts from the change that is required.²²¹ There is no doubt that the drafters contributed significantly to the simplification of the rules in order to facilitate access to justice using plain language as a tool for simplifying and reduce complexity in the rules and promote access to justice for both the represented and the unrepresented litigants. Di they achieve their objective?

EVALUATION OF THE SUCCESS OF THE WOOLF RULES

Lord Woolf was appointed by the Lord Chancellor in 1994 to review the then rules and procedures of Civil Courts in England and Wales. The aim of the review was to improve access to justice and reduce the cost of litigation, reduce complexity and

²¹⁸ I.R. Scott, 'The structure of the Civil Procedure Rules', (1999) 18 *Civil Justice Quarterly* 98, 102

²¹⁹ David Mellinkoff, *The Language of the Law* (Little, Brown and Company, 1963) 290.

²²⁰ Lord Woolf (n17) 211

²²¹ Stephen Laws, 'Plus ça change? Continuity and Change in UK Legislative Drafting Practice' (2009) 11 *European Journal of Law. Reform* 139, 140

modernise terminology and remove unnecessary distinctions of practice and procedure. He proposed radical structural and procedural reforms that which culminated with the drafting of the simplified Civil Procedure Rules through the adoption of the plain language and the unification of the different rules for the High Court and the county courts as well as the various sectoral rules. This was the greatest change since The Rules of the Supreme Court in 1883²²² but did they succeed?

On one hand the rules were earlier lauded as ‘a new sort of user friendly, easily followed and understood code of rules to meet the needs of all users of the civil process and their advisors whether professional or lay.’²²³ However, According to Lord Jackson, the Woolf Reforms which were aimed at reducing delay, complexity in the procedures and rules did not achieve all their objectives. While the first was achieved, the next two which are interconnected did not.

In fact while the unification of the rules resulted into one set of rules, the rules have overtime been updated about sixty times and practice directions and protocol issued. In fact according to Lord Jackson, ‘the size of the White Book has grown considerably and inexorably.....This in part is responsible for then unacceptable increases in costs which have taken place. The total corpus of procedural rules is daunting in size and complexity.’²²⁴ It appears that in the quest for predictability which could be the reason for the several amendments and issuance of practice directions and protocols has resulted into lengthy and detailed rules that rules that require more time to digest

²²² Dwyer (n18) 5)

²²³ Dick Greenslade 136

²²⁴ Lord Jackson (n76) 44

and thereby causing high costs of compliance²²⁵ and result in a are a challenge to the user when trying to determine a clear picture of the entire procedure?.²²⁶

The need for predictability could have arisen from the use of plain language to simplify the rules and avoid unnecessary detail instead of using more words²²⁷ especially because civil litigation is complex or technical and require rules that are specified with precisely and with certainty in order to be effective.²²⁸

Apparently, costs are still being found to be particularly high. In fact while the rules had been simplified, they required more to be done Further the rules require parties to undertake ‘time consuming procedures involving professional skill’. Therefore ‘the more work the rules require to be done, the more it will cost.....’.²²⁹ In some areas of litigation the complexity of the substantive legislation causes parties to incur substantial costs while complex cost rules that lack clarity also still escalate costs litigation costs²³⁰ It is acknowledged that the costs of litigation are still disproportionately high in England after the Woolf Reforms.²³⁵

The rules reduced delay from the commencement of proceedings to finalisation.²³⁸ The rules also evidently reduced ‘satellite litigation’ which is litigation which does not

²²⁵ Lord Jackson (n76) 44

²²⁶ Greenberg (n183) 77

²²⁷ Butt (n215) 115

²²⁸ Duncan Berry, ‘Could Our Statutes Be Simpler?’, (1987) 8 Statute Law Review 92, 93

²²⁹ Comments of the Civil Committee of the Council of Her Majesty’s Circuit Judges quoted in Lord Jackson (n76) 43-44

²³⁰ Lord Jackson (n76) 43

²³⁵ Michael Zander, ‘The Woolf Reforms: What’s the Verdict?’ in Deidre Dwyer (Ed.) *The Civil Procedure Rules Ten Years On* (Oxford University Press, 2009) 417

²³⁸ Zander (n234) 427

further the efficient and economical progress of claims to their final determination on merits.²³⁹ On this aspect, the rules and the reforms succeeded.

²³⁹ Anthony Clarke, 'The Woolf Reforms: A Singular Event or An On Going Process?' in D. Dwyer, *The Civil Procedure Rules Ten Years On* (Oxford University Press, 2009) 46

Chapter 5: Conclusion

Access to justice is recognized as fundamental right and an aspect of the rule of law and is important because it enables citizens to meet their legal needs as well as facilitates the actualisation of human rights and promotes the rule of law.²⁴⁰ While attempts have been made to promote access to justice, through legal aid schemes financial pressure and strict eligibility criteria disqualify many people who lack resources to hire lawyers to advise or represent them as they pursue claims in the formal civil justice system leading to the increase in the number of unrepresented litigants who are not familiar with the civil procedure or the rules. This gives rise to the need to develop an ingenious, cheaper yet effective means of promoting access to justice as well as reduce the cost of access to justice to both individuals and states.²⁴¹

This dissertation sought to consider and prove whether drafters can contribute to access to justice. This dissertation found out that most of the problems of access to justice are linked to substantive or procedural legislation. First and foremost is the substantive law that is often criticised for being complex and inaccessible²⁴² thus hindering the citizen and the implementers ability to enforce the rights and duties arising from these substantive legislation.²⁴³ Secondly, complexity and uncertainty in some areas of law also contribute to disproportionate costs of litigation.²⁴⁴

While Lord Jackson suggests that drafters and authors of practice directions, protocols and court guides should in future accord higher priority to the goal of simplicity when

²⁴⁰ Cranston (n57) 84

²⁴¹ Commonwealth Legal Education Association (n6) 552

²⁴² Cranston (n57) 9

²⁴³ D. R. Miers and A.C. Page, *Legislation*, (Sweet and Maxwell, 1982) 211

²⁴⁴ Lord Jackson (n76) 45

striking the balance between the need for predictability and the need for simplicity in order to reduce complexity,²⁴⁸ Thornton warned that such simplicity without precision could lead to uncertainty thereby rendering legislation ineffective.²⁴⁹

The goal of any drafter is effectiveness so the drafter should not lose focus on this goal and promote access to justice by improving the quality of legislation by enhancing clarity and precision through the use of plain language as a tool to enhance intelligibility and accessibility of the legislation. Undoubtedly inaccessible and bad law may deny an individual the access to a remedy because access to prevailing legislation is necessary for persons seeking to assert their asserting their legal rights.²⁵⁴

By improving the manner the in which legal rules, including the civil procedure rules are expressed a drafter contributes to the development of a more equal and just society especially because the legal system including the civil justice system nowadays should not be an exclusive domain for jurists.²⁵⁵ Improving the quality of the Civil Procedure Rules, by consolidation or unification (reducing the number), simplification of the language and condensing laws, and eliminating any inconsistencies would greatly benefit both lawyers and unrepresented litigants. It will also enhance compliance with the rules thereby enhance access to justice.

While the drafter can contribute to access to justice by improving the quality of legislation, other measures should be adopted to enhance access and maximize

²⁴⁸ Lord Jackson (n76) 52

²⁴⁹ G. C. Thornton, *Legislative Drafting*, (4th Edition) (Butterworths, 1996)52

²⁵⁴ Clarke (n27) 160

²⁵⁵ Blume (n97) 210

individuals' opportunities to address legal problems without the expensive representation by attorneys especially in simple matters.²⁵⁷ In order to achieve this objective, rules of procedure and other supporting structures that are designed to facilitate the citizens to sort out their legal problems on their own without expensive professional assistance. Such efforts would better serve the rule of law since the more as a state strives to achieve expeditious and affordable dispute resolution, though not easily achievable, the. The more the rule of law is served.²⁵⁸ In this respect, the contribution of a drafter should not be a one off but should continuous as the drafters strive to draft effective legislation.

However it must be acknowledged that while the changes in the Rules of Procedure in the UK could not solely eliminate the problems of access to justice, they are a significant part of comprehensive reforms²⁶⁰ and to which the drafter contributed much. Since it has now been admitted by academics and practitioners of legislative studies that legislative drafting processes and products extend beyond national experience,²⁶¹ the experience of England would definitely benefit other jurisdictions who undertaking reforms or contemplating reforms to justice.

Finally, while the Woolf Reforms that radically reformed the civil justice system may be regarded as successful, there would be need for empirical research which would confirm the extent the changes have impacted access to justice in the civil justice

²⁵⁷ Deborah Rhode Access to Justice, (Oxford University Press, 2004) 20

²⁵⁸ Bingham (n42) 89

²⁶⁰ Lord Woolf (n198) 281

²⁶¹ Xanthaki, (n143) 133

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system and would inform the any future actions as the aspiration to enhance access to justice.²⁶²

²⁶² Cranston (n57) 177

Bibliography

Access to Justice/Rule of Law/ Security Democratic Governance Group Bureau for Development Policy, *Accelerating Access to Justice for Human Development -A UNDP Rule of Law Initiative- 2010 Global Programme Annual Report* (UNDP, 2011) 5 accessed from [www.undp.org/content/dam/undp/library/Democratic Governance/RoL-A2J GP Annual Report 2010 DGG BDP.pdf](http://www.undp.org/content/dam/undp/library/Democratic%20Governance/RoL-A2J%20GP%20Annual%20Report%202010%20DGG%20BDP.pdf) > on 03/07/2013

Andrews, Neil, 'Adversarial Principle: Fairness and Efficiency: Reflections on the Recommendations of the Woolf Report' in Zuckerman, A., and Cranston, R., (Eds.) *Reform of Civil Procedure: Essays on 'Access to Justice'*, (Oxford University Press, 1995)

Asprey Michelle, *Plain Language for Lawyers* (3rd Ed.) (Federation Press, 2003)

Assy Rabeea, 'Revisiting the Right to Self-representation in Civil Proceedings' (2011) 30 *Civil Justice Quarterly* 267

Bellis Douglass, 'The Role and Efficacy of Legislative Drafting in the United States: An Update on the American Drafting Process' *The Loophole* November, 2011 13

Bennion Francis, 'The Readership of Legal Texts' accessed from www.francisbennion.com/topic/intelligibilityoflegislation.htm on 30/09/2013

Berry Duncan, 'Could Our Statutes Be Simpler?', (1987) 8 Statute Law Review 92

Berry Duncan, 'Audience Analysis in the Legislative Drafting Process' *The Loophole* June, 2000 61

Bigwood Rick (Ed.), *The Statute: Making and Meaning*, (Lexis Nexis, 2004)

Bingham Tom, *The Rule of Law*, (Penguin Books, 2011)

Bramley Michelle and Gouge Anna, *The Civil Justice Reforms One Year On: Freshfields Assess Their Progress*, (Butterworths, 2000)

Butt Peter and Castle Richard, *Modern Legal Drafting: A Guide to Using Clearer Language* (2nd Edition) (Cambridge University Press, 2006)

Cameron Camille and Kelly Elsa, 'Litigants in Persons in Civil Proceedings: Part 1', (2002) 32 Hong Kong Law Journal 313

Cappelletti, M. and Garth, B, (Eds), *Access to Justice Volume I: A World Survey Book 1*, (Alphen aan den Rijn ; Milan : Sijthoff and Noordhoff : Giuffrè Editore-Milan, 1978)

Carter Ross, "'High-quality" Legislation – (How) Can Legislative Counsel Facilitate It? 5 Views of "Quality" (Minister, Legislator, Judge, Legislative Counsel, Users)' *The Loophole* October, 2009 41

Clarke Anthony, 'The Woolf Reforms: A Singular Event or An On Going Process?' in
Dwyer, D. *The Civil Procedure Rules Ten Years On* (Oxford University Press, 2009)

Clearer Laws Committee, *Causes of Complex Legislation and Strategies to Address
These* (Office of the Parliamentary Counsel, 2006) accessed from
<www.opc.gov.au/clearer/docs/ClearerLaws_Causes.PDF> on 20/07/2013

Commission on Legal Empowerment of the Poor, "Making the Law Work for
Everyone" Vol 1, Report of the Commission on Legal Empowerment of the Poor, (the
Commission on Legal Empowerment of the Poor and United Nations Development
Programme, 2008) 27 accessed from
<http://www.undp.org/content/dam/aplaws/publication/en/publications/democratic-governance/legal-empowerment/reports-of-the-commission-on-legal-empowerment-of-the-poor/making-the-law-work-for-everyone---vol-i---english/Making_the_Law_Work_for_Everyone.pdf> on 03/07/2013

Commonwealth Legal Education Association, 'Access to Justice in the
Commonwealth: Some Current Trends', (2004) 30 *Commonwealth Law Bulletin*, 552

Crabbe, V.C.R.AC., *Legislative Drafting* (Cavendish Publishing Limited, 1993)

Cranston, R, *How Law Works*, (Oxford University Press, 2006)

Cranston, Ross, 'Access to Justice in South and South East Asia' in Julio Faundez
(Ed.) *Good Government and the Law: Legal and Institutional Reform in Developing
Countries*, (Macmillan Press, 1997)

Cranston, Ross, 'The Rational Study of Law: Social Research and Access to Justice' in A. Zuckerman and R. Cranston (Eds), *Reform of Civil Procedure: Essays on Access to Justice*, (Clarendon Press, 1995)

Cranston, Ross, *How Law Works: The Machinery and Impact of the Civil Justice*, (Oxford University Press, 2006)

David Mellinkoff, *The Language of the Law* (Little, Brown and Company, 1963)

Davis, G. L., 'Civil Justice Reform in Australia', in Zuckerman, A. (Ed.) *Civil Justice in Crisis: Comparative Perspectives of Civil Procedure*, (Oxford University Press, 1999)

Dick Robert, *Legal Drafting in Plain Language* (3rd. Ed), (Thomson Canada Limited, 1995)

Dickerson Reed, 'How to Write a Law', (1995) 31 *Notre Dame Lawyer* 14

Dingwall Robert and Durkin Tom, 'Time Management and Procedural Reform: Some Organizational Questions for Lord Woolf', in A. Zuckerman and R. Cranston (Eds), *Reform of Civil Procedure: Essays on 'Access to Justice*, (Oxford University Press, 1995)

Driedger, E. A, *The Composition of Legislation*,(2nd Edition), (Ottawa: 1976)

Dupperron Robert, 'Interpretation Acts-Impediments to Legal Certainty and Access to Law' (2005) 26 *Statute Law Review* 64

Dwyer Deidre (Ed.) 'Introduction', in Dwyer, D, *The Civil Procedure Rules Ten Years On* (Oxford University Press, 2009)

Flückiger, Alexandre, 'Concluding Remarks: Can Better Regulation Be Achieved By Guiding Parliaments and Governments? How the Definition of the Quality of Legislation Affects Law Improvement Methods (2010) 4 *Legisprudence*, 213

Francioni Francesco, 'The Rights of Access to Justice under Customary International Law', in Francioni Francesco (Ed.) *Access to Justice as a Human Right*, (Oxford University Press, 2007).

Galanter Marc, 'Access to Justice as a Moving Frontier' in Bass Julia, Bogart, W. A. and Zemans, F. H., (Eds), *Access to Justice for a New Century: The Way Forward*, (Law Society of Upper Canada, 2005)

[Gibbon v Manchester City Council \[2010\] EWCA Civ 726, \[2011\] 2 All E.R. 258](#), per Moore-Bick L.J. at 263 Court of Appeal

Greenberg Daniel (Ed.), *Craies on Legislation*, (10th Ed.), (Sweet & Maxwell, 2012)

Greenberg Daniel, 'Access to Legislation—The Legislative Counsel's Role', *The Loophole*, October, 2009 7

Greenberg Daniel, *Laying Down the Law: A Discussion of the People, Processes and Problems the Shape Acts of Parliament*, (1st Ed), (Sweet & Maxwell, 2011)

Greenberg Daniel, *The three myths of plain English drafting*, *The Loophole* February, 2011

Greenslade Dick, 'A Fresh Approach: Uniform Rules of Court', in A. Zuckerman and R. Cranston (Eds) *Reform of Civil Procedure: Essays on Access to Justice*, (Clarendon Press, 1995)

Grossman J. B and Sarat A 'Access to Justice and the Limits of Law' (1981) 3 *Law and Policy Quarterly* 125

Grossman Joel B and Sarat Austin, 'Access to Justice and the Limits of Law' (1981) 3 *Law and Policy Quarterly* 125

Hanycz Colleen M., 'More Access to Less □Justice: Efficiency, Proportionality and Costs in Canadian Civil □Justice Reform' (2008) *Civil Justice Quarterly* 98

Hector Fix-Fierro, *Courts, Justice and Efficiency: A Socio-Legal Study of Economic Rationality in Adjudication*, (Hart Publishing, 2003)

J Barnes 'The Continuing Debate About 'Plain Language' Legislation: A Law Reform Conundrum' (1990) 11 *Statute L. Rev.* 161

Jackson, Lord Justice Jackson, *Review of Civil Litigation Costs: Final Report*, (The Stationary Office, 2010)

Karpen Ulrich, 'Good Governance Through Transparent Application of the Rule of Law' (2009) 11 *European Journal of Law Reform* 213

Kayira Tiwonge , 'Towards audience-based legislative drafting: What Aspects of the Language of the Malawi Penal Code Impede Communication' (2013) 39 *Commonwealth Law Bulletin* 373

Lasht Karen A., Gee Pauline, Zelon Laurie, 'Equal Access to Civil Justice: Pursuing Solutions Beyond the Legal Profession' (1998-1999) 17 Yale Law Policy Review 489

Laws, Stephen, 'Plus ça change? Continuity and Change in UK Legislative Drafting Practice' (2009) 11 European Journal of Law. Reform 139

Laws, Stephen, 'Consistency versus Innovation', The Loophole, October, 2009 25

Laws, Stephen, 'Giving Effect to Policy in Legislation: How to Avoid Missing the Point', (2011) 32 Statute Law Review 1

Lupo Nicola and Piccirilli Giovanni, 'European Court of Human Rights and the Quality of Legislation: Shifting to A Substantial Concept of 'Law'? (2012) 6 Legisprudence 229

Macdonald, R., 'The Fridge-Door Statute', (2001) 47 McGill Law Journal. 11

Macdonald Roderick A., 'Access to Justice and Law Reform #2' (2001) 19 Windsor Year Book of Access to Justice 317

Macdonald Roderick, 'Access to Justice in Canada Today: Scope Scale and Ambitions', in Julia Bass, W. A. Bogart and F. H. Zemans (Eds), *Access to Justice for a New Century: The Way Forward*, (Law Society of Upper Canada, 2005)

Mader, L., 'Evaluating the Effects: A Contribution to the Quality of Legislation', (2001) 22 Statute Law Review 119

Maria Mousmouti, 'Operationalising Quality of Legislation Through the Effectiveness Test', (2012) 6 Legisprudence 191

Markman, Sandra C., 'Legislative Drafting: Art, Science or Discipline?' The Loophole November, 2011 5

Michalik Paul, 'Justice in Crisis', in A. Zuckerman (Ed.), Civil Justice in Crisis, (Oxford University Press, 1999)

Miers, D. R. and Page, A.C., Legislation, (Sweet and Maxwell, 1982)

Neate Francis, 'The Rule of Law-A Commentary on the IBA Council's Resolution of September, 2005' in Neate Francis (Ed.), The Rule of Law: Perspectives from Around the Globe, (LexisNexis, 2009)

Office of the Parliamentary Counsel, Cabinet Office, When Laws Become Too Complex: A review into the Causes of Complex Legislation, April, 2013, accessed from <www.gov.uk/government/publications/when-laws-become-too-complex> on 31/08/2013

OPC, Guide to Reducing Complexity in Legislation, 2011 4 accessed from<www.opc.gov.au/about/docs/ReducingComplexity.pdf>on 22/07/2013.

Paul Salembier, Legal and Legislative Drafting,(LexisNexis, 2009)

Peter Blume, 'The Communication of Legal Rules', (1990) 11 Statute Law Review189

Rani Sudha, 'The Role and Efficacy of Legislation' The Loophole February, 2011 73

Rendleman Doug , 'Simplification-A Civil Procedure Perspective', (2000-2001) 105 Dickinson. Law Review. 241

Renton David, 'The Preparation of Legislation: Report' Presented to Parliament by the Committee on Preparation of Legislation (HMSO, 1975)'

Rhode, Deborah L., *Access to Justice* (2000) 69 *Fordham Law Review* 1785

Rhode, Deborah L., *Access to Justice*, (Oxford University Press, 2004)

Rickard-Clarke, Patricia T., 'Access to Justice: Accessibility', (2011) 11 *Legal Information Management*, 159

Robert Eagleson , 'Efficiency in Legal Drafting' in David St Kelly (Ed), *Essays on Legislative Drafting In Honour of J Q Ewens*, (Adelaide Law Review Association, 1988)

Sainsbury Roy and Glenn Hazel, 'Access to Justice: Lessons from Tribunals' in A. Zuckerman and Ross Cranston (Eds), *Reform of Civil Procedure: Essays on 'Access to Justice'*, (Oxford University Press, 1995)

Scott, I.R., 'The structure of the Civil Procedure Rules', (1999) 18 *Civil Justice Quarterly* 98

Seidmans. A, Seidman R and Abeyesekere. N, *Legislative Drafting for Democratic Social Change: A Manual for Drafters*, (Kluwer Law International, 2001)

Silberman, L., Stein, A., Wolff, T., *Civil Procedure Theory and Practice*, (3rd Ed.), (Aspen, 2009) 3

Stefanou, C. 'Drafters, Drafting and the Policy Process', in Stefanou. C and Xanthaki, H., (Eds) '*Drafting Legislation: A Modern Approach. In Memory of Sir William Dale*', (Ashgate 2008)

Thornton, G. C., *Legislative Drafting*, (4th Edition) (Butterworths, 1996)

Turnbull, I.M.L., 'Problems of Legislative Drafting' (1986) 7 Statute Law Review 67

Voermans Wim, 'Concern about the Quality Of EU Legislation: What Kind of Problem, By What Kind of Standards?'(2009) 2 Erasmus Law Review accessed from www.erasmuslawreview.nl/files/ELR_issue6_004.pdf on 06/08/2013 59

Voermans Wim, 'Styles of Legislation and Their Effects' (2011) 32 Statute Law Review, 38

Wahiu Winluck, 'The Fundamental Right of Access to Justice', (2005) 3 East African Journal of Human Rights and Democracy 43

Watson-Brown, A., 'In Search of Plain English—The Holy Grail or Mythical Excalibur of Legislative Drafting,' (2001) 33 Statute Law Review 7

Woolf Lord, 'Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales', (HMSO, 1996)

Woolf, Lord, 'Access to Justice: Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales', (Lord Chancellor's Department, 1995)

Xanthaki, H., 'Drafting Manuals and Quality in Legislation: Positive Contribution Towards Certainty in the Law or Impediment to the Necessity for Dynamism of Rules?' (2010) 4 *Legisprudence*, 111

Xanthaki, H., 'Editorial: Burying the Hatchet Between Common and Civil Law Drafting Styles in Europe,' (2012) 6 *Legisprudence*, 133

Xanthaki, H., 'On Transferability of Legislative Solutions: The Functionality Test', in C. Stefanou and H. Xanthaki (Eds), *Drafting Legislation: A Modern Approach In Memory of Sir William Dale*, (Ashgate Publishing Limited, 2008)

Xanthaki, H., 'The Problem of Quality in EU Legislation: What on Earth is Really Wrong?' (2001) 38 *Common Market Law Review*, 651

Xanthaki, H., 'The Slim Initiative', (2001) 22 *Statute Law Review* 108, 112

Xanthaki, H.,(Ed.) Thornton's Legislative Drafting (5th Ed.) Bloomsbury Professional Ltd, 2013)

Zuckerman, A.A. S., 'Justice in Crisis: Comparative Dimensions of Civil Procedure' in A. Zuckerman (Ed.) *Civil Justice in Crisis* (Oxford University Press, 1999)

Zuckerman, A.A.S, 'Lord Woolf s Access to Justice: Plus ça change...' (1996) 59 *Modern Law Review* 773