

STRUCTURE OF LEGISLATION: A PARADIGM FOR ACCESSIBILITY AND EFFECTIVENESS

Institute of Advanced Legal Studies
School of Advanced Study
University of London

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DEDICATION

I dedicate this paper to my Husband, Dr. Omafume Onoge, my children, Anita, Uri and Ovie for your perseverance while I was away, and my dear friend Mr. Kukule for all the encouragement.

STRUCTURE OF LEGISLATION: A PARADIGM FOR ACCESSIBILITY AND EFFECTIVENESS

Legislation is the framework by which governments achieve their purposes.

Governments need legislation. The governed need well drafted, readable understandable legislation. Statute law is seen to govern almost every facet of our lives, from birth to death, and even after.¹

Aims and Objectives

The hypothesis of this dissertation is that the structure of legislation can nurture accessibility and effectiveness of legislation.

To explore whether the drafter can nurture effective communication of the policy maker's intent to the targeted audience by use of the structure of legislation as a tool.

Greater recognition of the importance of the structure of legislation can assist in nurturing the overall quality of legislation. The structure of legislation plays a critical part in ensuring that legislation is not only effective but also accessible to users.

Methodology

This paper looks at the third and fourth stages of Thornton's stages of the drafting process: design and composition. The paper also applies Peter Butt's types of structure which relates to drafting legal documents but this paper applies it to the drafting of legislation.

Part A of this paper looks at the concept of Quality and Effectiveness of legislation being the main goal of legislation and how it relates to the structure of legislation .It discusses the

¹ Susan Krongold, 'Writing Laws: Making Them Easier to Understand', (1992)24 Ottawa Law Rev., 495-582,499.

importance of accessible law and what is meant by audience of legislation. How the audience of legislation can influence the structure the legislative drafter adopts when drafting legislation. It considers the connection between the structure of legislation and accessible and effective legislation. **Part B** looks at the traditional structure of legislation, the provisions that make up the structure, division of the legislation into parts, the organization and ordering of the provisions of the legislation and the grouping of provisions. **Part C** discusses the types of structure of legislation; Telescoping structure, thematic structure and Chronological structure. It also looks at the Telescoping structure and the audience of legislation. **Part D** looks at the structure of legislation and accessibility, intelligibility and clarity of legislation. **Part E** considers the structure of legislation and effectiveness, how the structure of legislation can nurture effectiveness and the benefits of an effective structure. **Part F** is the conclusion which gives an overview of how the drafter with the use of the structure of legislation can nurture legislation that is accessible and effective

A. INTRODUCTION

“It is strange that free societies should thus arrive at a situation where their members are governed from cradle to grave by texts they cannot comprehend”²

Legislation is defined as the process of legislating, a law or a body of laws³.

A government needs legislation in order to govern. Politicians and administrators see legislation as a means to attain their economic, cultural, political and social policies⁴ and a tool for development and fostering regulatory behaviour in every society.

As legislation governs all parts of our lives in any given society, it is of utmost importance that the audience of the legislation understand it to foster compliance and effectiveness of the legislation.

Legislation is both a crystallization and declaration of rights, privileges, duties, and legal relationships and a form of communication⁵ therefore, when drafting a piece of legislation, the drafter, saddled with the task of translating policy into legislation has an obligation, to convert legislative proposals into legally sound and effective law⁶ and to communicate same clearly to the targeted audience⁷ in order to ensure compliance and effectiveness.

² Francis Bennion, *Writing Laws: Making them Easier to Understand* (2nd edn, Oyez Longman, London 1983)8.

³ Webster-Dictionary of the English Language (International edn, Lexicon2004)565.

⁴V.C.R.A.C Crabbe, *Legislative Drafting* (Cavendish Publishing Limited 1993)2.

⁵Reed Dickerson, *Materials on Legal Drafting* (St. Paul, Minn.: West Publishing Co 1981) 19; Constantin Stephanou, ‘Is Legislative Drafting a Form of Communication?’(2011)37(3), Commonwealth Law Bulletin, 407-416,308.

⁶ Eamonn Moran, ‘Legislative Drafting Without Borders’ (2012)11J.L.D.L.R, 169-174,169.

The past 20 years has seen a growing interest in the format of legal texts. Part of this interest stems from public demand for more readable legal documents.⁸

The contents of legislation should be ordered logically; from the readers' perspective, to enable the reader read and use it quickly and effectively.⁹

The unquantifiable impact that legislation has on the lives of citizens requires that it should be of quality and the quality of any legislation must follow function.

1.2 Quality and Effectiveness of Legislation

Quality of legislation is an issue that has triggered a lot of debates in recent times.

Xanthaki defines “quality legislation” as that which is capable of producing regulatory result required by policy makers, a law which is capable of producing, leading to efficiency and effectiveness.¹⁰ There is a direct link between the quality of legislation with the certainty in law and ultimately the rule of law and human right.¹¹

Crabbe¹² states that:

“the important step in the drafting process is the preparation of the legislative scheme. Upon that scheme hangs the quality of the bill. The legislative scheme represents counsel’s mental picture of how well the Act of parliament would look in structure and quality, in substance and in form...”

⁷Michele M Asprey, *Plain Language for Lawyers* (3rd edn, The Federation Press 2003) 8.

⁸ David Elliot, ‘Writing Rules: Structural Style’ International Conference on Legal Language, Linguist and Lawyers (2004)6.

⁹ Peter Butt & Richard Castle, *Modern Legal Drafting: A Guide to Using Clearer Language* (2nd edn Cambridge University Press 2001)170.

¹⁰ Helen. Xanthaki, Duncan Berry, a Visionary of Training Legislative Drafting, (2011), The Loophole CALC, 18.

¹¹ William. Dale, *Legislative Drafting A New Approach*, (Butterworths 1977)340.

¹² Crabbe,(n4)16.

Quality refers to the substance and the form¹³ of the law; the form refers to the drafting and presentation of texts and substance includes conformity with principles of good legislation, effectiveness of rulemaking.¹⁴ Quality of Legislation entails the structure of legislation and how accessible the legislation is to the public.¹⁵

The Organisation for Economic Cooperation and Development (OECD) identified different quality standards which are: user standards such as clarity, simplicity and accessibility; design standards which has to do with flexibility and consistency of rules and application; legal standards for structure and drafting; and analytical standards relating to benefit-cost and cost-effectiveness test.¹⁶

Quality of Legislation is a universal pursuit and the main goal of a drafter is to achieve effectiveness; this is a universal goal which cuts across all jurisdictions¹⁷; in both the civil and common law systems, this is because effectiveness is a common functionality that can be applied to the drafting of legislation.¹⁸

Mousmouti states that “quality essentially refers to the real word outcomes of legislation and the degree of achievement of its goals; in other words it refers to effectiveness”¹⁹

Legislation cannot improve unless effectiveness becomes the guiding value concerning design and drafting legislation.²⁰ Effectiveness is the extent to which the observable attitude and behaviour of the target population correspond to the attitudes and behaviours prescribed

¹³ Jean Claude Piris, ‘The legal orders of the European Union and of the Member States: Peculiarities and influences in Drafting’ (2006) IV ½ European Journal of Law Reform, 8.

¹⁴ Claudio Radaelli and Fabrizio de Francesco, *Regulatory Quality in Europe: Concepts, Measures and policy processes*, (Manchester University Press 2007)28.

¹⁵ Jean.Claude Piris, ‘The Quality of Community Legislation: The View Point of the Council of Legal Service in Kellerman and others (eds), *Improving the Quality of Legislation in Europe*, (Kluwer, The Hague, 1998)28.

¹⁶ OECD, Background Note to the OECD Reference Checklist for Regulatory Decision Making, point3.

¹⁷ Helen .Xanthaki, ‘Transferability of Legislative Solution: The Functionality Text’ in Constantine Stefanou and Helen.Xanthak (eds), *Drafting Legislation A Modern Approach*, (Ashgate 2008)17.

¹⁸ Helen.Xanthaki, ‘European Union Legislative Quality after the Lisbon Treaty: The Challenges of Smart Regulation’<<http://slr.oxfordjournals.org/>>accessed13February2014.

¹⁹ Maria.Mousmouti, ‘Operationalizing Quality of Legislation through the Effectiveness Test (2013) (6) *Legisprudence*, 197.

²⁰ Maria Mousmouti, ‘Effectiveness as an Aid to Legislative Drafting’, (2014)2*The Loophole CALC*, 15.

by the legislation.²¹ Effectiveness of legislation has to do with the features of the legislative text: the purpose and objectives, initial design, analysis and means of a piece of legislation with its real life outcomes²².

It is argued that improved quality of legislation would lead to accessibility and consequentially effectiveness²³. Legislation of good quality is one that is clear, simple and effective.²⁴ The drafter employs the criterion of effectiveness; clarity, precision, cost efficiency and unambiguity in drafting the legislation²⁵.

Effectiveness is the extent to which the legislation influences in the desired manner the social phenomenon which it aims to address.²⁶ It simply reflects the extent to which the legislation manages to introduce adequate mechanisms capable of producing the desired regulatory results.

Effectiveness can be achieved by use of Clarity, or clearness,²⁷ therefore if the legislation, by the use of a logical structure, is made clear to the audience, the quality of being clear and easily perceived or understood²⁸ makes compliance a matter of conscious choice for the user.

Thus, in its narrow sense quality in legislation is synonymous to effectiveness and effectiveness can be achieved when the targeted audience act in accordance with the provisions of the legislation. The contents of legislation should be accessible,

²¹ L.Mader, 'Evaluating the Effects: A Contribution to the Quality of Legislation', (2001)22(2) Statute Law Review, 119-131.

²² Dickerson (n7)191.

²³ V. Vanterpool, 'Critical look at Achieving Quality in Legislation' (2007)9EURJ.L Reform, 167.

²⁴ European Parliament Council Commission International Agreement on Better Law Making (2003) Official Journal of the European Union C 32; Anthony Watson-Brown, 'In Search of Plain English-The Holy Grail or Mythical Excalibur of Legislative Drafting(2012)33(1), Statute Law Rev.7-23.

²⁵ .Xanthaki. (n116).

²⁶ I. Jenkins, *Social Order and the Limits of the Law: a Theoretical Essay* (Princeton, Princeton University Press, 1981), 180. R Cranston, 'Reform Through Legislation: the Dimension of Legislative Technique' (1978-1979) 73 North western University Law Review, 875.

²⁷ H Thring, *Practical Legislation: The Composition and Language of Acts of Parliament and Business Documents* (London, John Murray, 1902) 61.

²⁸ *Compact Oxford English Dictionary of Current English* (Oxford University Press, 2005).

The legislative drafter should therefore draft the structure of the piece of legislation in a way that is sensible, attractive and comprehensible to the reader.²⁹

1.3 Accessibility of Legislation

Access to legislation is a key element of the rule of law³⁰.

The efficacy and maintenance of the rule of law, which is the foundation of any parliamentary democracy, has at least two prerequisites. First people must understand that it is in their interests, as well as in that of the community as a whole, that they should live their lives in accordance with the rules and all the rules. Secondly, they must know what those rules are.³¹

In the words of Lord Simon of Glaisdale:

“legislation which is difficult to understand is derogation from the democratic right of a citizen to know what law he is governed”.³²

The courts are beginning to develop strands of a doctrine of clear communication as an obligation on legal drafters. In one sense, this obligation can be seen as the other side of the rule that says ignorance of the law is no excuse for failing to comply with it, ³³ it is therefore of enormous importance that laws are made accessible to the public³⁴.

Accessibility goes beyond the simple question of whether citizens can obtain a text to whether they can reasonably be expected to understand the text and its application to their lives once they have obtained it, this was considered in the case of

²⁹ Butt and Castle, (n6) 231.

³⁰ W Robinson, ‘Accessibility of European Union legislation’ <<http://www.85.opc.gov.au/calc/papers.htm>> accessed 13 July 2014.

³¹ *Merkur Island Shipping Co. v Laughton* [1983] 1 All E.R. 334. *Blackpool Corporation v Locker* [1948] 1 All ER 85, 87. *The Preparation of Legislation* (Renton) 36.

³² GC Thornton, *Legislative Drafting* (4th edn Butterworths, London 1996) 50.

³³ Daniel Greenberg, *Craies on Legislation* (Sweet&Maxwell, 2008) 373.

³⁴ *Jones v Randal* (1774) 1 Cowp. 37, 40. *Martindale v Falkner* (1846) 2 C.B. 706, 719 and *Reg. v Tewkesbury Corporation* (1868) L.R. 3 Q.B. 629, 635.

*Sunday Times v United Kingdom*³⁵ where the Court of Appeal distilled what it saw as a rule of the European Court of Human Rights, that it “declines to recognise national laws which are not adequately accessible”.

The legislative drafter as a translator of policy into legislation is faced with the challenge of creating texts that embody the law in a fixed form and to communicate the same law to everyone—the parliamentarians who will enact the law, the citizens whose rights and interests will be affected by it, and the officials who will enforce it.³⁶

Legislation should be accessible not only in the physical sense, but the content and meaning, the format, and structure of the legislation also need to be understandable. The targeted audience ought to be able to navigate around legislation and understand it.³⁷

The logical structure of legislation triggers compliant behavior from the bulk of its addressees, even if they do not know the penalty for non-compliant behavior.³⁸

In most jurisdictions, the structure of legislation is either determined by statute or by the established practice, the effect of this is that the drafter has little or no choice but to conform to what is the ‘house style’. This contradicts the creative or innovative role that the drafter is expected to play in the preparation of legislation.

When the audience of legislation do not understand the legislation, they are less likely to comply with the law or exercise the rights under it;³⁹ this therefore makes the legislation ineffective.

Butt therefore says structure and form are crucial to an effective, readable legal document.⁴⁰ The contents of the legislation should be consciously ordered to enable it be read

³⁵ [1979-1980]2 EHRR 245.

³⁶ Ruth Sullivan, ‘The Promise of Plain Language Drafting’, (1992)24 McGill L.J 97,188.

³⁷ Krongold, (n1)499

³⁸ Wim Voermans ‘Wetgeving als software voor menselijk handelen?(Legislation and ICT-Applications)preadviezen van de Vereniging voor wetgeving en wetgevingsbeleid(Contribution to the Annual Conference of Dutch Association for Legislation) (Weka Den Haag 2005)105-10.

³⁹David Kelly, ‘The Victorian Experience of Plain Drafting’, *Legislation and Its Interpretation A Discussion and Seminar Papers*, (1998), 57

quickly and efficiently, to achieve this, Butt assert that the legislation be ordered logically from the readers' point of view.

1.4 Audiences of Legislation

Drafters have paid little attention to the challenge of communication.

One cannot decide on the form in which statute law should ideally be presented without knowing the type of person for whom it is intended, in this paper referred to as the user.

The question then is who is the audience of legislation?

Duncan Berry identified the audience of legislation as all who will potentially read the legislation or whose activities it will control.⁴¹ He takes it for granted that these different groups are to be addressed simultaneously, and the challenge for the drafter is finding a voice that communicates successfully with all of them.⁴²

Hant, contends that 'legislation should be both accessible and understandable to "the ordinary man" who is an ordinary person of ordinary intelligence and education, who has a reasonable expectation of understanding legislation and of getting the answers to the question he or she has.⁴³

Murphy states the ordinary people are and should be the intended audience.⁴⁴

Sullivan conceptualises the audience of legislation to mean the audience targeted by parliament or the least experienced.⁴⁵

⁴⁰ Peter Butt, *Modern Legal Drafting: A Guide to Using Clearer Language* (3rd edn Cambridge University Press 2013)129.

⁴¹ Duncan Berry, 'Audience Analysis in the Legislative Drafting Process' (2000) *the Loophole: CALC*, 62; *The Preparation of Legislation* (Renton Report) Cmnd.5053, 1975.

⁴² *ibid.*

⁴³ Brian Hant, 'Plain Language in Legislative Drafting: Is It Really the Answer?' (2001) 22 *Statute Law Review* 25, 27.

⁴⁴ Dennis. Murphy, 'Plain Language in a Legislation Drafting Office' (1995) 33 *Clarity*, 3.

⁴⁵ Sullivan, (n35)118.

This shows that the audience's analysis is crucial in legislative drafting. The drafter is faced with a challenge when designing the structure and composition of the legislation, to identify whom the message is addressed to. The analysis depends on the context and the subject matter of the piece of legislation. From the point of view of audience based drafting, we agree with the Berry's definition.

The Legislative drafter has a duty to draft the structure of the legislation in a way that is clear to the audience. Different audiences bring different levels of competence in different contexts to their reading. Drafters should also be aware of this reality when conceptualising and designing the structure of the legislation.

Thornton holds the view that a legislative drafter cannot succeed in communicating to the general public⁴⁶, but must endeavour to draft the law in such a way as to successfully communicate to (i) lawmakers (ii) persons who are concerned with or affected by the law and (iii) the members of the judiciary. However, Thornton goes on to say that a sound structure lays the foundation for a draft that is understandable. He recommends that the format of the text of the legislation should be drafted with the needs of the users in mind.⁴⁷

Butt asserts that the structure and form is crucial to an effective and readable legal document.⁴⁸ A thoughtful and logical organisation of the legislation assists the users and contributes to the successful communication of the policy intent and consequently the

⁴⁶ Thornton, (n31)48.

⁴⁷Helen Xanthaki(ed), *Thornton's Legislative Drafting* (5th edn Bloomsbury2013) 204.

⁴⁸ Peter Butt, (39)129.

effectiveness of the legislation. Often there are multiple users of the rule. Sometimes parts of a rule will be used largely by one group, and other parts by many groups, but identifying the various user groups helps decide how to structure the rule and make it functional for the people who use it.⁴⁹

⁴⁹ David C. Elliott, 'Writing Rules: structure and style', International Conference on Legal Language, Edmonton, Alberta, Can 1994, 24-27.

B. 2.1 STRUCTURE OF LEGISLATION

Structure is a complex construction; manner or basis of construction or organisation.⁵⁰

It is the quality of being well organised or to arrange something according to a plan or system.⁵¹

Thornton⁵² distinguishes five stages in the process of drafting and the structure of the legislation comes up in the third and fourth stage in the process of drafting which refers to the design and composition of the draft.

Dickerson described structure as the logical pyramid in which the location of specific items in the hierarchy of substantive ideas show their inter relationships and relative importance.⁵³

Careful layout and design of legislation is as important as clear language. If a document looks terrifying, it does not matter how easy the words are they will never be read. Good design sets the tone and communicates the intent as much as the words to the reader.⁵⁴

The structure of legislation can help users locate relevant provisions, it leads the user and therefore it is important for the overall accessibility of the legislation.⁵⁵

The drafter must therefore take care to ensure that the design of the structure is one that leads to quality. In a world where jurisdictions are drawing nearer under the influence of globalisation, common principles, rules, and regulations in the drafting of

⁵⁰ Collins English Dictionary, (Harper Collins publishers, 2012)569.

⁵¹ Compact Oxford English Dictionary of current English, (3rd Edn, Revised, Oxford University Press, 2013)1029.

⁵² Thornton, (n31) 128.

⁵³ Dickerson, (n5)79.

⁵⁴ Alan Siegel, Conference of Experts in Clear Legal Drafting National Centre for Administrative Justice, Washington DC, 1978(Reproduced in Reed Dickerson, *Materials on Legal Drafting* (1981)294.

⁵⁵Wim Voermans, 'Styles of Legislation and Their Effects' (2011)32(1) Statute Law Review 47.

legislation across the common versus civil law divide indicate an approximation and convergence of their respective drafting styles⁵⁶, the structure of legislation is one of such similarity cuts across all jurisdictions which can be used to nurture accessibility of legislation.⁵⁷

Xanthaki rejects the idea of a divide of civil law and common law drafting.⁵⁸

The structure of legislation can act as a road map for users who want to find the relevant provisions. A well-conceived structure leads the user to the place of interest and, therefore the overall accessibility of the legislation.⁵⁹

Butt contends that the layout and design are not merely cosmetic but it improves understanding by helping the readers find their way around the document, aiding assimilation of the contents.⁶⁰

Communication experts have proved that document design has an important effect on the reader's ability to read, find, understand and use the information in a document.⁶¹

The structure of legislation carries the primary burden of demonstrating the writer's logic, without an adequate structure the legislation will only accidentally serve its purpose. The readers of the legislation can only apprehend, understand and behave as prescribed by the legislation only if its structure is logical and not difficult.⁶² The arrangement that is

⁵⁶ Helen Xanthaki, 'Editorial: Burying the Hatchet Between Common and Civil Law Drafting Styles in Europe' (2012)6(2), *Legisprudence*, 133-148,147.

⁵⁷ Ibid.

⁵⁸ Helen Xanthaki, 'Legislative drafting styles: is there REALLY a common v civil law divide?', *Styles of Legislation*, European Academy for Law and Legislation, Peace Palace, The Hague, 17-18 December 2009.

⁵⁹ Voermans (n54)38-53.

⁶⁰ Butt, (n39)173.

⁶¹ Asprey, (n8)242; Antony Watson-Brown, 'In Search of Plain English-The Holy Grail or Mythical Excalibur of Legislative Drafting' (2012)33(1) *Statute Law Rev.*7-23.

⁶² A.Seidman, R.Seidman and N.Abeysekere, *Legislative Drafting for Democratic Social Change: A Manual for Drafters*, (The Hague: Kluwer Law International, 2001) 207-209.

appropriate in any given case is determined by the needs of the persons who will be making the fullest use of the text.⁶³

It may be argued that choosing the structure of legislation may not be the prerogative of the drafter; the drafter is expected to draft legislation that fits into the statute book and follow the existing methodology and conventions prevalent in the jurisdiction in relation to the structure.⁶⁴ But legislation is a communication and it is not effective if there is no communication and a structure which has been the practice over a period of time but does not achieve its purpose of communication is not effective and falls short of legislative quality.

The audience of the legislation is an important element in communication; these are the persons on whom a legal burden is imposed or a benefit conferred and also those who administer the law,⁶⁵ the laws should therefore be drafted clearly and the structure should be one that nurtures comprehension of the legislation.

Structuring a piece of legislation involves how the drafter on analysing the policy decides to group and order the provisions of the legislation. Grouping involves the gathering of individual chapters into parts and individual sections into chapters. Ordering determines the sequence of parts within the legislation, chapters within a part and sections within the chapter⁶⁶

Thornton contends the principal purpose of the drafter is to design a structure that facilitates communication of the content at the same time as it achieves the object of the instruction.⁶⁷

⁶³ H.Martin & R.Ohmann, *The Logic and Rhetoric of Exposition* (revised 1963) 152.

⁶⁴ Geoffrey. Bowman, 'The Art of Legislative Drafting' (2005) 7(3) Eur. J. L. Reform, 3-18,10.

⁶⁵ D.C.Pearce and R.S.Geddes (Eds), *Statutory Interpretation in Australia*, (6th edn, Lexis Nexis, 2006)2.

⁶⁶ Sullivan, (n35)212.

⁶⁷ Xanthaki, (n46)157.

Research in the United States has shown that organisation and layout of documents is as important as the length of the sentence and the difficulty of specific words.

Legislation are increasingly being expected to be organised to help the most likely reader find what they need without undue effort, drafted from an audience point of view.

"The words and sentences in legislation may be clear, but if the provisions are not properly arranged, the Bill will be more difficult to understand. The relationship between provisions is should be as clear as possible. If the reader can see a pattern in the provisions, then it's easier to understand because the reader has a mental framework into which information can be fitted as it is absorbed..."⁶⁸

There is no uniformity in the structure and arrangements of the various parts of a statute followed by various countries, it depends on the Subject matter⁶⁹.

In England, the definitions are kept at the end of the Act, in India, and, in recent years also in the United States, they are inserted at the beginning.

The short title of an Act finds a place as the first section in India and in the United States, while in England; it generally appears as the last section.

Reed Dickerson ⁷⁰ asserts that:

“There is, of course, no all-purpose arrangement that is the most suitable for all sets of ideas; every sensible arrangement reflects a point of view. ... The draftsman should make sure that he is reflecting

⁶⁸ Sullivan, (n35)212

⁶⁹ P.M. Bakshi, *An Introduction to Legislative Drafting*, (N.M.Tripathi,1972)

⁷⁰ Dickerson, (n5)57.

the point of view that best advances the purposes of his client”.

The structure of legislation is backed by *Bergeron’s Rule*⁷¹ which says that Bill must be arranged in logical order.

The traditional structure of Legislation in most jurisdictions takes the following form with slight variations;⁷²

2.2 TRADITIONAL STRUCTURE

Preliminary provisions⁷³

Long title

Preamble (if a preamble is necessary)

Enacting clause

Short title

Commencement

Duration/Expiry

Application

Purpose clause

Definitions

Interpretation

Principal provisions

Substantive provisions

Administrative provisions

⁷¹ Robert Bergeron, ‘Rules of Legislative Drafting – Letters to Ukrainian Drafters’ (Department of Justice Canada and Ministry of Justice of Ukraine, Kiev 1999).

⁷² *Legislative Manual: Structure and Style*, (1996) 35 NZLCR, 190.

⁷³ Helen Xanthaki, Lecture notes on Structure of Legislation, 2013-2014 <<http://studyonline.sas.ac.uk/course/view.php?id=17>> accessed 18 August 2014.

Miscellaneous

Offences and provisions ancillary to offences such as time limit for prosecution, continuing offences, offences by corporations, and vicarious responsibility

Miscellaneous and supplementary provisions such as evidentiary provisions, a power to make subordinate legislation, service of notices, powers of entry and search, seizure and arrest.

Final Provisions

Savings and transitional (these may also be placed in a schedule if they are long)

Repeals

Consequential amendments (these may be placed in an annex especially if the repeals and consequential amendments are numerous and can conveniently be presented in a tabular form)

Schedules

2.2.1 PRELIMINARY PROVISIONS

The Preliminary Provisions of a Bill are introductory provisions to a Bill. They are not the main or substantive provisions of a Bill although they are very useful and cannot be avoided in any given Bill. The Preliminary Provisions are –

(i) Long title

The long title is a brief statement giving a short story of the principal way or ways in which the statute will affect the existing law. It is more comprehensive than a short title. The long title sets out the purpose or scope of the Act. It is part of the Act and may be used in interpreting the

provisions.⁷⁴ According to Orr, the title of an Act is a key to interpretation and not just an administrative convenience.⁷⁵

In *Vacher & Sons Ltd. v London Society of Compositors and Others*

Lord Moulton said:

“The title of an Act is undoubtedly part of the Act itself, and it is legitimate to use it for the purpose of interpreting the Act as a whole, and ascertaining its scope...”

It has been suggested that the long title be abolished .In Canada, Australia, Kenya and New Zealand long titles are no longer being used. While UK and other commonwealth countries continue to make use of long titles.

(ii) Purpose

The purpose clause also called an object clause, aims to state what the statute tends to achieve. The purpose clause help the audience of legislation to understand the goal the legislation seeks to achieve. It is a formal way of explaining what the legislation, or part of it is intended to do.⁷⁶

(iii) Preamble

The preamble is a formal, but narrative statement, usually of the background, the circumstances and reasons leading up to the enactment.⁷⁷

While it is a source of information to the addresses, it has been difficult to

⁷⁴ Helen Xanthaki, (n72)229.

⁷⁵ Graeme. Orr, ‘Names without Frontiers: Legislative Titles and Sloganeering, (2000)21(3) Statute Law Rev.188-212.

⁷⁶ Anthony Watson-Brown, ‘In Search of Plain English-The Holy Grail or Mythical Excalibur of Legislative Drafting (2012)33(1) Statute Law Rev., 14.

⁷⁷ K.W.Patchette, Legislative Drafting Course notes, (RIPA International, Regents College London, 1992) 171.

convince jurists of its legal status.⁷⁸

Preambles are rarely used, but are mostly used in constitutions and constitutional instruments, legislation implementing international agreements, legislation of an historic or ceremonial character, private Acts of Parliament; and decrees of military regimes.

It is argued that politicians sometimes use preambles to give expression to their own political philosophy without there being anything in the body of the relevant Act⁷⁹.

It is argued that all the relevant matters or an object of a preamble could be Can be in the body of the long title of the Act thus making the preamble redundant.

(iv) Enactment clause

An Act has an enacting formula and the appropriate or proper form of an enacting clause depends on the constitution of the specific jurisdiction, which has to be strictly followed.

The enacting clause gives the statute its jurisdictional identity and constitutional authenticity.⁸⁰

(v) Short title

Because the long title sets out the scope of the statute, it tends to be

⁷⁸ Liav Orgard, 'The Preamble in Constitutional Interpretation', (2010)8 Int'L.J.Const, 714-721.

⁷⁹ Paul Rajago, *The Drafting of Laws* (Bombay, N.M. Tripathi Ltd) 41.

⁸⁰ Robert M. Anderson, 'Drafting a Legislative Act in Arkansas' (1947-1948)2 Ark.L.Rev.383-407,386.

too long making it necessary to have a short title.⁸¹

The short title has been described as a convenient label by which the statute is known or identified and must be short and succinct, limited to the topic covered. It is by the short title that an Act is identified. It describes and gives a name to an Act and facilitates reference to the Act.⁸²

An Act of parliament as a rule must have a short title, ending with the year in which it is passed⁸³

Lord Moulton once described the short title as "a statutory nickname to obviate the necessity of always referring to the Act by its full and descriptive title"⁸⁴. The New South Wales Acts from 1995, no longer refer to a short title but instead the short title is referred to as the name of the Act⁸⁵

The short title has been held not to be used in the interpretation of the body of an enactment, although the law is not certain on this point, in *Vacher & Sons Ltd vs. London Society of Compositors*⁸⁶ and *National Telephone Co Ltd v HM Postmaster-General*⁸⁷ the court held that the short title may be used to assist in the interpretation of the body of an enactment.

It could also be argued that the short title can be used in interpretation since it is also enacted by the Legislature. However, there are a good number of

⁸¹ Paul Salembier, *Legal and Legislative Drafting*, (Lexis Nexis, 2009)295.

⁸² Thornton (n31)200.

⁸³ Xanthaki, (n46)240-244.

⁸⁴ Thornton (n31) 200.

⁸⁵ *Ibid*; *Vacher and Sons Ltd v London Society of Compositors*, [1913] AC 107, 128.

⁸⁶ [1913] AC 107.

⁸⁷ [1915] AC 546 at 560.

judicial pronouncements against the use of short title in the interpretation of the body of an enactment.⁸⁸

The short title is normally placed at the beginning of the Act, as its first section, but there are some jurisdictions that cite the short title at the end of the Act.

(vi) Commencement

An Act commences when it comes into operation or force. This is not the same as the passing of an Act, an Act may have been passed but may not have commenced.

An Act is passed when all legislative steps have been completed and the assent of either Her Majesty or the President in case of a Republic is given. Once it has been assented to, it becomes part of the law of the land while, the commencement provision informs the audience on the status of the law whether it has come into operation or not.

The standard rule for commencement of legislation is invariably contained in interpretation legislation. Where the provisions in the interpretation Act is not adequate then there has to be an express provision.

Where statute come into operation immediately then no commencement provision is required.⁸⁹

⁸⁸ Re Vexatious Actions Act 1896, Re Boaler [1915] KB 21, 40.

⁸⁹ Xanthaki, (n46)246.

The commencement of an Act that is intended to regulate future conduct should not be permitted to occur before the text of the Act is published and available to the public.⁹⁰

Commencement is more helpful to the reader if the reader is made aware of the Act's operative status before studying the substance of the Act.

Commencement provision should be expressed in direct unambiguous form; it must ensure adequate public notice.⁹¹

The position of the commencement provision is not fixed, some jurisdictions place it at the beginning after the long title, and this is the practice in Nigeria and Brunei, while some place it at the end of the Act as is the case of Indonesia.

(vii) Duration Provision

The duration provision is used to set a date on which legislation will cease to have effect.

An Act is perpetual in duration until it is repealed or it expires. However, if an Act or any part of it is intended to be of temporary duration, it ought to expressly provide a duration provision for its expiry.

The duration provision is helpful to the reader because it informs the reader of the validity of the Act.

An Act may specify a date when it will expire or may empower some person or authority to fix a date of expiry, or it may provide for expiry upon the occurrence of an event.

(viii) Application Provision

An application provision gives an indication of the area or geographical area of

⁹⁰ Ibid,263.

⁹¹ Ibid.

application of a statute. This makes it certain the manner in which the new law affects situations and transactions existing at the time the law come into force.

Applications provisions may make the legislation to apply to:

- a) the existing circumstances at the coming into force of the legislation.
- b) a territorial area.
- c) particular person or things.
- d) the Crown or the Government.

(ix) Purpose clause

The purpose clause states the aim of the law; it can be a bridge between policy and law because it expresses the intent of the policy initiator.

A purpose clause states what the statute intends to achieve, it is a formal way of explaining what legislation, or part of it, is intended to do.⁹² The purpose clause aids the audience of the legislation to understand the particular legislation.⁹³

(x) Definitions

A definition is used to give a standard meaning to words or phrases that occur frequently in an Act. It is used to avoid ambiguity and repetitions.⁹⁴

Definitions are placed at the beginning or at the end of legislation depending on the practice in a particular jurisdiction.

There are three broad classes of definition:

Delimiting definition: it determines the limits of the significance to be attached to the term defined.

Extending definition: this gives a term a meaning that goes beyond the

⁹² Watson-Brown, (n75)14, Alec Samuels, 'Ensuring Standards in the Quality of Legislation (2013)34(3) Statute Law Rev., 296-299.

⁹³ Xanthaki, (n46)253.

⁹⁴ Ibid, 164.

dictionary meaning or meaning of common usage.

Narrowing definition: this stipulates a meaning narrower in some respect than the common meaning.

Definitions can lead to ambiguity if it plays no clear function in the text of the legislation.⁹⁵

The placement of definition in a legislative text has been the subject of debate. Traditionally they are placed at the beginning of the Act but recent practice is that definitions are placed at the end or in the schedule; this is the practice in the United Kingdom, this is to rid the legislation of unnecessary preliminaries. Thornton is of the view that two reasons are commonly put forward to justify placing the definitions near the end:

“First, it is said that until the legislature has enacted the substantive and administrative provisions of an enactment, it cannot be known what definitions will be required and it is premature to anticipate the decision of the legislature. Secondly, it is said that it is appropriate that the attention of the legislature should immediately be directed to the essence of the legislation”.

Definitions should indeed be used sparingly and only where there are strong arguments for giving a statutory expression a meaning which it does not ordinarily carry.

⁹⁵ Xanthaki, (n46)167.

(xi) Interpretation

The Interpretation clause is a definition that is not restricted in its application to a distinct part of the Act and is placed in a separate section⁹⁶. It is drafted mainly to avoid ambiguities and uncertainties, and to avoid tedious repetition.

The United Kingdom place the interpretation section near the end of the Act.

2.2.2 Substantive provision

Substantive provisions stipulate the rights, powers, privileges and immunities of persons to benefit or be regulated. It is advisable to place substantive provisions before administrative or technical ones, but this principle is sacrificed to practicality.⁹⁷

Administration provisions

The creation or extension of administrative agencies must be drafted in the framework of the Constitution. A checklist of administrative provisions includes the department, department head, appointment and removal, compensation, powers and duties, classification of employees, rules, civil service status, reports, and relationship to local government.⁹⁸

2.2.3 Miscellaneous

Miscellaneous provisions comprise of offences and provisions ancillary to offences as time limit for prosecution, continuing offences, offences by corporations, and vicarious responsibility. Miscellaneous and supplementary provisions such as evidentiary provision, a power to make subordinate legislation, service of notices, powers of entry and search, seizure and arrest.

⁹⁶ Patchett, (n76)186.

⁹⁷ Xanthaki, (n72).

⁹⁸ *ibid.*

2.2.4 Final provisions⁹⁹

These are provisions which are traditionally placed at the end of the legislation.

(i) Savings

Savings preserve or “save” a law, a right or privilege which would otherwise be repealed or cease to have effect.¹⁰⁰ This provision is designed to preserve the status quo in specific circumstances, such as preserving existing rights that might otherwise be repealed as a result of some new provisions; it keeps rights or obligations which might otherwise disappear when an existing law is repealed to continue to be law.

Savings provisions are introduced to remove doubts; the general rule is that a saving clause should not be included automatically but only when necessary.¹⁰¹

(ii) Transitional Provisions

Transitional provisions generally make positive modifications to a new statutory scheme for a limited time.¹⁰²

Transitional provisions are necessary to enable a smooth transition between the existing law and the new law; they tie up the loose ends which would otherwise be left dangling. When a department or agency is reorganized or abolished or its duties are significantly altered, it is often necessary to provide for the transfer of the functions, property and personnel of the prior agency to the new agency or to accommodate the change in duties. This is accomplished through the use of a transition clause.

(iii) Repeals Provisions

Repeals should always be in express terms, although in appropriate cases the courts will, if driven to do so, construe an implied repeal.

⁹⁹ *ibid.*

¹⁰⁰ Xanthaki (n46), 473.

¹⁰¹ Rosmizan Mohamad, ‘Savings Clause: Get It Right’ (2011)37(3), Commonwealth Law Bulletin, 445-452.

¹⁰² *ibid.*

Different terms are used to indicate repeal: "revoke", "rescind", "delete", and "cancel".

Types of repeal provisions are:

Simple repeal: where legislation is no longer required (unusual in practice);

Repeal and re-enactment: where a new enactment consolidates the law which is essentially unchanged;

Repeal and replacement: where existing legislation is being remolded to meet new circumstances in different ways.

(iv) Schedules

A Schedule is a convenient device for dealing with matters of detail which will otherwise unnecessarily encumber the main body of an Act. Matters of administrative detail may be provided for in a Schedule. The Schedule also frees the main body of an Act from a possible charge of untidiness.¹⁰³

Although Schedules form part of the legislation, they cannot stand on their own and must be appended to a particular provision in the main body of the legislation. This is done by the use of what is called "inducing words".

(v) Sunset provisions

Sunset provisions are expiry provisions;³⁷ they determine the expiry of laws on a certain date and are designed to guarantee that the legislator decides on the merit of the legislation after a determined period.¹⁰⁴

(vi) Review provisions

This is an alternative to the sunset provision. The purpose of the review provision is to empower the responsible minister, some other person, or authority to review operations of legislation after a specified period and

¹⁰³ VCRAC Crabbe, *Legislative Drafting* (Cavendish Publishing, Oxford, 1998) 145-147.

³⁷ Thornton, (n29), 216.

¹⁰⁴ Sofia Ranchordas, 'Sunset Clauses and Experimental Regulations: Blessing or Curse for Legal Certainty?' (2014) *Statute Law Rev.* 7-18.

to recommend to the parliament accordingly. This provision makes the parliament not to lose sight of its creation.

This structure is generally followed in Australia, New Zealand, Nigeria and many other Commonwealth countries.

As earlier stated, there is no “right” structure for legislation and the choice is up to the drafter. The drafter strives to present the material in a way that is logical and that puts the reader to as little trouble as possible. In the case of some legislation, complex provisions are inevitable. But the drafter can help the reader if the initial provisions are easy and he is led gently to the inevitable complexity.¹⁰⁵

Butt says if the traditional structure of legislation is to be followed; the drafter is likely to be denied the freedom to practice the art of drafting, and structuring the legislation in the most effective way.¹⁰⁶

Thornton¹⁰⁷, discussing the design of an Act...., holds onto the need to comply with conventional practice as to the position in the framework of a statute to be given to various provisions of a formal or technical nature. Practice is not uniform throughout the Commonwealth and there is no absolute right or wrong position for particular provisions. However, consistency of practice within a jurisdiction undoubtedly facilitates the use of statutes by regular users.

The principal purposes of legislation are:

(i) to establish and delimit the law; and

¹⁰⁵ Bowman, (n63)9.

¹⁰⁶Peter Butt, (n39)9-10.

¹⁰⁷ibid.

(ii) to communicate the law from the law making authority to society and in particular to the person affected by it.¹⁰⁸

Every written communication has a common purpose which is to convey information in the writer's mind, through the medium of writing, into the mind of the reader. The objective is that nothing be lost in the formulation of ideas, the transcription of ideas into writing, and the accurate comprehension of those ideas by the reader.

When designing the structure of legislation, the Law Reform Commission of Victoria¹⁰⁹ suggests that important matters should be dealt with first. The Report argues that a reader may overlook or underestimate the main point of an Act if it is buried in the middle of the text, and readers tend to remember and spend more time on the opening parts of a division or section of an Act and remember them.

While this suggestion can be borne in mind by drafters, it is important to remember that a reader consults an Act for an answer to a specific question of law, and is therefore unlikely to be reading an Act from start to finish, but will flip through an index or table of contents to find the answer sought. It is therefore important that the clear structure and organisation to the legislation be one that enables the answer to the particular problem to be quickly found.

2.3 DIVISION INTO PARTS

Dividing the legislation into parts makes it more readily comprehensible. Driedger recommends that:

“if the division of an Act into parts will make it more readable, will

¹⁰⁸ Xanthak, (n46), 49.

¹⁰⁹ Law Reform Commission of Victoria, Access to the Law and Structure and Format of Legislation, Report 33, 1990.

enable the scheme of the Act to be more readily comprehensible or will facilitate the drafting or passage of the measure, then it is not only proper but desirable so to divide it”

It is common practice to divide statute of legislation into groups of sections; this is to aid communication of the legislation to the audience.

The decision to divide the legislation is best made at the drafting stage by the drafter when the major topic of the legislation has been identified and developed.

The logical arrangement of a structure is likely to demonstrate to the reader the underlying theme of the legislation. The division into parts is an invaluable aid to intelligibility, readability and comprehensibility.

It enables the user understand the statute better .Division of the legislation is very important because it helps the audience access the legislation. The divisions are Headings, Chapters, and Parts, group of sections, division and sub-division.

2.4 ORGANISATION AND ORDERING OF PROVISIONS

Ordering determines the sequence of parts within the Act, chapters within a part, and sections within a chapter.

The usability to the bills primary addressees and the administrators should govern the ordering of the parts, chapter and sections within the legislation.

Legislation should be organised so that readers can find their way around it easily¹¹⁰

instead of putting first the sections that describe in detail the formation and structure of the implementing agency.¹¹¹

The Law Reform Commission Victoria noted:

The success of a document in communicating depends greatly on the careful organisation of the material in it. The right facts must not only be selected, but must also be put in an order that shows the interconnections between the facts.¹¹²

Poor organisation obscures underlying principles and deflects the reader¹¹³,

the drafter therefore when conceiving the structure of the legislation should work out an arrangement of the provisions that would make them easy to locate, read and referred to.

The message of legislation can be made clear and coherent if the text is properly organised so that the relationship between provisions is as clear as possible. The structure should show the audience a pattern in the provisions, this makes easier to comprehend the information.¹¹⁴

2.5 GROUPING OF PROVISIONS

Grouping involves gathering the individual chapters into parts and individual sections into chapters, depending on the nature, length and complexity of the legislation. The judgement as to which items are to be placed together in order to establish their relationship is based on the

¹¹⁰ Krongold (n1), 509.

¹¹¹ *ibid* (n61)57.

¹¹² Law Reform Commission of Victoria, *Plain English and the Law* (1987) Appendix 1, 17.

¹¹³ E.N (Ted) Hughes, *Access to Justice*, Law Reform Commission of Victoria, *Plain English and the Law*, 12.

¹¹⁴ I M L Turnbull QC, *Clear Legislative Drafting: New Approaches in Australia*, (1990) 11 *Statute L.Rev.* 161-183

criteria chosen for division by the drafter¹¹⁵. The drafter should group the provisions from the perspective of usability to those who use the legislation.

This makes the legislation easy to read and understand and also allows for easy reference and citation by the audience.

¹¹⁵ Pachette, (n76)151.

C 3.1 TYPES OF STRUCTURE

The conventional structure of legislation used by most jurisdictions as earlier considered is the traditional structure. Drafters are used to, in most cases drafting legislation with similar structure based on precedents or practice.

It is argued that this ensures precision which promotes certainty. But it is argued that this also subverts the creative part of drafting which the drafter needs to carry out to produce an effective legislative text which would be more effective than the traditional form.¹¹⁶

A well-structured legislation is only achieved with a measure of creative effort.¹¹⁷When considering drafting of the structure of legislation, it is unwise to be dogmatic on any drafting matter. Greenberg observes that while there are occasional rules of thumb that may assist, they will do so only if applied flexibly and with an eye constantly on achieving the most clear, simple and effective result in each context.¹¹⁸

Asprey is of the opinion that there is something about the structure of a document that looks permanent, and we are tempted to stay with the existing structure and try to fit our own ideas in here and there, instead the drafter's ideas can set the structure; they shouldn't have to fit an existing structure if it isn't the best structure.¹¹⁹When considering the structure of legislation the drafter ought to look at communicating what the legislation is about.

¹¹⁶ Peter Butt (n39).

¹¹⁷ Andreas Lotscher, 'Conceptual and Textual Structure in Legislative text' in Ann Wagner and Sophie Cacciaguidi-Fahy, (eds), *Obscurity and Clarity in the Law Prospects and Challenges*, Ashgate 2008,137.

¹¹⁸Greenberg, (n32), 387.

¹¹⁹ Michele. Asprey, *Plain Language for Lawyers*(3rd edn,The Federal Press2003)93

The New Zealand law commission recommends in its legislative manual on structure and style ¹²⁰that drafters should always try to write with the user in mind and this means drafting as simply as possible.

There have been complaints about the state of legislation; the Renton Committee¹²¹ noted complaints from even professional users such as judges who find it difficult to understand, and stated that if lawyers find the law difficult, how the layman is expected to fare.

In line with this Lord Justice Harman¹²² described his experience on reading the English Housing Act 1957:

“To reach a conclusion on this matter involved the court in wading through a monstrous legislative morass, staggering from stone to stone and ignoring the marsh gas exhaling from the forest of schedules lining the way on each side. I regarded it at one time, I must confess, as a Slough of Despond through which the court would never drag its feet, but I have by leaping from tussock to tussock as best I might, eventually, pale and exhausted, reached the other side.”

Most times the Drafter drafts from the point of view of the authorities and formulates the provisions accordingly, but the law is meant to regulate the right of the individual, the provision therefore ought to be formulated from the point of view of those whose rights would be affected by the legislation.¹²³ Legislation that is clear to the audience would undoubtedly be clear to the professional user.

¹²⁰ NZLC R35,1995,Reviewed (1996)17(3)Stat LR iii,para141

¹²¹ The Renton Committee, The Preparation of Legislation, 37.

¹²² Davy v Leeds Corporation [1964]3 All E.R. 390,394.

Structure and form are crucial to an effective, readable, legal document.¹²⁴

Butt looks at three logical structures for legal documents, these structures would be applied to the drafting of legislation. These three types of structure are the Telescoping Structure, the Thematic Structure and the Chronological Structure.

3.2 TELESCOPING STRUCTURE:

The telescoping structure, here the legislation is ‘front loaded’, putting key information before less important information.¹²⁵ The key information has to do with the subject matter that is key to the audience; then it broadens out to material that is less important to the audience, but is still important for carrying out the policy intent, such as the administrative provisions. Then it further broadens

The logic behind the telescopic structure is that the audience of the legislation expect important materials to be at the beginning of the legislation and this structure meets that expectation by front loading the legislation with the key issues.¹²⁶

Research has shown that the human brain can only focus for a short period of time. Therefore it is important that a user centred approach to structure as opposed to logic centred approach is adopted and they are given the relevant information within this time span.

A telescoping structure allows the reader to meet the important material up front and therefore assists the audience in assessing relevant information easily.

Asprey in support of this structure says:

“organisation of the Bill will depend on what the document is, but it is important

¹²³ Andreas Lotscher, ‘Conceptual and Textual Structure in Legislative texts’ in Anne Wagner and Sophie Cacciaguiddi-Fahy(eds), *Obscurity and Clarity in the Law*(Ashgate 2008)142.

¹²⁴ Butt, (n39), 129.

¹²⁵ Ibid, 130.

¹²⁶ Henry.Thring., *Practical Legislator* (2nd edn, London john Murray, 1902)29.

to set out the substantive provisions of the law preferably from the onset or beginning, so that they should not be hidden among administrative and procedural aspects of law. To organise the draft in the above manner therefore necessitates the drafter looking at” things from the reader’s perspective”.¹²⁷

The telescoping structure is found in the Australian Income Tax Assessment Act 1997; the Act's first five sections address the core provisions then moves on to general rules of wide application, and then moves down to the more specialised topics.

The Uniform Law Commission in promoting uniform and logical structure has tried to organise legislation in an order that takes into account the readers’ perspective thus:

Title

Preamble (if necessary)

Definition

Interpretation or Application Provision.

Sustenance of the Act

Regulation of the Act

Regulation-making power

Transitional or Temporary provision

Repealing and Amending Provisions

¹²⁷ Asprey, (n118), 92-95.

Commencement provision

Schedules

Forms

The substance of the Act is closer to the beginning of the Act.¹²⁸

3.3 THEMATIC STRUCTURE:

The thematic structure is drafted based on the each main topic, seriatim. It does not front load or place the key topics at the beginning of the legislation rather, it takes each topic to be provided for in the legislation and presents all the provisions relevant to each topic together.

It takes the main topics and treats all the provisions in accordance to topic.

This structure keeps related materials together, promoting ease of understanding.¹²⁹ Textual units dealing with the same subject form a thematic segment set.

The audience of legislation with a thematic structure may have to go through the whole legislation because there may just be provisions relating to them in every thematic segment.

3.4 CHRONOLOGICAL STRUCTURE:

The chronological structure presents the provisions of the legislation in accordance with the chronological order. It is drafted in the logical order of progression of the legislation.¹³⁰

This Structure requires the audience to pay close attention all the time. It has key information in every part of the legislation which is relevant to the audience and therefore requires the audience paying close attention to all provisions in the legislation.

¹²⁸ Drafting Convention, Uniform Law Conference Part III; Krongold (n1)510.

¹²⁹ Butt (n39)131.

¹³⁰ Ibid,132.

Legislation is not all the same and addresses different problems and so it would be illogical to expect the same structure for everyone but they can logically follow any one of the three structures.

Butt in addressing the accessibility of the audience, is of the view that the drafter would achieve effectiveness by drafting from the viewpoint of the audience.

No single structure will suit all transactions; however, we venture to suggest that if achievable without fracturing the essence of the transaction, readers prefer the telescoping (or front-loading) structure. This structure gives them key information as early as possible. The other two structures; thematic and chronological, require readers to pay close attention at all times as they read through the document, for they are likely to encounter key information throughout the legislation. If concentration lapses, they may miss important provisions.¹³¹

There are cases where the statute may best be organised chronologically to enable easy access, for example in procedural matters.¹³²

The user is assisted if the clauses of the legislation are arranged as much as possible with related sections together and important statements of principle near the beginning.¹³³

3.5 TELESCOPING STRUCTURE AND THE AUDIENCE

The telescoping structure supports the audience based drafting which addresses the audience directly. It ensures that the needs of the ultimate audience of the law are provided for early in the legislative text. The needs of the audience must always be on the mind of the legislative

¹³¹ Butt (n39)135.

¹³² Salembier, (80)287.

¹³³ Catherine Hnad, 'Drafting with the User in Mind- A Look at Legislator', (1983)4(1) Statute Law Rev. Statute Law Rev 166-169.

drafter when drafting the legislation.¹³⁴The audience of legislation determines how legislation is drafted¹³⁵

It is argued that the audience based drafting may not be achievable where the legislation addresses several audience. The legislation can be composed of multiple layers so that a reader can obtain as much or as little information as required.¹³⁶

Bates suggests that where the legislation addresses several audiences the text with greater authority be drafted more formally while those addressing a wide audience are drafted in a less technical language.¹³⁷

Phil Knight and Joe Kimble in the bid to draft for the audience in their plain language rewrite of South Africa's human rights legislation tried to access the ability of an audience to find, read, interpret, and apply the legislation. Simulations were developed for professionals and lay people. They recorded an improvement in the use of the Act by legal professionals and lay readers which was achieved by improving the structure of the legislation and getting rid of legalese.¹³⁸

Also in the rewrite of the Employment Insurance Act (EIA) carried out by Vicki Schmolka and GLPi¹³⁹, user response to two plain language versions was tested and the results were similar to those reported by Knight. Groups working with both plain language versions performed better than groups working with the current version.

¹³⁴ Xanthaki, (n46) VI.

¹³⁵ I.V Gendron, 'Can a Statute Be All Things to All People? The Reality of Audience Based Legislative Drafting', (LL.M Major Research Paper, University of Ottawa, 2000)36.

¹³⁶ Sullivan, (n35).

¹³⁷ T.ST.J.N.Bates 'Differential Drafting'21(1) (2000) Statute Law Rev57-69.

¹³⁸ P. Knight, 'Clearly Better Drafting: A Report to Plain English Campaign on Testing Two Versions of the South Africa Human Rights Commission Act,1995'(Stockport,UK.:Plain English Campaign,1996)39.

¹³⁹ GLPi & V. Schmolka, A Report on Results of Usability Testing Research on Plain Language Draft Sections of the Employment

Insurance Act: A Report to Department of Justice Canada and Human Resources Development Canada (August 2000) [unpublished],

referred to in Ruth Sullivan, 'The Promise of Plain Language Drafting' (1992)24 McGill Law Journal, 107.

User testing in South Africa, Hong Kong, New Zealand, and Canada supports the claim that it may be possible to draft legislation that is easier for many different audiences to use.¹⁴⁰

When contemplating the drafting of legislation based on the telescoping structure, the drafter placing provisions relevant to the audience at the beginning, must first decide who the audience is.

The drafter may draft legislation that is easier for different audiences to use or draft for different audiences.

Sullivan suggests that if audiences in have different needs and interests, or bring a different knowledge base to the legislation, drafters must either shift back and forth among the several audiences, accommodating sometimes one group and sometimes another or they must single out a primary audience whose needs become their primary concern.¹⁴¹

Having to draft legislation for audiences with competing interests, divergent backgrounds, and unequal power is a challenge that drafters face on a daily basis, when the drafter faces a dilemma when the drafter sits down to devise a structure for the legislation that would reflect the logic.

¹⁴⁰ D. Berry, "Audience Analysis in the Legislative Drafting Process" (June 2000) *Loophole: J. Commonwealth Ass'n Legis. Couns.* 61 at 62. 24

¹⁴¹ Sullivan, (n35) 110.

Bearing in mind that there are different groups of readers, with different interests and purposes in reading the document, the logical approach to arranging the subject matter, Knight recommends, is to write for the least experienced readers.¹⁴²

When drafting the South Africa Human Rights Legislation the drafters chose to write for the subcategory of the persons whose lives would be affected by the legislation. In other plain language projects, however, drafters have chosen to write for the audience that is most likely to read the legislation.

Writing for the actual readers of legislation is the approach taken in Australia; this practice excludes the uninformed lay users whose rights would be affected by the legislation.

It is believed that more people are making use of legislation and these users may want to bypass the intermediaries and read the law themselves¹⁴³.

The argument is that the structure of legislation should be addressed to the audience whose rights are actually affected by the legislation and not addressed only to the current users of the legislation.

D 4.1 STRUCTURE OF LEGISLATION AND ACCESSIBILITY

Accessibility is vital to the credibility of legal and political systems; credibility creates stability, trust, and confidence and thus enhances economic performance.

States have increasingly in recent years developed policies to improve the accessibility of their legislation and some have looked at the structure of legislation to improve the accessibility of their legislation.

¹⁴² *ibid* (n108)9.

¹⁴³ Sullivan(n35)115.

The Court of appeal in ZL&VL addressed the concept of “sufficiently good law” and the goodness it raised is that of accessibility.¹⁴⁴ This case discussed the physical publication of legislation but, accessibility goes beyond this, the Sunday Times Case¹⁴⁵ goes beyond the Physical access to legislation and questions whether citizens can reasonably be expected to understand the text and its application to their lives.

Accessibility is seen as a fundamental component of certainty.¹⁴⁶

In the Age of Enlightenment, the call for accessible legislative language or the drafting of simplified is intended to improve public acceptance of rules, reduce legal disputes, limit the authority of jurists or protect the sovereign from competing sources of law.¹⁴⁷

It is argued that since the law is addressed primarily to ordinary citizens, rather than lawyers and judges, it should be drafted so as to be fully intelligible to those affected by it.¹⁴⁸

As earlier stated, the use of structure of the legislation to aid accessibility is a practice which can be applied in all jurisdictions; whether within the common law or civil law systems, the structure of legislation is one similarity that cuts across all jurisdictions which can be used to nurture accessibility of legislation.

For example the Swiss government has established an interesting system to organise legislation in a way that improves its accessibility¹⁴⁹, the EU and the US also use structure to improve accessibility.

¹⁴⁴ ZL & VL v Home Secretary and Lord Chancellor’s Department [2003] EWCA 25.

¹⁴⁵ [1979-1980]2 EHRR,245.

¹⁴⁶ Administration des Douanes v Gondrand Freres [1981] ECR 1931, Black Clawson Ltd v Papierwerke AG [1975] AC.591.

¹⁴⁷ Alexander Fluckiger, ‘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) 4.2Legisprudence,213-218.

¹⁴⁸ Rabeea Assy, ‘Can The Law Speak Directly to its Subjects? The Limitation of Plain Language’,(2011) 38(3) Journal of Law And Society,376-404377

¹⁴⁹ CC L Mader, ‘Multilingualism and other distinctive aspects of Swiss Legislation’(2009)

Examples of legislation drafted to aid accessibility are the Australian Income Tax Legislation, 2011 and the South Africa Human Rights Commission Act, 1994.

4.2 INTELLIGIBILITY

The Law Reform Commission of Victoria states that legislation should be drafted not for lawyer or judges but for its real audience, namely, ‘the group of people who are affected by it and the officials who must administer it’,¹⁵⁰ it states that:

“When parliament passes a law applying to citizens or to a selected group of citizens, the law should be drafted in such a way to be intelligible, above all, to those directly affected by it. If it is intelligible to them then lawyers and judges should have no difficulty in understanding it and applying it”.

The structure of legal documents should therefore be improved, not in the hope of making the document intelligible to the average citizen, but in order to make it intelligible to as many of those who are concerned with the relevant activities.¹⁵¹ The legislation should speak directly to the very persons whose lives it affects.¹⁵²

The Community on Administrative Language observed that the drafter is always responsible for the intelligibility of a statute¹⁵³ the drafter should therefore make use of every tool that would make the statute intelligible and clear to the audience, ideally all legislation should be

¹⁵⁰ Law Reform Commission of Victoria, *Plain English and The Law*(Report No.9)(1987)paras 69-107

¹⁵¹ *Ibid* (n60), para. 71.

¹⁵² Francis Bennion, ‘Confusion Over Plain Language Law’ (2007)16(2) Commonwealth Lawyers Association, 66<<http://www.francisbennion.com>>accessed 18 August, 2014.

¹⁵³ Aino Piehl, ‘Finland Makes its Statute Intelligible: Good intentions and Practicalities’ in Ann Wagner and Sophie Cacciaguidi-Fahy (eds) *Obscurity and Clarity in the Law*, (Ashgate 2008) 162.

readily intelligible.¹⁵⁴ Legislation that is easy to understand is less likely to result in disputes.¹⁵⁵

On the other hand Justice Nazareth contends that speaking directly to the audience of legislation is a dream, saying complicated matters are not easily understood nor explained and so such fanciful notions should be abandoned.¹⁵⁶

The ultimate users demands of legislation are principally that it should be intelligible, and legally certain, that is, precise and clear. Intelligibility here means that it is possible for the user to assimilate and understand the legislation without undue difficulty.

A clearly planned structure improves the intelligibility of the text.¹⁵⁷

The use of telescoping structure of legislation by the drafter to communicate the policy to the audience can improve the audience understanding of the legislation.

The law is made more intelligible to the user and therefore the rate of compliance is enhanced and the quality of the legislation is improved by the use of an audience based structure.¹⁵⁸

Audience based structure can help the user understand their rights and obligations in various circumstances and because they are adequately informed, may serve to reduce the incidence of litigation and enhance conformity to the legislation.

4.3 CLARITY

¹⁵⁴ Walter Iles, 'Legislative Drafting Practices in New Zealand,(1991)(12)Statute Law Rev.,16-30,22.

¹⁵⁵ Watson-Brown, (n70)12.

¹⁵⁶ C.B.E.Nazareth, 'Legislative Drafting: Could our Statutes be Simpler?' (1987)8, Statute Law Rev.81.

¹⁵⁷ Alexandre Fluckiger, 'The Ambiguous Principle of Clarity of Law' in Ann Wagner and Sophie Cacciaguidi-Fahy (eds) *Obscurity and Clarity in the Law*, (Ashgate2008) 16.

¹⁵⁸ D.R.Miers and A.C.Page, *Legislation*,(Sweet &Maxwell1982)81-82

Lord Radcliff, ¹⁵⁹considering the helplessness of the ordinary citizen faced with legislation observed:

“What willing allegiance can a man owe to a canon of obligation

which is not even conceived in such a form as to be understood?”

The Law Reform Commission of Victoria made proposals with respect to the organisation and formatting of legislation to enable the contents to be readily understood.¹⁶⁰ The clarity of the legislation can be enhanced by the structure of legislation.

Laws have to be drafted clearly so that those who are subject to them can know their rights and obligations. Citizens cannot be guided by incomprehensible rules. Rules drafted in a complicated and convoluted fashion.¹⁶¹

Clarity is the state or quality of being clear and easily perceived or understood.¹⁶²

Clarity in the language of the law enhances understanding and transparency of legislation,¹⁶³ but it does not depend on language alone but also on the proper selection of words and on their arrangement.¹⁶⁴

Clarity is an essential ingredient of legality, lack of which, may lead to legality being unattainable.¹⁶⁵

¹⁵⁹Ibid(n148).63

¹⁶⁰ Law Reform Commission of Victoria (Report No.33)“Access to the Law: The Structure and Format of Legislation”.

¹⁶¹ Paul Salembier, *Legal & Legislative Drafting*,(Lexis Nexis 2009)1.

¹⁶² Compact Oxford English Dictionary of Current English(Oxford University Press, Oxford 2005)

¹⁶³ Lord Thring, *Practical Legislation: The Composition and Language of the Acts of Parliaments and Business Documents* (London: John Murray, 1902)61, Helen Xanthaki, ‘On Transferability of Legislative Solutions: The Functionality Test’ in Constantin Stefanou and Helen Xanthaki (eds), *Drafting Legislation: A Modern Approach* (Ashgate; Aldershot 2008)1.

¹⁶⁴ Lord H Thring, *Practical Legislation: The composition and Language of Acts of Parliament and Business Documents* (John Murray, London1902)61.

¹⁶⁵ L.L.Fuller, *The Morality of Law*, (152) Yale University Press, 1969)63.

It is a common standard of good quality legislation in both the common and civil law drafting style.¹⁶⁶Clarity in legislative drafting as a means of eliminating ambiguity and vagueness cannot be overstated¹⁶⁷

Clarity is a requirement for quality legislation.¹⁶⁸It is a known fact that democracy requires clarity; the rule of law requires that the officers of the law understand and apply the law and when the law is not clear and easily understood it leads to expensive litigation. Xanthaki expounded that clarity is a tool of effectiveness; which is the virtue sought after by the drafter, accordingly, what matters is that the audience of the particular statute receive the message the drafter attempts to communicate.

The drafter by use of the structure of legislation, help the addressees to easily access the contents of legislation because it communicates the specification of who does what, and leave its addressees in no doubt about what the law requires of them.¹⁶⁹

Clarity promotes both communication and effectiveness. In complex legislation therefore it is beholden on the drafter to uphold clarity and this drafter can achieve to a great extent by the use of structure, organising the legislation in a way that it makes the information clear and understandable to the audience.

Clarity is one of the basic qualities of good legislation. In order for legislation to be effective and of good quality, the provisions of the legislation must be clear and easy for the reader to understand. If the reader cannot comprehend the legislation, it would be a miracle if they behave as it prescribes.¹⁷⁰

¹⁶⁶ Xanthaki,(n46)

¹⁶⁷ VCRAC Crabbe, (n4)43.

¹⁶⁸ Helen Xanthaki, 'On Transferability of Legislative Solutions: The Functionality Test' in Constantin Stefanou and Helen Xanthaki (eds), *Drafting Legislation: A Modern Approach* (Ashgate; Aldershot 2008)11.

¹⁶⁹ Sideman, (n61)256.

¹⁷⁰ Ibid.

Gashabizi opines that the drafter can draft a legislation that is unambiguous and precise ensuring consistency, coherence and clarity by proper structuring of the legislation; the layout of the legislation can enable the reader to be gently introduced to the legislation.¹⁷¹

Thornton said “ the purpose of legislation are most likely to be expressed and communicated successfully by the drafter who is ardently concerned to write clearly and to be intelligible...in other words to communicate successfully, requires the unremitting pursuit of clarity by drafters”¹⁷².

In the legislative area, the very credibility of a legal system is at stake by the manner in which its laws are expressed. This was forcefully stated in the 1975 Renton Report by the British Committee on the Preparation of Legislation.¹⁷³

The legislative drafter is faced with the question of how to make the legislation as easy and as clear as possible for the audience to understand. The legislative drafter can make use of several devices to make complex legislation accessible to the audience but one fundamental tool that can be used by the drafter to ensure clarity and readability of the legislation is the structure of the legislation. The drafter by use of audience based drafting can achieve substantive clarity in legislation; the structure can facilitate the understanding and the communication of the content of the legislation and eliminate vagueness and ambiguity.¹⁷⁴

It is of fundamental importance in a free society that the law should be readily ascertainable and reasonably clear. To the extent that the law does not satisfy these conditions, the citizen is deprived of a basic right and the law itself is brought into contempt.

¹⁷¹ Alain Gashabizi, ‘In Pursuit of Clarity: How Far Should The Drafter Go?’ (2013)36(3) Commonwealth Law Bulletin,420.

¹⁷² Helen Xanthaki, *Thornton’s Legislative Drafting*(5th ed Bloomsbury Professional 2013)55.

¹⁷³ Renton Committee(n120)37.

¹⁷⁴ Reed Dickerson, *Legislative Drafting*(Little Brown and Company 1954)10;Thornton 55.

It is argued that it is not possible for everyone to understand the law but the drafter has the burden to strive for clarity and effectiveness and should make use of all possible techniques such as the structure of legislation to ensure that the audience of the legislation understand it. In December 1992, the European Council asked for legislation to be clearer and simpler, on 8th June, 1993, the Council adopted a Resolution on the quality of drafting legislation covering a number of issues, ranging from the wording and structure, the aim of the Resolution is to make Community legislation more accessible.

E 5.1 STRUCTURE OF LEGISLATION AND EFFECTIVENESS

Legislation is communication and the goal of communication is effectiveness.

The transfer of information from the sender to the receiver is effective when the reader understands and responds to the message.¹⁷⁵ Effectiveness of legislation can be seen as the relationship between the purpose and the effects of legislation and the extent to which legislation guides the attitude and behaviour of the target audience to the intent of the legislation.¹⁷⁶

In practice legislation gives effect to policy which always involves and intends a legal change¹⁷⁷ the legislations ability to effect this legal change determines its effectiveness.

Effectiveness is an important aspect of quality in legislation; it is an indicator of quality in legislation. Effectiveness is the result of specific choices made when designing and drafting legislation, it is determined by the design and form of the law.¹⁷⁸

¹⁷⁵ Clarice Pennebaker Brantley, and Michele Miller, *Effective Communication For Colleges*, (Thompson, South Western, USA 2007) 4.

¹⁷⁶ Luzius Mader, 'Evaluating the Effects: A Contribution to the Quality of Legislation' (2001) 22; 2 Statute Law Review 119, 126.

¹⁷⁷ Stephen Laws, 'Giving Effect to Policy in Legislation: How to Avoid Missing the Point' (2011) 32(1) Statute Law Rev. 1-16.

¹⁷⁸ Maria Mousmouti, 'The 'effectiveness test' as a Measure of Legislative Quality: Equality in Law, Inequality in Practice, and Quality in Legislation' (PhD Thesis, IALS 2013) 168-169.

Effectiveness of legislation is promoted when the structure of legislation is considered in the process of drafting legislation in relation to the audience which the legislation is addressed to.

The structure used in the legislation has a significant impact on the achievement of results.¹⁷⁹

Clearly drafted legislation enhances democratic participation and effective administration.¹⁸⁰

The structure of legislation can nurture accessibility which is an important feature of effectiveness; the structure is an important factor that bears on the impact of the legislation.

Legislation fails if compliance is difficult because of lack of clarity or precision.¹⁸¹

Poor structure of legislation leads to incomprehensibility and inaccessibility of the provisions of the legislation by the addressees. The audience of the legislation will find it difficult to access their rights and obligations and so cannot exercise them. This can consequently affect the purpose of the law and make it ineffective.

If the legislation is inappropriate to address the problem or do not contribute to the objective of the law, if enforcement mechanisms are inappropriate or implementation is inadequate.

Enforcement is ineffective; if the subjects of the law do not know how to comply or encounter difficulties in complying or interpreting the legislation, the design and drafting of the legislation is ineffective.¹⁸²

An inadequately structured legislation makes it difficult for its addressees to understand its substantive provisions and unless the addressees know and understand its contents, they obey its prescriptions only accidentally; and if by chance they obey them, they do so woodenly.

¹⁷⁹ JF Burrows and R I Carter, *Statute Law in New Zealand*, (4th edn, Lexis Nexis 2009)129.

¹⁸⁰ Ibid.

¹⁸¹ Julia Black, 'Critical Reflections on Regulation' (2002)27 *Australian Journal of Legal Philosophy*, 3.

¹⁸² *ibid.*

The more logical the structure the more accessible and therefore the more usable the legislation.¹⁸³

It can also create difficulties in addressing the intended ill which the policy behind the legislation seeks to address; it can therefore create difficulties in addressing an issue through legislation and hinder overall behavioural change.¹⁸⁴

An ambiguous or incomprehensible statute can give rise to significant social cost.¹⁸⁵ When people don't know the law or misunderstand the law, they are less likely to comply with the law or exercise their rights under it.¹⁸⁶ It may be true that members of the public will never read or want to read legislation that applies to them, but the number of persons who want to be able to access legislation is steadily increasing and this should not be discouraged by the practice of difficult structures of legislation.

Taking into cognisance that clear and simple legislation helps businesses and citizens to comply with the law without imposing excessive burdens and facilitates the task of authorities who have to enforce it.¹⁸⁷

Errors in format and layout can therefore affect the interpretation of an enactment, and can be costly if litigation is required to settle the meaning of an enactment. Accuracy in format and layout is also important during a Bill's progress through the Parliamentary process.

There is an argument that since legislation does ultimately affect and regulate the lives of all citizens, it should be capable of being understood by the reasonably well-educated layperson. The drafter has to recognize that people read rules to gain information, and the

¹⁸³ Seidman,(n61)209.

¹⁸⁴ Ibid, 208.

¹⁸⁵ Paul Salembier, *Legal & Legislative Drafting*, (Lexis Nexis 2009) 4.

¹⁸⁶ David Kelly, 'The Victorian Experience of Plain Drafting' *Legislation and Its Interpretation, Discussion and Seminar Papers*, 1988, .54.

¹⁸⁷ Commission Staff Working Paper entitled *Making Single Market Rules More Effective, Quality in Implementation and Enforcement*, 25, 1998, 5.

difficulties readers have when information is hard to find, and understand, the obscurity creates anxiety and leads to non-compliance, increases transaction costs, and causes inefficiencies, drafters should therefore make use of every means at their disposal to communicate rules clearly¹⁸⁸ design the structure of the legislation with the audience in mind, making use of a structure that is easily accessible.

5.2 BENEFITS OF AN EFFECTIVE STRUCTURE

The drafter's investment of time and resources on the structure of legislation is easy to identify but difficult to quantify.

An effective structure of legislation would lead to:

- (i) Improved compliance rates. Every well written and functionally well-structured document will result in greater compliance with the rule.
- (ii) Greater efficiency. Good structure means that readers can find their way around the document more quickly, not just once, but every time every reader seeks information from the document.
- (iii) Greater respect for the rule. Better written rules mean they are better understood, which in turn gives the rule greater credibility
- (iv) Reduced administrative costs. Well written rules reduce the need for explanatory information or the need to answer questions about the rule.
- (v) Improved access to the law. The substance of the legislation is not impeded by difficulty in understanding it.

¹⁸⁸ Elliot (n48)27.

(vi) The rule of law because it decreases the risk of unintentional contravention of the law.¹⁸⁹

(vii) Compliance by the audience to take advantage of benefits

provided for in the law, or in the case of obligations; discharge their obligations.

Among other benefits, it reduces the cost of administration since it is clear and understood by the audience. People also participate more in the life of the community because they understand the laws, and because they understand the legislation and comply with the objectives of the legislation, the government programme is consequently effective.

In recent times many jurisdictions have come to recognise the relationship between the form of legislation to accessibility and effectiveness of the legislation and have taken measures to address this:

Australia through its Law Reform Commission has prepared a manual aimed at helping drafters prepare legislation which communicates their message effectively and efficiently, looking at the organisation and formatting of legislation to enable the contents to be more readily understood.¹⁹⁰

Canada has Legislative conventions geared towards standardising the way statutes are drafted in Canada and advocate that legislation should be written to suit the intended audience.¹⁹¹

¹⁸⁹ Elliot(n48)27.

¹⁹⁰ Ibid(n117).

¹⁹¹ Uniform Law Conference of Canada< www.ulcc.ca>accessed11August,2014.

In the United Kingdom, the European Council of Ministers Resolution 1990 on quality of drafting of European Community legislation recommends making community legislation more accessible.

New Zealand in simplifying the content of the law and improving access to legislation introduced a format of legislation and encourage clear and simple drafting.¹⁹²

The Ministry of Justice in South Africa is not left out; it began a drive to have laws drafted in a simple accessible form.

F. 6.1 CONCLUSION AND RECOMMENDATIONS

The objective of this paper is to assess whether the structure of legislation can nurture accessibility and effectiveness of legislation. There are good arguments for an audience based structure to aid accessibility but these have to be considered with the prevalent structure and practice in the particular jurisdiction.

A statute is the ultimate instrument of state intervention.¹⁹³ Legislation is a basic tool of Government and an expertly crafted legislation is fundamental to democracy.¹⁹⁴

Legislation drafted in conventional legal English is often difficult to understand and those who draft legislation in plain language seek to overcome these failings by using the structure, of the legislation to communicate to the target audience.¹⁹⁵

¹⁹² New Zealand's Parliamentary Counsel Office <www.pco.parliament.gov.nz> accessed 11 August, 2014.

¹⁹³ Robert C. Bergeron, 'Globalisation of Dialogue on the Legislative Process', *Statute Law Review* (23) (2002)89.

¹⁹⁴ Sakari Arkio, 'Assessment of Draft Legislation in Finland', in Kellermann and Others, *Improving the Quality of Legislation in Europe*, (Kluwer, The Hague 1998), 228.

A government that values clearer law must support clarity as a policy. Drafters should broaden the concept of whom the legislative audience is. A user who is familiar with the subject matter of a provision should be able to make sense of it in relation to a given set of circumstances. The design of a legislative document has important political and legal implications.

The quality requirement of legislation analysed in Part A of this paper is essential for the accessibility and effectiveness of any legislation. It is important that the drafter considers quality of legislation, accessibility and the audience being addressed in relation to the structure of the legislation. Because these have an overall impact on the effectiveness of the legislation. It is important that the audience of legislation understand the legislation which affects them and that one of the quality of good law is accessibility. The structure of legislation can nurture accessibility or lead to difficulty in accessing legislation.

Part B considers the traditional structure that is prevalently used in most jurisdictions and discusses briefly the provisions that make up the traditional structure. The traditional structure has consistency due to long term use by various jurisdictions and therefore reduces uncertainty. But in the past two decades there has been complaints about legislation, which includes the structure, and there is a recent trend of people wanting to read the laws that govern them which is made difficult by the traditional structure of legislation.

Part C looks at the types of structure; the telescoping, thematic and chronological, that can be applied to the drafting of legislation and considers which structure best communicates information to the audience of legislation. The telescoping structure of legislation is preferred as it communicates information to the audience easily by placing all relevant provisions at the

¹⁹⁵ Peter Butt, 'Plain Language in Property Law: Uses and Abuses' (1991)73 ALJ 807,808.

beginning of the text, therefore this structure can nurture accessibility and effectiveness of the legislation. The structure which nurtures accessibility also fosters effectiveness of the legislation which ensures good quality legislation.

The structure of legislation does actually nurture accessibility if drafted from the perspective of the audience, the audience is considered to be those whose rights are affected by the legislation. The audience is considered because the audience determines the perspective and organisation of the structure determining the audience is the bane of the drafter whose main goal is communicating the policy intent and drafting effective legislation that would achieve its purpose.

To a large extent the accessibility of the legislation is dependent on whether the drafter chooses to follow the tradition and practice in the particular jurisdiction or to draft legislation adopting a structure that would communicate directly to the audience and make the legislation effective.

The legislative text should be able to communicate to the targeted audience what is required. The rule of law demands that the audience understand what is expected of them and what the law grants. The rule of law dissipates if its official audience fail to obey the law.¹⁹⁶

The legislative drafter is encouraged to engage in how much more they can do as a profession to help their audiences access their product. The acceptability of legislation may depend on how much they can draft in the style that best suits the readers' needs, with the aid of structure of legislation to produce a useful rule.

¹⁹⁶ HLA Hart, *The Concept of Law* (Oxford: Oxford University Press, 1961).

The drafter sticking to the traditional structure may be problematic, because in most cases the message is delayed, sometimes for several pages, and may hinder communication to the audience.

There is a global move towards simplifying laws, making them accessible to the audience, so as to ensure that the laws have the intended legal effect and cause the required behavioural change.

Unapproachable legislation make way for problems of effectiveness, haphazard implementation and an invitation to Judge made law. Making the legislation clear is about the language alone but about the design and layout also; how the structure of the legislation can be presented in a way that is helpful to the audience in understanding the legislation

The legislative drafters work or objective is basically the same in all jurisdictions.¹⁹⁷The responsibility of drafting legislation which is of good quality is to a large extent dependent on the drafter.¹⁹⁸Effectiveness is the contribution of the drafter to the efficacy of the drafted legislation.

Drafter's are in the communication business and therefore need their products accessible.¹⁹⁹The rule of law must also be upheld in the course of drafting legislation and the law made accessible to the addresses.²⁰⁰

The drafter is expected to draft legislation with the detail and consistency of architecture for it is law architecture,²⁰¹ creating a rule that is legally certain, and to do it in a way that is functional. When the subject-matter is complex, or a process is difficult to follow, drafters should seek additional ways of improving clarity, by the use of a clear structure of legislation.

In carrying out their duty to uphold the rule of law, Drafters must take care that the structure of the legislation nurtures effectiveness, that it upholds the features of clarity, precision and consistency.

¹⁹⁷ Moran (n6)169.

¹⁹⁸ Alfred.Kellermann, 'Proposals for improving the Quality of European and National Legislation'Eur J.L Reform, (1999)12.

¹⁹⁹ Constantin Stefanou, 'Is Legislative Drafting a Form of Communication?'(2011)37(3) Commonwealth Law Bulletin,407-416.

²⁰⁰ Xanthaki,i(n16)5.

²⁰¹ Alber R.Menard, 'Legislative Bill Drafting, (1950-1951)12 Rocky Mntn.L.Rev.127.

Drafters, who are serious about enhancing democracy and promoting the rule of law, must write for the audience that has the best claim to their assistance, which is not necessarily the audience that is most likely to read what they have written

If effective communication is the goal, there are no universals and endless adaptation that are unavoidable. Statutes that confer benefits on vulnerable groups in society must be drafted differently from statutes that deal with corporate tax. Codes of conduct for specialists must be drafted differently from statutes like highway codes .As communication technologies change and evolve, as audiences develop new expectations, drafting will have to change and evolve to accommodate these changes. The drafter ought to invent ways of writing rules that improve clarity.

Thornbull²⁰² envisages the day when a rule is composed of multiple layers - so that a reader can obtain as much or as little information as he or she needs. When we move beyond the fruitless debate over the "right" drafting style; common law or civil law, and move towards a capacity to draft in the style that best suits the readers' needs, with all the aids necessary to provide a useful rule.

The drafter is expected by society to invest more resources in the way in which our rules are written for a more productive, effective, and efficient result.A user centred approach to structure as opposed to a logic centred approach to structure will produce the goal of the drafter which is effectiveness.

²⁰²ibid,(n113) P.39

Altering inefficient structure of legislation is not an easy task since such drafting structure is influenced and governed by tradition. But with a well thought out plan, the drafter can develop the right structure for a particular legislative proposal to achieve clarity and in so doing nurture accessibility and consequent effectiveness.²⁰³

There is therefore a need for drafters to be more original in their drafting,²⁰⁴ drafting a structure that is legally effective and certain thereby nurturing quality of legislation.²⁰⁵

Thornton challenges the drafter by saying that the way to greater intelligibility in drafting is for the drafter to be obsessed with drafting so as to be understood, but without the sacrifice of precision and accuracy. A continuing questioning, evaluation and improvement of stylistic and other drafting practices. Readiness to accept change where a benefit is demonstrated.²⁰⁶

The needs of the users of legislation must never be allowed to escape from the mind of the drafter.²⁰⁷

The drafter's task is a herculean one which must not be underestimated, it entails nurturing accessibility and effectiveness of legislation by the use of an effective audience based structure. The structuring of legislation that is effective is an essential aspect of legislation and the adherence to the rule of law; it is very vital because it is accessible by the public²⁰⁸ and fosters effective implementation of the legislation thereby.

²⁰³ Ruth Sullivan (n35).

²⁰⁴ VCRAC Crabbe, 'The Ethics of Legislative Drafting', (2010), (36) Common Wealth Law Bulletin, 22.

²⁰⁵ Paul Salembier, 'Designing Regulatory Systems: A Template for Regulatory Rule Making' (2002) (23) Statute Law Rev172.

²⁰⁶ G.C.Thornton, (n31) V.

²⁰⁷ H.Xanthaki, ,(n46) VI.

²⁰⁸ Vanterpool,(n22)186.

Legislation being the ultimate instrument of state intervention²⁰⁹; it also nurtures the easy running of the state.

Based on this it could be said that the structure of legislation can to a large extent nurture accessibility and effectiveness of legislation and it is a task which is worth embarking on.

²⁰⁹ Robert Bergeron, 'Globalisation of Dialogue on the Legislative process', (2002) (23) Statute Law Rev.89.

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