

Legislative Drafting and the Rule of Law

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Declaration

The work presented in this thesis is my own.

Dedication

I dedicate this thesis to my long-suffering family who have endured many years of a father and husband too busy with work to spend time with his family.

Abstract

The rule of law is a cornerstone of the UK legal order, it states that we are all subject to, and ruled in accordance with, the law. Under Bingham's analysis, the rule of law is made up of eight separate elements. Element one has four aspects, these are that legislation ought to be accessible, intelligible, clear and predictable.

Legislative drafting means turning policy ideas into legislation fit for the statute book – it is literally writing the law. It is best described as *phronesis*, the subjective application of wisdom.

The hypothesis of this thesis is that legislative drafting principles can be derived from element one of Bingham's definition of the rule of law, and that these drafting principles facilitate the drafting of legislation in accordance with the rule of law. The methodology is deductive reasoning, meaning that each aspect of element one is examined, and from each aspect, drafting principles are derived. The principles therefore flow directly from the rule of law.

In Chapter 2 the rule of law requirement of accessibility is dissected. Accessibility means that citizens have access to the law. This leads to the conclusions that legislation ought to be drafted so as to be available (citizens can physically read it), navigable (citizens can find their way around it, particularly to the portion which directly affects them) and inclusive (containing all the relevant legal information).

In Chapter 3 the rule of law requirement of predictability is analysed. Predictability means that citizens can predict the legal consequences of their actions by reference to the legislation, or in other words, that the law is fixed and certain. Drafting principles are then derived from this. These are that legislation is prospective (it has effect in the future, not the past), that it is determinate (certain, unambiguous and precise), stable (not changing all the time), it must have a clear start and stop date, it must be consistent (within individual statutes and more generally across the statute book), that it must apply in the real world, that it must be capable of being implemented, and that there must be constraints on the discretion given to officials by legislation.

Chapter 4 deals with intelligibility – that the law must be capable of being understood by citizens. This means that the drafter must consider the characteristics of the individual who is most likely to be using the legislation, that both amending legislation and the legislation as amended must be comprehensible, that excessive interconnectedness must be avoided, that plain language, easification and good writing techniques must be used and finally that the legislation contain examples where appropriate to aid understanding.

The conclusion is that the hypothesis has been proved and that it is built on sound foundations of the importance of the rule of law, the importance of legislation and the key role of legislative drafters in the process of making legislation. Drafters are already guardians of the statute book who are already under an obligation to protect the rule of law. The hypothesis supports observance of rules, fairness, respect for human autonomy, certainty and provides a constitutional check on power. It can be extended to other jurisdictions which have a similar approach to the rule of law.

Contents

Chapter 1 – Introduction.....	12
1.1 Background	12
1.2 Hypothesis and methodology	12
1.3 Structure of thesis.....	15
1.4 The Rule of Law	15
1.4.1 Rule of law as a principle	16
1.4.2 Rule of law as an ideal.....	19
1.4.3 Bingham and the rule of law	23
1.5 Legislative Drafting.....	25
1.5.1 Legislative drafting: turning policy into legislation	25
1.5.2 Thornton’s five stages of the drafting process	26
1.5.3 Broader role of legislative counsel.....	27
1.5.4 Drafting as art, science or phronesis.....	29
1.6 Principles of legislative drafting	30
1.6.1 Bentham.....	31
1.6.2 Xanthaki	32
1.6.3 UK drafters	35
1.7 Conclusion.....	36
Chapter 2 Accessibility	38
Introduction	38
Part 1 The Theory of Accessibility.....	38
2.1 The Importance of Accessibility	38
2.1.1 Accessibility in the UK	41
2.1.2 Accessibility in the UK – Prerogative Legislation	44
2.2 Difficulties with providing (electronic) access to legislation.....	45

2.2.1 Cost	45
2.2.2 Volume	45
2.2.3 Interconnectedness	46
2.2.4 Dynamic legislation	46
2.2.5 Authority	47
2.2.6 Paper based process	47
2.2.7 Bilingualism	47
Part 2 Drafting Principles that Promote Accessibility	48
2.3 Availability.....	48
2.3.1 Electronic or non-electronic availability	49
2.3.2 What must be available?	49
2.3.3 Aspect 1 – availability of law as enacted	50
2.3.4 Aspect 2 – availability of law as amended	51
2.3.5 Aspect 3 – law at a point in time.....	52
2.3.6 Aspect 4 – law in a particular geographical area	55
2.3.7 Aspect 5 – legislation in context	58
2.3.8 Aspect 6 – findability.....	61
2.3.9 A fully electronic system?	62
2.4 Navigability.....	63
2.4.1 Short titles.....	63
2.4.2 Omnibus bills.....	67
2.4.3 Section headings	68
2.4.4 Structure	70
2.4.5 Parallel structures	72
2.4.6 Signposting.....	74
2.4.7 Discrete or parcelled ways of consuming legal information.....	77
2.4.8 Highlighting defined terms	77
2.4.9 Numbering	78

2.4.10 'Hidden' provisions	79
2.5 Inclusivity	80
2.5.1 Tax legislation and extra-statutory concessions	81
2.5.2 Broadly drafted legislation constrained by non-legislative indications of narrow application	82
2.5.3 Broadly drafted legislation due to the difficulty of defining exactly what is to be covered	84
2.6 Conclusion.....	85
Chapter 3 Predictability	87
Introduction	87
Part 1 – The Theory of Predictability	87
3.1 The Importance of Predictability	88
3.1.1 Why is legislation sometimes not predictable?	89
3.1.2 Predictability in primary legislation, or in the legal system as a whole?	91
3.1.3 The qualifier – so far as possible.....	92
Part 2 Drafting Principles that Promote Predictability	92
3.2 Prospectivity.....	92
3.2.1 Three Sub-types of Janus-faced Legislation	95
3.2.2 Retroactive Legislation.....	95
3.2.3 Retrospective Legislation	96
3.2.4 Legislation that interferes with existing rights	97
3.2.5 A drafting solution – transitional and savings provisions	98
3.2.6 UK terminology to describe Janus-faced legislation	100
3.2.7 Using the rule of law as a guide for drafting Janus-faced legislation	100
3.2.8 Using the ECHR as a guide for drafting Janus-faced legislation	102
3.2.9 Conclusion on efficacy of prospectivity as a drafting principle	107
3.3 Determinacy.....	107
3.3.1 Unambiguity.....	108
3.3.2 Precision.....	112

3.4 Stability	120
3.4.1 The nature of legal change.....	121
3.4.2 Ameliorating the effects of unstable law.....	122
3.4.3 Highlighting the change	122
3.4.4 Advertising the change	122
3.4.5 Long lead in time to change.....	123
3.4.6 Dealing with rapid technological changes	124
3.5 Clear commencement.....	129
3.5.1 Commencement date on Act when Act is made	130
3.5.2 Presentation of commencement dates	130
3.5.3 Clear repeal date.....	130
3.6 Consistency	131
3.6.1 Words mean the same thing.....	133
3.6.2 Consistent grammar.....	135
3.6.3 Do similar things in similar ways.....	136
3.6.4 Consistent presentation.....	138
3.6.5 Address the same issues	138
3.6.6 Consistency and the development of new ideas	138
3.6.7 Consistency and changes in legal culture	139
3.6.8 Need for consistent interpretation by judges.....	140
3.7 Application in the real world.....	140
3.7.1 Law is ignored	140
3.7.2 'The law is an ass'	141
3.7.3 Impossible law.....	141
3.7.4 Panglossian law	142
3.7.5 Law is inaccessible	142
3.7.6 Law is unintelligible.....	142
3.7.7 Disconnect between language of the law and practice on the ground	142

3.7.8 Things which aren't in the law but which are intended to be applied in practice	144
3.7.9 Things which are in the law but which aren't intended to be applied in practice	145
3.8 Implementation / Implementability	148
3.9 Constraints on discretion	152
3.9.1 Rules v discretion	153
3.9.2 Three legislative elements of discretion	154
3.9.3 How tightly does the discretion have to be constrained?	155
3.10 Conclusion.....	157
Chapter 4 Intelligibility.....	159
Introduction	159
Part 1 – The Theory of Intelligibility.....	159
4.1 The Importance of Intelligibility.....	159
4.1.1 The qualifier – so far as possible.....	162
4.2 Why is legislation sometimes not intelligible?.....	162
4.2.1 Exhaustiveness / comprehensiveness.....	163
4.2.2 Complex policy	165
4.2.3 Complexity masking a lack of direction	166
4.2.4 Desire for solemnity.....	166
4.2.5 The nature of legislation	167
Part 2 Drafting Principles that Promote Intelligibility.....	168
4.3 Characteristics of the user	168
4.3.1 Conception of legislation and relationship with human autonomy	168
4.3.2 Target audience – the citizens using the legislation	169
4.3.3 Target audience – state focused legislation	171
4.3.4 Target audience – special cases: those with a particular difficulty in understanding legislation	172
4.3.5 Target audience – those who will always have an interest in the legislation.....	172
4.3.6 Intelligibility and law as a method of communication.....	172

4.3.7 Role of intermediaries.....	174
4.3.8 The consequences for intelligibility in considering the user.....	177
4.3.9 The reality of citizens using legislation	178
4.4 Intelligibility of amending legislation or of the legislation as amended	179
4.4.1 How amending legislation works	179
4.4.2 Different users, different needs.....	180
4.4.3 Drafting solutions to dealing with amendments	182
4.5 Excessive interconnectedness of legislation.....	187
4.5.1 Excessive interconnectedness and amending legislation	187
4.5.2 Excessive interconnectedness and signposts / cross references.....	188
4.6 Plain language	189
4.6.1 What is plain language?.....	189
4.6.2 Plain language techniques	193
4.7 Easification	199
4.8 Good writing	201
4.9 Examples	201
4.9.1 Different ways of drafting an example	202
4.9.2 Appropriate cases where examples can be used.....	203
4.9.3 Difficulties with examples	204
4.10 Conclusion.....	206
Chapter 5 Conclusion	208
5.1 Proving the hypothesis	208
5.1.1 Accessibility.....	208
5.1.2 Predictability	208
5.1.3 Intelligibility.....	210
5.1.4 Derivation of drafting principles	210
5.2 Is the hypothesis built on sound foundations?.....	211
5.2.1 Importance of the rule of law	211

5.2.2 Importance of legislation	214
5.2.3 Importance of drafters in the legislative process	215
5.2.4 Practical value of the hypothesis	215
5.3 Validity of hypothesis by reference to practice	215
5.3.1 Drafters as ‘guardians of the statute book’ and protectors of the rule of law	216
5.3.2 Current drafting practice in the UK.....	218
5.4 Benefits of the hypothesis: core values it supports.....	219
5.4.1 Observance of rules	220
5.4.2 Fairness	220
5.4.3 Respect for human autonomy	221
5.4.4 Certainty.....	221
5.4.5 Constitutional check on power	223
5.4.6 Democratic governance	223
5.5 Extension of the hypothesis.....	224
5.5.1 Extension to other elements of the rule of law	224
5.5.2 Extension to other jurisdictions	225
5.6 Concluding remarks	225
Bibliography	226

Chapter 1 – Introduction

1.1 Background

Legislative drafting is the discipline of turning the policy ideas of legislators into law fit for the statute book. Although legislative drafters have written about it from a practitioner’s viewpoint,¹ until recently it has received relatively little academic attention.² Xanthaki describes legislative drafting as neither art nor science but phronesis – the practical application of wisdom.³

The rule of law is a fundamental legal principle that everyone is subject to the law and that we are governed in accordance with law. It has also come to represent the ideal characteristics that a legal system ought to possess. By contrast with the study of legislative drafting, the rule of law has been written about extensively.⁴ Tom Bingham was a respected English judge who wrote a well-regarded book on the rule of law.⁵ He conceived of the rule of law as having 8 different elements. Element one is that law should be accessible, intelligible, clear and predictable. This thesis examines the intersection between the rule of law and legislative drafting.

1.2 Hypothesis and methodology

The hypothesis is

Legislative drafting principles can be derived from element one of Bingham’s definition of the rule of law (that law should be accessible, intelligible, clear and predictable) that facilitate the drafting of legislation in accordance with the rule of law.

Specifically, the drafting principles derived are:

- Availability
- Navigability
- Inclusivity
- Prospectivity

¹ See The Loophole – The Journal of the Commonwealth Association of Legislative Counsel.

² See Statute Law Review (mainly focusing on the UK) and Theory and Practice of Legislation.

³ Helen Xanthaki, *Drafting Legislation: Art and Technology of Rules for Regulation* (1 edition, Hart Publishing 2014).

⁴ For a recent summary, see Venice Commission, ‘Report on the Rule of Law’ (2011).

⁵ Tom Bingham, *The Rule of Law* (Penguin UK 2011).

- Determinacy
- Stability
- Clear commencement
- Consistency
- Application in the real world
- Implementability
- Constraints on discretion
- Focus on characteristics of the user
- Use of examples
- 'Good writing' techniques
- 'Plain language' techniques
- Easification
- Intelligibility of amending legislation and of legislation as amended
- Avoiding excessive interconnectedness

This thesis is original because it is the first systematic attempt to link drafting principles with the rule of law. Much has been written about the rule of law already. This thesis does not attempt to offer a fresh definition of the rule of law or justify its existence. Instead it accepts that there is such a thing as the rule of law and that it is a good thing. It does contain justification for using Bingham's definition of the rule of law. By comparison, not much has been written about legislative drafting. The focus in the literature is on the nature of legislative drafting and the meaning of quality legislation. Although it is possible to find statements that legislation must be in accordance with the rule of law, there has been no systematic effort to delve deeper. The originality of this thesis is the focus on the nexus of drafting and the rule of law.

This thesis only covers element one of Bingham's definition of the rule of law. This is for two reasons. Firstly, expanding it out to include the other seven elements would dilute the scope of the inquiry and cause a loss of focus. Secondly, element one deals with the form of legislation, whereas the other elements deal more with the substance of the legislation. It is in the form of legislation that legislative drafters have the greatest opportunity to give effect to the rule of law. This is because drafters determine the form of legislation and others (politicians, civil servants) determine the content.

Drafters can indirectly influence the content of legislation by advising those who have requested the legislation. This is part of the role of a legislative counsel. However, they can directly influence the way that the legislation is constructed, as it is they who are doing the constructing. Since the focus

of this thesis is on legislative drafting principles, the thesis is directed towards those elements of the rule of law which are more concerned with the form of legislation not its substance.

The methodology is innovative as well as being straight-forward. I examine each aspect in element one of Bingham's definition of the rule of law - accessible, intelligible, clear and predictable (this is done in Part 1 of each Chapter). From each aspect I derive legislative drafting principles which give effect to it (this is done in Part 2 of each Chapter). I use deductive reasoning to do so. That is to say, I start with each aspect of element one as my premise, and reason out from that what drafting principles are needed in order that legislation is enacted which is in accordance with that aspect. Once I have set out the drafting principles I develop them, both by reference to practical examples and also by reference to the works of others who have written about drafting. I use the views of others to (a) demonstrate that the conclusions of my deductive reasoning accord with the conclusions that others have reached and (b) to develop more fully the drafting principles I have postulated. Nothing is new under the sun, so the drafting principles that I derive often replicate drafting principles which others have put forward.

I also examine the views of other key writers on the rule of law as they relate to element one of Bingham's definition. This is for several reasons. Firstly, as a check on the soundness of my methodology, to ensure that what Bingham includes as an element is not at variance with what others have said. Secondly, to provide more detail on the rule of law, since Bingham doesn't set out in great detail the reasoning behind his elements. Greater detail on the nature of element one helps with deriving the drafting principles from it. These other writers are Fuller⁶ and Raz⁷ for all aspects of element one, and also Locke⁸ and Bentham⁹ where they are writing on a subject relevant to element one.

The focus is very much on the rule of law and legislative drafting in the UK. However some examples of legislation from other jurisdictions are also used where apposite.

Some drafting principles are relevant to more than one aspect of element one (or are even relevant to one of the other seven elements of Bingham's definition). In those cases, I deal with them under

⁶ Lon L Fuller, *The Morality of Law: Revised Edition* (Revised, Yale University Press 1969).

⁷ Joseph Raz, 'The Rule of Law and Its Virtue', *The Authority of Law: Essays on Law and Morality* (Oxford University Press 1979).

⁸ John Locke, *Locke: Two Treatises of Government Student Edition* (Peter Laslett ed, 3rd Student Manual/Study Guide, Cambridge University Press 1988).

⁹ Bentham's writing on legislation is voluminous. The main works of Bentham's I have looked at are Jeremy Bentham, *Legislator of the World: Writings on Codification, Law, and Education* (Clarendon Press ; Oxford University Press 1998); Jeremy Bentham, *Theory of Legislation* (CK Ogden ed, Routledge 1950); Jeremy Bentham, *An Introduction to the Principles and Morals of Legislation* (JH Burns and HLA Hart eds, Clarendon Press).

one aspect, and simply mention or refer to them in another aspect. For example, the drafting principle of consistency promotes both predictability and intelligibility, but I deal with it only in Chapter 3 under the heading of predictability.

1.3 Structure of thesis

Chapter 1 sets out the hypothesis and methodology. It then analyses the two concepts contained within the thesis – the rule of law and legislative drafting. It concludes by looking at some existing principles for legislative drafting. This chapter lays out the necessary groundwork for what is to follow.

Chapter 2 examines accessibility of legislation. Part 1 investigates what accessibility meant to Bingham and to others as well as the arguments around accessible legislation in the UK. Part 2 is the main part of the chapter, it derives and expounds upon the drafting principles of availability, navigability and inclusivity.

Chapter 3 examines predictability of legislation. Part 1 looks at what predictability means – that the legal effect of our actions are predictable by reference to legislation. Part 2 derives the drafting principles of: prospectivity, determinacy, stability, clear commencement, consistency, application in the real world, implementability and constraints on discretion.

Chapter 4 combines the analysis of both intelligibility and clarity. Part 1 looks at what these concepts mean to Bingham and others. Part 2 looks at the drafting principles derived from them. These are that we must focus on the user we want to make the legislation intelligible to, the difficulties in making amending legislation intelligible, excessive interconnectedness, the use of plain language, easification, the use of examples, and good writing styles.

Chapter 5 is the conclusion.

1.4 The Rule of Law

There is a duality to the rule of law.¹⁰ At one level, the rule of law is a basic principle that we are all subject to the law. At another level, the rule of law is the ideal of the values that a legal system ought to possess. This section gives an overview of competing theories of the rule of law.

Bingham gave the following definition of the rule of law:

¹⁰ Much of what follows will be published in *Theory and Practice of Legislation* (2017) in an article entitled “What has legislation got to do with the rule of law?”.

All persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly made, taking effect (generally) in the future and publicly administered in the courts.¹¹

One of the strengths of his analysis is that it reflects the duality of the rule of law. He sets out the basic principle of the rule of law – that everyone is subject to the law. But he then goes further and sets out the ideal of the rule of law, the values that legal systems should reflect. These are his eight elements of the rule of law:

1. Law should be accessible, intelligible, clear and predictable
2. Questions of legal right and liability to be resolved by law, not by exercise of discretion
3. Law should apply equally to all
4. Government should exercise powers in good faith
5. Law must protect fundamental human rights
6. Courts must be able to resolve legal disputes
7. Adjudicative procedure of the state must be fair
8. States must comply with international legal obligations as well as domestic ones

1.4.1 Rule of law as a principle

At its very simplest, the rule of law is the notion that everyone, both state and citizen, is bound by the law. Turning firstly to the state, the state makes the rules and is expected to follow the rules. Even though it may make the law, the state is not itself above the law. Bingham describes this as the ‘duty to govern in accordance with law’.¹² So, the executive doesn’t have an untrammelled power to lock people up.¹³ As the Supreme Court reiterated, ‘If the rule of law is to mean anything, decisions as to what is necessary or expedient in this context cannot be left to the uncontrolled judgment of the executive’.¹⁴

Turning secondly to the citizen, the basic principle includes an obligation upon the citizen to obey the law. There may be several reasons for this: the law is morally good and ought to be obeyed for this reason, the law is backed up by sanctions and citizens will be penalised if they fail to obey, and

¹¹ Bingham (n 5) 8.

¹² Tom Bingham, ‘The Case of *Liversidge v Anderson* : The Rule of Law Amid the Clash of Arms’ (2009) 43 *The International Lawyer* 33, 38. .

¹³ In *Liversidge v Anderson* [1942] AC 206, the core of the dissenting judgement was that the executive had to rule in accordance with the law. Even in times of war, the courts could not simply accept without question the executive’s view of what was reasonable. So, the executive couldn’t lock up a person without evidence because they thought it was necessary, they had to at least be able to justify this in a court to be in accordance with the law.

¹⁴ *Ahmet and others v HM Treasury* [2010] UKSC 2 at para. 45

pragmatically, society works better if everyone follows the rules. The Bible advances a further argument for obeying the rules, that they contain sound advice on how best to live your life 'your statutes are my delight, they are my counsellors'.¹⁵ Cooter argues that citizens should obey the law out of respect as the law conforms to their view of morality, but that if people obey the law out of fear, this can be characterised as rule of state law.¹⁶ This is too simplistic, there can be many valid reasons why citizens obey the law. For Hart, this disconnect between law and morality means that law is better for lawyers than it is for ordinary citizens.¹⁷ Seidman approaches this issue from the other direction, he accepts that people ought to obey the law, but his focus is on why they obey it in practice.¹⁸

This basic principle has been around for a very long time. It has existed in one form or another since at least the time of Plato, long before the term "rule of law" was itself thought of. Plato wrote that 'if the law is the master of government and the government its slave, then the situation is full of promise and men enjoy all the blessings all the gods shower on a state'.¹⁹ Aristotle stated that 'It is better for the law to rule than one of the citizens'.²⁰ It is clearly not simply a UK concept, in Germany it is called *rechtsstaat* which could be translated as 'state governed by law' according to Zamboni.²¹

In *the Case of Prohibitions* (1607) 12 Co Rep 63, Coke quotes Bracton in stating that 'the King ought not to be under any man, but under God and the law'. Coke ruled in that case that the King cannot sit in judgements in cases before the court, but that cases ought to be judged according to the laws of England. In the same era, James Harrington argued for an 'empire of laws, not of men'.²²

According to Corwin, Harrington himself ascribed the idea back to Aristotle.²³ The idea was picked up by the American revolutionaries. For example, the Declaration of the Rights of the Massachusetts Constitution 1780 includes references to a government of laws, not of men and

¹⁵ Psalm 119, Verse 24. Most of Psalm 119 is a paean to statutes, uplifting reading for depressed drafters!

¹⁶ Robert Cooter, *The Rule of State Law and the Rule-of-Law State: Economic Analysis of the Legal Foundations of Development* (Annual World Bank Conference on Development Economics 1996 1997).

¹⁷ HLA Hart, *The Concept of Law* (2nd edn, Clarendon Press 1997).

¹⁸ Robert Seidman, 'Drafting for the Rule of Law: Maintaining Legality in Developing Countries' (1987) 12 Yale Journal of International Law 84, 97.

¹⁹ Plato, *Laws*, Book IV, 715d.

²⁰ John Warrington (tr), *Aristotle's Politics and the Athenian Constitution* (JM Dent 1959). Book III, s. 1287, p. 97. Counter views did also exist in antiquity, for example the Roman maxim 'princeps legibus solutus' means that the prince is free of laws, see for example the discussion in Gaines Post, 'Bracton on Kingship' (1967) 42 Tulane Law Review 519.

²¹ Mauro Zamboni, 'Rechtsstaat: What Is It That Swedish Development Assistance Organisations Export' (2002) 2 Non-State Actors and International Law 89.

²² James Harrington, *The Prerogative of Popular Government* (1656).

²³ Edward S Corwin, 'The Higher Law Background of American Constitutional Law' (1928) 42 Harvard Law Review 149, 156.

according to Mason the concept is a fundamental part of the US constitutional structure.²⁴ This is what Thomas Paine meant when he said that in the US there was no king, but that the law was king.²⁵

AV Dicey is usually regarded as the first theorist to coin the phrase 'the rule of law' in 1885.²⁶ For Dicey, the second component of the rule of law was that all persons are subject to the ordinary laws and the ordinary courts. Using Bingham's colourful example, if you maltreat a penguin in London Zoo, it doesn't matter if you are the Archbishop of Canterbury, you will still be prosecuted.²⁷ Dicey also developed the theory of sovereignty of Parliament - the idea that Parliament was the supreme power in the land and could make any law on any subject without any constraint. Although this is a fundamental tenet of English constitutional law, it does not sit well with the rule of law notion that there are limits to what legislation can do. If Parliamentary sovereignty means that Parliament can pass any law it wishes then, as Lane asks 'if the rule of law is the foundation of the State, then how can Parliament claim a power not bound by any legal restrictions'.²⁸

Friedrich Hayek defined the rule of law as follows

Government in all its actions is bound by rules fixed and announced beforehand-rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances, and to plan one's individual affairs on the basis of this knowledge.²⁹

Hayek was more of an economist and philosopher rather than a lawyer. Indeed, in *The Road to Serfdom*, the rule of law is discussed in the context of state planning. His approach was that laws stifled individual freedom and that therefore laws should be as minimalist and as unobtrusive as possible. Laws should be pieces of functional or instrumental machinery which give certainty and stability rather than directing individuals towards a particular course of action. The rule of law means that laws should be predictable and general and apply equally.

In the modern era, the key theorists on the rule of law agree with this basic principle. For Cass, the core concept of the rule of law is a government of laws.³⁰ Raz argues simply that people should be ruled by the law and obey it.³¹ Waldron argues that the rule of law means that law stands above

²⁴ Alpheus T Mason, 'Ours--A Government of Laws and Not of Men' (1929) 13 *Constitutional Review* 197.

²⁵ Thomas Paine, *Common Sense* (Dover Publications 1997).

²⁶ AV Dicey, *An Introduction to the Study of the Law of the Constitution* (1885).

²⁷ Bingham (n 5) 4.

²⁸ Jan-Erik Lane, *Constitutions and Political Theory* (Manchester University Press 1996) 44.

²⁹ Friedrich Hayek, *The Road to Serfdom* (Routledge 1944) 75.

³⁰ Ronald A Cass, *The Rule of Law in America* (JHU Press 2003).

³¹ Raz (n 7).

every other authority in the land.³² The definition of the rule of law by the Secretary General of the United Nations begins ‘the rule of law refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws’.³³ Therefore it can be said that, at the level of the basic principle, everyone is in agreement, the rule of law means that everyone is bound by the law.

This may have been sufficient at one point in time, or where there are checks and balances built into constitutions. Magna Carta, the 1215 motherlode of our notions of the rule of law states that no-one could be imprisoned, save by the law of the land.³⁴ The law (or legislation) was the bulwark against the seizure of liberty. The King couldn’t simply arrest whoever he wanted, it had to be first authorised by law. In modern constitutional theory, this translates into the Executive being constrained by the Legislature, which must first pass the law authorising the Executive, that law being enforced through, and interpreted by, the Courts. But what happens when the legislature and the executive start to merge (as they do in the UK)? Then one isn’t constaining the other. Instead of King John being constrained by the Magna Carta Barons, they collude together to enact a law authorising the ‘bad’ thing. Then imprisonment without trial (or exile, or seizure of goods etc.) is ‘in accordance with law’.

If the rule of law is limited to the principle that everyone is subject to the law, then it is impossible for legislation to be against the rule of law, because if the legislation authorised it, then it is done in accordance with the law. Therefore, there must be more to the rule of law than the basic principle that everyone is subject to the law. If this is all that it is, then it doesn’t really do very much, and is undeserving of its central status in our legal systems.

1.4.2 Rule of law as an ideal

Many writers argue that their particular version of the ideal is derived from the basic principle, but each writer who extrapolates from the principle to the ideal seems to derive a slightly different set of values that the legal system ought to possess. For example Raz doesn’t include human rights within the ideal of the rule of law,³⁵ but for Allan, it does include the principal civil liberties.³⁶ Other writers don’t even seek to derive the ideal from the principle, but rather decide that a particular

³² Jeremy Waldron, *The Rule of Law and the Measure of Property* (Cambridge University Press 2012).

³³ S/2004/616, Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies.

³⁴ Article 39 states ‘No Freeman shall be taken or imprisoned, or be disseised of his Freehold, or Liberties, or free Customs, or be outlawed, or exiled, or any other wise destroyed; nor will We not pass upon him, nor condemn him, but by lawful judgment of his Peers, or by the Law of the Land.’

³⁵ Raz (n 7).

³⁶ TRS Allan, ‘The Rule of Law as the Rule of Reasons: Consent and Constitutionalism’ (1999) 115 *Law Quarterly Review* 221.

legal value is morally good and that it ought therefore to form part of the concept of the rule of law. For example the Declaration of Delhi stated that the rule of law required us ‘to establish social, economic, educational and cultural conditions under which [people’s] legitimate aspirations and dignity may be realized’.

Waldron calls this ‘constellation theory’ as it confuses the individual stars (rule of law, justice, democracy etc.) with the overall constellation of a good legal system.³⁷ Echoing this, Drinóczi includes ‘rule of law’ in a list of other general principles of European states, including democracy, participation, legal hierarchy, legislative competence and constitutional review of legal norms.³⁸ McWhinney views the rule of law not as a unified set of principles but rather ‘a distillation of English common law legal history from the great constitutional battles of the seventeenth century onwards’.³⁹

Another taxonomy is the ‘thick’ versus ‘thin’ conceptions of the rule of law.⁴⁰ The thin conception is tightly tied to the basic principle and characterises a legal system as conforming to the rule of law if it satisfies some requirements relating to the form of the legal system. The thick conception is broader and requires that the content of the legal system reflects certain substantive values.

A slight variation on thick and thin approaches is Dworkin’s distinction between a rule book approach and a rights based approach. The rule book conception is about form and procedure – if laws are made in accordance with set rules then the rule of law is satisfied. The rights conception goes further and argues that not only must the rules be obeyed, but the content of the law must reflect moral and political rights of the citizen.⁴¹ Jowell argues that the rule of law in the UK does contain respect for substantial rights (although not extending as far as democratic rights)⁴² and Wade⁴³ and de Smith and Brazier⁴⁴ agree.

³⁷ Waldron, *The Rule of Law and the Measure of Property* (n 32).

³⁸ Tímea Drinóczi, ‘Legislative Process’, *Legislation in Europe: A comprehensive guide for scholars and practitioners* (Hart 2017) 35.

³⁹ Edward McWhinney, *Constitution-Making: Principles, Process, Practice* (University of Toronto Press 1981) 10.

⁴⁰ Charles Sampford, *Retrospectivity and the Rule of Law* (OUP Oxford 2006). Sampford describes this classification at page 45 to 55; see also Craig, ‘Formal and Substantive Conceptions of the Rule of Law’ [1997] Public Law 467.

⁴¹ Ronald Dworkin, *A Matter of Principle* (Harvard University Press 1985). See in particular ‘Political Judges and the Rule of Law’ 11-12.

⁴² Jeffrey Jowell and Dawn Oliver, *The Changing Constitution* (3rd edn, Clarendon Press 1994) 74–77.

⁴³ William Wade and Christopher Forsyth, *Administrative Law* (10th edn, OUP Oxford 2009).

⁴⁴ SA De Smith, *Constitutional and Administrative Law* (Rodney Brazier ed, 8th Revised edition, Penguin Books Ltd 1998).

Yet another variant taxonomy of the rule of law is the distinction between formal and substantive versions of the rule of law. Craig summarises this taxonomy as follows.⁴⁵ Formal versions of the rule of law are concerned with the manner in which the law was made and its form and structure (or what laws look like⁴⁶). Substantive versions are concerned also with the content of the law, i.e. does it reflect certain legal values seen as important.

The indeterminacy of the rule of law as an ideal has led many to question whether it has any value at all as a concept. Although Waldron doesn't agree with this argument, he does see a sense in which the rule of law simply means 'hooray for our side'.⁴⁷ In the same way Tamanaha argues that everyone is for the rule of law, but no-one knows exactly what it is.⁴⁸ For Shklar, it is simply a self-congratulatory device, ruling class chatter.⁴⁹ In a similar vein, Finnis has argued that the rule of law simply means that a legal system is in good shape.⁵⁰ With respect to all these esteemed writers, I disagree for two reasons. Firstly, I adopt Bingham's argument that the ubiquity of an obligation to respect the rule of law in domestic and international legal instruments, case law, legal history and political pronouncements means that it cannot simply be ignored.⁵¹ Secondly, even though there may be disagreements about the outer edges of the definition of the rule of law, there is a surprising amount of agreement about both the basic principle of the rule of law and many of the elements that make up the ideal of the rule of law.

Fuller wrote about what he termed the morality of the law rather than the rule of law.⁵² However, the substance of the morality of the law is what I have termed the ideal of a good legal system under the rule of law. He began by distinguishing between the morality of duty (a minimum standard that all must adhere to) and the morality of aspiration (an ideal standard to which all must aspire). He set out eight ways in which a system of law could fail - 'a total failure in any of these eight directions does not simply result in a bad system of law; it results in something that is not properly called a legal system at all'.⁵³ This conforms to his morality of duty. He then set out eight desiderata, things which legal systems are exhorted to possess. This conforms to his morality of aspiration.

⁴⁵ Craig (n 40).

⁴⁶ Adam Shinar, 'One Rule to Rule Them All? Rules of Law against the Rule of Law' (2017) 0 *The Theory and Practice of Legislation* 1, 4. (advance online access).

⁴⁷ Jeremy Waldron, 'Is the Rule of Law an Essentially Contested Concept (in Florida)?' in R Bellamy (ed), *The Rule of Law and Separation of Powers* (Ashgate 2005).

⁴⁸ Brian Tamanaha, *On The Rule of Law* (Cambridge University Press 2004) 3.

⁴⁹ Judith Shklar, 'Political Theory and the Rule of Law' in A Hutchinson and P Monahan (eds), *The Rule of Law: Ideal or Ideology* (Carswell 1987) 1.

⁵⁰ John Finnis, *Natural Law and Natural Rights* (Oxford University Press 1980) 270.

⁵¹ Bingham (n 5) 6–8.

⁵² Fuller (n 6).

⁵³ *ibid* 39.

Fuller did not derive his eight desiderata from the basic principle that everyone is subject to the law. Instead he made a normative judgement about what was good and bad about a system of law. His rationale is a practical one - what would the populace think of as elements of a good legal system. Although the content of his eight desiderata is sound, they can be criticised for not flowing from a single logical source. His desiderata are mainly about the form of the law rather than its content. They are as follows.

1. There should be general laws by which society is regulated.
2. Laws should be promulgated.
3. Laws should generally not be retroactive
4. Laws should be clear.
5. Laws should not contradict themselves.
6. Laws should not require the impossible.
7. Laws should be relatively constant over time.
8. There must be congruence between official actions and declared rules.

For Raz, the basic idea of the rule of law is that 'people should obey the law and be ruled by it' and that 'government shall be ruled by the law and subject to it'.⁵⁴ The rationale behind this is so that law is capable of guiding human decisions. The strength of Raz's analysis is in his logical derivation of principles from this basic idea of the rule of law. These principles are similar in many ways to Fuller's desiderata, in fact Raz acknowledges the merit of many of Fuller's desiderata. His principles are:

1. Laws should be prospective, open and clear.
2. Laws should be relatively stable.
3. Making of laws should be guided by open, stable, clear and general rules.
4. Independent judiciary.
5. Observe principles of natural justice in judicial process.
6. Courts can review implementation of these principles
7. Courts should be accessible
8. Independence of police and prosecutors

Raz is at the 'thin' end of the spectrum of conceptions of the rule of law. He eschews substantive rights being included as part of the rule of law. In fact he says that the rule of law can be

⁵⁴ Raz (n 7) 212. Although there is a suggestion in Raz's later work that 'the rule of law respects those civil rights which are part of the backbone of the legal culture, part of its fundamental traditions' Joseph Raz, *Ethics in the Public Domain, Essays on the Morality of Law and Politics* (Clarendon Press 1994) 376.

‘compatible with gross violations of human rights’.⁵⁵ It is at this point that I disagree with him for two reasons. Firstly, it seriously devalues the aspirational side of the rule of law if we can point to a country like apartheid-era South Africa and say that it is a rule of law compliant country. Why should we aspire to having the rule of law in the UK if it places the UK legal system at the same level as a system that grossly violates human rights? Secondly, the rationale that Raz gives for admiring the rule of law is that it respects the ability of humans to make their own decisions. He says that ‘respecting human dignity entails treating humans as persons capable of planning and plotting their future’.⁵⁶ However a legal system that authorises gross human rights violations does not respect human dignity. Taking the South African situation again, a law prohibiting black people from voting did not allow them to plan and plot their future save in the farcical way of them ‘deciding’ not to vote. Arthur Chaskalson, former Chief Justice of South Africa addressed this very question. He argued that, contrary to Raz’s view, apartheid South Africa was not a rule of law state, ‘without a substantive content there would be no answer to the criticism, sometimes voiced, that the rule of law is “an empty vessel into which law could be poured”’.⁵⁷ It is noteworthy that the new South African Constitution is founded upon the ‘Supremacy of the Constitution and the rule of law’ in Clause 1.

1.4.3 Bingham and the rule of law

Tom Bingham was a leading British judge who acted as Master of the Rolls, Lord Chief Justice of England and Wales and Lord of Appeal in Ordinary. He died in 2010. As a judge in the House of Lords he gave several key decisions on the rule of law, human rights and the validity of legislation.⁵⁸ After retirement as a judge he lectured and wrote on the rule of law and human rights. The Bingham Centre for the Rule of Law at the Institute of Advanced Legal Studies, University of London, was established in his honour.

Bingham’s theory of the rule of law was set out in his book, *The Rule of Law* in 2011.⁵⁹ One of the strengths of his analysis is that it reflects the duality of the rule of law. He sets out the basic principle of the rule of law, that everyone is subject to the law. He then goes further and sets out

⁵⁵ Raz (n 7) 221.

⁵⁶ *ibid.*

⁵⁷ Mark David Agrast and Juan Carlos Botero, *World Justice Report: Rule of Law Index 2012-2013* (World Justice Report 2013).

⁵⁸ *A v Secretary of State for the Home Department* [2004] UKHL 56 on the illegality of indefinite detention, *Doe v Secretary of State for the Home Department* [2004] UKHL 26 on freedom of conscience, *Jackson v Attorney General* [2005] UKHL 56 on the legality of legislation banning fox-hunting, *Begum v Governors of Denbigh High School* [2006] UKHL 15 on right to wear religious clothing and *Bancoult v Secretary of State for Foreign and Commonwealth Affairs (No. 2)* [2008] UKHL 61 on the legality of prerogative legislation as it affected fundamental rights in the Chagos Islands.

⁵⁹ Bingham (n 5).

the ideal of the rule of law, the values that legal systems should reflect. His selection of eight elements comprising the rule of law was derived from legislative and case law precedent, the works of other writers, and his own personal choice. His definition of the rule of law tends more towards the thick end of the spectrum and the influences of Fuller, Raz and Dicey (amongst others) are obvious.

There are three reasons why Bingham has been chosen as the cornerstone for this analysis of the interaction of the rule of law with legislative drafting. Firstly, he was a judge as well as being a writer. He had first-hand experience of the importance of legislation, the value of human rights, and the practical impact both had upon government and citizens. He gave several judgements upon the content of the rule of law. Secondly, he wasn't just any judge, he was one of the most pre-eminent judges of his generation. According to an obituary by Philippe Sands QC he 'was widely recognised as the greatest English judge since the second world war'.⁶⁰ In the same obituary, Louis Blom-Cooper agreed that he was the greatest judge of our time and Martin Kettle wrote that he was arguably one of the greatest living Englishmen. Andenas edited a 900 page *liber amicorum* in his honour.⁶¹

Thirdly, the content of his definition of the rule of law is clear and compelling. It acknowledges the duality of the rule of law. He very effectively synthesized many previous definitions and persuasively argued his case. It is a modern and up to date definition. His book was aimed at those

who have heard references to the rule of law, who are inclined to think it sounds like a good thing rather than a bad thing, who wonder if it may not be rather important, but who are not quite sure what it is all about and would like to make up their minds.⁶²

The validity of his argument has been recognised by others. The book itself won the Orwell Prize 2011 for the best political writing of the year. In awarding the prize, judge James Naughtie said that 'its brilliantly done but perfectly straightforward, and makes its case extraordinarily powerfully' and the other judges said that it was 'incisive, wise and clear'.⁶³ Its book reviews were consistently laudatory.⁶⁴

⁶⁰ Philippe Sands, 'Lord Bingham of Cornhill Obituary' *The Guardian* (11 September 2010) <<http://www.guardian.co.uk/law/2010/sep/11/lord-bingham-of-cornhill-obituary>> accessed 17 May 2013.

⁶¹ Mads Andenas and Duncan Fairgrieve (eds), *Tom Bingham and the Transformation of the Law: A Liber Amicorum* (Reprint edition, OUP Oxford 2011).

⁶² Bingham (n 5). viii.

⁶³ Alison Flood, 'Orwell Prize Goes to Tom Bingham' *The Guardian* (17 May 2011) <<http://www.guardian.co.uk/books/2011/may/17/orwell-prize-tom-bingham>> accessed 17 May 2013.

⁶⁴ Alasdair Palmer, *The Rule of Law by Tom Bingham: review*, *The Telegraph* 21 Feb 2010, Robert Gaisford, *The Rule of Law by Tom Bingham*, *The Independent*, 31 January 2010, John Gardner, *How to be a Good Judge*,

1.5 Legislative Drafting

1.5.1 Legislative drafting: turning policy into legislation

The drafter writes down the words that, upon being enacted by the legislature, become the law. Although legislation represents the will of the legislature, it is the drafter who gives that will form and shape. Drafters play a key role in what Zamboni calls ‘legalization of politics’, that is ‘the subordination of the political discourse to the domain of the legal discourse, and, in particular, its legislative format’.⁶⁵ Legislative drafting involves taking the policy ideas of another and turning them into law fit for the statute book. Drafters are the translators of policy into legislation. For Thornton ‘the proper role of a legislative drafter is to convert a developed legislative policy to legislative shape’.⁶⁶ Although the thrust of this is correct, it is too broad, for ‘legislative shape’ simply substitute ‘legislation’. Jamieson speaks of the ‘transcendental endeavour to translate policy into law’ as the essence of drafting legislation.⁶⁷ Ismail makes the same point saying that drafters must express their clients meaning.⁶⁸ Daintith and Page say that the drafter’s skill lies in ‘translating the government’s intentions into legislative form’.⁶⁹ Carter says that drafters ‘translate the Government’s policy into legislation’.⁷⁰ Bowman drilled deeper into this when he said that ‘the drafter’s main and most valuable function is to subject policy ideas to a rigorous intellectual analysis’.⁷¹ For Bowman, before translating the policy into law, it is necessary to first properly analyse the policy. Lord Thring, the very first First Parliamentary Counsel in the UK took the same view over 100 years ago. His advice was that the Minister should decide on what the principles of the Act were, and then instruct the drafter to prepare the Bill in accordance with those principles.⁷²

The practice in the UK reflects this theory. In Wales, the job description for the Office of the Legislative Counsel states ‘our primary purpose is to give effect to Welsh Government policies by

London Review of Books 8 July 2010, Jonathan Sumption, Weighed in the Balance, The Spectator 10 February 2010, Pillar of Wisdom, The Economist, 11 February 2011.

⁶⁵ Mauro Zamboni, ‘Legislating Politics: An Introduction’ (2008) 2 *Legisprudence* 155, 155.

⁶⁶ GC Thornton and Helen Xanthaki, *Thornton’s Legislative Drafting*. (Bloomsbury Professional 2013) 142.

⁶⁷ Nigel Jamieson, ‘Would a Parliamentary Counsel by Any Other Name Be More of a Law Draftsman’ [1982] *Statute Law Review* 13, 20.

⁶⁸ Norismizan Haji Ismail, ‘Legislative Drafters: Lawyers or Not?’ (2013) 39 *Commonwealth Law Bulletin* 455, 456.

⁶⁹ Terence Daintith and Alan Page, *The Executive in the Constitution: Structure, Autonomy and Internal Control* (Oxford University Press 1999) 254.

⁷⁰ Ross Carter, ‘“High Quality” Legislation - (How) Can Legislative Counsel Facilitate It?’ [2011] *The Loophole* 41, 51.

⁷¹ Geoffrey Bowman, ‘Why Is There a Parliamentary Counsel Office?’ (2005) 26 *Statute Law Review* 69, 70.

⁷² Henry Thring, *Practical Legislation: The Composition and Language of Acts of Parliament* (HMSO 1877). 4,5.

drafting Assembly Acts'.⁷³ The UK drafting office (Office of the Parliamentary Counsel) state that 'we work closely with Departments to translate policy into clear, effective and readable law'.⁷⁴ In an analysis of the work of the OPC, Page finds strong evidence of the role of the drafter in the policy process.⁷⁵ The First Scottish Parliamentary Counsel has said that 'it is the counsel's job to draft a Bill that meets the policy'.⁷⁶ The job description for the Office of the Legislative Counsel in Northern Ireland simply states that the job is to draft legislation.⁷⁷ This practice is not peculiar to the UK, for example, in New Zealand the policy to law function is also clearly set out: 'the drafter's job is to produce a draft that gives effect to government policy'.⁷⁸

1.5.2 Thornton's five stages of the drafting process

Thornton's five stages of the drafting process⁷⁹ remains the classic analysis of legislative drafting.⁸⁰

1. Understand the policy proposal
2. Legally analyse the proposal
3. Design a legislative plan
4. Composition and development of the draft law
5. Scrutiny and development of the draft law

Drafting ought also to be seen in the larger context of the legislative process. Before the drafting process begins, there will be the policy development process.⁸¹ Afterwards, there will be the parliamentary process as the Bill goes through the legislature. For drafters, there are no clear lines marking the limits of their functions in the broader process. They will most likely be involved in some fashion in the policy development process, and they will definitely be involved in the parliamentary process, amending Bills as they pass through the legislature.

⁷³ Welsh Government, 'Senior Legislative Counsel (Deputy Director) Welsh Government Job Description and Person Specification'.

⁷⁴ <<https://www.gov.uk/government/organisations/office-of-the-parliamentary-counsel>> accessed 11/9/2013.

⁷⁵ Edward Page, 'Their Word Is Law: Parliamentary Counsel and Creative Policy Analysis' [2009] Public Law 790. See also Office of the Parliamentary Counsel, 'Role of United Kingdom Counsel in Relation to Policy-Making' [2009] CALC Newsletter 39.

⁷⁶ Colin Wilson, 'Managing Increasing Government Expectations with Respect to Legislation While Maintaining Quality' [2009] The Loophole 21, 22.

⁷⁷ Office of the First Minister and deputy First Minister, 'Candidate Information Booklet: First Legislative Counsel Office of the Legislative Counsel Office of the First Minister and Deputy First Minister'.

⁷⁸ Parliamentary Counsel Office, 'Guide to Working with the Parliamentary Counsel Office'.

⁷⁹ Thornton and Xanthaki (n 66). 145-202.

⁸⁰ The five stages are ubiquitous in much writing about legislative drafting. For example, in a special (2012) edition of the European Journal of Law Reform on legislative drafting, six out of the nine articles referred to Thornton, and four referred specifically to Thornton's five stages.

⁸¹ Comptroller and Auditor General, *Modern Policy-Making: Ensuring Policies Deliver Value for Money* (National Audit Office 2001).

1.5.3 Broader role of legislative counsel

The essence of drafting is to convert policy into legislation, but that is not all that drafters do. They have a broader role of being legislative counsel - advising on legislation. Before exploring this, it is important to say what they are not.

Crabbe argues, perhaps rather tongue in cheek that drafting has an ancient lineage and may even be divinely inspired.⁸² Schulz states that in Roman times the people who actually wrote the law (the drafters of that era) were called *scribae*.⁸³ In modern ears, a scribe is a lowly profession, implying one who simply copies work from one manuscript to another. Schulz makes it clear that the Roman drafters were not simply copyists (he uses the word *librarii*). Crabbe makes exactly the same point with regards to modern drafters. They are not simply amanuensis - persons employed to type out the words others dictate.⁸⁴ Drafters do not simply write down what the legislature say. They don't copy text from a policy document and put 'be it enacted' at the top.

A step up from being a scribe is the function of wordsmith, someone skilled in the craft of working with words. Consecutive articles in *The Loophole* discuss whether drafters are wordsmiths. Hull objects to drafters being characterised in this fashion.⁸⁵ He sees this as a pejorative term to describe someone who merely writes out at the dictation of others. However, Laws, a former First Parliamentary Counsel in the UK is happy for the function of wordsmith to be included within the parameters of legislative drafting - drafters are wordsmiths because they are crafters who work with words.⁸⁶ Laws made it clear elsewhere that drafters 'are not just wordsmiths; they are also counsel, who advise the instructing department on a whole range of matters'.⁸⁷ McNair also argues that drafters are more than scribes and wordsmiths.⁸⁸

⁸² VCRAC Crabbe and United Nations Institute for Training and Research, *The Role of Parliamentary Counsel in Legislative Drafting: Paper Written Following a UNITAR Sub-Regional Workshop on Legislative Drafting for African Lawyers (Kampala-Uganda, 20 to 31 March 2000)*. (UNITAR 2000). 6. Drafters do enjoy discussing the Ten Commandments as a model of legislative drafting. See for example Alec Samuels, 'Thou Shalt Not Steal' (1999) 20 Statute Law Review 95., Nigel Jamieson, 'The Scots Statute—Style and Substance' (2007) 28 Statute Law Review 182., A Conard, 'A Legislative Text: New Ways to Write Laws' (1985) 6 Statute Law Review 62.

⁸³ Fritz Schulz, *Principles of Roman Law* (The Clarendon Press 1936). 80.

⁸⁴ Crabbe and United Nations Institute for Training and Research (n 82).

⁸⁵ David Hull, 'The Role of Legislative Counsel: Wordsmith or Counsel? [1]' [2008] *The Loophole* 35.

⁸⁶ Stephen Laws, 'The Role of Legislative Counsel: Wordsmith or Counsel? [2]' [2008] *The Loophole* 39.

⁸⁷ Stephen Laws, 'Drawing the Line' in Constantin Stefanou and Helen Xanthaki (eds), *Drafting Legislation: A modern approach* (Ashgate 2008) 20.

⁸⁸ D Mac Nair, 'Ethics and Drafting' (2004).

The term that best reflects what drafters do is legislative counsel. They don't just draft, they also advise. Carter says that 'counsel can question and advise'.⁸⁹ Jamieson's article is entitled 'Would a Parliamentary Counsel by any other name be more of a Law Draftsman?'.⁹⁰ His conclusion is that they are both counsel and legislative draftsmen. Legislative counsel do not simply regurgitate in legislative form the policy requests of their political masters. They interrogate the policy, perhaps even improving upon it. They advise on parliamentary procedure and tactics. They question the need for the legislation in the first place. Tsukahara Bokuden was famed for defeating opponents without drawing his sword. He practiced *munekatsu-ryu* 'the style that wins without the sword'.⁹¹ Sometimes legislative counsel can win by not drafting legislation. Greenberg argues that drafters should be paid for inactivity, not activity.⁹² Although he is being somewhat facetious, his point is a good one. Characterising the job as simply 'drafting' makes the focus the volume of output. However as 'counsel' it is perfectly acceptable to advise that sometimes the best thing to do is to do nothing. Carter makes the same point, arguing that we shouldn't see it as a 'failure' that a Bill doesn't get made, but a success in that we weed out bad laws before they get onto the statute book.⁹³

Returning to the Romans, Schulz said that the drafters sometimes referred to themselves as *iuris prudentes*.⁹⁴ One translation of this is those wise in the law. The etymological link to jurisprudence is clear. Legislative counsel don't simply draft legislation, they advise, in the fullest sense, on legislation.

How hard is it to be a drafter? According to Bentham, 'to draw up laws is of all the literary tasks the easiest'.⁹⁵ However, the context of this remark may show it in a light more favourable to drafters. Firstly, Bentham was comparing the drafting of laws with an explanation of the rationale behind the laws. In his view, every single legislative provision should be directly tied to a written policy justification for it. Secondly, Bentham wrote this statement in a letter to James Madison, US president, extolling his own virtues and proposing he (Bentham) be appointed as the drafter of a

⁸⁹ Carter (n 70). 51.

⁹⁰ Jamieson (n 67). On a gender equality point, I use the term 'drafter' rather than 'draftsman' unless I am making a specific reference to a person using the term 'draftsman'.

⁹¹ Stephen Turnbull, *The Samurai Swordsman: Master of War* (Tuttle Publishing 2008) 79.

⁹² Daniel Greenberg, *Laying down the Law: A Discussion of the People, Processes and Problems That Shape Acts of Parliament* (Sweet & Maxwell 2011).154-155.

⁹³ Carter (n 70). 56.

⁹⁴ Schulz (n 83). 80.

⁹⁵ Bentham, *Legislator of the World* (n 9). 8.

complete set of US laws. In his desire to promote his own abilities, he may have exaggerated how easy it is to draft. Duxbury argued that the word 'drafting' indicates a rather dull and technical job.⁹⁶

Drafting is not easy. This view is shared by Jamieson, although he perhaps exaggerates in the other direction to Bentham when he said 'the vocation of parliamentary counsel requires great strength of personality, intellect, education, and experience besides physical stamina and health'.⁹⁷ Bowman spoke of the 'real effort that the job entails'.⁹⁸ Ismail's interesting conclusion was that although the job was difficult, it didn't always need to be done by a lawyer.⁹⁹

1.5.4 Drafting as art, science or phronesis

There has been a debate on how to characterise legislative drafting. Is it an art or a science? I have argued previously that this debate leads to an intellectual dead end.¹⁰⁰ This is because the classification of drafting does not lead to any useful conclusions on how to carry out drafting. However, the debate is useful in illustrating how drafting is conceived of, and for that reason it is summarised here.

In the drafting context, the traditional view is that art is subjective, creative and flexible, whereas science is objective, fixed and certain. Viewed as art, drafting is innovative and should not be bound by stifling rules. Watson describes artistic culture as 'creative, imaginative, intuitive and instinctive knowledge'.¹⁰¹ Bowman entitled his article 'The Art of Legislative Drafting' and states that 'the composition of legislation has little of the mechanical about it'.¹⁰² Viewed as science, drafting is a technical skill which is reducible to a body of rules. A Canadian editorial stated that 'statute drafting is a science ... intrusted [sic] to the hands of those who are skilled in such work'.¹⁰³ Piris also argues that drafting is at least part science.¹⁰⁴ Crabbe argued that it is a discipline.¹⁰⁵

Markman backs away from strait-jacketing drafting into one or another classification. She exhorts us to 'see the profession in all its dimensions'.¹⁰⁶ Ismail blurs the boundaries by calling drafting a

⁹⁶ Neil Duxbury, *Elements of Legislation* (Cambridge University Press 2013). 59.

⁹⁷ Jamieson (n 67). 19.

⁹⁸ Geoffrey Bowman, 'The Art of Legislative Drafting' (2005) 7 *European Journal of Law Reform* 3.3.

⁹⁹ Ismail (n 68).

¹⁰⁰ Ronan Cormacain, 'An Empirical Study of the Usefulness of Legislative Drafting Manuals' (2013) 1 *Theory and Practice of Legislation* 205 (some elements in this subsection are a development of that work).

¹⁰¹ P Watson, *A Terrible Beauty: The People and Ideas that Shaped the Modern World* (Phoenix, 2001) 4.

¹⁰² Bowman (n 98). 4.

¹⁰³ 'Editorial Review' (1902) 22 *Canadian Law Times* 428. 437.

¹⁰⁴ JC Piris, 'The Legal Orders of the European Union and of the Member States: Peculiarities and Influences in Drafting' (2006) 6 *European Journal of Law Reform* 1.

¹⁰⁵ Crabbe and United Nations Institute for Training and Research (n 82).

¹⁰⁶ S Markman, 'Legislative Drafting: Art, Science or Discipline' [2011] *The Loophole* 5. 11.

‘technical art’.¹⁰⁷ Karpen has a foot in both camps, he talks about legisprudence as a practical science which also deals with handicraft or art.¹⁰⁸ Xanthaki also eschews an art / science dichotomy. She finds assistance in the Aristotelian concept of phronesis and describes drafting as ‘informed yet subjective application of principles on set circumstances’.¹⁰⁹ The useful, if unsurprising conclusion that can be drawn from the entrails of the art / science debate is that drafting has some aspects that are artistic and some that are scientific.

It is best not to be dogmatic about the precise classification of drafting. It has both creative and technical aspects. Xanthaki’s description of it as phronesis is superior as it recognises the many dimensions of drafting.

1.6 Principles of legislative drafting

The goal of this thesis is to derive legislative drafting principles from the rule of law. These drafting principles are what Zamboni has called the internal quality of legislation, its technical or drafting qualities.¹¹⁰ Duprat calls these instead ‘formal legistics’ although he sees these as being the same as drafting techniques.¹¹¹ Although principles derived from the rule of law has not been done before, there do exist drafting principles from other sources. An analysis of these sets the context in which this thesis operates. Furthermore, there may be an overlap between the existing drafting principles and those derived from the rule of law. In fact, if there is a correlation between the principles, it further adds to the legitimacy of those principles as they will have been justified from more than one perspective.

As with the rule of law, there are many different approaches as to what constitute the principles of sound legislative drafting. As with the rule of law, there is no consensus on what the principles are. As with the rule of law, there is a remarkable degree of overlap between the principles put forward by different writers. However, unlike the rule of law, there has been little academic discourse of the principles of legislative drafting. Sitting within the general subject heading of legisprudence,

¹⁰⁷ Ismail (n 68). 459.

¹⁰⁸ Ulrich Karpen and Helen Xanthaki (eds), *Legislation in Europe: A Comprehensive Guide for Scholars and Practitioners* (Hart 2017) 3.

¹⁰⁹ Helen Xanthaki, ‘Drafting Manuals and Quality in Legislation: Positive Contribution towards Certainty in the Law or Impediment to the Necessity for Dynamism of Rules?’ (2010) 4 *Legisprudence* 111, 122. This argument is developed further in Helen Xanthaki, ‘Quality of Legislation: An Achievable Universal Concept or an Utopia Pursuit?’ in Luzius Mader and Marta Tavares de Almeida (eds), *Quality of Legislation: Principles and Instruments. Proceedings of the Ninth Congress of the International Association of Legislation in Lisbon, June 24-25, 2010* (Nomos 2011) and Xanthaki, *Drafting Legislation*, (n 3).

¹¹⁰ Mauro Zamboni, ‘Goals and Measures of Legislation’, *Legislation in Europe: A comprehensive guide for scholars and practitioners* (Hart 2017) 97.

¹¹¹ Jean-Pierre Duprat and Helen Xanthaki, ‘Legislative Drafting Techniques / Formal Legistics’, *Legislation in Europe: A comprehensive guide for scholars and practitioners* (Hart 2017) 109.

legislative drafting is seen more as a technical skill rather than something that deserves academic investigation. One purpose of this thesis is to remedy this inattention and to provide evidence for Xanthaki's assertion that we are witnessing the birth of legislative drafting as a new academic sub-discipline.¹¹²

Most of the principles set out below are practical and pragmatic rather than being reasoned out from an underlying rationale. The principles have been put forward by drafters themselves based upon their own experiences. The exception to this is Xanthaki whose principles are all derived from the functional rationale that legislation exists to effect social change.

The phrase 'principles of legislative drafting' rather than 'rules of legislative drafting' is deliberate. Principles represent suggestions or guidance. They are something which ought to be borne in mind, but not something which requires dogmatic adherence to. Rules are something absolute which must not be broken. Drafting has more of the creative than the technical to it. Being strait-jacketed into rules tends to stymie drafting and retard its development.

For a profession whose job it is to write rules, drafters in the UK are surprisingly anarchic when it comes to rules for their own profession. For a long time, there were no drafting manuals in the UK.¹¹³ However, Parliamentary Counsel Office has recently produced what it calls Drafting Guidance.¹¹⁴ According to Greenberg, 'the only drafting matter on which it is wise to be dogmatic is that it is unwise to be dogmatic on any drafting matter',¹¹⁵ although this advice is normally shortened to a statement that the first rule of legislative drafting is that there are no rules of legislative drafting. Even though Thring framed 'rules' for drafting, he said that each rule had so many exceptions that the rules should instead be seen as something which assists drafters rather than absolute requirements.¹¹⁶

1.6.1 Bentham

Even though he is not considered a drafter, Bentham's works offer lucid principles for legislative drafting. In Ogden's introduction to Bentham's *Theory of Legislation* he stated that uniform and scientific methods for drafting were inspired by Bentham.¹¹⁷ In his letter to James Madison, Bentham himself wrote that when it comes to the form of law, the goal was cognoscibility – the

¹¹² Helen Xanthaki, 'Legislative Drafting: A New Sub-Discipline of Law Is Born' (2013) 1 IALS Student Law Review 57.

¹¹³ Bowman (n 98) 15.

¹¹⁴ Office of the Parliamentary Counsel, 'Drafting Guidance'.

¹¹⁵ Daniel Greenberg, *Craies on Legislation* (10th edn, Sweet & Maxwell 2012). 387.

¹¹⁶ Thring (n 277) 40.

¹¹⁷ Bentham, *Theory of Legislation* (n 9).

quality of being understandable.¹¹⁸ He delved deeper and produced a sound rationale for his guiding principle of cognoscibility. This is the fundamental rationale of maximising adherence to the law, or as he put it ‘producing, to the greatest extent possible, in respect of number of observances compared with the number of non-observances’.¹¹⁹ This is a pragmatic approach – if we want the law to be obeyed then we must make it understandable.

In a letter of 1817,¹²⁰ Bentham derives some principles from his first principle of cognoscibility. He cites the following properties which are desirable in a body of laws:

1. notoriety
2. conciseness (in terms of bulk)
3. clearness of language
4. compactness (of form)
5. completeness / comprehensiveness
6. intrinsic usefulness
7. justifiedness / manifested usefulness

Bentham uses the word notoriety in the sense that the law must be well-known ‘only in so far as it is present to the mind, can any idea be productive of any effect’.¹²¹ The reference to justifiedness is a reference to his idea that each legislative provision should be accompanied by a statement justifying it.

1.6.2 Xanthaki

Xanthaki sets out a hierarchy of principles (in the form of a pyramid) for quality in legislation.¹²² The top of the pyramid is the principle that the law is efficacious, by which she means that it

¹¹⁸ Bentham, *Legislator of the World* (n 9). 9, Letter to James Madison, October 1811.

¹¹⁹ *ibid.* 12.

¹²⁰ *ibid.* Letter to the citizens of several American States, July 1817, Letter II.

¹²¹ *ibid.* 119.

¹²² This hierarchy first appeared in Helen Xanthaki, ‘On Transferability of Legislative Solutions: The Functionality Test’ in Constantin Stefanou and Helen Xanthaki (eds), *Drafting Legislation: A modern approach* (Ashgate 2008) and was developed further in Xanthaki, ‘Drafting Manuals and Quality in Legislation: Positive Contribution towards Certainty in the Law or Impediment to the Necessity for Dynamism of Rules?’ (n 109); Xanthaki, ‘Quality of Legislation: An Achievable Universal Concept or an Utopia Pursuit?’ (n 109).; Xanthaki, ‘Legislative Drafting: A New Sub-Discipline of Law Is Born’ (n 112). and most recently Xanthaki, *Drafting Legislation*, (n 3).

must solve the social problem that it aims at. Zamboni¹²³ and Mousmouti¹²⁴ both echo this, seeing effectiveness as a key criterion of quality in legislation, by which they mean the capacity of the legislation to produce the social results desired by the political actors. Efficaciousness is aimed more at those creating the policy rather than the drafters themselves. Those constructing the policy come up with the solution to the problem: the drafter works with whatever solution they have decided upon and puts that solution into legislative form.

The next level down is that the law must be effective in that it gives full effect to the intended policy. This is within the bailiwick of the drafter's responsibilities. It flows from the function of the drafter of converting policy into legislation. The next level down contains three entries: the law must be clear, precise and unambiguous. Clarity means that citizens can easily understand the law. Precision means that the law is exact rather than vague. Unambiguity means that the law can only admit to one meaning. The bottom level contains two entries. The first is that the law must be written in gender neutral terms i.e. that it doesn't refer to any particular gender. The second is that the law is written in accordance with the principles of the plain language movement. Each level in Xanthaki's hierarchy is subservient to the level above it. Thus, if there is a clash between using plain language and being precise, then precision wins out.

Xanthaki's analysis has three main strengths. Firstly, like Bentham, there is a rationale underpinning it. She proceeds on the logical basis that the purpose of legislation is to effect social change, 'a good law is simply a law that is capable of achieving the regulatory reform that it was released to effectuate or support'.¹²⁵ She puts this another way saying that

A good law is one that is capable of leading to efficacy of regulation. There is nothing technical at this level of qualitative functionality: what counts is the ability of the law to achieve the reforms requested by the policy officers.¹²⁶

From this can be derived drafting principles that make it more likely that social change will be effected. Her principles flow from this initial proposition. This is soundly rooted in both practice and principle. Legislation is not simply window-dressing; it is there to do something, to change

¹²³ Mauro Zamboni, 'Legislative Policy and Effectiveness' (Conference: Effective Law and Regulation, Institute of Advanced Legal Studies, 7 July 2017).

¹²⁴ Maria Mousmouti, 'Making Legislative Effectiveness an Operational Concept' (Conference: Effective Law and Regulation, Institute of Advanced Legal Studies, 7 July 2017).

¹²⁵ Xanthaki, 'Quality of Legislation: An Achievable Universal Concept or an Utopia Pursuit?' (n 109). 81.

¹²⁶ Xanthaki, 'Legislative Drafting: A New Sub-Discipline of Law Is Born' (n 112). 67.

something in society. It is eminently sensible to derive principles for evaluating quality legislation from the rationale behind that legislation.

Secondly, her hierarchy is simple, coherent and comprehensive. It is simple because it is easy to understand. It is coherent as it makes sense as a whole. Subject to what is said below, it is comprehensive as it covers the full spectrum of what amounts to quality in legislation.

Thirdly, the individual elements making up the hierarchy are soundly rooted in what others see as important criteria for quality legislation. Those who have written about quality in legislation in the past will find many of their individual ideas reflected in the hierarchy. Thus, Bennion¹²⁷ and Butt¹²⁸ both advocated clarity in drafting. The Renton report argued strongly for certainty and precision.¹²⁹ Kimble¹³⁰ and Thomas¹³¹ were of the opinion that plain language should be used in legislation. Schweikart¹³² and Petersson¹³³ were in favour of gender neutral drafting. Xanthaki summarises and synthesizes much of what is already regarded as important in drafting.

However, there is a gap in this approach as there is a lack of an express normative element which is exogenous to legislative drafting. So Xanthaki does see efficaciousness as a moral virtue, but this is an endogenous virtue as it relates to drafting itself. Most of what she says is about the form of laws, without much focus on their content. Carter has a similar view, arguing that a law can still be of a high quality even if it implements a defective policy.¹³⁴ I disagree and see this as a criticism which could be levelled generally at any functional approach. A law imposing the death penalty for parking offences may 'work' in the sense that it stops people from parking where they shouldn't park, but its disproportionality makes it morally wrong. Xanthaki's drafting principles do not require, for example, that laws be constitutional, or protect human rights, or be in accordance with the rule of law (although this could be seen as implicit within the notion of effectiveness). The only normative aspiration is gender equality under gender neutral drafting. It seems odd that drafting should promote gender equality, but not other sorts of equality. The functional approach lacks a moral dimension, it doesn't matter to what purpose the law is directed, only that it is effective in fulfilling that purpose. A knife which

¹²⁷ Francis Bennion, 'The Readership of Legal Texts' (1993) 27 *Clarity* 1.

¹²⁸ Peter Butt, 'Modern Legal Drafting' (2002) 23 *Statute Law Review* 12.

¹²⁹ 'Report of the Renton Committee on the Preparation of Legislation' (1975) Cmnd 6053.

¹³⁰ Joseph Kimble, 'Answering the Critics of Plain Language' (1994) 5 *The Scribes Journal of Legal Writing* 51.

¹³¹ Richard Thomas, 'Plain English and the Law' [1985] *Statute Law Review* 139.

¹³² D Schweikart, 'Gender Neutral Pronoun Redefined' (1998) 20 *Women's Rights Law Report* 1.

¹³³ S Petersson, 'Gender Neutral Drafting: Recent Commonwealth Developments' (1990) 20 *Statute Law Review* 35.

¹³⁴ Carter (n 70). 49.

is sharp is a good knife, regardless of whether it is used to chop vegetables or stab people. A law which is effective is a good law, regardless of whether it remedies some social ill or is an instrument of oppression.

This normative lacuna is analogous to the 'thin' conception of the rule of law. In my view, both these approaches are missing something as they fail to include a moral dimension within the law.

1.6.3 UK drafters

It would be wrong to say that there is an agreed single set of drafting principles to which all UK drafters adhere. Instead, individual drafters (and drafting offices) have on occasion set down some suggestions on how drafters should draft and what qualities legislation should aspire to.

Henry Thring, the first First Parliamentary Counsel in the UK offered guidance to drafters in his book *Practical Legislation*.¹³⁵ As its title suggests, this is a practical rather than a theoretical work. Thring does not set out general principles underlying the concept of drafting, instead he gives concrete advice on how to construct legislation. However, by closely analysing his concrete suggestions, it is possible to derive some more general principles. Thus, he says that legislation must be concise,¹³⁶ that it must be clear,¹³⁷ brief¹³⁸ and uniform.¹³⁹ He quotes with approval a comment made by Mr Justice Stephen

it is not enough to attain to a degree of precision which a person reading in good faith can understand; but it is necessary to attain, if possible, to a degree of precision which a person reading in bad faith cannot misunderstand.¹⁴⁰

His more specific and concrete advice was:

- Separate provisions declaring the law from administrative provisions.
- Simpler provisions should precede more complex ones.
- Separate principal provisions from subordinate ones.
- Local or temporary provisions should be separated and placed at the end.
- Procedural issues and points of detail should be contained in a schedule.

¹³⁵ Thring (n 231) recently republished as Henry Thring, *Practical Legislation: The Composition and Language of Acts of Parliament* (Madeleine MacKenzie ed, 3rd edn, Luathe Press 2015).

¹³⁶ Thring, *Practical Legislation: The Composition and Language of Acts of Parliament* (n 116). 11.

¹³⁷ *ibid.* 11, 39, 41, 61.

¹³⁸ *ibid.* 41.

¹³⁹ *ibid.* 41.

¹⁴⁰ *ibid.* 9 (Thring does not give the source of this quote).

Thring notes the influence of Coode on his work. Coode's book expresses similar advice on the construction of legislation, without delving much into general principles.¹⁴¹

Bowman, a much more recent First Parliamentary Counsel in the UK set out his approach to drafting.¹⁴² He summed up his drafting philosophy very simply: first decide what you want to say, second, say it. He also was of the opinion that legislation should be precise, clear and simple. He made some general observations: consider the target audience for the legislation, use short sentences, express things in the positive not negative, use active not passive voice etc. However, he was adamant that these were not rules and that their application was a matter of judgement and degree.

The Good Law initiative is an attempt by the Office of the Parliamentary Counsel to improve the quality of legislation in the UK. According to its website, good law is law which is necessary, clear, coherent, effective and accessible.¹⁴³ In its report on complexity in legislation, OPC set out a few additional matters which could be regarded as criteria for quality in legislation, for example that it is in harmony with other legislation, or that it achieves political, social or legal objectives.¹⁴⁴

In Scotland, the First Parliamentary Counsel spoke of the need for the 'logical and principled development of the law'¹⁴⁵ and the 'coherence of the statute book'.¹⁴⁶ He also argued that legislation should be clear, unambiguous and accessible.¹⁴⁷ On its website, the Office of the Scottish Parliamentary Counsel reiterates these points calling for effective, clearly-drafted and accessible law.¹⁴⁸

There is a clear overlap between these principles espoused by UK drafters. The same principles re-appear: clarity, brevity, accessibility, precision etc. These principles also mirror those espoused by Bentham and Xanthaki.

1.7 Conclusion

This chapter has laid the groundwork for the rest of the thesis. The rule of law is both the principle that we are all subject to the law, as well as being the ideal set of values which a legal system ought

¹⁴¹ George Coode, *Legislative Expression* (William Benning and Co 1845) and see also Courtney Ilbert, *Legislative Methods and Forms* (Clarendon Press 1901).

¹⁴² Bowman (n 98).

¹⁴³ <<https://www.gov.uk/good-law>> accessed on 27/9/2013.

¹⁴⁴ Office of the Parliamentary Counsel, 'When Laws Become Too Complex - Inside Government' (March 2013) <<https://www.gov.uk/government/publications/when-laws-become-too-complex/when-laws-become-too-complex>> accessed 19 April 2013., 11.

¹⁴⁵ Wilson (n 76). 22.

¹⁴⁶ *ibid.* 22.

¹⁴⁷ *ibid.* 22.

¹⁴⁸ <<http://www.scotland.gov.uk/About/People/Directorates/OSPC>> accessed on 27/9/2013.

to possess. Legislative drafting is turning policy into legislation. The goal is to derive principles of legislative drafting from element one of Bingham's definition of the rule of law. Our starting point, from Bingham, is that legislation ought to be accessible, predictable, intelligible and clear. The following chapters address each of these aspects of element one in turn.

Chapter 2 Accessibility

Introduction

Chapter 1 set out the hypothesis and methodology. This is the first substantive chapter and applies the methodology to the first aspect of Bingham's element one of the rule of law. Element one states:

Law must be accessible and so far as possible, intelligible, clear and predictable.

This chapter examines accessibility of the law. Accessibility means the citizen can physically get the legislation, can find it, can read it.¹⁴⁹ Accessibility can also be taken to include the ability to understand the thing being accessed, but I consider this under the separate heading of intelligibility in Chapter 4.

Part 1 examines more closely what Bingham said and compares this with the views of other writers on the rule of law. Part 2 looks to see the drafting principles that we can derive from the starting point of a need for accessibility. Three main principles are derived. Firstly, that legislation must be available to users. Secondly, that legislation must be navigable in the sense that the users can easily find their way around the statute book. Thirdly, that legislation must be inclusive of all important relevant material.

Part 1 The Theory of Accessibility

2.1 The Importance of Accessibility

Bingham argued that all law (including case law and legislation) must be accessible to citizens. He didn't deconstruct "accessibility" into its component parts; he simply used it in its ordinary sense of citizens being able to get their hands on the law. He advanced three reasons why law should be accessible.¹⁵⁰ Firstly, you need to know in advance what the criminal law is in order to avoid being prosecuted for your actions. Secondly, in the civil field, you cannot claim rights or perform obligations if you don't know what these rights and obligations are. Thirdly, a successful commercial environment is enhanced if there are accessible legal rules governing commercial relations. Roznai argued that accessibility 'inherently derives from the rule of law'.¹⁵¹

¹⁴⁹ John Burrows and Ross Carter, *Statute Law in New Zealand* (4th edn, Lexisnexis 2009).

¹⁵⁰ Bingham (n 5). 37, 38.

¹⁵¹ Yaniv Roznai, 'Access to Justice 2.0: Access to Legislation And Beyond' (2015) 3 Theory and Practice of Legislation 333, 336.

In Locke's Commonwealth, it is vital that laws are promulgated. By this he meant that they should be officially made, proclaimed and disseminated to citizens. So, he says that the supreme authority 'cannot assume to itself a power to rule by extemporary arbitrary decrees, but is bound to dispense justice and decide the rights of the subject by promulgated standing laws, and known authorised judges'.¹⁵² He reiterates this point by stating that there must be 'declared laws',¹⁵³ 'settled standing laws',¹⁵⁴ 'declared and received laws'¹⁵⁵ and 'established and promulgated laws'.¹⁵⁶ As justification for this he advanced Bingham's argument 'that both people may know their duty, and be safe and secure within the limits of the law'.¹⁵⁷

Although Locke published this in 1689, even then, this principle was not new. Allen stated that 30 years earlier, Thomas Hobbes 'waxed indignant at the difficulties which confronted the layman in ascertaining the law, and he contended that there ought to be as many copies of statutes abroad as the Bible'.¹⁵⁸

Desideratum 2 for Fuller is 'a formalized standard of promulgation'¹⁵⁹ of laws. This is the only one of Fuller's desiderata where the morality of duty is the same as the morality of aspiration – i.e. the minimum standard is that all laws must be promulgated. Fuller stated that there ought to be a legal duty to publish law in a specified manner in a specified time frame. Fuller was a realist and stated that 'the requirement that laws be published does not rest on any such absurdity as an expectation that the dutiful citizen will sit down and read them all'.¹⁶⁰ Even though most citizens won't read legislation, Fuller argued that the ones most directly affected by it (or the opinion formers) will read it.

Raz dealt with this point very briefly in his principles about the rule of law. Under principle 1 he stated that 'the law must be open and adequately publicised'.¹⁶¹ This is for the rather obvious reason that if the law isn't accessible, it can't guide human behaviour.

¹⁵² Locke (n 8).

¹⁵³ *ibid.* section 136.

¹⁵⁴ *ibid.* section 136.

¹⁵⁵ *ibid.* section 137.

¹⁵⁶ *ibid.* section 137.

¹⁵⁷ *ibid.* section 137.

¹⁵⁸ Sir Carleton Kemp Allen, *Law in the Making* (Clarendon Press 1964). Three hundred years later, Hockman agreed with this Hobbesian requirement for accessibility, Stephen Hockman, 'Free the Law How the Australasian Legal Information Institute (AustLII) Achieved the Free Availability of Legal Information on the Internet' (2000) 1 *Journal of Information, Law and Technology* <http://www2.warwick.ac.uk/fac/soc/law/elj/jilt/2000_1/free_the_law/transcript/>.

¹⁵⁹ Fuller (n 6).

¹⁶⁰ *ibid.* 51.

¹⁶¹ Raz (n 7).

The World Justice Report requires law to be ‘clear, publicised, stable and fair’¹⁶² and this is tied directly to assessing how well a country is heeding the rule of law. Waldron states that law should be promulgated,¹⁶³ although for Roznai access means more than simply promulgating the law.¹⁶⁴ For Upham, in order for the law to be effective, people need to be able to understand it and it must be accessible.¹⁶⁵ Stevenson included accessibility as one of the ‘vital components of legal systems and of substantive laws for centuries’.¹⁶⁶ In the course of examining European approaches to legislation, Donelan stated that ‘for a legal system to be credible, legislation must be accessible’.¹⁶⁷ The SIGMA initiative reinforces this point for Europe – ‘a principal aim of legislation is to enable those affected by it to organise and regulate their activities in accordance with its normative requirements ... ready access to that legislation is a necessary concomitant’.¹⁶⁸ Cass argued that if a legal rule was applicable to persons it must be ‘reasonably accessible to those persons’.¹⁶⁹ The European Court of Human Rights stated that ‘the law must be adequately accessible’.¹⁷⁰

The Venice Commission took the view that in order to attain legal certainty ‘the state must make the text of the law easily accessible’.¹⁷¹ Relating accessibility directly to the rule of law, Greenberg stated that ‘accessibility is at the heart of the efficacy of the rule of law’.¹⁷² Duprat stated that formal legistics (meaning legislative drafting techniques) ‘aims to make legislation more accessible to the public’.¹⁷³

Marsh-Smith, writing as a legislative drafter in the Isle of Man stated that ‘access to the law is a basic right’¹⁷⁴ – this was in the context of creating a new system for electronic access to legislation. The courts in Canada take the same view ‘to bind the citizen by a law, the terms of which he has no means of knowing, would be a mark of tyranny’.¹⁷⁵ Canadian drafter Keyes agrees, ‘if the law is to

¹⁶² Agrast and Botero (n 57).

¹⁶³ Waldron, *The Rule of Law and the Measure of Property* (n 32).

¹⁶⁴ Roznai (n 151).

¹⁶⁵ Frank Upham, *Mythmaking in the Rule of Law Orthodoxy* (Carnegie Endowment for International Peace 2002) <<http://carnegieendowment.org/files/wp30.pdf>>.

¹⁶⁶ Kim Stevenson and Candida Harris, ‘Breaking the Thrall of Ambiguity: Simplification (of the Criminal Law) as an Emerging Human Rights Imperative’ (2010) 74 *Journal of Criminal Law* 516.

¹⁶⁷ Edward Donelan, ‘European Approaches to Improving Access to and Managing the Stock of Legislation’ (2009) 30 *Statute Law Review* 147.

¹⁶⁸ SIGMA, *Law Drafting and Regulatory Management in Central and Eastern Europe* (1997).

¹⁶⁹ Cass (n 30).

¹⁷⁰ *Sunday Times v UK* (1979) 2 EHRR 245, 271

¹⁷¹ Venice Commission (n 4).

¹⁷² Daniel Greenberg, ‘Gender Neutrality in the House of Lords (and Ladies)’ (2014) 35 *Statute Law Review* v.

¹⁷³ Duprat and Xanthaki (n 111) 110.

¹⁷⁴ Lucy Marsh-Smith and Gordon Wright, ‘Information Technology on a Budget: A Giant Leap for the Isle of Man’ (winds of change- Calc conference, Cape Town, April 2013).

¹⁷⁵ *Watson v Lee* (1979) 26 ALR 461, 465

command respect and function as it is intended, it must be adequately promulgated'.¹⁷⁶ Bing also argues in favour of free access to law and cites yet more writers who back this proposition.¹⁷⁷ In Australia, Lord Justice Brooke called for 'access to all, free of charge, to our case law and statutes'.¹⁷⁸ The New Zealand Law Commission stated that 'one aspect of the rule of law is to ensure Acts of Parliament are accessible and available'.¹⁷⁹

If even Hobbes is seen as too modern, then consider what has been said about Caligula. Millennia ago Suetonius wrote the following of Caligula's laws

These taxes being imposed, but the act by which they were levied never submitted to public inspection, great grievances were experienced from the want of sufficient knowledge of the law. At length, on the urgent demands of the Roman people, he published the law, but it was written in a very small hand and posted up in a corner so that no one could make a copy of it.¹⁸⁰

2.1.1 Accessibility in the UK

In the UK there is a slightly schizophrenic attitude to accessibility of legislation. On the positive side, certainly in modern times, it is strongly endorsed. On the negative side, legislation which is difficult or even impossible to access is still valid.

Dealing with the positive side first, the Welsh drafters regard accessibility as crucial with Hughes and Davies strongly supporting additional resources being made available in order that the public may have access to up to date versions of Welsh legislation.¹⁸¹ The head of Legislation Services in the UK government has directly quoted Bingham's element 1 before going on to state that 'the principle of free public access to the law underpins legislation.gov.uk and the work of the Legislation Services team at The National Archives.'¹⁸² The High Court has spoken of the 'constitutional imperative that

¹⁷⁶ John Mark Keyes, 'Perils of the Unknown - Fair Notice and the Promulgation of Legislation' (1993) 25 Ottawa L Rev 579.

¹⁷⁷ Jon Bing, 'Let There Be Lite: A Brief History of Legal Information Retrieval' (2010) 1 European Journal of Law and Technology <<http://ejlt.org//article/view/15>>.

¹⁷⁸ Lord Justice Brooke, 'Publishing the Courts: Judgements and Public Information on the Internet' (Commonwealth Law Conference, Melbourne, 15 April 2003). Another Australian judge made exactly the same point 'the content of the law must be adequately accessible' Murray Gleeson, 'Courts and the Rule of Law' (2001) <http://www.hcourt.gov.au/assets/publications/speeches/former-justices/gleeson/cj_ruleoflaw.htm>.

¹⁷⁹ Law Commission, *Presentation of New Zealand Statute Law* (Law Commission 2008). page iv.

¹⁸⁰ Suetonius, *Lives of the 12 Caesars* (Alexander Thomson translator, 1883) 278.

¹⁸¹ Dylan Hughes and Huw G Davies, 'Accessible Bilingual Legislation for Wales (Deddfwriaeth Hygyrch a Dwyieithog I Gymru)' (2012) 33 Statute Law Review 103.

¹⁸² John Sheridan, 'People, Patterns and Data - the Story of Legislation.gov.uk People, Patterns and Data - the Story of Legislation.gov.uk' <<http://www.socialtech.org.uk/blog/people-patterns-and-data-the-story-of-legislation-gov-uk/>> accessed 20 January 2016.

statute law be made known.¹⁸³ The courts have directly tied this requirement to the rule of law ‘the acceptance of the rule of law as a constitutional principle requires that a citizen, before committing himself to any course of action, should be able to know in advance what are the legal consequences that will flow from it’.¹⁸⁴ Lord Renton produced the highly influential Report on the Preparation of Legislation in 1975.¹⁸⁵ In Chapter XVI Renton discussed how computers would help and in that context made some recommendations about access to legislation. He was in favour of a searchable database of legislation which contained copies of the law as enacted and the law as amended.

Greenberg says that ‘it is of enormous importance that laws are made accessible to the public as soon as possible’.¹⁸⁶ The Law Commission considered the importance of access to legislation in its report on post-legislative scrutiny.¹⁸⁷ After discussing the difficulty with reading out of date legislation, particularly subordinate legislation, they made two recommendations. Firstly, that consolidated subordinate legislation be available rather than requiring users to try to manually piece together amendments themselves.¹⁸⁸ Secondly, ‘that steps should be taken to ensure that the related provisions of primary and secondary legislation should be capable of being accessed in a coherent fashion by a straightforward and freely available electronic search’.¹⁸⁹

The government’s response came in 2008.¹⁹⁰ They saw the benefit of consolidation, but were concerned about the cost. With regards to electronic access, they discussed the Statute Law Database (the forerunner of the system now provided by The National Archives). They went on to say ‘the aim has been to present legislation in the most accessible and useable way, whilst maintaining the traditional strengths of immediacy and accuracy’.¹⁹¹

Within Parliament, the critical importance of access to legislation has not been gainsaid. The House of Commons Political and Constitutional Reform Committee carried out an inquiry into the quality of legislation. In the course of giving evidence to that Committee, Sir David Lloyd Jones stated that ‘it is fundamental that legislation, that the law in general, should be accessible and intelligible’.¹⁹² One of

¹⁸³ *R (Salih) v Secretary of State for Home Department* [2003] EWHC 2273 (Admin).

¹⁸⁴ *Black Clawson v Papierwerke Waldhof* (1975) AC 591, 638

¹⁸⁵ ‘Report of the Renton Committee on the Preparation of Legislation’ (n 129).

¹⁸⁶ Daniel Greenberg, *Craies on Legislation* (9th edn, Sweet & Maxwell 2008).

¹⁸⁷ Law Commission, ‘Post-Legislative Scrutiny’ (2006) Law Com No 302.

¹⁸⁸ *ibid.*

¹⁸⁹ *ibid.*

¹⁹⁰ Office of the Leader of the House of Commons, ‘Post-Legislative Scrutiny - the Government’s Approach’ (2008) Cm 7320.

¹⁹¹ *ibid.*

¹⁹² Political and Constitutional Reform Committee, ‘Ensuring Standards in the Quality of Legislation’ (House of Commons Political and Constitutional Reform Committee 2013) HC 85.

the Committee's recommendations was a Draft Code of Legislative Standards.¹⁹³ One element of this Code was that legislation should be accessible. The Leader of the House of Lords has stated that,

All Acts are published simultaneously on the Internet and in print as soon as possible after Royal Assent. It is important to ensure that an accurate approved text is published and that all users have access at the same time to the same text.¹⁹⁴

The Select Committee on European Scrutiny, in its Fifteenth Report welcomed 'access to legislation in a variety of databases' (although this was in terms of European legislation).¹⁹⁵ In a memorandum to the Select Committee on the Constitution, Michael Ryle, former Clerk of Committees and Secretary of the Hansard Society Commission said that the publication of statute law and the Statute Law Database were constitutionally significant.¹⁹⁶

However, the negative side is highlighted by two rules. The first is that, in the UK, ignorance of the law is no defence. The fact that a citizen doesn't know the law is not an excuse for failing to observe the law (this principle is common in many jurisdictions). The second is that legislation is valid (and may therefore be binding) as soon as it is made. Therefore a person may be liable under an Act which has not yet been published, an Act which it would be impossible for the citizen to access. The justification for this rather unfair rule is set out by Austin. It is that every citizen is present in Parliament by dint of being represented there by their Member of Parliament. So, the printing of the statute isn't telling a citizen something new, it merely refreshes the citizen's memory. Thus 'for before an Act is printed, and whether it is printed or not, it is a statute and is legally binding'.¹⁹⁷ The Court of Appeal found itself bound to hold this statement to be true, ruling that 'it is beyond argument that an Act of Parliament takes legal effect on the giving of Royal Assent, irrespective of publication'.¹⁹⁸ Allen 'doubted whether many substantial hardships result from this'.¹⁹⁹ This is because 'most people become acquainted with the elements of the statutory or Common Law which affect them specially in their particular vocation or circumstance'.²⁰⁰

Very rarely, legislation comes into operation in advance of publication. One recent example is the Nationality, Immigration and Asylum Act 2002. It received Royal Assent on 7 November 2002 and s.

¹⁹³ *ibid.*

¹⁹⁴ HL Deb. February 10, 2003 cc. 464-466, see also the government's general obligation to publish the statute book, discussed in HC Deb. June 13, 1991 WA 613-614.

¹⁹⁵ Select Committee on European Scrutiny, 'Fifteenth Report' (2003).

¹⁹⁶ Select Committee on the Constitution, Minutes of Evidence (April, 2004) para 17-18.

¹⁹⁷ John Austin and Sarah Austin, *The Province of Jurisprudence Determined* (J Murray 1861).

¹⁹⁸ *ZL and VL v Secretary of State* [2003] EWCA Civ 25 [17].

¹⁹⁹ Allen (n 158).

²⁰⁰ *ibid.*

115 of that Act came into force immediately. However, it wasn't actually printed until 28 November 2002. The Court of Appeal, with considerable unease, ruled that s. 115 applied from the 7 November 2002.²⁰¹ Contrast this with the decision by the European Court in *Skoma-Lux sro v Celní ředitelství Olomouc*²⁰² that EU legislation is only enforceable against individuals if it has been properly published.

Cabinet Office guidance is that an Act must be published online 'immediately after the approved text has been received from the Lords Public Bill Office'.²⁰³ However,

Where an Act cannot be published before it takes practical effect, the department should seek to disseminate the final text of the relevant sections to those most interested, or their representatives.²⁰⁴

Although this makes a gesture towards accessibility, the quality of that access will invariably be poor.

2.1.2 Accessibility in the UK – Prerogative Legislation

I have previously considered accessibility of a very particular subset of UK legislation – legislation made under the Royal Prerogative.²⁰⁵ In investigating prerogative legislation relating to British Indian Ocean Territory (BIOT), I concluded that, despite the views set out above on the importance of access, this legislation was not accessible. Tomkins criticised it as 'unaccountable, indeed wholly secret rule-making'.²⁰⁶

It could be thought that the lack of official promulgation of BIOT legislation is accidental. However, it is clear that official government policy is to make it inaccessible. The Secretary of State sent a confidential telegram to the Governor of the Seychelles on the subject of some of this legislation. In paragraph 3 he stated 'our concern is that publication of Ordinance and any regulations thereunder should be limited to minimum by law so as to attract as little attention as possible'.²⁰⁷ The Governor responded 'Ordinance would be published in BIOT Gazette which has only very limited circulation

²⁰¹ *ZL and VL v Secretary of State for the Home Department* [2003] EWCA Civ 25. For an example of legislation which was relied upon even though it was repealed, see *R v Chambers* where the mistake was only caught at the last minute and the court complained that 'there is no comprehensive statute law database with hyperlinks which would enable an intelligent person, by using a search engine, to find out all the legislation on a subject', [2008] EWCA Crim 2467 [28].

²⁰² ECR 2007, p. I-10841.

²⁰³ Cabinet Office, *Guide to Making Legislation* (2013).

²⁰⁴ *ibid.*

²⁰⁵ Ronan Cormacain, 'Prerogative Legislation as the Paradigm of Bad Law-Making: The Chagos Islands' (2013) 39 Commonwealth Law Bulletin 487.

²⁰⁶ Tomkins, 573.

²⁰⁷ Telegram of 22/12/1970.

both here and overseas after signature by Commissioner. Publicity will therefore be minimal'.²⁰⁸ So, in limited cases in the UK, inaccessibility is a deliberate policy.

2.2 Difficulties with providing (electronic) access to legislation²⁰⁹

2.2.1 Cost

Hicks gave a presentation designed to assist drafting offices from around the world with purchasing electronic legislation systems.²¹⁰ The most basic system would cost between \$60,000 and \$120,000 and would not include a website. In his view, a system which included a website and a way of updating legislation on that website would cost between \$120,000 and \$3,000,000. In Northern Ireland, the tender documentation for a system for drafting, printing and amending primary legislation suggested a contract price of £410,000.²¹¹ It is possible to have a cheaper system. According to Marsh-Smith, the Isle of Man is currently developing a system with a target budget of £60,000.²¹² Cost objections to a new legislation system can be short-sighted. A modern system can provide large financial benefits. The direct financial benefits can quickly recoup the cost of the financial outlay.

2.2.2 Volume

Legislation needn't be voluminous, but the modern practice tends towards verbosity. Dhavan argued that part of the problem was a prolific Parliament producing too many laws.²¹³ Margaret Thatcher stated that the opportunities for judges criticising prolix legislation were 'increasingly rare' due to the fulfilment of Renton's recommendations.²¹⁴ Regrettably this has turned out to be a Panglossian prediction. The 2011 annual volumes of UK primary legislation run to 2,789 pages. The 2008 volumes of secondary legislation run to 10,818 pages. The House of Commons Library prepared a briefing note entitled 'Acts and Statutory Instruments: the Volume of UK legislation 1950 to 2012'.²¹⁵ The results from this detailed statistical analysis show that the figures cited above are, if anything, below the average annual page output of the last 10 years. The government's own drafters agree, citing

²⁰⁸ Telegram of 11/1/1971.

²⁰⁹ Some material in this section was previously published in Ronan Cormacain, 'Have the Renton Committee's Recommendations on Electronic Access to Legislation Been Fulfilled?' (2013) 19 Web Journal of Current Legal Issues.

²¹⁰ Ed Hicks, 'Implementing Legislation Systems — Considerations and Options' (CALC, Hyderabad, India, February 2011).

²¹¹ Information contained in the Tenders Electronic Daily, Supplement to the Official Journal of the European Union, < <http://ted.europa.eu/udl?uri=TED:NOTICE:244968-2011:TEXT:EN:HTML&tabId=1> > accessed on 12/6/2013.

²¹² Marsh-Smith and Wright (n 174).

²¹³ R Dhavan, 'Legislative Simplicity and Interpretative Complexity - a Comment on the Renton Committee on "the Preparation of Legislation"' (1976) 5 Anglo-Am L Rev 64.

²¹⁴ Renton, 'The Renton Report's Tenth Birthday' [1985] Statute Law Review 60.

²¹⁵ SN/SG/2911 (November 2012).

volume as a cause of complexity in legislation.²¹⁶ The vast tidal wave of legislation enacted every year makes it difficult to access the specific legislative provision required. Spencer refers to it as 'binge law-making',²¹⁷ and for Karpen one goal of legisprudence is to reduce the quantity of legislation.²¹⁸

2.2.3 Interconnectedness

As the current First Parliamentary Counsel put it, we have 'an intricate web of laws'.²¹⁹ An excellent visual representation of this is available online which shows the legal interactions of one statute with other statutes.²²⁰ It is rare to find a statute that exists in a vacuum, un-connected to any other piece of legislation. If a new criminal offence is enacted, it presupposes the existence of a raft of other pieces of legislation. It requires other legislation to set out the powers of arrest for that offence, rules of court indicating the manner in which the offence can be prosecuted, evidential rules on what can be relied upon to prove the offence, sentencing guidelines, prison rules, judicial appointment procedures etc. The more interconnected legislation is, the harder it is to make it fully accessible.

2.2.4 Dynamic legislation

There isn't one tidal wave of legislation; there are fresh tidal waves every year. New law is constantly changing old law. So a system of accessible laws doesn't simply have to deal with all the laws in force at a particular date, it has to deal with all the new laws as and when they are made.

At the micro level, although there is a single date upon which a statute is enacted, it regularly comes into force on different days. Take for example the Criminal Justice (Northern Ireland) Order 1999:

- Articles 1, 2, 33, 35, 44 to 47, 53 to 56, 57 (partially), 58 (partially), Sch 5 (partially), Sch 6 (partially), Sch 7 (partially) came into force on the 25th of July 1997.²²¹
- Articles 3 to 22, 24 to 32, 34, 36, 37, 48 to 52, Schs 1, 2, 3 and 4 came into force on the 1st of January 1998.²²²

²¹⁶ Office of the Parliamentary Counsel, 'When Laws Become Too Complex - Inside Government' (n 144).

²¹⁷ JR Spencer, 'Criminal Justice Legislation That Everyone Can Understand: A Flying Pig or a Realistic Aspiration' (Institute of Advanced Legal Studies, 25 January 2016). See also What the eye says, 'The Shame of Britain's Binge Law Making' [2005] *Private Eye* 24. (with special thanks to Private Eye for sending me this article from their archives).

²¹⁸ Karpen and Xanthaki (n 108) 1.

²¹⁹ Office of the Parliamentary Counsel, 'When Laws Become Too Complex - Inside Government' (n 144).

²²⁰ < https://assets.digital.cabinet-office.gov.uk/government/uploads/system/uploads/attachment_data/file/9078/Fig_3_representation_legal_effects.png > accessed on 28 June 2013.

²²¹ Under the Criminal Justice (1996) Order (Commencement No. 1) Order (Northern Ireland) 1997 No. 267.

²²² Under the Criminal Justice (1996) Order (Commencement No. 2) Order (Northern Ireland) 1997 No. 523.

- Part III came into force on the 1st of June 1999.²²³

Different commencement dates make it more difficult to meaningfully access legislation.

2.2.5 Authority

Legislation needs to be authentic and authoritative. Historically this has meant that laws must be published in paper form, or even on vellum as described by Bennion.²²⁴ It should be noted that ‘paper’ is not synonymous with ‘authentic’. The use of correction slips to remedy defects in published legislation shows that paper is no guarantee of accuracy. In some ways, a fully auditable electronic system provides more guarantees against interference with the content of legislation. Some jurisdictions have put electronic systems onto a statutory footing. The EU adopted Regulation 216/2013 on electronic publication of the EU Official Journal. Article 1.2 provides that the Official Journal be published electronically and that this electronic publication is authentic and shall produce legal effects. As another example, the long title of the Legislation Publication Ordinance in Hong Kong reads:

An Ordinance to provide for the establishment of an electronic database of legislation and approval of a website on which the information in the database may be published and accessed; to give legal status to copies of the legislation published on an approved website.

2.2.6 Paper based process

The only thing that Parliament passes is the two dimensional page before it. A hypertext link is not part of a statute, it is an editorial addition designed to improve accessibility. Although such editorial additions can be extremely helpful to users, they do not have democratic legitimacy. What happens if a link is wrong? I submit that as Parliament has not assented to the link, it does not form part of the law.

2.2.7 Bilingualism

There is an additional factor on availability when we consider the UK as a whole – the need for bilingual legislation. Acts of the Welsh Assembly are to be in both English and Welsh, and both texts are to be treated as being of equal standing.²²⁵ It has also been a long-standing policy goal of some political parties in Northern Ireland that there be an Irish Language Act which would make similar

²²³ Under the Criminal Justice (1996) Order (Commencement No. 3) Order (Northern Ireland) 1999 No. 230.

²²⁴ Francis Bennion, ‘Modern Royal Assent Procedure at Westminster’ (1980) 2 Statute Law Review 133.

²²⁵ Government of Wales Act 2006, s. 156

provision for Northern Ireland in respect of the Irish language.²²⁶ That policy has not resulted in any legislation, but the possibility cannot be ignored.

There are far reaching consequences of a requirement for bilingualism. The most obvious one is the practical one of resources – having the time and personnel available to enact legislation in two languages. Then there are matters of process, whether to simply translate one language into the other at various points in the legislative process, or whether instead to co-draft (following the Canadian model for French / English legislation). Then there are the difficulties arising from words having different shades of meaning in different languages, meaning that a straight “translation” of an English word into a Welsh word may not always work.²²⁷ It is beyond the scope of this research to advise on the best way to draft and enact bilingual legislation, see instead the analysis of Watkin.²²⁸ Suffice to say that bilingualism adds another level of difficulty to making legislation accessible.

Part 2 Drafting Principles that Promote Accessibility

2.3 Availability

The most basic requirement of accessibility is that legislation is physically available to the user. The New Zealand Law Commission stated that access to legislation had three meanings: availability to the public, navigability and clarity.²²⁹ Carter described it in this way ‘availability involves provision to the public, and especially to users, of hard copies, or copies available electronically’.²³⁰ Users need to be able to place their hands on the actual paper of the legislation, or be able to read the actual words of the legislation on screen. Availability in the general sense is not a drafting principle – drafters cannot themselves print, publish and disseminate legislation. However, it is included here as a drafting principle for two reasons. Firstly, as it directly touches upon what they do, it is not unreasonable to expect drafters to promote availability even if they can’t actually physically deliver it. Secondly, as will be seen below, when availability is deconstructed, it will be seen that some aspects of it are actually capable of being implemented by the drafter in the drafting of legislation.

²²⁶ Stephen Walker, ‘Political Tug of War over Irish Language’ *BBC News* (22 September 2017) <<http://www.bbc.co.uk/news/uk-northern-ireland-41348278>> accessed 25 September 2017.

²²⁷ Thomas Glyn Watkin, ‘Bilingual Legislation: Awareness, Ambiguity, and Attitudes’ (2016) 37 *Statute Law Review* 116.

²²⁸ Thomas Glyn Watkin, ‘Bilingual Legislation and the Law of England and Wales’ (2014) 2 *Theory and Practice of Legislation* 229. See also Watkin, ‘Bilingual Legislation’ (n 227).

²²⁹ Law Commission, *Presentation of New Zealand Statute Law* (n 179). 13.

²³⁰ Burrows and Carter (n 149). 141.

2.3.1 Electronic or non-electronic availability

The primary focus in this chapter is on electronic availability of legislation. Hard copies of legislation remain useful, but electronic availability is more important for several reasons. Firstly, the hard-copy can swiftly become out of date as the law is amended. Secondly, in the information age, information is increasingly consumed not just electronically, but online. Having said this, there is no guarantee that electronic is more accurate (or will last) as long as hard copies.

Gee, Deputy Librarian at the Institute of Advanced Legal Studies, provides some evidence of this second point as it relates to law. He carried out a study of law libraries from around the world.²³¹ One of his findings was that the top ambition for university law libraries was to develop and enhance their electronic and digital resources. The mean number of electronic databases in law libraries was 124 databases, with Westlaw, Lexis and HeinOnline (respectively) the most popular.

Turning specifically to the UK, Gee also carried out a survey of academic law libraries in the UK.²³² The top free website at those libraries was the website of the British and Irish Legal Information Institute at www.baili.org and the second most popular was the official government website on legislation at www.legislation.gov.uk. Both these websites provide electronic access to legislation. Anecdotally, Gee states 'My sense too is that law researchers and legal practitioners are overwhelmingly relying on electronic access to legislation nowadays, but I have no hard evidence for this.'²³³ According to Bertlin²³⁴ legislation.gov.uk has 2 million separate visitors per month, and provides more than 400,000,000 page impressions per year.

Having said this, there are dangers if legislation is only available electronically. There are those who, for economic reasons, may not be able to afford the technology necessary to look up laws online. There will also be those who live in places with limited electronic infrastructure to allow for online access. Finally, some people may have a disability which makes electronic access more challenging.

2.3.2 What must be available?

I said above that the drafting principle is that legislation must be available – but what is the exact content of this, what is it that must be made available in order to comply with the rule of law? In my view, there are six aspects of availability. The first four aspects are what Fuller would call the

²³¹ David Gee, 'Survey of Major Law Libraries around the World' (2013) 41 *International Journal of Legal Information* 108.

²³² David Gee, 'SLS/BIALL Academic Law Library Survey 2012/2013' (2014) 14 *Legal Information Management* 215.

²³³ David Gee, Email 11/9/14 to author.

²³⁴ Alison Bertlin, 'What Works Best for the Reader? A Study on Drafting and Presenting Legislation' [2014] *The Loophole* 25.

morality of duty – minimum requirements that must be fulfilled. The final two are morality of aspiration – a summit to aim at, although the legislation will still be valid even if it doesn't crest the summit. I previously developed and published the idea of these aspects and some of the ideas in this section come from that article.²³⁵

2.3.3 Aspect 1 – availability of law as enacted

Legislation must be placed online as soon as it is made. All that is required for this aspect is a snapshot of the law as enacted, not how it changes over time. Dilating upon dates, it becomes apparent that there is an important nuance between the date a statute is made and the date it comes into effect. Although it is important for law to be available as soon as it is made, it is even more important for it to be available before it comes into force.

For example, New Zealand has the Public Access to Legislation project. According to Anthony, the key outcomes of the project are:-

- Free electronic access to up to date legislation.
- Access to legislation as soon as possible after enactment.
- Access to updated legislation (i.e. older Acts as amended by later Acts).
- Access to Bills as they pass through the legislature.²³⁶

There is a quantitative aspect to availability. If a specific statute or the official legislation website is online but doesn't appear near the top of search rankings, it is less visible to users. A great website that is little known isn't truly accessible.

This aspect of availability is something that the drafter can encourage, for example by recommending that resources are devoted to the publication of legislation. It is also something the drafter can have a direct effect upon by striving to ensure that commencement dates are sufficiently far from the date that legislation is made so that there is time for the law to be published before it comes into effect.

²³⁵ Cormacain, 'Have the Renton Committee's Recommendations on Electronic Access to Legislation Been Fulfilled?' (n 209).

²³⁶ Kate Anthony, 'Public Access to Legislation Project: Served with Accompaniments' 16 Australian Law Librarian 21. See also Geoff Lawn, 'Improving Public Access to Legislation: The New Zealand Experience so Far' (2004) 6 UTS L Rev 49.

2.3.4 Aspect 2 – availability of law as amended

The system needs to keep all legislation up to date (what Benedetto refers to as interventions of compilation and consolidation)²³⁷. This means that where new legislation amends old legislation, the old legislation on screen should fully reflect all those amendments. The system needs to tell users what the law is today, as well as what it was when it was enacted. This is the key aspect of the system. If the system cannot tell the citizen what the law is, it has failed.

There is one specific tool that can be used in this regard in the UK – the Keeling schedule. I deal with the Keeling schedule in chapter 4 under the heading of intelligibility.

This aspect is complicated by commencement provisions, or more specifically, by the practice of different provisions commencing at different times. In the past, an Act was made and then a reasonably short period afterwards it came into force. Now it is quite common for the commencement of an Act to spread out over a long period of time, with different provisions coming into force at different times. This creates an extra level of complexity for users. In addition to tracking what legislation has been enacted over time, they must also track what legislation has been brought into force over time. For a bad example, see the Public Services Ombudsperson (Northern Ireland) Act 2016. In section 64 of that Act:

- subsection (1) lists the provisions coming into force on 1 April 2016,
- subsection (2) lists provisions coming into force on the day after Royal Assent,
- subsection (3) lists provisions coming into force on 1 October 2016,
- subsection (4) the provisions coming into force on 1 April 2017,
- subsection (5) the provisions coming into force on 1 April 2018 and
- subsection (6) gives the government the power to commence other provisions on different dates.

Each of these subsections is complicated in its own right. How much simpler for the user (and those trying to organise the statute book) if there was a simple statement that “This Act comes into operation on 1 April 2016”.

There are several drafting techniques to address these problems. Firstly, the drafter can seek to confirm that a legislative power sought will actually be used. There is no point in clogging up the statute book with a provision that the government are not sure will ever be brought into force. For example, the Easter Act 1928 has never been commenced. Secondly, the drafter can encourage a simple commencement provision that commences the entire Act in one fell swoop, rather than

²³⁷ Maria de Benedetto, ‘Maintenance of Rules’, *Legislation in Europe: A comprehensive guide for scholars and practitioners* (Hart 2017).

having it commenced in fits and starts. Thirdly, the drafter can insert the commencement date on the face of the Act. This way the reader will at least know, from reading the Act, when it comes into force. This tool is less necessary as there is now a power to amend legislation to include the actual commencement date on the face of it.²³⁸ Fourthly, where the government seeks a power to commence an Act by future subordinate legislation, a limited rather than extensive power can be drafted. For example a power to commence the Act, rather than a power to commence different provisions of the Act on different days. Unfortunately, these are mainly matters of substance of legislation and the drafter may not have much power to actually make the final determination on these points.

One problematic issue here is where defective legislation is corrected judicially on the principles set out in *Inco Europe v First Choice Distribution*.²³⁹ Although drafting mistakes are obviously to be avoided, it is inevitable that they will occasionally occur. Overt judicial correction of drafting mistakes is an established aspect of the UK legal system. The point here is not to question the limits of that power to correct, but to ask what consequences it has for the availability of legislation. Correcting a mistake may do justice in the individual case before a judge, but will not serve the population as a whole unless they know that the mistake has been corrected. The reader of the statute book will still see the incorrect words used in that statute and will not have an easy way of knowing what the judicial correction is. There is still no indication to the reader of the statute book that the words in s. 18(1)(g) of the Senior Courts Act 1981 are to be read with the addition of the words added to it by the House of Lords in *Inco*.

If a mistake is found in legislation (by a judge or by anyone else), it is incumbent upon the drafter to get it rectified in the statute book as soon as possible. Although a drafter may be embarrassed about a long title that includes the phrase ‘An Act to rectify a mistake in [previous legislation]’²⁴⁰ or ‘correcting a mistake in the repeals effected by [previous legislation]’²⁴¹ it is still better to correct it than to let the mistake fester on the statute book.

2.3.5 Aspect 3 – law at a point in time

The system needs to state what the law was at a particular point in time in the past. There will be many situations when past legal rights and obligations will be relevant. The Historical Institutional Abuse Inquiry is obliged by statute to investigate child abuse in Northern Ireland between 1922 and

²³⁸ S. 104 Deregulation Act 2015.

²³⁹ [2001] 1 WLR 568 HL.

²⁴⁰ See the Act of 1823 4 Geo 4 c. 10.

²⁴¹ Statute Law Revision (Northern Ireland) Act 1973.

1995.²⁴² It is a prime example of a situation where it is vital that all legislation in force between those times needs to be available.

It is unrealistic to expect legislation to stay the same forever. It needs to adapt and change as society changes. In some cases there will be an ‘arms race’ as citizens take action to get around rules and then new rules emerge to stop this. However, there comes a point where frequent changes to rules make it virtually impossible to know what the rules are at any point in time.

Consider the Immigration Rules in the UK. The table below sets out how many times they have been amended in the last 3 full years.

Year	Rules amended on ...
2014	16 October
	10 July
	10 June
	1 April
	13 March
	10 March
	2013
	10 December
	9 December
	? November (actual date not specified on government website)
	6 September
	10 June
	? April (actual date not specified on government website)
	14 March
	11 March
	7 February

²⁴² Inquiry into Historical Institutional Abuse Act (Northern Ireland) 2013.

Year	Rules amended on ...
	30 January
2012	20 December
	12 December
	22 November
	5 September
	9 July
	? July (actual date not specified on government website)
	? June (actual date not specified on government website)
	? April (actual date not specified on government website)
	15 March
	19 January

These rules have changed 27 times in three years. They changed on the 9th, 10th and 18th December 2013. This makes it extremely difficult for an ordinary user to know what the law is at a particular point in time. The entire thrust of Yeo's analysis of immigration legislation is that it doesn't comply with the rule of law.²⁴³

The drafter does have a role to play here. The drafter cannot simply acquiesce in drafting legislation which is so volatile that it makes a mockery out of any attempt by the citizen (or in this case the immigrant) to having meaningful access to the legislation. There comes a point when incontinent legislative changes undermine the rule of law and the drafter has to at the very least counsel that there needs to be more stability. Lord Justice Beatson expressed concern over the Immigration Rules on this very point. He stated

²⁴³ Colin Yeo, 'How Complex Are the UK Immigration Rules and Is This a Problem?' <https://www.freemovement.org.uk/how-complex-are-the-uk-immigration-rules-and-is-this-a-problem/?utm_source=rss&utm_medium=rss&utm_campaign=how-complex-are-the-uk-immigration-rules-and-is-this-a-problem&utm_source=FM+master+list&utm_campaign=f5aa408822-RSS_EMAIL_CAMPAIGN_DAILY&utm_medium=email&utm_term=0_792133aa40-f5aa408822-105097653&mc_cid=f5aa408822&mc_eid=bfe873d008> accessed 6 September 2017.

The detail, the number of documents that have to be consulted, the number of changes in rules and policy guidance, and the difficulty advisers face in ascertaining which previous version of the rule or guidance applies and obtaining it are real obstacles to achieving predictable consistency and restoring public trust in the system, particularly in an area of law that lay people and people whose first language is not English need to understand.²⁴⁴

2.3.6 Aspect 4 – law in a particular geographical area

The legal jurisdictions in the UK are:

- England and Wales
- Scotland
- Northern Ireland

(This excludes consideration of the Crown Dependencies and British Overseas Territories.) Even though England and Wales are a single jurisdiction, it is possible to have different laws for England and Wales. Watkin explains this as follows ‘The laws made by the National Assembly extend to England and Wales, even though they can apply only in relation to Wales’.²⁴⁵ So the most accurate geographical division of legislation in the UK is:

- Law of England and Wales as it applies in England and Wales
- Law of England and Wales as it applies in Wales
- Law of England and Wales as it applies in England
- Law of Scotland
- Law of Northern Ireland

The rise of devolution has increased the degree of divergence of legislation between these areas. This is not simply in terms of where they apply, but also the way in which they apply. As Watkin points out, the devolution statutes are ‘inevitably silent as to how the style of the legislation made at Holyrood and Stormont or in Cardiff Bay is to relate to that enacted at Westminster and as to how the approach to the drafting of legislation for the devolved legislatures is to develop’.²⁴⁶ This means that we have three jurisdictions and five geographical areas in which law can apply. This does not consider experimental / trial legislation. It also does not consider the expired jurisdictions such as legislation that applied throughout the island of Ireland before Northern Ireland was established.²⁴⁷

²⁴⁴ *Hossain v Secretary of State for the Home Department* [2015] EWCA Civ 207 at [30]. Yeo sets out a number of other cases where judges have repeated these concerns, *ibid*.

²⁴⁵ Thomas Glyn Watkin, *The Legal History of Wales* (2nd edn, University of Wales Press 2012) 208.

²⁴⁶ Watkin, ‘Bilingual Legislation and the Law of England and Wales’ (n 228) 230.

²⁴⁷ Brice Dickson, *Law in Northern Ireland* (2nd edn, Hart 2013) 69. Dickson lists 7 legislatures which have (or had) jurisdiction to pass laws for Northern Ireland, not counting secondary legislation or the European Union.

When the procedures for enacting legislation are considered, this becomes even more confusing. The Westminster Parliament can pass legislation for all, or any part of the UK. The Northern Ireland Assembly can only pass legislation for Northern Ireland.²⁴⁸ As part of this, for matters within its legislative competence, it can amend any UK legislation in so far as it applies in Northern Ireland. The National Assembly for Wales can pass legislation for Wales.²⁴⁹ As part of this, for matters within its legislative competence, it can amend any UK legislation in so far as it applies in Wales. For matters within its legislative competence, it can also amend the law of England and Wales as it applies in England, if that is incidental to amending the law of England and Wales as it applies in Wales.²⁵⁰ The Scottish Parliament can only pass legislation for Scotland.²⁵¹ As part of this, for matters within its legislative competence, it can amend any UK legislation in so far as it applies in Scotland.

There is an additional level of complication. The Secretary of State (for Wales) can make secondary legislation, in consequence of legislation made by the National Assembly for Wales, which amends the law of England, Wales and Northern Ireland (but not Scotland).²⁵² The Queen, by order in council, (in effect the Secretary of State (for Northern Ireland)) can make secondary legislation, in consequence of legislation made by the Northern Ireland Assembly, which amends the law of any part of the UK.²⁵³ The Queen, by order in council or a Minister of the Crown can make secondary legislation in consequence of legislation passed by the Scottish Parliament (presumably amending the law of any part of the UK although this isn't explicit).²⁵⁴

The net result of this is that it is hard to ascertain the geographical extent of UK laws. They may apply (or extend) to one or more parts of the UK. Sometimes they will, on their face, amend the law of the UK, but the effect is only to amend the law of the UK in so far as it applies to one particular part of the UK. For example, the Human Trafficking and Exploitation (Criminal Justice and Support for Victims) Act (Northern Ireland) 2015 inserted s. 36(9)(d) into the Criminal Justice Act 1988. However, even though the Criminal Justice Act 1988 is a UK wide Act, the insertion only exists in Northern Ireland. In England, Scotland and Wales, section 36(9) stops at paragraph (c), only in Northern Ireland does it continue to paragraph (d).

²⁴⁸ S. 6 Northern Ireland Act 1998.

²⁴⁹ S. 108 Government of Wales Act 2006.

²⁵⁰ *Ibid.*

²⁵¹ S. 29 Scotland Act 1998.

²⁵² S. 150 Government of Wales Act 2006.

²⁵³ S. 84 Northern Ireland Act 1998.

²⁵⁴ S. 104 Scotland Act 1998.

What does this all mean? It means that there is no universal text of legislation. Unlike the speed of light, which is constant to all observers, legislation varies depending upon where the observer is standing. Take for example s. 105 of the Children Act 1989. There is no universal text of s. 105. In fact, it is meaningless to talk of s. 105, there is no such thing. Instead, there is s. 105 as it applies in England, s. 105 as it applies in Scotland and S. 105 as it applies in Wales, but no s. 105 as it applies in Northern Ireland. (Everyone obviously knows that that Children Act 1989 doesn't extend to Northern Ireland, except for the bits which do extend as listed in s. 108(12), and that the relevant Northern Ireland legislation is the Children (Northern Ireland) Order 1995.) This complication is exacerbated by a particular focus on Westminster legislation which leads to consideration of devolved legislation being marginalised.²⁵⁵

A good system of legislation needs to specify to users what the law is in a particular area. As well as the temporal division in aspects 1 to 3, there is also the spatial division in aspect 4.

At present, there are two main tools used by drafters to demarcate the geographical boundaries of legislation: the extent section and the territorial limits of devolved legislatures.

The extent section is the section in a (Westminster) Act setting out to what parts of the UK the Act applies. Section 60 of the Modern Slavery Act 2015 provides a standard example. It provides that:

- Parts 1, 2 and 5 of the Act extend to England and Wales only
- Section 35 extends to England and Wales only
- Section 36 extends to Scotland only
- Section 37 extends to Northern Ireland only
- Parts 6 and 7 extend to England and Wales, Scotland and Northern Ireland²⁵⁶

Each devolved jurisdiction has the territorial limit on its legislative competence set out above. So for example, the Northern Ireland Assembly can only enact legislation for Northern Ireland. It has no competence to enact legislation for any other part of the UK. This territorial limitation is contained in the legislation establishing the devolved legislatures, but it is not stated in the legislation that they enact. So, legislation of devolved legislatures will include "Northern Ireland", "Scotland" or "Wales" in the title, but will not contain an express statement anywhere "this Act only extends to Northern Ireland / Scotland / Wales". It could therefore be thought that if the geographical name appears in the title, the reader will know that the legislation only extends to that area. Unfortunately, this is not so. An Act may be UK wide even if a particular name appears in the title. For example, the

²⁵⁵ Law Commission, 'Form and Accessibility of the Law Applicable in Wales' (Law Commission 2015) Consultation Paper No 223 15.

²⁵⁶ This is a slight simplification of s. 60.

Corporation Tax (Northern Ireland) Act 2015 forms part of the law of England and Wales, Scotland and Northern Ireland (it was passed by the Westminster Parliament). But the Air Passenger Duty (Setting of Rate) Act (Northern Ireland) 2012 only forms part of the law of Northern Ireland (it was passed by the Northern Ireland Assembly).

This is all very confusing for the reader. In order to know if a statute applies in the area they are situated in, they need to know about extent clauses, which legislature made the statute and the territorial limitations of that legislature. These are not pieces of information that the casual reader of statutes would have access to.

Two solutions are suggested to remedy this: a presentational one and a drafting one. The presentational solution is one already adopted by the official government website on legislation. This is that the legislation is displayed with additional information set out along side it setting out geographical extent. This way the reader can see at a glance to which part of the UK it applies. Subscription databases such as Westlaw also provide this service.

The drafting solution is to expressly include the geographical extent of legislation in section, chapter or part titles. For example, s. 26ZB of the Children Act 1989 is entitled 'Representations: further consideration (Wales)' and the cross head before section 79N of that Act is entitled 'Inspection: England'. This immediately tells the reader what geographical area the legislation is relevant to.

2.3.7 Aspect 5 – legislation in context

The system needs to be able to cite these legal provisions in context. If another piece of information (legislative or otherwise) would help the reader to understand a law, it would be helpful if the reader were made aware of that information. The Interim Woolf Report expressed this aspect as follows:

Eventually, fully integrated legal information systems will combine legislation, case law and specialist commentary, all structured in such a way that users will be able to find their way more easily through these materials.²⁵⁷

There are several elements to this. Firstly, it means internal links within a statute to other relevant parts of that statute. For example, if a rule in s. 5 refers to an exception in s. 10, there could be a hypertext link within s. 5 to s. 10. The National Archives and the Office of the Parliamentary Counsel carried out research in 2012 /2013 on how users interacted with The National Archives website. Bertlin has summarised some of the results of this²⁵⁸ and some of them have been referred to by

²⁵⁷ Lord Woolf, 'Access to Justice: Interim Report' (1995).

²⁵⁸ Alison Bertlin, 'Clarity in Drafting: How Can We Know What Works Best for the Reader?' (Cape Town, April 2013).

the Cabinet Office.²⁵⁹ One finding was that users are not familiar with the structure of legislation, for example division into sections and schedules. Internal links help overcome lack of familiarity with legislative structure. So if a section refers to a schedule then at a very basic level there could be a hypertext link to that schedule.

Secondly, there could be external links to other statutes that are relevant to the statute being used. Most obviously, where primary legislation grants a power to make secondary legislation, there could be a link to each statutory instrument made under that power. Also obvious is that where a statute refers to another statute, there could be a link to that other statute. External legislative links are easier to conceive of where there is a direct textual reference to the provisions of another Act. They are much more difficult if there is no textual reference to the other statute but that other statute remains fundamentally relevant.

Take the example of section 203 of the Planning Act (NI) 2011. That section provides for the establishment of the Planning Appeals Commission. If the government were to wait until s. 203 comes into force before appointing members, then there would be a long delay before the Commission could hear cases. It might be useful to appoint members in advance, before the section becomes operative. The power to make appointments in advance of an enactment coming into force already exists and is contained in s. 16 of the Interpretation Act (NI) 1954. Therefore, s. 16 of the 1954 Act is relevant to s. 203 of the 2011 Act, even though there is no direct textual reference connecting the two provisions.

This requires a certain amount of subjective judgement and is less easy to satisfy automatically. For example, if one legislative provision establishes a new legal entity, is it necessary to link it to every other section setting out the powers of that entity?

Thirdly, the legislation could have external links to non-legislative information which is relevant to the statute being used. Explanatory Notes are designed to assist the reader in understanding legislation, but do not form part of the legislation themselves. Jenkins, former First Parliamentary Counsel in the UK, recommended that 'to make [Explanatory Notes] as widely accessible as possible, they would be made available on the internet alongside the Bill and subsequently the Act'.²⁶⁰

In addition to the non-legislative information suggested by Woolf above, there could also be links to Parliamentary debates, official forms, Departmental guidance, House of Commons Library Briefing Papers on Bills, etc. Irresberger states that if legislation allows for 'acceptable means of compliance',

²⁵⁹ Office of the Parliamentary Counsel, 'When Laws Become Too Complex - Inside Government' (n 144).

²⁶⁰ Sir Christopher Jenkins KCB QC, Second Report of the Committee on the Modernisation of the House of Commons, HC 190 (1997-1998). Appendix, paragraph 19.

then those means must also be included or linked in some way to the legislation, otherwise accessibility is incomplete.²⁶¹ Watkin lauded the inclusion of the Convention on the Rights of the Child within a Welsh statute as 'a reader of the Measure would be able to discover what had been incorporated without having to seek out the text of the Convention and Protocols from another source'.²⁶² Occasionally, during a debate on a Bill, a Minister won't be able to answer a point raised by a legislator and undertakes to answer the point in a letter at a later date. Greenberg points out that although the promise to write will be contained in the Hansard report, the actual letter won't. He argues that this letter should also be linked, in some way, to the proceedings in Parliament.²⁶³ There is the potential for different levels of access to this information, i.e. some items restricted for internal government use.

There are two methods for generating these links. The traditional way is the top-down approach where civil servants think through what they consider relevant to an Act and then create the links. The more innovative (and riskier) way is to use some Big Data concepts and allow links to be influenced by the choices previously made by users. For example, if people who look at the Companies Act 2006 also usually look at the Insolvency Act 1986, then the system could automatically suggest that a reader of one also may find the other useful.

This desirability of making contextual information available is increasingly important with the rise of quasi-legislation.²⁶⁴ Quasi legislation is difficult to define, but it is essentially something that can have a legal effect without being itself legislation. Codes of practice, administrative rules, official guidance, memorandums of understanding, these are all examples of quasi legislation. Sometimes these may have statutory authority or be referred to in legislation. They can have a critical effect. For example, the codes of practice referred to in the Human Transplantation (Wales) Act 2013 set out guidance on how to handle family disputes in cases of organ donation after death. Accessibility of legislation extends to access to this type of relevant material also.

The court has recognised the importance of additional contextually relevant material. It stated in *R (Salih) v Secretary of State for the Home Department* [2003] EWHC 2273 (Admin) that

²⁶¹ Karl Irresberger and Anna Jasiak, 'Publication', *Legislation in Europe: A comprehensive guide for scholars and practitioners* (Hart 2017).

²⁶² Watkin, 'Bilingual Legislation' (n 227) 122.

²⁶³ Daniel Greenberg, *Laying down the Law: a Discussion of the People, Processes and Problems That Shape Acts of Parliament* (Sweet & Maxwell 2011) 54.

²⁶⁴ HE Broring, 'Administrative Rules in British Law' (1994) 1 *Maastricht Journal of European and Comparative Law* 273.

it is in general inconsistent with the constitutional imperative that statute law be made known for the government to withhold information about its policy relating to the exercise of a power conferred by statute.

How far this extends is a question of degree. Official guidance drawn up by government in accordance with a statute does seem like precisely the kind of information that should be accessible alongside the legislation. However, what about guidance drawn up by private bodies which is referred to in the legislation? This issue arose in the Dutch Copyright Act. The Dutch Supreme Court ruled that this guidance did not constitute 'legislation' and was therefore not subject to the copyright provisions that ordinarily applied to legislation.²⁶⁵ Although this decision may be correct in the narrow sense that guidance produced by a private body is not legislation, it is submitted that it is incorrect if it leads to such guidance being inaccessible. If it is directly relevant to the law, if it colours the way the law is applied, then it ought to be accessible alongside the law.

Another example is the memorandum of understanding on the role of regulators of financial services industry. Section 3E of the Financial Services and Markets Act 2000 obliges regulators to prepare a memorandum of understanding setting out their role. This must be given to the Treasury and laid before Parliament. It is clearly an important document, referred to in primary legislation, but it is not available alongside that legislation. This goes against the rule of law requirement of accessibility.

2.3.8 Aspect 6 – findability

Morville defined findability in 2005 as follows:

- The quality of being locatable or navigable.
- The degree to which a particular object is easy to discover or locate.
- The degree to which a system or environment supports navigation and retrieval.²⁶⁶

Lavery used the word in a legal context a long time ago, considering a lawyer with a legal question, 'somewhere in that vast storehouse of the law is the answer to his problem, but he cannot find it'.²⁶⁷ For Lavery the problem was the volume of law piling up, making it harder to find the desired nugget of legal information.

This requirement is the hardest to satisfy – the user ought to be able to retrieve the legislative answer to their question from the database, even if the user does not know which piece of legislation contains the answer. If we start from the proposition that the user knows which section in which Act contains the answer to the question, it is relatively easy to design a legislation database

²⁶⁵ Rob van Gestel, 'Primacy of the European Legislature? Delegated Rule-Making and the Decline of the "Transmission Belt" Theory' (2014) 2 *The Theory and Practice of Legislation* 33.

²⁶⁶ P Morville, *Ambient Findability: What We Find Changes Who We Become* (O'Reilly 2005).

²⁶⁷ Urban Lavery, 'The "Findability" of the Law' (1943) 27 *Journal of the American Judicature Society* 25.

which can quickly point to that section in that Act. However, the user may not always know the relevant section or indeed the relevant Act. The electronic system needs to facilitate easy access to help find the answer. For example, if the police arrest a child in Northern Ireland and decide not to release the child on bail, where must the child be placed in detention? The answer is contained in Article 39(8) of the Police and Criminal Evidence (NI) Order 1989. For the system to be effective, it must be able to display an accurate and up to date version of Article 39(8). But it must also be able to indicate to the user that the answer is contained within Article 39(8).

Findability flows into the drafting principle of navigability. Findability means the ability to find a particular piece of information whereas navigability relates to the ease of moving around the statute book. The drafting principles assisting findability are discussed below in relation to navigability. The basic concept for the drafter to bear in mind is to make it as easy as possible for the reader to find the information they are looking for.

2.3.9 A fully electronic system?

The six aspects listed here all have the basic assumption that a human is looking at legislation on the official government website. However, there is the potential for more advanced, computer-assisted methods of interaction. Computers could scan the website for relevant legislative information, process it and present it in a different format away from the website. For example, a business providing company formation services could mine companies legislation for relevant provisions to reproduce on its own expert advice systems. This ability would be enhanced by a logical and coherent addressing mechanism for storing legislation on the official government website.

I hesitate before setting this out as aspect 7 – that a legislative system must be fully machine readable. However, it is likely to become an increasingly important dimension of electronic access to legislation. The European Union has made recommendations on this point in Council Conclusions Inviting the Introduction of the European Legislation Identifier.²⁶⁸ The problem identified by the EU is a diversity of electronic legislation systems across the EU – ‘this hampers the interoperability between the information systems of national and European institutions’.²⁶⁹ The solution is the European Legislation Identifier (ELI), a standardised ‘code’ for referring to legislation. It attempts to standardise Uniform Resource Identifiers (URIs) for legislation. URIs are essentially methods of creating addresses for web pages. In principle a sound URI taxonomy, combined with adoption of ELIs, means that both humans and computers will find it easier to access and use online legislation.

²⁶⁸ 2012/C 325/02

²⁶⁹ *Ibid.* paragraph 6.

2.4 Navigability

Legislation is more accessible if it is navigable. By navigable, I mean that the user can easily move around legislation, can easily get from one part of it to another. Thornton sees the benefit if users can ‘find their way around the statute without difficulty’.²⁷⁰ (Spencer objects to the premise on which this is based – that different criminal law provisions are ‘scattered’ around the statute book rather than being in the same place.²⁷¹) This is related to findability (the ability to find a relevant provision) but also has to do with the structure, the architecture of the legislation. The closest analogy is of mapped and unmapped terrain. If there is no map, no signposts, no roads, it is very difficult for the traveller to get around, or to know the terrain. By contrast, with a map, good signposts and roads, the traveller can easily reach a destination. Well mapped legislation is more navigable and therefore more accessible, it allows ‘users to find their way more easily around the statute’.²⁷² Navigability relates to individual statutes as well as to the statute book as a whole, so the users must be able to find the statutes they are looking for, as well as the individual provisions within those statutes. In fact, a former First Parliamentary Counsel has adopted this language of navigability:

our legislation, complex as it is, needs a map. Lawyers have been trained in a sort of informal, passed-down map that lets you surf the wonderful web that is the statute book. But what about non-lawyers?²⁷³

2.4.1 Short titles

The short title of an Act contributes to the navigability of the statute book by

- a) indicating the content of an Act, and
- b) assisting in the logical ordering of the statute book.

A title conveys meaning by being short and descriptive. It assists in the arrangement of the statute book by tessellation – fitting in harmoniously with what is already there.

The descriptive aspect of titling legislation is under threat. The trend seems to be a movement from pure description, through to rhetoric as a way of persuading legislators to vote for a Bill, to bare-faced political sloganeering. The best short title (in terms of navigability) is the one which is

²⁷⁰ Thornton and Xanthaki (n 66). 204.

²⁷¹ Spencer (n 217).

²⁷² Duprat and Xanthaki (n 111) 120.

²⁷³ Richard Heaton, ‘Innovation and Continuity in Law-Making’ (Institute of Advanced Legal Studies, 2014) <<https://www.gov.uk/government/speeches/innovation-and-continuity-in-law-making>> accessed 20 January 2016.

politically neutral and best encapsulates the content of the Act in as pithy a way as possible. Duprat calls it ‘a tool indicating the main issue under regulation’.²⁷⁴ Orr charts how in Australian titles have become more and more tendentious, observing ‘a loss of descriptiveness in titling in favour of an image-conscious and rather cynical form of political rhetoric’.²⁷⁵ The classic US example is the USA PATRIOT ACT, which is actually an acronym for Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act. It is a political argument masquerading as a piece of legislation. Another argument against propagandist titles is that they clamp down on proper political debate – how can a true patriot vote against the USA PATRIOT Act? Strause sees this as a problem with naming conventions in American statutes, that they bring ‘the law, and perhaps the lawmakers, into contempt by seeming too narrowly partisan’.²⁷⁶

This affliction of propagandist titles is global. In Australia there was the Roads to Recovery Act 2000 which is about funding expenditure on roads. The title was chosen to align with a political slogan and is criticised by Orr for being a ‘corny pun’. In Canada there is the Standing up for Victims of White Collar Crime Act which amends the criminal law in respect of sentencing for fraud. The Roads (Funding) Act and the Fraud (Sentencing) Act may have been more appropriate. In Uganda, legislators didn’t like the title of the Marriage and Divorce Bill for religious and moral reasons. A leading daily paper called for it to be renamed the Marriage and Family Relations Bill.²⁷⁷ Thankfully the drafters were successful in arguing that if it was about divorce, then divorce should be in the title.

But is this criticism too harsh? Drafters live in the real world, and in the real world, legislation must pass (as razors must sell).²⁷⁸ In order to pass, a Bill must be politically persuasive. After all, legislation also represents political vision turned into law. The Criminal Justice Act (No. 2) 2003 may not inspire political interest, but the Hang Child Killers Act 2003 will. Jones has carried out some fascinating empirical research into this, and his unsurprising findings where that people are more likely to be in favour of a Bill if it has an ‘evocative’ title rather than a ‘descriptive / technical’ title.²⁷⁹

²⁷⁴ Duprat and Xanthaki (n 111) 116.

²⁷⁵ Graeme Orr, ‘Names without Frontiers: Legislative Titles and Sloganeering’ (2000) 21 Statute Law Review 188. 189.

²⁷⁶ Renata Strause and Allyson Bennett, ‘How Federal Statutes Are Named’ (2013) 105 Law Library Journal 7, 30.

Graeme Orr, ‘From Slogans to Puns: Australian Legislative Titling Revisited’ (2001) 22 Statute Law Review 160.

²⁷⁷ ‘Marriage Bill Should Help Couples Remain Together’ <<http://www.newvision.co.ug/news/640738-marriage-bill-should-help-couples-remain-together.html>> accessed 5 May 2015.

²⁷⁸ George Engle, ‘“Bills Are Made to Pass as Razors Are Made to Sell”: Practical Constraints in the Preparation of Legislation’ (1983) 4 Statute Law Review 7.

²⁷⁹ Brian Christopher Jones, ‘Manipulating Public Law Favorability: Is It Really This Easy?’ (Social Science Research Network 2013) SSRN Scholarly Paper ID 2336895 <<https://papers.ssrn.com/abstract=2336895>> accessed 7 July 2017.

However, in my view, this is precisely where the legislative drafter should have a role. Protecting the rule of law is more important than a transient political slogan.²⁸⁰ Drafters should seek to resist government ‘spin’ in the wording of legislation.²⁸¹ A slogan may help an Act to pass, but this is only one instance in the life-cycle of an Act. For years to come, readers will have to struggle to navigate badly titled law.

The UK is doing quite well in this regard. Although there is always a political desire towards catchy names, by and large short titles here are relatively straightforward. In fact, in Scotland, the guidance expressly refers to this, stating that the text of a Bill ‘including both the short and long titles – should be in neutral terms and should not contain material intended to promote or justify the policy behind the Bill, or to explain its effect.’²⁸² According to Erskine May ‘the short title must describe the content of the bill in a straightforwardly factual manner. An argumentative title or a slogan is not permitted’.²⁸³

Being neutral doesn’t necessarily mean being boring. Contrast approaches in Hong Kong and Australia to the same problem of junk emails. In Hong Kong the legislation is the Unsolicited Electronic Messages Ordinance, whereas in Australia it is the Spam Act. Both are good and accurate titles, but the Hong Kong one is more legalistic and perhaps stuffy. The Australian one is much more quotidian and instantly tells all readers what it is about.

The tessellation argument is not one that is often made in the context of legislation. Tessellation means that the individual pieces of a mosaic fit together without gap or overlap. In the context of the statute book it means that the statute book fits together as a whole, that it is coherent. To assist in the logical ordering of the statute book, titles must follow an agreed format. They must make it easy to fit a particular statute within the general scheme of the statute book. This will help any indexing or referencing system as well as making it easy for the user to see at a glance if a particular statute falls within a group of statutes. So for example, in Northern Ireland there is the:

- Housing (NI) Order 1976
- Housing (NI) Order 1978
- Housing (NI) Order 1981
- Housing (NI) Order 1986
- Housing (NI) Order 1988
- Housing (NI) Order 1992

²⁸⁰ Greenberg, *Laying down the Law* (n 92) 54.

²⁸¹ Daintith and Page (n 69) 254. Daintith gives examples of these struggles at 253, 254.

²⁸² Directorate of Clerking and Reporting, *Guidance on Public Bills* (3rd edn, The Scottish Parliament 2007).

²⁸³ Malcolm Jack and others (eds), *Erskine May: Parliamentary Practice* (24th Revised edition, Butterworths Law 2011). 527.

- Housing (NI) Order 2003
- Housing (Amendment) (NI) Order 2006

The reader can easily identify these in an alphabetical index of statutes, as O'Brien says, 'one of the main purposes of the short title is to locate the legislation in the statute book'²⁸⁴. The reader also knows that any new legislation called the Housing Order will deal with the same subject matter as these existing orders. But if a new statute was called the Buildings for Residential Use Act, this would immediately make the statute book much less navigable. In this context, the keyword is consistency. Legislation dealing generally with the same subject matter must have generally the same name.

As ever though with drafting decisions, there is a balance to be struck. Sometimes the old name will be inappropriate. For example, in Victorian times in Ireland it was acceptable to have the Lunacy Regulation (Ireland) Act 1871. Now this language is seen as offensive and the modern title is the Mental Health (NI) Order 1986.

Personalised names in legislative titles cause problem with this. For example, in the US, there is the Lily Ledbetter Fair Pay Act, named after a famous litigant in an employment case. Legislation can also be named after victims, for example Megan's Law. It can be named after politicians closely connected with it, for example the Landlord and Tenant (Amendment) Act (Ireland) 1860 is more commonly called Deasey's Act after the Irish Attorney General. This is sometimes done posthumously, as a mark of respect, for example the Ronald W Reagan National Defence Authorization Act for Fiscal Year 2005. Jim Allister MLA in discussing a Bill before the Northern Ireland Assembly stated 'whereas the Bill must officially be called the Civil Service (Special Advisers) Bill, I trust that, in common language, it will, if passed, become known as "Ann's law"'.²⁸⁵ This was in tribute to a particular victims' campaigner. Jones has written about the different approaches to what he calls 'humanised' titles in the USA and the UK.²⁸⁶ He concludes that the UK establishment zealously guard the 'neutral names' approach. This non-personalised approach to short titles is one which is in accordance with the rule of law.

An additional problem is the overly broad and bland Act title. We know the Crime and Courts Act 2013 is about criminal law, but we don't know much more than this. We know the Northern Ireland (Miscellaneous Provisions) Act 2013 is about Northern Ireland, but we don't have an idea about the

²⁸⁴Paul O'Brien, 'Legislative Titles - What's in a Name?' [2012] *The Loophole* 17.20. One key recommendation of the New Zealand Law Commission was that statutes be indexed, Law Commission, *Presentation of New Zealand Statute Law* (n 179). iv.

²⁸⁵ Official Report (Hansard) Session 2012/2013, Monday 3 June 2013.

²⁸⁶ Brian Jones, 'Transatlantic Perspectives on Humanised Public Law Campaigns: Personalising and Depersonalising the Legislative Process' (2012) 6 *Legisprudence* 58.

details. There isn't very much the drafter can do about this generally. Sometimes an Act will deal with a broad subject and make lots of different amendments to different aspects of that subject. If we were to list everything that the Act dealt with, it would be far too long a title. For example, a more descriptive short title for the Northern Ireland Act would be the Northern Ireland (Political donations, Assembly membership, Justice Minister, Excepted and Reserved Matters, Electoral Matters etc.) Act 2013 – this is obviously far too long to be of any real use. But sometimes we can be more specific, for example most legislation amending criminal justice is often called the Criminal Justice Act, but we also have the Criminal Justice (Evidence) (NI) Order 2004 – as that Order only deals with criminal evidence, the title can be more specific. There is no easy answer for the drafter here, the drafter has to balance three things: keeping the short title short, indicating its content, and promoting indexing of the statute book.

2.4.2 Omnibus bills

The section above discussed the dangers of bills dealing with a broad subject and having a bland title. Much more problematic are omnibus bills – ‘a massive bulk of unrelated rules modifying numerous existing statutes’.²⁸⁷ In the UK, these are sometimes termed ‘Christmas tree bills’ as there is something for everyone on them.²⁸⁸ Popelier calls it ‘mosaic legislation’.

An omnibus Bill makes navigation of the statute book very difficult. The reader has no idea of what an omnibus Bill may contain. Its title will not convey meaning and will not assist in the logical ordering of the statute book. An omnibus Bill is there for the benefit of legislators, not of citizens. In Belgium they are called ‘Programme Laws’ or ‘Law holding diverse provisions’ – how on earth is the user to divine content from such a broad title? Popelier directly lists the disadvantages of mosaic law ‘The Citizen’s Perspective: Accessibility of Law’.²⁸⁹ In Israel these are called “Arrangement Laws” and the Israeli Supreme Court heard objections about these been railroaded through the Knesset.²⁹⁰ Although that case (as Bar-Siman-Tov points out²⁹¹) was about procedural rationality in law making, it also illustrates the difficulty with navigability of the statute book. The Supreme Court in Israel has

²⁸⁷ Patricia Popelier, ‘Mosaics of Legal Provisions’ (2005) 7 *European Journal of Law Reform* 47.

²⁸⁸ Office of the Parliamentary Counsel, ‘When Laws Become Too Complex - Inside Government’ (n 144).

²⁸⁹ Popelier (n 287).

²⁹⁰ HCJ 4885/03 *Isr. Poultry Farmers Ass’n v. Gov’t of Isr.* 59(2) PD 14 [2004] (Isr.), translated in 2004 *Isr. L. Rep.* 388 (2004).

²⁹¹ Ittai Bar-Siman-Tov, ‘The Dual Meaning of Evidence-Based Judicial Review of Legislation’ (Social Science Research Network 2016) SSRN Scholarly Paper ID 2818007 <<https://papers.ssrn.com/abstract=2818007>> accessed 7 July 2017.

ruled 'Arrangements Law' as unconstitutional, although this is more for reasons of legislative due process than for navigability of legislation.²⁹²

An example of omnibus legislation in the UK is the Enterprise and Regulatory Reform Act 2013. The long title shows the diversity of subjects within it:

An Act to make provision about the UK Green Investment Bank; to make provision about employment law; to establish and make provision about the Competition and Markets Authority and to abolish the Competition Commission and the Office of Fair Trading; to amend the Competition Act 1998 and the Enterprise Act 2002; to make provision for the reduction of legislative burdens; to make provision about copyright and rights in performances; to make provision about payments to company directors; to make provision about redress schemes relating to lettings agency work and property management work; to make provision about the supply of customer data; to make provision for the protection of essential supplies in cases of insolvency; to make provision about certain bodies established by Royal Charter; to amend section 9(5) of the Equality Act 2010; and for connected purposes.

The sharp-eyed reader will notice a reference to the Equality Act 2010 being amended – the amendment is to make 'caste' an element of 'race' for the purposes of equality legislation. Although laudable, this has nothing to do with regulatory reform and its short title will therefore mislead the reader. It detracts from navigability and has the appearance of a provision shoved into the first available Bill. Perhaps the only time that omnibus legislation is acceptable is the Statute Law Repeal Act. These Acts repeal vast swathes of legislation that are no longer of practical utility, and usually follow recommendations of a Law Commission. Since these laws are generally obsolete anyway, citizens are not hindered by any loss of navigability.

2.4.3 Section headings

Short titles can assist in finding the Act sought. Headings within the Act can assist in finding the exact provision sought (I use the word heading as shorthand, these have also been called marginal notes, titles, sidebars etc.). For the purposes of navigability, each part, chapter, cross heading and section heading should clearly indicate its content.

Unlike short titles, section headings can be longer and more specific. Depending upon how pithily the heading can be expressed, it can be a 'content-indicator' title or a 'rule-summary' title. A

²⁹² H CJ 4885/03 *Isr. Poultry Farmers Ass'n v. Gov't of Isr.* 59(2) PD 14 [2004] (Isr.), translated in 2004 ISR. L. REP. 388 (2004), see further *ibid.*

content-indicator title gives an idea of the content of the provision, whereas a rule-summary title actually summarises the rule itself. For example, when the Civil Service (Special Advisers) Bill was introduced into the Northern Ireland Assembly, clause 2 was entitled 'special advisers not to have serious criminal conviction'. This accurately reflected the content of the rule set out in clause 2, it was an abbreviated description of the rule itself. However, as the Bill passed through the Assembly the content of clause 2 was changed and there was no longer an absolute prohibition on special advisers having a serious criminal conviction. Therefore, upon enactment, the title of that clause had changed to 'special advisers: serious criminal convictions'. The new title didn't summarise the actual rule, instead it gave an indication of the subject matter of the provision. Rule-summary titles are usually more difficult to set out than content-indicator titles as it is hard to condense most rules into one line. However, rule-summary titles make it easier for the user to know the thrust of the legislation. A combination of a well-organized table of contents and descriptive titles means that reading the table of contents can be like reading a condensed narrative of the legislation.

For constitutional and historical reasons, there is a certain ambiguity about the legal status of headings in legislation in the UK. In the past they have been viewed, not as part of the legislation enacted by the legislature, but as an editorial addition inserted by the clerks and administrative staff of the legislature.²⁹³ The actual practice of making legislation shows this to be nonsense – every part of the Bill, including all the headings, is crafted by the legislative drafter working on behalf of the legislator. However, the rule of interpretation is that section headings may be used to assist in the interpretation of the legislation, even though they are not determinative.²⁹⁴ This is an eminently sensible canon of construction as three or four words in a heading can't adequately describe the entirety of the section that follows.²⁹⁵ However, this rule does give the drafter an unusual opportunity for creativity and innovation, unburdened by the usual requirements of precision and legal accuracy. The purpose of a navigable heading is to convey meaning, not to be legally precise, therefore the drafter is relatively free to select headings which best convey meaning.

An example will illustrate this. The Northern Ireland Law Commission produced a Bill to amend the law on bail.²⁹⁶ Clause 30 of the Bill is entitled 'repeal of street bail'. But 'street bail' has no legal meaning, the correct legal term is 'bail at any place other than a police station'. Street bail is the term used in practice, it is quicker and less cumbersome, but it is legally incorrect. However, as a

²⁹³ Jack and others (n 283). 575.

²⁹⁴ Oliver Jones, *Bennion on Statutory Interpretation* (6th Revised edition, Butterworths Law 2013). 696.

²⁹⁵ Simamba discusses whether or not this is a good idea in various jurisdictions, Bilika Simamba, 'Should Marginal Notes Be Used in the Interpretation of Legislation' (2005) 26 Statute Law Review 125.

²⁹⁶ Northern Ireland Law Commission, 'Bail in Criminal Proceedings' (Northern Ireland Law Commission 2012) NILC 14.

title it works, the reader with a connection to the criminal justice world instantly knows what this provision is about. The detail of the provision uses the legally correct terminology, as it must, but in crafting the title, the drafter is freer to convey meaning. This practical example provides a partial answer to Heaton's concern that titles in legislation don't convey meaning to non-legal users.²⁹⁷ The legal lexicon (words like tort, fee simple, actionable) are familiar and relevant to lawyers, but not to non-lawyers. So in section headings it is open to us to use the demotic word, not the legally precise word.

A contrasting EU legislative provision shows the benefit of this more flexible UK approach. Article 5 of Directive 2002/58/EC is entitled 'confidentiality of these communications' and paragraph 3 of that Article begins

Member States shall ensure that the use of electronic communications networks to store information or to gain access to information stored in the terminal equipment of a subscriber or user is only allowed on condition that the subscriber or user concerned is provided with clear and comprehensive information in accordance with Directive 95/46/EC, inter alia about the purposes of the processing, and is offered the right to refuse such processing by the data controller.

How much more navigable would this provision be if it was entitled 'no cookies without consent'? Most computer users know that websites store information about these users every visit, and this information is colloquially known as a 'cookie'. The reader would instantly know the gist of the provision if 'cookie' appeared in its title. In fact the word 'cookie' even appears several times in the recital of the Directive, how much better if had worked its way into the law itself.

2.4.4 Structure

An Act is more navigable if it is organized and structured²⁹⁸ – but what does this actually mean in practice? It means that users can see at a glance the general thrust of the Act and see, again at a glance, which provisions are relevant to them. Voermans distinguished between 'structure' (division of legislation, referencing) and 'superstructure' (relation to other legislative texts, hierarchy) but I include both these here within my use of the word structure.²⁹⁹ Voermans went on to say that 'the structure of an Act can act as a road map for users who want to find the relevant provisions'.³⁰⁰

²⁹⁷ Heaton (n 273).

²⁹⁸ Thornton and Xanthaki (n 66).

²⁹⁹ Wim Voermans, 'Style of Legislation and Their Effects' (2011) 32 Statute Law Review 38. 41.

³⁰⁰ *ibid.* 47.

Onoge also saw structure as extremely important, writing that ‘careful layout and design of legislation is as important as clear language’.³⁰¹

Unless an Act is extremely short, it should have a table of contents (sometimes referred to as arrangement of sections, or contents). Like a short title, a table of contents gives the reader the gist of the Act, it also sets out the scope of the Act. So, although the Crime and Courts Act 2013 is a very broad title, looking at the table of contents reveals it is about the National Crime Agency, administration of justice, self-defence etc.

Structure is helped immeasurably by divisions and sub-divisions of the legislation – as Duprat notes it is to make ‘the provisions easily seen by the public and to simplify the interpretation of enactments’.³⁰² Related material should be grouped together and listed under a separate heading. Related headings should also be grouped together and listed under larger headings. The UK taxonomy is of Parts, divided into Chapters, divided into cross headings. It is not necessary to have each of these tiers in a single Act – a short Act may only have cross headings, whereas a larger one may have multiple Parts, Chapters and cross headings. The more topically different provisions are, the higher up the tier the divisions should be. For example, in the Water Act 2014, Part 1 deals with the water industry. This is conceptually very different from provisions on flood insurance, so it is quite right that flood insurance is dealt with in Part 4. Therefore the reader interested in the new law on flood insurance doesn’t have to wade (pun intended) through the other water provisions in the Act, but can jump straight to Part 4.

Different writers have suggested different ways to structure legislation. For example, Thring suggested stating the law first and then how the law was to be administered.³⁰³ He suggested including the standard provisions first and then the special or more complicated ones. It is also possible to take a chronological approach, such as setting out in order the steps with which a user must comply in order to satisfy a particular administrative hurdle. For example in Part 2 of the Companies (Guernsey) Law, 2008, the first cross heading is ‘conditions precedent to incorporation’ and the second cross heading is ‘incorporation of a company’. Bergeron suggests having permanent provisions first and temporary provisions later.³⁰⁴ This practice is followed nearly all the time in the UK, where transitional provisions or transitory provisions appear at the very end of a statute. Bentham wanted to separate the ‘imperative’ provisions (which would be short and come first) from

³⁰¹ Elohor Stephanie Onoge, *Structure of Legislation: A Paradigm for Accessibility and Effectiveness* (Unpublished LLM thesis 2014).

³⁰² Duprat and Xanthaki (n 111) 119.

³⁰³ Thring, *Practical Legislation: The Composition and Language of Acts of Parliament* (n 135).

³⁰⁴ R Bergeron quoted in Xanthaki, *Drafting Legislation*, (n 3). 65.

the 'expository provisions' which would be longer, contain more explanatory material and come later.³⁰⁵

Xanthaki proposes an innovative approach to structure, what she calls the layered approach.³⁰⁶ Under this structure, legislation is drafted in different layers, corresponding to the different users of it. So Part 1 is for the lay people and sets out the basic regulatory message of the law. Part 2 is for non-legal professionals and sets out a greater amount of detail that they would need to have access to. Part 3 deals with issues of interpretation, application, amendments, repeals etc. It is for those lawyers who need to know the precise details of every last provision.

As with all these drafting principles, they are only guides and can be over-ridden. For example, in the Telecommunications Act 1984, there is provision vesting property belonging to British Telecommunications in a successor company. Normally this sort of transitional provision is relatively unimportant and is included as a schedule at the end of the statute. However, as it was considered of crucial economic and political importance, it appeared in the body of the statute, not at the very end. The key point for the drafter is to choose a structure and an ordering of provisions that makes it as easy as possible for the reader to find their way through the statute.

The other difficulty with maintaining a sound and coherent structure is amendments, both amendments to a Bill as it passes through the legislature³⁰⁷, and amendments to an Act after it is made. These can often wreck a carefully balanced piece of legislation by forcing new provisions in to a structure that was not designed to accept them. The Aristotelian idea of the perfectly structured statute doesn't work when faced with the grubby realities of making political law in a political legislature. One thing that the drafter can do however, is to strongly counsel that the Bill as introduced into Parliament is the finished product, at least from the government's perspective. Introducing a Bill that even the government knows to be incomplete is a good predictor of a Bill that will be structurally unsound, with subsequent amendments stretching it out of shape. The more pre-legislative scrutiny and consultation, the less likely that the introduced Bill's structure will be deformed by amendments as it passes through the legislature.

2.4.5 Parallel structures

If an Act regulates two or more similar activities or entities in similar ways, it is made more navigable if it adopts parallel structures for that regulation. A parallel structure means that the same approach and headings (so far as possible) are used for each entity. This makes it easier for the user to follow,

³⁰⁵ Bentham, *An Introduction to the Principles and Morals of Legislation* (n 9).

³⁰⁶ Xanthaki, *Drafting Legislation*, (n 3). 76.

³⁰⁷ Greenberg, *Laying down the Law* (n 92).

and they can also quickly see where the regulation differs. This is the approach taken in the Companies (Guernsey) Law, 2008. Listed below are cross headings and section headings for Part XXVII (Protected Cell Companies) and Part XXVIII (Incorporated Cell Companies). This approach makes it easier for readers to compare and contrast these two different types of company than if the structure adopted had been wildly different.

PART XXVII PROTECTED CELL COMPANIES	PART XXVII INCORPORATED CELL COMPANIES
<i>Formation</i>	<i>Formation</i>
437. Companies which can be protected cell companies	468. Companies which can be incorporated cell companies
438. Consent of Commission required	469. Consent of Commission required
439. Determination of applications to and other decisions of Commission	470. Determination of applications to and other decisions of Commission
440. Appeals from determinations and other decisions of Commission	471. Appeals from determinations and other decisions of Commission
	472. Incorporation of incorporated cell
<i>Status</i>	<i>Status</i>
441. Status of protected cell companies	473. Status of incorporated cell company
442. Creation of cells	474. Status of incorporated cell
443. Demarcation of the core	
444. Cell shares and cell share capital	
<i>Assets and liabilities</i>	<i>Separate nature of incorporated cell company and its incorporated cells</i>
445. Cellular and core assets	475. Separation of assets and liabilities
445. Protected assets	476. Transactions

In a similar way, provisions establishing a body in legislation generally take a similar approach: setting out how people are appointed to the body, their salary, staff, reporting arrangements, budgeting, pensions, procedure, status, termination of membership etc. If a new body is set up, the reader would expect to see similar provisions in a similar order. This is not an argument for blindly following precedent – it is an argument for assisting readers by using a structure with which they will be familiar.

2.4.6 Signposting

A statute is a single document that only makes full sense if read as a whole. In the same way that one line from a recipe doesn't make for the meal, one section from an Act doesn't explain the Act in its entirety. In a short Act, the connection between sections is clear and obvious, and there is no need for any aids to make it more navigable. But in a longer Act, there may be a gap between two related sections – a section may make more sense if read in conjunction with another provision which may be in a different part of the Act. Take a simple example: section 10 sets out an offence and section 11 sets out the defence. It is easy for the reader to navigate from one to the other. But what if sections 10 to 15 set out the offences, and sections 30 to 32 set out the defences? Suddenly we have reduced navigability, we have made it more difficult to readers to link together important information.

There are a number of drafting solutions to this. Firstly, there is the age-old drafting adage of keeping like material with like. Thring, for example, recommends keeping provisions declaring the law together, and keeping them separate from provisions relating to the administration of the law.³⁰⁸ The difficulty with this is that a provision may be 'like' one provision in one way, but 'like' a different provision in another way. For example, we could put all offences together because they are like each other, or we could put an offence relating to a particular subject next to the other material on that subject. This is a zero-sum game – if we put two like sections together, we automatically displace another like section and push it further away. This may be an unavoidable consequence of the interconnectedness of legislation. The rules of interpretation tell us that we can't read provisions in isolation, we need to read the entire Act.

The next solution is to try to place all relevant material together in a single section. And if material is relevant to more than one section, it can be repeated in each of those sections. There are two problems with this. Firstly, we will dramatically extend the length of each individual provision. So, section 1 will be 10 pages long as it includes the rule, the exceptions, the defences and the definitions. A 10 page section is far too long to be easily comprehensible (see further Chapter 4). Secondly, it can be repetitive and increase the chance of making copying errors. For example, if the same definitions apply to the first five rules, it would seem silly to repeat them in each of the first five rules. Even worse, we increase the risk of future drafting errors. Say that next year we want to amend one of these definitions, we will have to amend it 5 times in 5 different places, and hope that we make exactly the same amendment in each place.

³⁰⁸ Thring, *Practical Legislation: The Composition and Language of Acts of Parliament* (n 135).

The third drafting solution to this is signposting – pointing the reader to where the other relevant provisions are. So, section 1 could be set out as follows.

- ‘1. (1) This is the rule.
- (2) But this is subject to –
- (a) the exceptions in section 5, and
- (b) the defences in section 10.
- (3) The elements of the rule set out below are defined in section 50 –
- (a) element A,
- (b) element B.’

This puts the user on notice that there is a context to the rule, and that the rule can’t be read in isolation. The reader is signposted to further relevant provisions. This is especially helpful for non-lawyers, particularly those not familiar with the standard structure of legislation, including its use of interpretation sections for definitions or schedules.³⁰⁹ Signposting is a great aid to navigability.

However, there are at least two problems with signposting. The first is knowing where to stop. It is conceivable that every provision in an Act could have a bearing on every other provision in an Act – does that mean that each individual section must contain a signpost to every other section?

Extending the example above, does section 1 also need to state:

- ‘(4) The decision to prosecute a person under the rule is to be taken by the body established in section 8.
- (5) Prosecutions must be initiated within the time limits set out in section 17.
- (6) If a person is arrested under the rule, that person must be released on bail under the criteria set out in section 29.’

This creates problems of undue length and complexity.

The second problem concerns the nature of legislation. If the function of legislation is to make law, everything extraneous to that is redundant and should be excised from legislation. A signpost is not

³⁰⁹ Bertlin (n 234).

law, it only clutters up the law. As Bowman put it, quoting another drafter ‘excess matter in Bills, as in people, tends to go septic’.³¹⁰

The answer to these two problems rests in the judgement of the drafter. Balance these two problems against the need to enhance navigability. So, don’t signpost everything, just those provisions which are most directly relevant (or most likely to be otherwise missed). This will sometimes mean shoehorning in a provision which isn’t strictly necessary from a legal perspective, just to make the reader aware of it. For a good example of legislation with signposts, see the Public Services Ombudsperson (Northern Ireland) Act 2015:

Power to investigate complaints made by a person aggrieved

5. (1) The Ombudsperson may investigate a complaint, made by or on behalf of a member of the public who claims to have sustained an injustice (in this Act referred to as “a person aggrieved”), if the requirements of this section are met.
 - (2) The complaint must relate to action taken by a listed authority (see sections 12 and 13).
 - (3) The complaint must relate to a matter which can be investigated (see sections 14 to 23).
 - (4) The correct procedure must have been followed (see sections 24 to 27).

In some Australian jurisdictions, navigability is taken a stage further, by making references not just to different provisions within an Act, but to provisions in different Acts. In the example below, the unauthorised version of the Children and Young People Act 2008 (as put online by the Australian Capital Territory Parliamentary Counsel’s Office) is as follows:

356 Offence—mandatory reporting of abuse

- (1) A person commits an offence if—
 - (a) the person is a mandated reporter; and
 - (b) the person is an adult; and
 - (c) the person believes on reasonable grounds that a child or young person has experienced, or is experiencing—

³¹⁰ Bowman (n 71). 77.

- (i) sexual abuse; or
- (ii) non-accidental physical injury; and

...

Maximum penalty: 50 penalty units, imprisonment for 6 months or both.

Note 1 A person who gives information honestly and without recklessness under this section does not breach professional ethics and is protected from civil liability (see s 874).

Note 2 Giving false or misleading information to the director general is an offence (see Criminal Code, s 338).

2.4.7 Discrete or parcelled ways of consuming legal information

The classic way of thinking about legislation is the statute book – an Act written out in hard copy as one continuous document. The document is a single whole, an indivisible entity. So, when the user looks at section 10, they can't help but also see section 9 and section 11. In fact, even in flipping through to section 10, they will catch a glimpse of other provisions. This has drafting implications – the drafter can feel safe that if section 10 sets out the offence, the defences in section 11 will easily be seen by the reader.

However, this classic paradigm no longer holds true. Most legislation is consumed electronically, and most provisions are consumed individually, not as part of the whole. So the user may click to section 10, but not have sections 9 and 11 displayed alongside. This was the precise finding that Bertlin made about how individuals interacted with legislation, they clicked directly on the provision in the table of contents and went straight to that provision.³¹¹ The drafter cannot rely on serendipity to make users aware of the other relevant provisions. This makes it more important to show links between sections. So section 10, should conclude with “But this is subject to the defences set out in section 11”.

2.4.8 Highlighting defined terms

Defined terms make legislation easier to read and understand. So for example, rather than using the phrase “a person under the age of 18” throughout it, the Children Act 1989 instead uses the term “child” and then defines it in section 105. This is both a useful shorthand term and a good way of indicating meaning to the user. But what of the reader who doesn't know of the existence of interpretation sections? They may be struggling to know whether a 17 year old is a “child” for the

³¹¹ Bertlin (n 234). 45.

purposes of the Act. This is where navigability principles can assist. If a defined term is used in legislation, it can be highlighted in some way to indicate that more information is available on that term. For example, in Guernsey legislation, defined terms are in bold in the place where they are defined. This at least draws the readers eye to the term so that they have a chance of knowing that this term has additional levels of meaning attached to it. Even better would be a system whereby the casual reader would immediately be alerted to the fact that a particular word has a precise meaning, and an easy way of getting (for example via a hypertext link) to that meaning.

2.4.9 Numbering

In physics, a quantum is the smallest size of an entity possible. So a photon is a single quantum of light, incapable of being divided any further. However, in legislation, there no limit to how far the gap between two sections in a statute can be divided. So, between sections 171 and 172 of the Social Security Contributions and Benefits Act 1992, there are 54 sections. The full list is as follows:

s. 171	s. 171ZG	s. 171ZC	s. 171ZEE	s. 171ZL	s. 171ZS	s. 171ZZ	s. 171B
s. 171ZA	s. 171ZH	s. 171ZD	s. 171ZF	s. 171ZM	s. 171ZT	s. 171ZZ1	s. 171C
s. 171ZB	s. 171ZI	s. 171ZE	s. 171ZG	s. 171ZN	s. 171ZU	s. 171ZZ2	s. 171D
s. 171ZC	s. 171ZJ	s. 171ZEA	s. 171ZH	s. 171ZO	s. 171ZV	s. 171ZZ3	s. 171E
s. 171ZD	s. 171ZK	s. 171ZEB	s. 171ZI	s. 171ZP	s. 171ZW	s. 171ZZ4	s. 171F
s. 171ZE	s. 171ZA	s. 171ZEC	s. 171ZJ	s. 171ZQ	s. 171ZX	s. 171ZZ5	s. 171G
s. 171ZF	s. 171ZB	s. 171ZED	s. 171ZK	s. 171ZR	s. 171ZY	s. 171A	s. 172

The eagle-eyed reader may have spotted that sections 171ZA to 171ZE appear twice. This is explained by Westlaw as follows:

Existing ss 171ZA-171ZE moved directly under Part XIIZA on the repeal of the cross-heading "Ordinary statutory paternity pay" by Children and Families Act 2014 c. 6 Sch.7 para.11 (April 5, 2015: substitution has effect subject to transitional provisions and savings specified in SI 2014/1640 art.16)

Westlaw does a better job than the official government database of legislation, legislation.gov.uk. That database is blithely unaware that there are any numbers between 171 and 172, stating:

This is the original version (as it was originally enacted). This item of legislation is currently only available in its original format.

When subsections and paragraphs are factored in, this means that we have (for example) section 171ZZ5(3)(b) of this Act. How are end users meant to navigate through this? How are they meant to know that 171ZZ1 comes after 171ZA but before 171F? Although there is reason behind it, it just looks like gibberish to the ordinary citizen.

The Immigration Rules are worse. We have:

- Rules with a number, e.g. rule 15 is about the common travel area.
- Rules with a number with a single letter as a suffix, e.g. rule 20A is about non-lapsing leave.
- Rules with numbers with multiple letters as a suffix, e.g. rules 245ZZ to 245ZZE deal with tier 4 (child) students.
- Rules with numbers with letters as prefixes and suffixes, e.g. rules A57A – A57H deal with persons entering the UK for short term study.
- Rules with multiple letter prefixes e.g. E-ECP.3.1 deals with financial requirements.

So, in Appendix FM-SE paragraph A1 reads ‘To meet the financial requirements under paragraphs E-ECP.3.1., E-LTRP.3.1., E-ECC.2.1. and E-LTRC.2.1. of Appendix FM, the applicant must meet’. The Court of Appeal in considering Immigration Rules stated that the ‘provisions have now achieved a degree of complexity which even the Byzantine emperors would have envied’.³¹² The Supreme Court spoke of the difficulty for users ‘to navigate their way around the requirements’.³¹³

This kind of complex numbering makes legislation extremely difficult to navigate and undermines accessibility and the rule of law. Although it may make things easier for government if the same numbers remain in place through many amendments, it does not help the reader. At some point the drafter has to advise that instead of the tortuous quantum fracturing of squeezing in new numbers where none ought to exist, there should instead be a fresh restatement of the legislation containing only actual numbers. And perhaps a schoolchild can advise that there is no such number as 171ZZ5.

2.4.10 ‘Hidden’ provisions

Legislation is not a weapon to be used against the people, it is a tool to be used for their benefit.³¹⁴ Equally, it is not something to be ‘sneaked through’ the legislature, it is something to be enacted by the legislature. A statutory provision is not navigable if it is hidden somewhere within the

³¹² *Pokhriyal v Secretary of State for the Home Department* [2013] EWCA Civ 1568 at [4].

³¹³ *Mandalia v Secretary of State for the Home Department* [2015] UKSC 59 at [2].

³¹⁴ Locke (n 8).

legislation, in an unexpected place, or in a place which is out of context with its content, or with a misleading title. Thring stated that provisions shouldn't be hidden in a schedule.³¹⁵ The more important, or revolutionary a provision is, the more prominent it should be in the legislation. Take as a positive example the legislation authorising the Prime Minister to initiate the procedure for leaving the European Union. This fundamentally important provision is not buried in a schedule of a bill on restructuring government, it is section 1 of the European Union (Notification of Withdrawal) Act 2017.

An Italian example shows the pernicious use of hidden provisions. The Italian Prime Minister Silvio Berlusconi had lost a civil case and was obliged to pay damages totalling millions of Euro. He wanted to amend articles 284 and 373 of the Civil Code so that payment of damages would be suspended pending appeal to the Court of Cassation. In 2011 he inserted this amendment to the Civil Code into a budget bill which was being fast-tracked through the Italian parliament due to the financial crisis. It was spotted and removed.³¹⁶ Although this was clearly wrong as being inserted for the personal benefit of the legislator, it was also wrong as it was in the wrong place, seriously hindering navigability.

2.5 Inclusivity

For legislation to be accessible, the legislation must contain within it all relevant legal information. If a piece of legislation only includes 90% of the information on how that law is going to be applied, then this undermines the values that accessibility promotes. Spelling this out, if the statute doesn't give the citizen the full picture, then the citizen can't properly follow the law. If the citizen is held liable for something which isn't effectively disclosed within the law, this would be unfair. Citizens can't make decisions based on things outside their knowledge. There is no certainty if the individual doesn't know the rules, and it is impossible to hold parliament to account for a rule if parliament hasn't fully set out the rule in the legislation. From this is derived the drafting principle of inclusivity. By this I mean that the legislation must itself include a reasonably complete statement of all the rules and other matters which affect its application. Nothing extraneous to the legislation should undermine the meaning of that legislation.

Inclusion can be direct by means of the legislation physically containing the material, or indirect, by means of the legislation including a reference or pointing to the material. The reader ought not to

³¹⁵ Thring, *Practical Legislation: The Composition and Language of Acts of Parliament* (n 135).

³¹⁶ Giovanni Negri, 'Nella Bozza Della Manovra Sospensione per Le Condanne Superiori a 20 Milioni. Vi Può Rientrare Il Lodo Mondadori' *Il Sole 24 Ore* (4 July 2011).

be surprised by the legislation applying in a way that isn't disclosed or easily inferable from the face of the legislation. In fact, this is already a ground for parliament to question subordinate legislation – if 'it appears to make some unusual or unexpected use of the powers conferred by the statute under which it is made'.³¹⁷

If this happens, then the statute as it appears on screen is misleading and the legislation isn't truly accessible. This chimes with Thring's comment over a century ago that readers ought not to 'have to look beyond the four corners of the Bill in order to comprehend its meaning'.³¹⁸ This drafting principle can be summed up as follows – if it is important, or if it will colour how the Act will be applied, then it should go into the Act.

This is related to aspect 5 of availability – legislation in context. The drafter can't make sure that contextually relevant material is linked to the statute as it appears on screen. However, the drafter does have a role in ensuring that such material is included (either directly or indirectly) in the legislation. This is a key legislative drafting principle - that the legislation ought to include all important relevant information. Readers ought to have a reasonable idea of how the law will be applied in practice and know what other sources of information will shed light upon this application. Set out below are three examples of the kinds of situations where this principle is not respected.

2.5.1 Tax legislation and extra-statutory concessions

It is a fundamental principle of UK tax law that we can only be taxed in accordance with legislation laid down by Parliament.³¹⁹ However, for at least 100 years, we can now be 'untaxed' (or excused of an obligation to pay tax) by an Extra-Statutory Concession granted by the government.³²⁰ As its name indicates, this is a situation, not provided for in legislation, where the government does not insist on applying the full rigour of the law, and thus reduces the tax liability of an individual. ESCs have been given (sometimes begrudgingly) a seal of approval by the judges.³²¹

Extra-statutory rules are anathema to the general principle of the rule of law that we are all subject to law. They are also anathema to the element 1 of Bingham's definition of the rule of law as they aren't accessible alongside the legislation. Having said this, the government do publish the list, together with details, of all ESC annually. The government do have a rolling program to turn some

³¹⁷ Standing Order 151(1)(B)(vi).

³¹⁸ Thring, *Practical Legislation: The Composition and Language of Acts of Parliament* (n 116). (3rd edition, 25)

³¹⁹ Article 4, Bill of Rights 1689.

³²⁰ D Williams, 'Extra-Statutory Concessions' [1979] *British Tax Review* 137.

³²¹ See for example *R v IRC ex parte Wilkinson* [2005] UKHL 30.

ESCs into actual legislation. There is legislative power to give effect to ESCs, including turning them into statutory concessions.³²²

In discussing ESCs, Freedman's main objections were in terms of lack of certainty and clarity over the law.³²³ Tax-payers could not be sure how much they could rely upon these ESCs. Freedman suggests that 'one way forward would be for all concessions and guidance to have a statutory basis'.³²⁴ However she sees this as a counsel of perfection and not feasible for the small, transitory and complex areas in which ESCs normally operate.

From the perspective of the drafter, three recommendations can be made. Firstly, so far as possible, there should be nothing outside the statute book which denudes the contents of the statute book- the principle of inclusivity requires that concessions ought to be contained within the statute book. Secondly, where this is not possible, the reader ought to be alerted at the very least to the existence of such things as extra-statutory concessions when they are reading the tax statutes. Thirdly, those ESC must be easily accessible in full.

2.5.2 Broadly drafted legislation constrained by non-legislative indications of narrow application

On occasion, legislation on its face has a broad remit, but the persons introducing the Bill into Parliament state that it will only be applied in narrow circumstances. If the intention is that it will only be applied in narrow circumstances, then this should be stated on the face of the Bill and shouldn't be reliant upon political whim. There are two problems with these kind of extra-statutory statements. Firstly, as they are not included with the legislation, they are inaccessible to the reader. Secondly, they are not legally binding and can be treated as flim-flam.

As an example, consider the Anti-Terrorism Crime and Security Act 2001. This was enacted in response to the terrorist bombings on 11 September 2001.³²⁵ When introduced, the Home Secretary David Blunkett used the following phrases in Parliament to describe it:

- 'legislative steps necessary to counter the threat from international terrorism',
- 'we will reinforce action against the perpetrators of organised crime, drugs and people trafficking',

³²² S. 160 Finance Act 2008.

³²³ Judith Freedman and John Vella, *HMRC's Management of the UK Tax System: The Boundaries of Legitimate Discretion* (Oxford University Centre for Business Taxation 2010).

³²⁴ *ibid.* 38.

³²⁵ Helen Fenwick, 'Anti-Terrorism, Crime and Security Act 2001: A Proportionate Response to 11 September, The' (2002) 65 *Modern Law Review* 724.

- ‘the emergency legislation will build on the provisions of the Proceeds of Crime Bill to deal specifically with terrorist finance through monitoring and freezing the accounts of suspected terrorists’.³²⁶

From the general tenor of the debate, it was quite clear that the powers contained within this bill, in particular the power to freeze assets, were to be used for the purposes of defeating terrorism. The actual legislation contained the following as one condition for making an order freezing assets of someone outside the UK:

The first condition is that the Treasury reasonably believe that—

- (a) action to the detriment of the United Kingdom’s economy (or part of it) has been or is likely to be taken by a person or persons,³²⁷

However, during the financial crisis, there was a risk to UK money held by the Icelandic bank Landsbanki. The government made an order under this provision freezing money belonging to the bank. There was no suggestion of terrorist activity on the part of the Icelandic banks, instead this was a measure used as part of the response to the economic crisis of the time. Although the actual action done may have been necessary and even laudable in economic terms, the fact remains that legislation with an ostensibly narrow remit (terrorism) was used for a much broader purpose. There was no requirement for there to be terrorist activity under the terms of the Act in order for the freezing powers to be used, but the idea that it be used for purely economic reasons seems out of keeping with how a reasonable person would expect the legislation be used. As Smyth stated ‘it was controversial because it was made under the Anti-terrorism, Crime and Security Act 2001’.³²⁸

Terrorist powers being used for non-terrorist purposes is the most egregious example of this kind of abuse. But it can happen in other circumstances where a Minister seeks a broad power in legislation, but then gives an undertaking in Parliament that it will only be used for a particular purpose. To make an analogy, once you give the soldier a weapon he is going to use it against all enemies, not simply those you tell him to use it against at the start.

This drafting principle is a matter of degree and balance. If the drafter is aware of some important limitation to the way the legislation is to be applied, then that limitation ought to be contained in the legislation itself. To do otherwise is to mislead users and subvert the legitimacy of the law-making process.

³²⁶ HC Debs 15 Oct 2001 col 923.

³²⁷ Section 4(2) Anti-terrorism, Crime and Security Act 2001.

³²⁸ Michael Smyth, ‘The Public Law of Commercial Regulation’ (2009) 14 *Judicial Review* 197, 208.

2.5.3 Broadly drafted legislation due to the difficulty of defining exactly what is to be covered

Sometimes it can be very difficult to draft a law in such a way that it will cover all the cases that are intended to be covered, while excluding all the cases which are not intended to be covered. This was precisely what happened with the Sexual Offences Bill in the UK Parliament. The main thrust of the law was to protect children from sexual assault. The thing that was meant to be excluded was children involved in natural, low-level, sexual experimentation with other children. One specific difficulty that exercised Parliament greatly was whether the law really ought to be criminalising consensual kissing or petting among 14 and 15 year olds. The entire debate in Parliament is extremely interesting. The Minister responsible for piloting the legislation through Parliament was David Blunkett, the Home Secretary, and he said that ‘it is extremely difficult to come up with a formulation’³²⁹ that includes and excludes the right activities. He said that the government (and by implication the drafters) simply couldn’t craft a provision which protected those who ought to be protected, but wouldn’t allow for prosecutions of those who ought not to be prosecuted. In fact he went on to say that he would offer ‘a flagon of champagne for anyone who comes up with a satisfactory answer’.³³⁰ Dominic Grieve (who later went on to become the Attorney General) stated that:

I have an inherent anxiety about administrative discretion. I accept that administrative discretion may be the only remedy in cases where the CPS will not charge. Nevertheless, when such matters are put on to the statute book in such stark terms, I always fear that, at some point, something will not work properly and that we will end up with prosecutions that cause serious problems. I admit to the Secretary of State that I am not sure that I know the answers, and I suspect that, if he had known the answers, he would have already put them on the statute book.³³¹

One solution proposed to this problem was that the Director of Public Prosecutions would offer guidelines on what activities should be prosecuted and what not. To my mind, this breaks the principle of inclusivity – an important limitation on the legislation is placed, not within the legislation, but outside it. The person reading the legislation would come away with the misleading impression that if they did X they would be prosecuted, even though the defence of Y existed somewhere outside the statute book. I can only agree with Sandra Gidley who said in the debate that ‘I feel that we need to deal with that matter in the Bill’.³³²

³²⁹ Hansard 15 July 2003 Column 178

³³⁰ Hansard 15 July 2003 Column 195

³³¹ Hansard 15 July 2003 Column 194

³³² Hansard 15 July 2003 Column 224

2.6 Conclusion

In this chapter I have demonstrated that access to legislation is a key part of the rule of law. Bingham, Locke, Fuller, Raz and many others have stressed how important this is. I have also shown the difficulties with making legislation accessible. It can be very expensive, particularly as the volume of legislation grows. Legislation is very interconnected, and maintaining and showing the links between legislation is difficult. Legislation is constantly changing and thus has to be constantly kept up to date. Legislation must also be authoritative, and the only thing that Parliament authorises is the paper version of the law passed by it.

The main focus of this chapter has been on the content of accessibility and the drafting principles that can be derived from it. Three key principles have been derived: availability, navigability and inclusivity.

Legislation must be available to users. This means they should be able to see the law as enacted as well as how it reads at various points in time and in various parts of the UK. They must also be able to have access to contextually relevant information which explains the law as well as being able to find the provision which is relevant to them.

They must be able to easily navigate around the statute book as a whole as well as individual statutes within it. This requires short titles and individual headings within Acts to be clear, consistent and neutral. The structure must be make it easy for the user to jump from provision to provision. It is important to realise that users frequently don't read legislation in order, but instead move directly to the provisions which look useful to them, ignoring other provisions nearby.

Finally, legislation must be inclusive of all important information. The reader should not be surprised by how the law is applied arising from something which is extraneous to the law. If a certain matter is intended to colour how the legislation is applied, then that matter ought to be included in the statute.

These three drafting principles all flow from the rule of law concept of accessibility. I have set out in detail how these three principles can be given effect to in legislation. These are important as examples of the outworking of these principles. However, other examples and specific drafting techniques could be given. The key thing is the principles themselves, principles which drafters should bear in mind when drafting legislation.

However, by itself, this is not enough. Wagner-von Papp concluded that legislation ought to be “known”, but that this does not merely mean that it is published.³³³ He went on to say that it must be clear, unequivocal, consistent and as stable as possible. These are also rule of law values which are reflected by Bingham in the principle that legislation ought to be predictable.

³³³ Florian Wagner-von Papp, ‘A Law and Economics Perspective on Effective Legislation’ (Conference: Effective Law and Regulation, Institute of Advanced Legal Studies, 7 July 2017).

Chapter 3 Predictability

Introduction

Chapter 2 was the first substantive chapter and derived drafting principles from the rule of law requirement of accessibility. This chapter is the next substantive chapter and deals with the next rule of law requirement - predictability. Bingham's element 1 states:

Law must be accessible and so far as possible, intelligible, clear and predictable.

Legislation is predictable if you know its effect. More specifically, it is predictable if you can read the legislation and then know in advance what the legal effect of your actions will be. For example, if rules on broadcasting are so vague that a broadcaster cannot predict if a particular program will be sanctioned for being 'indecent', then those rules ought not to stand.³³⁴ This means that legislation can be used as a guide to planning future conduct.

Part 1 examines at the theory of predictability. It analyses what Bingham says and compares it with other rule of law writers on predictability.

Part 2 is the main part of the chapter. It examines the drafting principles we can derive from the requirement of predictability. These are as follows. Prospectivity means that legislation generally takes effect in the future, although there are criteria for when it doesn't need to do this.

Determinacy means that the law is certain, precise and exact. Stability means that the law doesn't change too much, and when it does change, the effect of the change is ameliorated. Clear commencement means that the date the law has effect from is clear. Consistency means both that there are no contradictions within a statute, and also that the statute book as a whole is generally harmonious. Application in the real world means that the law on the statute book is the same as the law as it applies in practice. Implementation means that there are effective means for implementing the law within the legislation. Constraints on discretion sets out methods of curtailing discretion and identifies criteria for when and how discretion is to be constrained.

Part 1 – The Theory of Predictability

³³⁴ 'Constitutional Law – Vagueness – Second Circuit Strikes Down the FCC's Indecency Policy as Void for Vagueness' (2011) 124 Harvard Law Review 835.

3.1 The Importance of Predictability

Bingham said that laws must be, so far as possible, predictable.³³⁵ As with accessibility, he didn't deconstruct this. His reasons for predictability were subsumed into the reasons for accessibility as set out in chapter 2. However, unlike accessibility, predictability is not an absolute value. Instead, it need only be done 'so far as possible'. However, Bingham does not set out any criteria for determining whether or not something is 'possible'. Developing Bingham's argument, Laws stated that 'an element of predictability and permanence is an essential contributor to the role of law in preserving social cohesion and doing justice.'³³⁶ Xanthaki cites unambiguity and precision (two aspects of predictability as derived in this chapter) – 'this promotes the rule of law'.³³⁷

Locke didn't use the word predictability when discussing legislation. However, his manifesto in favour of the commonwealth argued for much the same thing. He argued that citizens should be safe and secure in the knowledge of their duties under the law³³⁸ and that the rules ought not to be varied in individual cases.³³⁹

Fuller didn't mention predictability as a specific desideratum of good law. However, at least three of his desideratum touch upon it. The first is prospectivity.³⁴⁰ Fuller states that retroactive laws are a monstrosity.³⁴¹ He states that laws are there to govern human conduct, and we can't govern today's conduct by tomorrow's rules. However, as with Bingham he also acknowledges that there can't be a blanket ban on retroactive laws. Criminal law ought never to be retroactive, but in other spheres, there can sometimes be a need for curative retroactive laws – 'because their draftsmen commonly overlook the occasional need for "curative" laws, flat constitutional prohibitions of retroactive laws have sometimes had to be substantially rewritten by the courts.'³⁴² As an example of a curative law, he cites a marriage law that was poorly executed, resulting in many proper marriages being declared void. A curative retroactive law would go back in time and deem all those void marriages valid.

The next desideratum touching on this is desideratum 7 on constancy of law through time. If laws are constantly changing, then it is hard for citizens to predict the legal effect of their actions. Again,

³³⁵ Bingham (n 5). 37.

³³⁶ Stephen Laws, 'Plus ça Change - Continuity and Change in UK Legislative Drafting Practice' (2009) 11 European Journal of Law Reform 139. 140

³³⁷ Xanthaki, *Drafting Legislation*, (n 3) 86.

³³⁸ Locke (n 8). Section 137.

³³⁹ *ibid.* section 142.

³⁴⁰ Fuller (n 6). Desideratum 3, no retroactive laws.

³⁴¹ *ibid.* 53.

³⁴² *ibid.* 54.

this is not an absolute for Fuller as it ‘seems least suited to formalization in a constitutional restriction’.³⁴³ It is difficult to know how much legislative change is ‘too much’.

The final desideratum on this point is desideratum 8, congruence between official action and declared rule. Legislation gives predictable results if the state follows the actual rules in the statute book. There are two aspects to this. Firstly, the broader respect for the rule of the law in terms of the state obeying the law. Secondly, a point on statutory interpretation, that the state (and judges and society) follow the obvious and natural meaning of the words used in a statute. As Fuller says, ‘if the legislative draftsman is to discharge his responsibilities he, in turn, must be able to anticipate rational and relatively stable modes of interpretation’.³⁴⁴

Raz doesn’t say that laws should be predictable. However, he says in principle 1 that laws should be prospective, as a retroactive law cannot guide behaviour.³⁴⁵ In principle 2 he states that laws should be relatively stable ‘stability is essential if people are to be guided by law in their long-term decisions’.³⁴⁶ He doesn’t see stability as an absolute value. Bingham’s recommendation for predictability is therefore reflected in Raz’s own recommendations.

3.1.1 Why is legislation sometimes not predictable?

All the writers cited above would agree that legislation ought to be generally predictable. This means that if you read the legislation, you will know how it will be applied (the two assumptions underlying this are that the legislation is accessible, as discussed in chapter 2, and that the legislation is intelligible, which will be discussed in chapter 4).

This is the theory (or what Fuller would call the morality of aspiration). However, why does the practice sometimes differ – i.e. why is the effect of legislation sometimes not predictable? To put this another way, why is legislation sometimes vague, or deliberately ambiguous? There is one very pragmatic reason for this. Legislation represents difficult political choices. Sometimes the choice between two alternatives is too difficult a political compromise, so rather than make that choice, it is ‘fudged’ by the politicians, and this fudge ends up in the legislation. Hedlund and Zamboni describe this as ‘initial political ambiguity’.³⁴⁷ VanSickle-Ward’s argument is that ‘ambiguity serves as a

³⁴³ *ibid.* 79.

³⁴⁴ *ibid.* 91.

³⁴⁵ Raz (n 7). 214.

³⁴⁶ *ibid.* 215.

³⁴⁷ Daniel Hedlund, Ann-Christin Cederborg and Mauro Zamboni, ‘The Art of the (im)possible: Legislators’ Experiences of the Lawmaking Process When Reforming Migration Law’ (2016) 4 *The Theory and Practice of Legislation* 45, 53.

vehicle for compromise when key participants disagree over details'.³⁴⁸ In the context of Brazilian law-making, this was the conclusion of de Paula, 'ambiguity is a usual escape for political conflicts'.³⁴⁹ Take an obvious example from international law, the UN Security Council Resolution following the 1967 Arab-Israeli war. The text in English calls for 'withdrawal of Israeli armed forces from territories occupied in the recent conflict'.³⁵⁰ The word 'territories' is ambiguous, does it mean 'some of the territories' or 'all of the territories'? I would suggest that the answer is politically very controversial, so the resolution was drafted in an ambiguous way to cover both possibilities. In an example closer to home, the Downing Street Declaration (part of the Northern Ireland Peace Process) states that the UK has no 'selfish strategic or economic interest' in Northern Ireland.³⁵¹ Does 'selfish' qualify 'strategic', or are they stand alone adjectives – i.e. no selfish interest and no strategic interest, or no selfish strategic interest? The phrase is ambiguous, perhaps because it needed to be ambiguous in order to keep the peace process going and say something which both sides could agree with.

It is often forgotten that legislation is a political as well as a legal creation. Primary legislation must be enacted by a legislature. Laws states that this means that political necessities must also be borne in mind alongside legal ones.³⁵² The consequences of this are as Greenberg points out 'expressions that are deliberately ambiguous or vague because clarity would require coming down on one side or another of a politically intractable argument'.³⁵³ Xanthaki takes a practical view on this, arguing that sometimes it is better to have vague legislation than no legislation at all.³⁵⁴ Schiemann goes so far as to make a virtue of this when he argued that ambiguity allowed things to be done, whether that be the writing of a judgement of a court containing several judges, or the passing of legislation accommodating mutually exclusive viewpoints.³⁵⁵

In my view, deliberate ambiguity in legislation is wrong. The legal effect of legislation ought to be predictable, in this way it can guide human behaviour. But if legislation is ambiguous, it cannot guide behaviour. There may certainly be political difficulties in agreeing a particularly thorny point, but it is the job of politicians to make these agreements, and it is an abdication of responsibility if they pass this job to judges and ultimately to citizens to resolve. In discussing a vague American law

³⁴⁸ Rachel VanSickle-Ward, *The Devil Is in the Details: Understanding the Causes of Policy Specificity and Ambiguity* (SUNY Press 2014) 22.

³⁴⁹ Felipe de Paula, 'Does Brazil Have a Legislative Policy?' (2016) 4 *Theory and Practice of Legislation* 329

³⁵⁰ UN Security Council Resolution 242 (S/RES/242).

³⁵¹ Downing Street Declaration, Wednesday 15 December 1993.

³⁵² Stephen Laws, 'Legislation and Politics', *Law in Politics, Politics in Law* (Hart Publishing 2015).

³⁵³ Greenberg, *Laying down the Law* (n 92). 151.

³⁵⁴ Xanthaki, *Drafting Legislation*, (n 3) 87.

³⁵⁵ Sir Konrad Schiemann, 'The Advantages of Obscurity: The Drafting of EU Legislation and Judgements' (Institute of Advanced Legal Studies, 13 June 2013).

on climate change, VanSickle-Ward stated that ‘it merely moved [key disagreements] to new venues, agencies and the courts’.³⁵⁶ In the field of international law and peace processes, it may be justifiable to fudge matters in order to gloss over political differences. In the field of domestic legislation, this is not acceptable, as domestic legislation will have a direct impact upon citizen’s lives.

3.1.2 Predictability in primary legislation, or in the legal system as a whole?

Does it make a difference where the lack of predictability is? Can a lack of predictability in primary legislation be cured by introducing predictability at some other point in the legal system?

Strauss refers to this as a lack of specificity in the legislation – that the primary legislation does not specify precisely what course of action ought to be followed.³⁵⁷ He cites the case of *Chevron USA v National Resources Defence Council* where the US court stated ‘perhaps Congress was unable to forge a coalition on either side of the question, and those on each side decided to take their chances with the scheme devised by the agency’.³⁵⁸ The agency in this case was the governmental body responsible for implementing the primary legislation. Strauss does accept ambiguity in primary legislation, but only if the legal system as a whole (including secondary legislation and administrative actions) is precise – ‘vagueness or a lack of clarity in modern legislation is tolerable because it exists within a system that does give legal obligations or restrictions more precise shape before the citizen is asked to act’.³⁵⁹

I think that Strauss is half right. If the primary legislation is vague (and thus its effects unpredictable) but the secondary legislation made under it is specific, then the citizen can read the law and predict its results. However, if the specificity rests on the layer underneath, the layer of administrative action, then the legal effect is not predictable. The Advocate General of the European Union has come to the same conclusion, albeit on slightly different reasoning. If the primary legislation gives too wide a power to make delegated legislation, then this will be unconstitutional as it gives an unwarranted power to the executive to make law:

a legislative provision empowering an EU level implementing authority to prohibit short selling “where necessary”, would represent an unconstitutional conferral of excessive implementing powers, irrespective of whether they were conferred on the Commission or an agency. This reflects the general principle of the primary role of the democratic

³⁵⁶ VanSickle-Ward (n 348) 58.

³⁵⁷ Peter Strauss, ‘Legislative Theory and the Rule of Law: Some Comments on Rubin’ (1989) 89 Columbia Law Review 427.

³⁵⁸ 467 US 837, 865.

³⁵⁹ Strauss (n 357). 445.

legislature, recognised in the constitutions of several Member States, and in Article 290 TFEU, to the effect that *legislation may not be so vague or open-ended that essential policy choices or value judgements remain to be decided at the implementation phase*.³⁶⁰

Although the reasoning here is based on the constitutional law of the EU (van Gestel argues in favour of greater transparency for rule-making authorities within the EU³⁶¹), I think it can equally rest on the quality of predictability. A citizen cannot predict the legal effect of law if the implementing authority is given too wide a discretion on how the law will be used.

3.1.3 The qualifier – so far as possible

What then about Bingham’s qualifier that law must be predictable ‘so far as possible’? There are two aspects to this.

Firstly, there is no binary choice between legislation being “predictable” or “unpredictable”. It is a matter of degree. Unlike something like availability (either the legislation is available or it is not available), predictability is measured on a scale of how predictable is the legal effect of legislation. So, we are aiming for maximum predictability, balancing the other rule of law drafting requirements such as accessibility, brevity, intelligibility etc. For example, a long and exhaustive list of how legislation will be applied in different circumstances may enhance predictability, but at the expense of intelligibility.

The second aspect is real world political pragmatism. If a requirement for specificity would cause a Bill to fail to be enacted, then it might be necessary for the drafter to swallow some pride in craftsmanship, and include an ambiguous provision. There are no easy answers to this question, and it is arguably more of a question for politicians to answer rather than drafters.

Part 2 Drafting Principles that Promote Predictability

3.2 Prospectivity

Predictability means that if you do something, you know what the legal consequences of that thing will be.³⁶² But if the legal consequences of the thing you do today will be retrospectively changed tomorrow, then there is no predictability. Therefore, in order to be predictable, law needs to be prospective, i.e. it applies from the date it is made forwards, it does not apply backwards in time.

³⁶⁰ Opinion of Advocate General Jääskinen C-270/12 (2013) (my emphasis).

³⁶¹ Rob van Gestel, ‘Primacy of the European Legislature? Delegated Rule-Making and the Decline of the “Transmission Belt” Theory’ (2014) 2 The Theory and Practice of Legislation 33.

³⁶² Some of the material in this section was previously published in Ronan Cormacain, ‘Retroactivity, Retrospectivity, and Legislative Competence in Northern Ireland: Determining the Validity of Janus-Faced Legislation’ (2015) 36 Statute Law Review 134.

This is slightly different from the drafting principle of stability. Stability means that the law today will be roughly the same as the law tomorrow. Prospectivity means that if the law changes tomorrow, those changes will only take effect from tomorrow. However, this is not a strong or absolute principle, it is capable of being overturned if there are good reasons for doing so.

There is a well-established legal principle that legislation should generally be prospective.³⁶³

Bennion describes the source of this principle as *lex prospicit non respicit* – law looks forwards not backwards.³⁶⁴ However, on rare occasions, legislation can have a backward facing component – it looks back to things which happened before the legislation was made. Under the broad title ‘the rule of law’ the House of Lords have argued that ‘enacting legislation with retrospective effect should be avoided’.³⁶⁵

The first thing this section does is to set out a clear, coherent and consistent taxonomy for describing backwards facing legislation. I use the term ‘Janus-faced legislation’ to mean legislation that has both a forward and backward facing component. Janus-faced legislation stretches into the future and into the past. Janus is the Roman god of beginnings and time. He has two faces, one that looks forwards to the future and one that looks back to the past. He is the god after whom January is named, looking back to the old year and forward to the new one. Janus-faced legislation can be (a) retroactive, (b) retrospective, or (c) can interfere with existing rights, and I will analyse the nature of these three sub-sets.

Janus-faced legislation can change the legal nature of a past event. This is frowned upon because it is seen as both unfair and artificial. It is unfair because the legislature changes the rules after the game has been played. It is artificial because it deems something to be that wasn’t. There is a wealth of judicial opinion supporting the proposition that Janus-faced legislation is to be avoided.³⁶⁶ It is ‘contrary to the general principle that legislation, by which the conduct of mankind is to be regulated ought, when introduced for the first time, to deal with future acts and ought not to change the character of past transactions carried out upon the faith of the then existing law’.³⁶⁷ The persuasiveness of these arguments against Janus-faced legislation is reflected in the various

³⁶³ Hayek states that rules should be fixed and announced beforehand, Hayek (n 29). 22. The Venice Commission stated that retroactivity offends against legal certainty, Venice Commission (n 4). [46]. For Northern Ireland, Dickson describes this as a legal convention, although I would put it at a higher level than that, Dickson (n 247) 48.

³⁶⁴ Jones, *Bennion on Statutory Interpretation* (n 294).

³⁶⁵ Jack Simson Caird, Robert Hazell and Dawn Oliver, *The Constitutional Standards of the House of Lords Select Committee on the Constitution* (University College London 2014).

³⁶⁶ See for example, *EWP v Moore* [1992] QB 460, 474. *L’Office Cherifien des Phosphates v Yamashita-Shinnihon Steamship Co Ltd.* [1994] 1 AC 486, 525. *Secretary of State for Social Security v Tunncliffe* [1991] 2 All ER 712.

³⁶⁷ *Philips v Eyre* (1870) LR 6 QB 1, 23.

restrictions and prohibitions of this type of legislation. The power of these restrictions is evidenced by the relative rarity of Janus-faced legislation. Most constitutions expressly prohibit it.³⁶⁸

The second thing this section does is to set out some criteria for determining when legislation can be Janus-faced. These are human rights criteria. The traditional arguments against Janus-faced legislation are based upon the rule of law. Salembier directly links common law temporal presumptions to the rule of law.³⁶⁹ Chaturvedi sets out the parameters of his discussion on retrospectivity in India by reference to the rule of law.³⁷⁰ The rule of law provides a theoretical framework by which the validity of Janus-faced legislation can be evaluated and challenged. However, there is a relatively new prism through which Janus-faced legislation can be viewed – the prism of human rights. The European Convention on Human Rights (ECHR) gives new tools and new criteria for evaluating Janus-faced legislation. Section 3 of the Human Rights Act 1998 requires all legislation to be read, so far as possible, in a way to give effect to the ECHR.

Human rights jurisprudence has supplanted traditional rule of law distinctions and jurisprudence in determining the validity of Janus-faced legislation. If Janus-faced legislation is to be drafted, the principles for drafting are no longer that of the case law developed by judges in elucidating the rule of law, they are the criteria set out in the ECHR and the case law flowing from it. I have previously sought to prove this proposition by reference to proceedings within the legislature, and judicial decisions around legislation.³⁷¹

It is submitted that the move from rule of law criteria to human rights criteria is a good thing. The rule of law is set at the level of general principle, it does not always provide detailed guidance. The ECHR and the case law which flows from it is much more detailed and makes greater distinctions between different types of criteria for evaluating Janus-faced legislation in different areas of law. In fact, the rule of law exhorts us to have law which is clear and precise. Evaluating legislation under the clear and precise criteria set out under the ECHR satisfies that exhortation. Moving from rule of law criteria to human rights criteria actually fulfils the precepts of the rule of law. Furthermore, Bingham includes human rights as an element of the rule of law, so using human rights as a drafting guide develops the rule of law rather than ignoring it.

³⁶⁸ See for example Article 50 of the Kenyan Constitution, Article 1, Section 9 of the American Constitution and Article 28I of the Indonesian Constitution.

³⁶⁹ J Paul Salembier, 'Understanding Retroactivity: When the Past Just Ain't What It Used to Be' (2003) 33 Hong Kong Law Journal 106.

³⁷⁰ Kameshwar Nath Chaturvedi, 'Legislative Retrospectivity and Rule of Law' (2013) 34 Statute Law Review 207.

³⁷¹ See further Cormacain, 'Retroactivity, Retrospectivity, and Legislative Competence in Northern Ireland' (n 362).

3.2.1 Three Sub-types of Janus-faced Legislation

There three sub-types of Janus-faced legislation are retroactive legislation, retrospective legislation and legislation that interferes with existing rights.

3.2.2 Retroactive Legislation

Retroactive legislation has effect before it was actually made. The chronological impossibility of this is solved by deeming it to have had effect before it was made. It goes back in time and states that the law at that time is what we now say that it was. To put this another way, the date that it comes into effect is earlier than the date it is made. Retroactive legislation applies to the past and in the past. It can be seen as brazenly unfair and artificial as it states something to exist when it did not exist. It is the easiest type of Janus-faced legislation to recognise and often the hardest to justify. Perhaps for this reason, it is also the least common type of Janus-faced legislation.

Some brief examples of retroactive legislation in the UK can be given. The Local Government (Miscellaneous Provisions) Act (NI) 2010 contained a provision that certain council contracts are deemed always to have had effect as if the council had power to make them.³⁷² In the Child Support, Pensions and Social Security Act (NI) 2000, certain provisions were deemed always to have had effect.³⁷³

The War Crimes Act was made in 1991 but criminalises actions carried out in World War 2. Persons can be punished under a law that did not exist at the time they carried out the impugned acts. When this Act passed through Westminster, the House of Lords did raise objections based on its retroactive nature. However, as Ganz pointed out, it did not cause a constitutional crisis.³⁷⁴

The International Criminal Court Act 2001 is also expressly retroactive as it applies to acts committed from 1 January 1991 onwards. Interestingly, the retroactive provisions were only added by way of amendments to the 2001 Act by the Coroners and Justice Act 2009.³⁷⁵

The Court of Appeal has adjudicated upon a particular instance of retroactive legislation – this is retroactive tax legislation that has effect from the date that the announcement about the new tax

³⁷² S.2.

³⁷³ S. 35.

³⁷⁴ Gabriele Ganz, 'The War Crimes Act 1991 – Why No Constitutional Crisis?' (1992) 55 *Modern Law Review* 87.

³⁷⁵ Robert Cryer and Paul Mora, 'The Coroners and Justice Act 2009 and International Criminal Law: Backing into the Future?' (2010) 59 *International and Comparative Law Quarterly* 803. Ronan Cormacain and Nick Donovan, *Suspected War Criminals and Génocidaires in the UK: Proposals to Strengthen Our Laws* (Aegis 2009).

law is made in Parliament, rather than the (later) date of when the tax law is actually enacted.³⁷⁶ The court ruled that this particular type of retroactive legislation was in accordance with human rights law.

3.2.3 Retrospective Legislation

Retrospective legislation bases future legal consequences upon events that occurred before the legislation was made. It looks back to the past and although it doesn't apply in the past, it does apply future consequences to what happened in the past. To put this another way, a provision will be retrospective if it is impossible to avoid the legal consequences of a past action. The action carried out before the legislation is made has a binding and irreversible legal impact. This means that at the time you do an action, you cannot predict its legal effect.

In the Safeguarding Vulnerable Groups (Northern Ireland) Order 2007, paragraph 3 of Schedule 1 contains a retrospective provision. A person may be placed on the Children's Barred List due to conduct the person has engaged in at any time. No matter what actions the person does now, they will still be bound by the consequences of a pre-commencement action.

Laws often set out qualifying or disqualifying conditions for the application of a particular rule. The fact that these conditions may have been satisfied in the past, before the law commences, makes the law retrospective rather than retroactive. Bennion put it this way:

Changes relating to the past are objectionable only if they alter the legal nature of a past act or omission in itself. A change in the law is not objectionable merely because it takes note that a past event has happened, and bases new legal consequences upon it.³⁷⁷

Retroactive legislation is easy to identify, as it will normally expressly state that it has effect on a date before it was made. Retrospective legislation won't necessarily make its backward facing component obvious on its face. It commonly arises when past conduct determines eligibility for a post. The Police Reform and Social Responsibility Act 2011 provided for the election of police and crime commissioners. Under s. 66(3)(c), a person is disqualified from being a commissioner if the person has been convicted of an imprisonable offence. Although this provision has been criticised as being disproportionately harsh, it has not been criticised as being retroactive.³⁷⁸ The provision takes note of a past event and bases a current disqualification upon it. It doesn't retroactively change the legal character of that past event, but it does base future legal consequences upon it.

³⁷⁶ *R v HMRC ex p Huitson* [2011] EWCA Civ 893.

³⁷⁷ Francis Bennion, *Bennion on Statutory Interpretation* (5th edn, Lexisnexis 2008) 317.

³⁷⁸ T Thomas, 'Old Criminal Records Playing a Familiar Tune' (2012) 176 *Criminal Law and Justice Weekly* 539.

The courts considered this point in *R v Field*.³⁷⁹ The legislation in that case disqualified people from working with children if they had certain criminal convictions. The convictions could have been incurred before the legislation commenced. The court stated that ‘the effect of disqualification orders is entirely prospective, because it only affects future conduct’. I would rephrase this slightly in order to fit in with the taxonomy being suggested in this section. That legislation falls into the retrospective subset of Janus-faced legislation, it isn’t solely prospective as it does look back to the past before determining future eligibility.

In practical terms, it makes social regulation very difficult if only conduct after and not before commencement of a new law can be considered. The court in *Antonelli* considered whether convictions incurred before commencement of the Estate Agents Act 1979 would render a person ineligible to be an estate agent.³⁸⁰ The court ruled that ‘it would be quixotic to suppose that Parliament intended that the public should be protected from the activities of a practitioner convicted a week after the Act came into force, but not from those of the practitioner convicted a week before’.³⁸¹

3.2.4 Legislation that interferes with existing rights

Even though legislation only takes effect in the future, it can affect historic rights, or in other words, interfere with rights being exercised before the legislation commences. This type of legislation takes effect in the future, but may prejudice rights accrued or enjoyed in the past. Citizens might have done something in reliance upon a particular law, and when a new law is made, it might affect their existing activities. This can be distinguished from retrospective legislation. If it is possible to avoid the legal consequences of a past action then, even though the person may suffer some disadvantage, it will be an interference with existing rights.

The Firearms (Northern Ireland) Order 2004 required persons possessing a firearm to hold a firearms certificate. If X possessed a firearm before commencement, then upon commencement, X has 3 choices: (1) get rid of the firearm, (2) keep the firearm and break the law, or (3) keep the firearm and get a licence. X has a choice, an opportunity to avoid the legal consequences of having a firearm without a certificate. The Order interferes with existing rights, but the legal consequences are avoidable. Contrast this with the Safeguarding Vulnerable Groups (NI) Order 2007 – if X had engaged in certain conduct with a child in the past, X could not avoid the legal consequences of that conduct.

³⁷⁹ [2003] 3 All ER 769.

³⁸⁰ *Antonelli v Secretary of State for Transport* [1998] 1 EGLR 9.

³⁸¹ *Antonelli* 13.

The courts have drawn a clear distinction between retroactivity and interference with existing rights.³⁸² The distinction was confirmed in the *Axa* case by Lord Reed. He held that

A distinction might, however, be drawn between laws which alter prospectively the rights and obligations arising from pre-existing legal relationships, and laws which alter such rights and obligations [retroactively].³⁸³

It is when there is an interference with an existing right combined with the interference being conditional upon past conduct that the blurring between the different sub-types of Janus-faced legislation is most pronounced. The Solicitors (Amendment) Act 1956 contained a provision requiring disqualification as a solicitor's clerk for certain offences. A clerk had a conviction from 1953, before the Act was made, but was nevertheless disqualified from acting under the auspices of the Act. The Court of Appeal in *Re A Solicitor's Clerk* ruled that the Act

is not in truth retrospective. It enables an order to be made disqualifying a person from acting as a solicitor's clerk in the future and what happened in the past is the cause or reason for the making of the order, but the order has no retrospective effect. ... This Act simply enables disqualification to be imposed for the future which in no way affects anything done by the appellant in the past.³⁸⁴

In this case, the legislation was both retrospective (applying to pre-commencement acts) and interfered with existing rights (affecting persons currently practising as solicitor's clerks).

The Estate Agents Act 1979 was construed in a similar way. It contained provisions prohibiting persons from being estate agents if they had certain criminal convictions. The person in *Antonelli* was already an estate agent and already had a conviction before the Act was commenced. Nevertheless, the Court of Appeal held that the Act applied to persons already acting as estate agents and to convictions incurred before the Act commenced.

3.2.5 A drafting solution – transitional and savings provisions

The perceived unfairness of interfering with existing rights is well recognised in the development of legislative policies. So much so, that there is an established mechanism for dealing with it – by way of transitional and saving provisions. Transitional provisions normally govern the transition from an old regime to a new one. Savings are similar, and protect existing rights that may be affected by the new regime. Where an existing right would be interfered with by new legislation, transitional and

³⁸² *West v Gwynne* [1911] 2 Ch. 1, 11.

³⁸³ *Axa Insurance* [2011] UKSC 46 [121].

³⁸⁴ [1957] 3 All ER 617.

saving provisions often soften the blow. Even more specifically, there are ‘grandfather’ clauses – if your grandfather was allowed to do a thing under the old law, then you as his descendant can continue to do that thing.³⁸⁵

With transitional and savings provisions there are five specific drafting techniques to ameliorate the harshness of Janus-faced legislation.

Firstly, the authorisation granted under the previous law for doing a thing can be treated as if it was an authorisation under the new law. The Firearms (NI) Order 2004 has already been mentioned in the context of interference with existing rights. There is an additional piece of legislation that ameliorates the position for persons already possessing firearms who held a certificate under the previous legislation. The Firearms (NI) Order 2004 (Commencement and Transitional Provisions) Order 2005 provided that firearms certificates granted under the old regime were to be treated as if they had been granted under the new regime. This is a classic example of a grandfather clause.

Secondly, if you have previously done the thing lawfully, and no authorisation was required, then you can continue to do the thing lawfully under the new law, even though you don’t have an authorisation under the new law. Consider a hypothetical example of a person who became a barrister before there was a requirement to hold a law degree. If the law was changed and required all barristers to hold a law degree, a savings provisions could exempt all existing barristers.

Thirdly, a person already doing the thing lawfully could be given additional time to comply with a new requirement under the new legislation. For example, if a new law prohibits a particular type of weapon, existing owners of that weapon could be given a six month grace period in which to dispose of it before they face the full rigour of the law.

Fourthly, a person could be compensated for the law interfering with existing rights, or for depriving them of their property. Unbelievable as it may seem today, when slavery was abolished, slave owners were ‘compensated’ for losing their slaves. So, the Slavery Abolition Act 1833 abolished slavery, but then in section XXIV went on to state:

And whereas, towards compensating the persons at present entitled to the Services of the Slaves to be manumitted and set free by virtue of this Act for the Loss of such Services, His Majesty’s most dutiful and loyal Subjects the Commons of Great Britain and Ireland in Parliament assembled have resolved to give and grant to His Majesty the Sum of Twenty Million Pounds Sterling

³⁸⁵ JW Summers, ‘The “Grandfather Clause” (1914) 7 Law & Banker & S Bench B Rev 39. sets out the historical background to this type of clause.

The subject matter is repugnant to us today, but the principle remains the same, if legislation takes away your property, you are entitled to compensation for it. A more modern example is the Civil Service (Special Advisers) Act (Northern Ireland) 2013. If a person lost their job as a special adviser because of this Act, then the Schedule to the Act provides for compensation to be paid to them.

Fifthly, the legislation can create a separate and special regime to deal with existing cases. Rather than the standard regime applying to existing cases, a separate regime could apply to them.

3.2.6 UK terminology to describe Janus-faced legislation

There is no consensus on the terminology used in the UK to describe Janus-faced legislation. The most common term is 'retrospective'. Bobbett analysed terminology used in House of Lords judgements since 1900 and reported that 'retrospective' appears 826 times with 'retroactive' appearing 167 times.³⁸⁶ A search of the database of Northern Irish legislation reveals that 'retrospective' appears in 10 statutes whereas 'retroactive' appears in none.³⁸⁷ In fact, when searching UK statutes as a whole, 'retrospective' appears in over 200 statutes whereas 'retroactive' appears in only one piece of primary legislation.³⁸⁸ Greenberg accurately describes the UK approach when he states that 'the terms "retrospective" and "retroactive" are generally used either interchangeably or, at least, without clear difference'.³⁸⁹

For reasons I have discussed more fully elsewhere,³⁹⁰ I favour the taxonomy adopted in this section, which follows on from the taxonomy of Driedger,³⁹¹ Sullivan,³⁹² Salembier³⁹³ and Twining and Miers.³⁹⁴

3.2.7 Using the rule of law as a guide for drafting Janus-faced legislation

The common law approach of the rule of law with respect to Janus-faced legislation in the UK can be set out as follows.³⁹⁵ If a provision can be classified as retroactive, it is problematic. If it is retrospective or interferes with existing rights, it does not offend against the rule of law. If it is

³⁸⁶ Catherine Bobbett, 'Retroactive or Retrospective? A Note on Terminology' (2006) 1 British Tax Review 15.

³⁸⁷ Search carried out on <www.legislation.gov.uk> on 10/1/2013. The following statutes were included in the search: Northern Ireland Orders in Council, Acts of the Northern Ireland Assembly, Acts of the Northern Ireland Parliament, Acts of the Old Irish Parliament and Measures of the Northern Ireland Assembly.

³⁸⁸ Geneva Conventions Act 1957.

³⁸⁹ Greenberg, *Craies on Legislation* (n 115) 492.

³⁹⁰ Cormacain, 'Retroactivity, Retrospectivity, and Legislative Competence in Northern Ireland' (n 362).

³⁹¹ Elmer Driedger, 'Statutes: Retroactive Retrospective Reflections' (1978) 56 Can Bar Rev 264.

³⁹² Ruth Sullivan, *Sullivan and Driedger on the Construction of Statutes* (4th edn, Butterworths Law 2002).

³⁹³ Salembier (n 369).

³⁹⁴ William Twining and David Miers, *How to Do Things with Rules* (5th edn, Cambridge University Press 2010). 233.

³⁹⁵ The following is a distillation of the standard approach to retrospectivity, see for example Bennion, *Bennion on Statutory Interpretation* (n 377) 315.

retroactive but deals with procedural matters, it is not problematic – retroactive changes to procedure are assumed to be of benefit to the individual. If it is retroactive and makes a substantive change to the law, it is problematic. If the substantive retroactive change is to civil law, it is less problematic. If the substantive retroactive change is to criminal law, it is very problematic. This is a general approach, so all the preceding propositions should be read as subject to the word ‘usually’.

This final prohibition on retroactive criminal legislation is probably the most important and deserves to be analysed in slightly more detail. Mokhtar traced its roots back to ancient law.³⁹⁶ The prohibition can be divided into two related principles. The first is *nullem crimen sine lege*, no crime without law. The impugned act must have been a crime at the time when it was committed. The second is *nulla poena sine lege*, no punishment without law. A heavier penalty for a crime cannot be imposed than the penalty that existed at the time the crime was committed. Since at least the time of the Nuremburg War Trials, this has been subject to a caveat that some things have always been crimes, regardless of what the domestic law says. For a legislative example of *nullem crimen*, see paragraph 1(4) of Schedule 2 to the Human Rights Act 1998, which provides that where a Minister makes a remedial order (remedying some human rights defect), the order cannot retroactively make a person guilty of an offence.

Given the sovereignty of Parliament, the courts do not have a rule prohibiting Janus-faced primary legislation. Instead, there are a series of presumptions as described by Bennion in his Codes.³⁹⁷ Thus, there is a general ‘presumption against retrospective operation’ under Code 97. This includes subdivisions depending on whether there is a civil law disadvantage suffered or whether there is a criminal law disadvantage. Code 98 sets out a different presumption where the retroactive provision is procedural in nature. Code 99 sets out further presumptions where events occur over a period of time. Code 100 and 101 set out more presumptions dealing with Janus-faced legislation. Sampford sets out a classification of Janus-faced legislation that may make it more amenable to rule of law evaluation.³⁹⁸

The main difficulty with using the rule of law as a drafting criteria on prospectivity, is that there is a binary decision about whether to classify something as ‘retrospective’ in which case it may be problematic, or ‘prospective’ in which case it is fine. This does not recognise the subtleties between the different sub-sets of Janus-faced legislation. Nor does it recognise that retrospective legislation and legislation that interferes with existing rights might sometimes be more unfair than retroactive

³⁹⁶ Aly Mokhtar, ‘Nullem Crimen, Nulla Poena Sine Lege’ (2005) 26 Statute Law Review 41. See also Rupert Ticehurst, ‘Retroactive Criminal Law’ (1998) 9 KCLJ 88.

³⁹⁷ Jones, *Bennion on Statutory Interpretation* (n 294).

³⁹⁸ Sampford (n 40).

legislation. Salembier considers this as a valid criticism of the Canadian presumption against retroactive legislation.³⁹⁹ Turatsinze argued that the theoretical differences between retroactive and retrospective legislation did not lead to practical differences in terms of their impact on individual rights.⁴⁰⁰ Consider again the estate agent in *Antonelli* and the solicitor's clerk in *Re A Solicitor's Clerk*. They had both been in their job for a number of years. No evidence had been brought of any problems this had caused to clients. Nevertheless, as the law was characterised as 'prospective', they were essentially sacked by Act of Parliament without any form of redress. However, this is not so much a criticism of the rule of law as a criticism of the common law classification of Janus-faced legislation.

3.2.8 Using the ECHR as a guide for drafting Janus-faced legislation

There is a specific prohibition on substantive retroactive criminal law in Article 7 of the ECHR. However, there is no general prohibition on Janus-faced legislation. Rather, there are specific rights that could in theory be infringed by such legislation. Therefore, unlike the rule of law criteria, there is no binary logic stating that if a provision is retroactive it is problematic, but if not, then it isn't. The key criterion for human rights jurisprudence is not the sub-type of Janus-faced legislation that a legislative provision falls into, rather the matter is determined by the substance of the provision itself and the nature of the right infringed.

This means that there is no separate and discrete body of principles for evaluating Janus-faced legislation. Rather, each case is assessed under the body of case law which has developed around the specific right alleged to have been infringed. It is beyond the scope of this section to set out all criteria used for evaluating whether a legislative provision is compliant with the ECHR. Instead, it selects the main Convention rights where Janus-faced legislation may occur and examines the judgements made in those cases.

Article 6 – right to a fair trial

Everyone is entitled to a fair trial, before an independent tribunal, in determination of their civil rights. If the legislature changes the law upon which a party to a case relies, then that party may not get a fair trial. According to Knight 'where the state legislates retrospectively on a matter which effectively determines the substance of an existing dispute, making it pointless for proceedings to continue, that can be a breach of Article 6'.⁴⁰¹ The leading case is *Zielinski & others v France* (2001)

³⁹⁹ Salembier (n 369). 115.

⁴⁰⁰ Elias Turatsinze, 'The Pursuit of Clarity, Precision and Unambiguity in Drafting Retrospective Legislation' (Thesis, 2012) <<http://sas-space.sas.ac.uk/4711/>> accessed 22 February 2013.

⁴⁰¹ CJ Knight, 'Taking an AXA to Acts of the Scottish Parliament' [2010] JR 163. 166.

31 EHRR 19. The court there held that Article 6 precludes ‘any interference by the legislature – other than on compelling grounds of the general interest – with the administration of justice designed to influence the judicial determination of a dispute’.⁴⁰²

Therefore, if the legislature retroactively changed the law to pre-determine the outcome of a particular case, that would infringe Article 6 unless there was a compelling public interest. However, if a retroactive Bill incidentally affected existing cases along with future cases, the Bill would only infringe Article 6 if it was ‘manifestly without reasonable justification’.⁴⁰³ The key question is not where on the spectrum of Janus-faced legislation a provision lies, but the justification and fairness of it.

Article 7 – no punishment without law

Article 7 contains two rights. Firstly, ‘no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed.’ Secondly, ‘nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed’. The European Court of Human Rights in *SW v UK* (1995) 21 EHRR 36 held that Article 7 embodied the rule of law principle of *nullem crimen*.⁴⁰⁴ The Convention only allows one exception to the prohibition on retroactive criminal legislation – if the act was, at the time it was committed, ‘criminal according to the general principles of law recognised by civilised nations’. This is the exception relied upon in the two Acts previously discussed, the War Crimes Act 1991 and the International Criminal Court Act 2001 and flows on from the Nuremberg War Trials.

As has been seen, the old UK case law of *Antonelli* and *Re A Solicitor’s Clerk* characterised disqualification from a position as a future consequence of a past action. On that basis, such a provision was acceptable. However, the ECHR approach asks instead whether a criminal penalty is now being imposed for that past action. In this context, the specific sub-type of Janus-faced legislation is less relevant. What is relevant is whether a criminal penalty is now being imposed for something which wasn’t criminal at the time when it was committed. The test for this is set out in *Achour v France* (2007) 45 EHRR 2

The court must therefore verify that at the time when an accused person performed the act which led to his being prosecuted and convicted, there was in force a legal provision which

⁴⁰² [57].

⁴⁰³ *James v United Kingdom* (1986) 8 EHRR 123, paragraph 46.

⁴⁰⁴ [35].

made that act punishable, and that the punishment imposed did not exceed the limits fixed by that provision.⁴⁰⁵

The court in *Welch v UK* (1995) 20 EHRR 247 gave specific guidance on the meaning of 'criminal penalty'. It said that the concept of a penalty is an autonomous Convention concept.⁴⁰⁶ The following factors should be considered:

- Whether the measure is imposed following conviction for a criminal offence
- Nature and purpose of the measure in question
- Characterisation under national law
- Procedures involved in the making and implementation of the measure
- Severity⁴⁰⁷

Welch concerned confiscation orders made under the Drug Trafficking Offences Act 1986. A pre-requisite under the Act was that a person had been convicted of a drugs offence. Once this trigger had been pulled, the person could be made the subject of a confiscation order in respect of the proceeds of drug trafficking, whether those proceeds had been gained before or after the commencement of the Act. The court ruled that this breached Article 7. The court in *Jamil v France* (1995) 21 EHRR 65 ruled that imprisonment for non-payment of a customs fine was not simply a matter of enforcement of payment, but a punitive sanction. The court in *Kafkaris v Cyprus* (2009) 49 EHRR 35 ruled that changing the prison rules on the meaning of 'life imprisonment' post conviction did not amount to retroactively changing the law. However, the law had not been formulated with sufficient precision to enable the individual to discern the scope of his life imprisonment, so Article 7 was breached in the wider sense.

The case most directly in point on the nature of a criminal penalty is *R v Field*.⁴⁰⁸ The court there proceeded on the assumption that disqualification from a particular post was not a criminal penalty. It was a preventative measure whose main purpose was to protect children, it was not designed as a penal measure to punish someone.

Article 8 – right to private and family life

Article 8 provides that everyone has the right to respect for their private and family life. Janus-faced legislation can infringe upon this right if something done in the past constitutes a legal impediment

⁴⁰⁵ [43].

⁴⁰⁶ [27].

⁴⁰⁷ *Welch* [28].

⁴⁰⁸ [2003] 3 All ER 769.

to enjoying your private and family life – for example if past conduct disqualifies you from employment in a particular profession.

Sidabras and Dziautas v Lithuania arose out of the post-communist reconstruction in Lithuania.⁴⁰⁹

It concerned a legal prohibition on employment which related to the entirety of the public sector as well as to many private sector jobs. A person would be ineligible for these jobs if they had, before the legislation came into force, been a member of the KGB (or other state security body). The European Court of Human Rights found that there had been a violation of Article 8 in conjunction with Article 14. The Court found that Lithuania did have a legitimate right to regulate both private and public sector employment. However, the court found the breadth of the prohibition objectionable and disproportionate. The particular provision could be characterised as retrospective (future consequences of past actions) and interfering with the existing rights of those already in post. However, this was not the key criterion upon which the judgement was based. Judgement was based upon the breadth of the prohibition, not its location in the Janus-faced legislation spectrum.

Article 9 – freedom of thought, conscience and religion

Article 9 provides that everyone has the right to freedom of thought, conscience and religion. Janus-faced legislation can interfere with this if some past conduct exercising this right colours the enjoyment of some current right. In *Thlimmenos v Greece*, the applicant was disqualified from being a chartered accountant as he had a conviction for a serious crime.⁴¹⁰ The serious crime was a refusal to wear his military uniform during a general mobilisation. He had been duly convicted of this crime, but his motivation for refusing to wear the uniform was religious - he was a Jehovah's Witness.

The European Court of Human Rights held that the general rule of prohibiting persons with convictions for serious crimes was legitimate. However, the Court ruled that the legislation should have differentiated between different cases. In a case where the conviction arose from the right to freedom of religion, it was not justified to disqualify the person. There was no objective justification for treating conscientious objectors the same as other criminals. Article 9, in conjunction with Article 14, had been infringed. The question of whether the legislation was retroactive, retrospective or interfered with existing rights did not arise. At issue was whether Article 9 was breached, and if the legislation was objectively justified in treating different people the same.

⁴⁰⁹ 27 July 2004, Application numbers 55380/00, 59330/00

⁴¹⁰ 6 April 2000, Application no. 34369/97.

Article 10 – freedom of expression

Article 10 provides that everyone has the right to freedom of expression. Similar to the Art 8 rights, this right can be infringed where the past exercise of it can mean disqualification from a particular job.

The European Court of Human Rights considered a number of cases from Germany where past (and present) political activities disqualified persons from being teachers. The teachers were all civil servants and, as such, owed a duty of loyalty to the constitutional principles of the German democratic state. It was argued that active membership of a communist party would breach this loyalty and that therefore the teachers should be disqualified. In *Glaser v Germany*, the Court ruled that such disqualifications were not in breach of Article 10.⁴¹¹ However, the Court also ruled in *Vogt v Germany* that such disqualifications were a breach of Article 10.⁴¹² It is hard to see why these cases were decided differently. The arguments in both cases were not focused on when the communist activity took place. The arguments were focused on whether the right to freedom of expression had been interfered with and whether such interference was justified.

Article 1 of Protocol 1 – right to property

Everyone has the right to peaceful enjoyment of their possessions. No-one is to be deprived of their possessions except in the public interest and in accordance with the law. The state can interfere with possessions in the public interest or to secure the payment of tax. When the state seeks to interfere with property rights, human rights jurisprudence has distilled the matter to: (a) is the interference for a legitimate aim? and (b) is the interference proportionate to achieving that aim?

The case of *Mellacher v Austria* (1989) 12 EHRR 391 concerned rent control legislation which applied to existing leases. Although Lord Reed characterised this as a civil law with retroactive effects,⁴¹³ I would respectfully disagree. It is a law which interferes with existing rights. The European Court of Human Rights itself observed that 'in remedial social legislation ... it must be open to the legislature to take measures affecting the further execution of previously concluded contracts in order to attain the aim of the policy adopted.'⁴¹⁴ The backward facing nature of the rent control legislation was one factor to consider in deciding upon its validity, but the main criteria were as set out in the previous paragraph: was the interference legitimate and proportionate?

⁴¹¹ 28 August 1986, Application no. 228/80.

⁴¹² 26 September 1995, Application no. 17851/91.

⁴¹³ *Axa Insurance* [122]

⁴¹⁴ *Mellacher*, [51].

The legislation in *Bäck v Finland* allowed courts to modify pre-existing creditor / debtor arrangements.⁴¹⁵ The European Court again noted that the legislation authorised interference with existing rights. This could be acceptable under the ECHR, but there would need to be ‘special grounds of sufficient importance to warrant it’.⁴¹⁶ Although the Janus-faced nature of the legislation was relevant, the main criteria remained the same as for any decision under Article 1 of the First Protocol: was the interference legitimate and was it proportionate?

3.2.9 Conclusion on efficacy of prospectivity as a drafting principle

Four conclusions can be drawn from all this. Firstly, if legislation is drafted to be prospective then it is predictable and satisfies this element of the rule of law. Secondly, prospectivity is not generally accurately defined in the UK. The taxonomy of Janus-faced legislation set out in this section will indicate better on what side of the line a particular provision falls. Thirdly, prospectivity is a weak rule of law requirement as it can be over-ridden for good reasons, or as Bingham says it need only be obeyed so far as is possible. Fourthly, criteria for determining what is a ‘good reason’ can be found in the ECHR and the jurisprudence under it. In *Axa Insurance* the UK courts adopted the ECHR reasoning to rule that retrospective civil legislation in the UK was in accordance with the rule of law and the ECHR.⁴¹⁷

3.3 Determinacy

Legislation is predictable if it is determinate. Determinacy means that it has fixed or exact limits, it is certain and precise. According to Simson Caird ‘the rule of law requires laws to be reasonably certain’.⁴¹⁸ Determinacy is concerned with the words used in the legislation, and the construction of those words into sentences. Provided the legislation is intelligible, determinacy means that there is no doubt about what it means, there are no grey areas. Readers can examine the legislation and can then be certain of the legal effect of their own actions.

There are two aspects to determinacy: legislation must be unambiguous and legislation must be precise. Xanthaki argues for unambiguity and precision because ‘they render the law predictable’,⁴¹⁹ and Dickerson includes vagueness and ambiguity in his list of drafting diseases.⁴²⁰ In fact, virtually all of the major works on legislative drafting include strong requirements in favour of unambiguity and

⁴¹⁵ 20 July 2004, Application no. 37598/97.

⁴¹⁶ *Bäck* [68]

⁴¹⁷ *Axa Insurance v Lord Advocate* [2011] UKSC 46.

⁴¹⁸ Simson Caird, Hazell and Oliver (n 365) 11.

⁴¹⁹ Xanthaki, *Drafting Legislation*, (n 3) 85.

⁴²⁰ Reed Dickerson, ‘The Diseases of Legislative Language’ [1964] 1 *Harvard Journal on Legislation* 5 (1964).

precision.⁴²¹ Indeterminacy can also arise from a wide degree of discretion of legislation, but this is considered separately below in section 3.9

There are limits to what a drafter can do to combat indeterminacy where the policy itself is indeterminate. VanSickle-Ward has investigated the causes of a lack of specificity in statutes. Her conclusion is that the greater the degree of fragmentation in a state (partisan legislators, division between different arms of government, powerful and heterogeneous interest groups etc.) then the more likely the legislation is to be vague.⁴²² Her analysis is from the political science perspective, but her findings indicate the limits of the power of legislative drafters – if the policy instructions are vague, then there is little the drafter can do to make the legislation specific. Depending upon the perspective of the legislator, this can set up a tension between legislator and drafter, with the legislator seeking vagueness in order to keep political supporters on board, with the drafter seeking determinacy in order to satisfy the rule of law.

3.3.1 Unambiguity

What is unambiguity?

A legislative provision is ambiguous if it can have more than one meaning.⁴²³ This isn't a question of nuance or shades of meaning, it is a clear distinction between two completely separate and distinct meanings, both of which could legitimately be argued as the 'correct' meaning. This is an important qualifier, that the interpretation is 'legitimate'. Language, by its very nature is not 100% precise as there is no such thing as perfect communication whereby 100% of the meaning intended by one person by the use of a word will be 100% understood by the reader of that word in that way. I am discounting what could be termed fanciful or absurd constructions of a word leading to it being considered as ambiguous.

If a legislative provision is ambiguous, then the reader cannot predict its legal effect, and can't use it as a guide to action. Xanthaki uses the analogy of overlapping circles of meaning, the ambiguous word could fall equally within either circle. Take the example of a 'light' truck – the word light could

⁴²¹ See Chapter 1 under the heading of words in Thornton and Xanthaki (n 66). See chapter 6 under the heading of writing effectively in Tobias Dorsey, *Legislative Drafter's Deskbook: A Practical Guide* (The CapitolNet 2006). See chapter 9 under the heading of ambiguity, vagueness and generality in Robert Martineau and Michael Salernon, *Legal, Legislative and Rule Drafting in Plain English* (Thomson West 2005). See Xanthaki at page 115 under the heading of quality in legislation in Xanthaki, 'Drafting Manuals and Quality in Legislation: Positive Contribution towards Certainty in the Law or Impediment to the Necessity for Dynamism of Rules?' (n 109).

⁴²² VanSickle-Ward (n 348).

⁴²³ J Evans, *Statutory Interpretation: Problems of Communication* (Oxford University Press 1988) 73. Xanthaki, *Drafting Legislation*, (n 3) 90.

mean light in terms of weight, or light in terms of colour. If we draw a circle entitled 'colour' and a circle entitled 'weight' then the word 'light' could be placed in the intersection of these two circles.

Xanthaki includes the quality of unambiguity as one of the criteria for quality of legislation in her hierarchy.⁴²⁴ She proceeds on the basis that law is there in order to have effect, and if it is ambiguous, it cannot have effect. My underlying rationale is different, that legislation ought to be in accordance with the rule of law, but the end result is the same, that legislation ought not to be ambiguous.

There are two different types of ambiguity – semantic and syntactical. Semantic ambiguity is at the level of individual words – the words can have different meanings. Many words are polysemous in the English language – they have multiple meanings. Using Dorsey's example, a seal is both a marine mammal and also a form of official approval on a document, so a legislative requirement for a 'seal' is, by reference solely to that word, ambiguous.⁴²⁵ 'Tata Jesus is bangala' says the missionary in the Congo in *The Poisonwood Bible*, an unfortunately ambiguous word as it can either mean that Jesus is precious, or Jesus is poisonwood.⁴²⁶

Syntactical or grammatical ambiguity arises from the construction of words into phrases. The phrase itself can mean more than one thing, either by regards to the placement of the words alongside each other, or the use of punctuation. For example, if a sentence contains two nouns and one pronoun, which of the nouns does the pronoun refer to? Or if there is an adjective followed by two nouns, does the adjective refer to the first noun, or both nouns?

There is a particular form of semantic ambiguity when a word is used which has a general meaning, but also one which is particular to a specific semiotic community. There will be such a community if 'they share a common understanding of words and phrases which the larger community do not share'.⁴²⁷ Thornton gives the example of 'issue', which will mean a point of argument for most people, but for chancery lawyers it will mean offspring, and for philatelists an issue of stamps.⁴²⁸ But what meaning should be followed when such a word appears in legislation, the 'ordinary' meaning or the 'technical' one? For Sullivan, as a matter of statutory interpretation the 'ordinary meaning of a legislative text is the meaning intended by the legislature. In the absence of a reason to

⁴²⁴ See for example Xanthaki, 'Drafting Manuals and Quality in Legislation: Positive Contribution towards Certainty in the Law or Impediment to the Necessity for Dynamism of Rules?' (n 109).

⁴²⁵ Dorsey (n 90) 174.

⁴²⁶ Barbara Kingsolver, *Poisonwood Bible* (Harper Collins Publ USA 2012).

⁴²⁷ Ronan Cormacain, 'A Plain Language Case Study: Business Tenancies (Northern Ireland) Order 1996' [2012] *The Loophole* 33, 42.

⁴²⁸ Thornton and Xanthaki (n 66) 133.

reject it, the ordinary meaning prevails'.⁴²⁹ Emon argues that this difficulty is to be resolved by looking at the audience of the statute, so if the statute is directed at a technical audience, then the technical meaning must prevail, but if directed at the populace at large, then the ordinary meaning must prevail.⁴³⁰ Unfortunately, the courts can take a different approach, as in *Will-Kare* where the courts took a technical meaning of the word 'sale or lease' even though it appeared in the Income Tax Act, a statute applying to everyone.⁴³¹

Is unambiguity always necessary?

Although there may be times when vagueness / lack of precision may be regarded as acceptable (see further below), it is hard to see any circumstances in which ambiguity is acceptable in legislation. The alternative meanings of ambiguous legislative provisions can be equally reasonable and this makes it impossible for citizens to know what the actual law is. The only justification is political, as set out in section 3.1.1 – ambiguous legislation to ensure that a contested statute is enacted.

Drafting techniques to enhance unambiguity

Having established that legislation ought to be unambiguous, how then is the drafter to do this? There are several techniques.

Firstly, where possible, avoid ambiguous words. So if the reasonable reader would be confused by the meaning of a word in a statute, use a word which is not ambiguous. For example 'partner' could mean business partner or romantic partner, so if the second meaning is intended, use 'spouse'.⁴³² However, this is not a very strong abjuration, as many words in English are polysemous, and avoiding them all would make drafting very difficult.

Secondly, consider the context. This is probably the key concept, which saves many provisions from being ambiguous. Going back to Dorsey's example, if a document is required to have an official seal, it is abundantly clear from the context that this means a stamp, not a marine mascot. The words in context (both the sentence and the statute as a whole) will remove many ambiguities. This chimes with Watkin's advice that 'clarity of expression therefore requires that it should be clear which of the several meanings which a word may bear is intended in a particular context'.⁴³³ So the drafter must ensure that the context within which a polysemous word is set resolves any potential ambiguities.

⁴²⁹ Ruth Sullivan, *Sullivan on the Construction of Statutes* (5th edn, Lexisnexis Canada 2008) 24.

⁴³⁰ Anver Emon, 'On Statutory Interpretation and the (Canadian) Rule of Law: Interpretive Presumptions as Boundary Setting' (2015) 3 *Theory and Practice of Legislation* 45, 68.

⁴³¹ *Will-Kare Paving and Contracting v Canada* [2001] 1 SCR 915.

⁴³² Or depending on the policy, spouse, civil partner, or persons living together as spouses or civil partners.

⁴³³ Watkin, 'Bilingual Legislation' (n 227) 120.

This requires a holistic appreciation of the text as a whole. So a bald requirement that “Each customer must be supplied with a fork” is ambiguous, but that ambiguity is resolved if the title of that provision is “Requirements for a restaurant” or “Requirements for a gardening centre”. The context tells the reader if it is a fork for eating, or a fork for gardening.

Thirdly, use definitions. If there could be a doubt over the light truck, then include a definition that ‘light truck means a truck under 1,000 kg’. Readers will normally expect words to have the ordinary, dictionary meaning. If a word is intended to having a different meaning, or a particular technical meaning, then that meaning should be given in a definition section.

Fourthly, use grammar and punctuation appropriately. The running joke in Truss’s popular book on punctuation is on the meaning of the sentence ‘the giant panda eats shoots and leaves’.⁴³⁴

Including a comma after ‘eats’ gives the sentence a completely different complexion. Grammar does supply rules that allow for unambiguity. Take for example the rule of the last antecedent. This rule states that where there is a list followed by a qualifier, the qualifier applies only to the last item on the list. This can be illustrated by the contract law dispute described by Adams.⁴³⁵ The contract provision stated:

Subject to the termination provisions of this Agreement, this Agreement shall be effective from the date it is made and shall continue in force for a period of five (5) years from the date it is made, and thereafter for successive five (5) year terms, unless and until terminated by one year prior notice in writing by either party.

At issue was whether the qualifying phrase (terminated by 1 year notice) applied only to subsequent contract periods, or also to the first contract period. The rule of last antecedent indicates that it applies only to the last item in the list. This contract provision contains a syntactical ambiguity which can be resolved by application of the rule of last antecedent.⁴³⁶

However, this is a perfect example of a failure of drafting. The provision was so ambiguous it required court proceedings to determine the full meaning, and only then by reliance on an obscure grammatical rule. Citizens should not be subjected to this level of unpredictability. Instead of relying on arcane grammar points to resolve ambiguity, the ambiguity should be avoided in the first

⁴³⁴ Lynne Truss, *Eats, Shoots and Leaves* (Fourth Estate 2009).

⁴³⁵ Kenneth Adams, ‘Behind the Scenes of the Comma Dispute’ *Globe and Mail* (28 August 2007) <<http://adamsdrafting.com/downloads/g-and-m-082807.pdf>>.

⁴³⁶ For a statutory example of the importance of commas, see *R v Casement* [1917] 1 KB 98 and the interpretation of the Treason Act 1353.

place. This leads onto the fourth way to remove ambiguities – by proper formatting. Formatting is an easy way to remove ambiguity of this sort. Thus, the provision should have read:

Subject to the termination provisions of this Agreement, this Agreement shall be effective from the date it is made and shall continue in force

(a) for a period of five (5) years from the date it is made, and

(b) thereafter for successive five (5) year terms,

unless and until terminated by one year prior notice in writing by either party.

If the termination clause is intended to apply to only (b), then it can be reformatted so that it only appears in relation to (b).

Polysemous words and ambiguous language are precisely the sort of area where the unreasonable reader can make mischief by misconstruing the statute. So, if there is a reasonable argument that a provision is ambiguous, the drafter ought to resolve this by context, by definitions, by grammatical rules or by proper formatting.

3.3.2 Precision

What is precision?

Legislation is precise (and thus predictable) if it is fixed and certain – the reader knows both the limits of the law and its details. The reverse is imprecise or vague legislation – legislation which doesn't contain sufficient specific information to allow a person to know what its effect will be. Writing within the context of legal determinacy, Dorf stated that 'if the application of a rule requires deliberation about its meaning, then the rule cannot be a guide to action in the way that a commitment to the rule of law appears to require'.⁴³⁷ There are two broad ways in which legislation can fail to be precise, firstly by using vague words or phrases, and secondly by a lack of specificity or detail.

Turning then to vagueness. Vagueness means that the boundaries of a word or phrase are in doubt.⁴³⁸ The core meaning may be clear, but the outer limits, or the length that the word extends to are not certain. Xanthaki's example is the word 'vehicle'. Most people would agree that it includes a car, but does it include a motorbike, or a snow-mobile, or a horse drawn carriage? Like a stone thrown into a pond, the ripples of meaning spread far and wide – how do we know where the ripples stop? The core of the word is clear, so most people would agree that vehicle includes cars,

⁴³⁷ Michael Dorf, 'Legal Indeterminacy and Institutional Design' (2003) 78 NYUL Rev 875, 877.

⁴³⁸ Xanthaki, *Drafting Legislation*, (n 3) 90.

lorries and motorbikes. But it is at the edges that the meaning of the word becomes blurred and indistinct.

Nouns like 'vehicle' have a reasonably distinct core meaning that most people would be able to agree upon. But there are other more general words where the boundaries of the word are much less distinct. These words can cover different types of activities and are, of their nature, more indeterminate. Words like "reasonable", "necessary", "appropriate" or "due care" give rise to a much wider spectrum of possible interpretation. Citizens will know that they need a licence to drive a car, because:

It is an offence for a person to drive on a road a motor vehicle of any class otherwise than in accordance with a licence authorising him to drive a motor vehicle of that class.⁴³⁹

But citizens may not know precisely what kind of activity is prohibited by the following:

If a person drives a mechanically propelled vehicle on a road or other public place without due care and attention, or without reasonable consideration for other persons using the road or place, he is guilty of an offence.⁴⁴⁰

Then there are words that are so broad that they lack sufficient determinacy to allow citizens to set their affairs in order. Lord Rodger criticises words like 'almost' or 'perhaps' in legislation 'since legislation is meant to delimit rights and duties exactly'.⁴⁴¹ I haven't found any of these vague words in legislation, but there are some provisions which are equally vague.⁴⁴²

Turning next to a lack of specificity. Legislation ought to set out the details of the law, rather than leave citizens to guess at those details. Legislation is not a sketch, or a rough guide to legal obligations, it is a detailed, exact and precise list of those obligations. It is not the job of citizens to fill in the blanks left by a statute – how are they meant to follow the law if the law isn't specific about what its requirements are? The Supreme Court has considered this particular point in *Reilly*.⁴⁴³ That case revolved around the lack of specificity in Regulations. Section 17A of the Jobseeker's Act 1995 stated that

⁴³⁹ S. 87 Road Traffic Act 1988.

⁴⁴⁰ S. 3 Road Traffic Act 1988.

⁴⁴¹ Lord Rodger, in David Feldman (ed), *Law in Politics, Politics in Law* (Hart Publishing 2015) 74.

⁴⁴² Standing Order 42A(8) of the Northern Ireland Assembly states that 'A legislative consent motion shall not normally be moved ...'. This is less of a rule and more of a description of what sometimes happens.

⁴⁴³ *R (Reilly) v Secretary of State for Work and Pensions* [2013] UKSC 68.

Regulations may make provision for or in connection with imposing on claimants in prescribed circumstances a requirement to participate in schemes of any prescribed description that are designed to assist them to obtain employment.

Regulation 2 of the Jobseeker's Allowance (Employment, Skills and Enterprise Scheme) Regulations 2011, made under s.17A, stated that

'The Employment, Skills and Enterprise Scheme' means a scheme within section 17A ... known by that name and provided pursuant to arrangements made by the Secretary of State that is designed to assist claimants to obtain employment or self-employment, and which may include for any individual work-related activity (including work experience or job search).

The Supreme Court held that regulation 2 was ultra vires because it wasn't precise enough, it didn't actually specify any scheme, all it did was mention a scheme. The Court of Appeal stated

The question as to precisely how much detail must be included in the Regulations in order to comply with the requirements of the Act does not arise for consideration in this appeal, since the Regulations contain none.⁴⁴⁴

In agreeing with this decision, the Supreme Court spoke of 'the importance of legal certainty' particularly where a statute has a significant impact upon a person's livelihood.⁴⁴⁵ Another example from Northern Ireland is abortion law, where there has been a long-standing argument that the legislation is too imprecise for people to know what the actual law on abortion is.⁴⁴⁶

Is precision always necessary?

The starting point is that law should be precise. The courts have been quite clear about this, ruling that

'John Citizen' should not be in complete ignorance of what rights over him and his property have been secretly conferred by the Minister ... for practical purposes, the rule of law ... breaks down because the aggrieved subject's legal remedy is gravely impaired.⁴⁴⁷

⁴⁴⁴ [2013] EWCA Civ 66.

⁴⁴⁵ [47].

⁴⁴⁶ See for example *Family Planning Association v Minister for Health, Social Services and Public Safety* [2004] NICA 39, *Northern Ireland Human Rights Commission's Application* [2015] NIQB 96.

⁴⁴⁷ *Blackpool Corporation v Locker* [1948] 1 KB 349, 362.

The US courts have gone a stage further, developing the concept of ‘void for vagueness’ doctrine.⁴⁴⁸ This doctrine means that a court can strike down any statute that is too vague. Legislation is void for vagueness if it ‘fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement’.⁴⁴⁹ Cunnion specifically points the finger at bad rule making if a statute is void for vagueness.⁴⁵⁰ This doctrine is not available to UK courts, although they did strike down the Regulations in *Reilly* for being ultra vires.

However, precision is not an absolute value. In general terms, it is better for law to be precise than for it to be imprecise. There are four reasons why sometimes absolute precision is not a good thing.

Firstly, precision can sometimes lead to over-precision or prolixity. According to the Chief Parliamentary Counsel of Ireland, ‘It is frequently unnecessary to name every single thing you are forbidding or requiring. An overzealous attempt at precision may result in redundancy and verbosity. Drafting too precisely may create unintended loopholes’.⁴⁵¹ Xanthaki speaks of the ‘trap of over-exhaustiveness’.⁴⁵² As a hypothetical example, consider if a government wants to ban people from destroying polling cards. The simple way is:

It is an offence to destroy a polling card.

An overly-precise way is

It is an offence to burn, tear, immolate, rip, or chew a polling card.

In trying to cover all eventualities, in trying to be too specific, two problems have arisen here, (a) that the sentence is longer to read and harder to understand, and (b) it has inadvertently left out some means of destruction, for example by dipping in acid. Bingham himself, in a judicial capacity criticised a style of interpretation that leads to over-precision

that is not to say that attention should be confined and a literal interpretation given to the particular provisions which give rise to difficulty. Such an approach not only encourages immense prolixity in drafting, since the draftsman will feel obliged to provide expressly for every contingency which may possibly arise. It may also (under the banner of loyalty to the

⁴⁴⁸ C Lockwood, ‘Defining Indefiniteness: Suggested Revisions to the Void for Vagueness Doctrine’ (2009) 8 *Cardozo Public Law, Policy, and Ethics Journal* 255.

⁴⁴⁹ *United States v Williams* 128 S. Cr. 1830, 1845 (2008).

⁴⁵⁰ Kyle R Cunnion, ‘Earning a C for Rulemaking: The Ambiguity and Potential Impact of a Recent SEC Rule Governing Nationally Registered Statistical Rating Organizations’ (2014) 93 *North Carolina Law Review Addendum* 150.

⁴⁵¹ Unpublished Legislative Drafting Manual, Dublin 2001, para 4.4.

⁴⁵² Xanthaki, *Drafting Legislation*, (n 3) 91.

will of Parliament) lead to the frustration of that will, because undue concentration on the minutiae of the enactment may lead the court to neglect the purpose which Parliament intended to achieve when it enacted the statute.⁴⁵³

Schulz criticises ancient Roman drafting as well as modern UK drafting for the tendency towards exhaustiveness 'legal science was convinced that unambiguous expression of thought could only be attained through the medium of pedantic, circumstantial phrasing' adding in a footnote 'the nearest parallel is the form of the English statute'.⁴⁵⁴

Secondly, it can sometimes be hard to set out in minute detail all the individual ways in which a statute can be breached. Sometimes it is better to use a broad and general term. Going back to the offence of driving without due care and attention,⁴⁵⁵ most people will have a general idea of what that means – driving without the appropriate level of care, or not driving carelessly. The other way to approach it would be to say

It is an offence –

- (a) to drive while talking on a mobile phone,
- (b) to overtake going around a bend,
- (c) to overtake on the brow of a hill,
- (d) to root around in the glove compartment for a CD while driving
- (e) to hold a cigarette in one hand and a drink in the other instead of having both hands on the wheel
- (f) etc.

It will swiftly become apparent that there are a myriad of types of behaviour that we want to prohibit, and that the catch-all of 'driving without due care and attention' is the most effective way to describe them.

Thirdly, with laws that regulate the activities of government, it can sometimes be necessary to have a level of flexibility, so that they can take whatever action is appropriate in the circumstances. This can be contrasted with the precision necessary when a citizen is told to do something on peril of

⁴⁵³ *Quintaville v Secretary of State of Health* [2003] UKHL 13 [8].

⁴⁵⁴ Schulz (n 83) 79–80.

⁴⁵⁵ S. 3 Road Traffic Act 1988.

breaking the criminal law. See for example s. 6(2)(b) of the Financial Services and Markets Act 2000 which states:

(2) In considering that objective the Authority must, in particular, have regard to the desirability of—

(b) regulated persons taking appropriate measures (in relation to their administration and employment practices, the conduct of transactions by them and otherwise) to prevent financial crime, facilitate its detection and monitor its incidence;

‘Appropriate measures’ is an extremely broad term here. (VanSickle-Ward’s measurement of lack of specificity includes the use of terms like: where appropriate, deemed necessary, reasonable charges and generally accepted.)⁴⁵⁶ However, it is used in connection with the duties of the Financial Services Authority and it does not impose duties on individuals. Likewise, the Secretary of State may do certain things for ‘the purpose of ensuring that all appropriate measures are taken to avoid damage to the environment’.⁴⁵⁷ As this gives a power to government rather than placing a duty on citizens, the benefits of flexibility outweigh the disadvantages of a lack of precision. This was accepted as a valid point in the *Reilly* case – ‘the self-evident need for flexibility in the precise characteristics of any scheme introduced under section 17A render it unlikely that Parliament can have intended much, if anything, in the way of specific information about any scheme to be included in any regulation made thereunder’.⁴⁵⁸

Fourthly, it is not always possible for the legislators to know in advance about the way in which society will react to a particular scheme, or know the different kind of factual situations that may arise. Although legislators ought to turn their mind to the impact of a law, it isn’t always possible to effectively predict every response. This means it isn’t always possible to specify what is to apply in every single case. The US courts have recognised this, stating that

most statutes must deal with untold and unforeseen variations in factual situations, and the practical necessities of discharging the business of government inevitably limit the specificity with which legislators can spell out prohibitions. Consequently no more than a reasonable degree of certainty can be demanded.⁴⁵⁹

⁴⁵⁶ VanSickle-Ward (n 348).

⁴⁵⁷ S. 112(1) Environmental Protection Act 1990.

⁴⁵⁸ *Reilly* [46].

⁴⁵⁹ *Boyce Motor Lines Inc v United States* 342 US 337 (1952) at 340.

Commenting upon this, Lockwood stated that it is impossible for legislation to achieve what she called ‘mathematical certainty’.⁴⁶⁰ Developing this argument, Soames⁴⁶¹ (as summarised by Asgeirsson) states that ‘under certain circumstances, it is a good idea for lawmakers to formulate laws in vague terms and thereby facilitate their incremental, case-by-case precisification, resulting from adjudication of borderline cases aimed at furthering their rationale’.⁴⁶² However, I think this argument fails (in democratic terms) in its reliance on judges making law. It also fails in accepting that the application of law is unknowable at the time it is made – this is the very opposite of predictability.

As with so many aspects of phronetic legislative drafting, this comes down to a judgement call by the drafter, balancing the need for precision against the arguments set out above. The guiding principle should be the rule of law, specifically predictability in this case – the law should be sufficiently precise so that reasonable people can predict the legal effect of their actions by reference to the words in the statute book.

Drafting techniques to enhance precision

Much of the drafting techniques on unambiguity apply equally here. In addition, the following techniques can assist with precision.

Firstly, the use of a general term followed by a non-exhaustive list. A non-exhaustive list sets out a certain level of detail, but states that there may be other points of detail which are not included in the list, and the fact that something isn’t included specifically, doesn’t mean that it is excluded.

Taking the polling card example, it could be phrased as

It is offence to destroy a polling card, including destroying it by burning, ripping, tearing or immolating.

The fact that we haven’t specifically mentioned ‘or by dipping it in acid’ is no longer problematic now, as ‘dipping in acid’ falls within the general heading of ‘destroying’. There are many ways to set up non-exhaustive lists:

- Without prejudice to the generality of the foregoing, X means ...
- Including, without limitation ...

⁴⁶⁰ Lockwood (n 448) 271.

⁴⁶¹ S Soames, ‘Vagueness and the Law’ in Andrei Marmor (ed), *The Routledge Companion to Philosophy of Law* (Routledge 2012).

⁴⁶² Hrafn Asgeirsson, ‘Can Legal Practice Adjudicate between Theories of Vagueness?’ (Social Science Research Network 2015) SSRN Scholarly Paper ID 2687091 <<http://papers.ssrn.com/abstract=2687091>> accessed 24 June 2016.

- For example, ...

This point can be seen by comparing the Commissioner for Complaints (NI) Order 1996 with its successor, the Public Services Ombudsman Act (NI) 2016. In the 1996 Order, the Commissioner is given powers to effect a fair settlement. IN the 2016 Act, the Ombudsman is given the same power, but with an addition “including by recommending that the listed authority make a payment to the person aggrieved”.⁴⁶³ In adjudicating upon the 1996 Order, the courts wrestled with the question if the Commissioner had a power to recommend a financial payment.⁴⁶⁴ However, the 2016 Act completely avoids the need for litigation as it expressly includes powers to recommend payment. Kirkham, in writing about the case, rather misses the point.⁴⁶⁵ His focus is on statutory interpretation when the legislation is unclear, rather than on drafting tools to make the legislation clear in the first place.

Secondly, avoid indeterminate or subjective words where it would place a difficult burden on the citizen to understand, and where the consequences of failure to understand would be severe. So, whilst it may be appropriate to require government to take ‘appropriate measures’ it would not be sufficiently precise to require citizens to take ‘appropriate measures’ on peril of breach of the criminal law.

Thirdly, encourage the appropriate use of extra-statutory guidance. An indeterminate word or phrase may be fleshed out by official guidance. This goes slightly beyond being a drafting principle as it is external to the draft, but the drafter can certainly recommend its use. For example, there is a test for obscenity in the Obscene Publications Act 1959

For the purposes of this Act an article shall be deemed to be obscene if its effect or (where the article comprises two or more distinct items) the effect of any one of its items is, if taken as a whole, such as to tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it.⁴⁶⁶

Without anything more, the test of what is obscene could be as unhelpful to the citizen as the test in the American case of *Jacobellis v Ohio* – ‘I know what it is when I see it’.⁴⁶⁷ However, the Crown Prosecution Service in the UK have written guidance on when they will normally prosecute:

⁴⁶³ S. 11(b).

⁴⁶⁴ *In the matter of an application by JR55 for judicial review (Northern Ireland)* [2016] UKSC 22.

⁴⁶⁵ Richard Kirkham, ‘JR55, Judicial Review and the Limits of Textual Reasoning’ [2017] Public Law 46.

⁴⁶⁶ S. 1(2) Obscene Publications Act 1959.

⁴⁶⁷ 378 US 184 (1964).

It is impossible to define all types of activity which may be suitable for prosecution. The following is not an exhaustive list but indicates the categories of material most commonly prosecuted:

- sexual act with an animal
- realistic portrayals of rape
- sadomasochistic material which goes beyond trifling and transient infliction of injury
- torture with instruments
- ...⁴⁶⁸

3.4 Stability

Law is predictable if it is stable. This means that the law today is reasonably similar to the law tomorrow. The Law Society have pointed out (in relation to rule of law problems in Fiji) that 'practical difficulties are created by the frequent amendment of decrees'.⁴⁶⁹ However, laws cannot be expected to remain static forever. Fuller dismisses the argument that laws must never change so as to avoid prejudice to people who entered into contracts on the faith of an existing law.⁴⁷⁰ That way lies ossification and a refusal to let the law evolve in response to changing social circumstances, or as the Energy and Climate Change Committee put it 'policy changes are a fact of life in a democracy'.⁴⁷¹ Citizens cannot expect the law to remain static and that a social activity will always be regulated in the same manner. In a Canadian case, Dickson J observed that 'No one has a vested right to continuance of the law as it stood in the past'.⁴⁷²

In fact, the question of how often a law ought to change isn't really a drafting question at all, it is more a political question to be determined by reference to social pressures. Tax law changes every year in response to changing financial pressures – the need for stability does not over-ride the need for a balanced budget. Criminal law changes regularly in response to different political priorities, and again, this is entirely appropriate. For example, if society / legislators see a heightened problem with knife crime, then it is perfectly acceptable for the law on knife crime to change in response.

Therefore, we can say that stability is a weak drafting principle as it can be displaced if there is a good reason for it. The drafter may not be in a position to evaluate what is 'a good reason' as the

⁴⁶⁸ 'Obscene Publications: Legal Guidance: The Crown Prosecution Service'

<http://www.cps.gov.uk/legal/l_to_o/obscene_publications/> accessed 24 June 2016.

⁴⁶⁹ The Law Society Charity, 'Fiji: The Rule of Law Lost' (The Law Society Charity 2012). 5.

⁴⁷⁰ Fuller 60.

⁴⁷¹ Energy and Climate Change Committee, 'Investor Confidence in the UK Energy Sector' (House of Commons 2016) Third Report of Session 2015 – 16 9.

⁴⁷² *Gustavson Drilling v Department of National Revenue* [1977] 1 SCR 271, 282

reasons may not have anything to do with legal criteria. However, the drafter must at the very least ensure that there are reasons advanced politically for legislation being unstable.

3.4.1 The nature of legal change

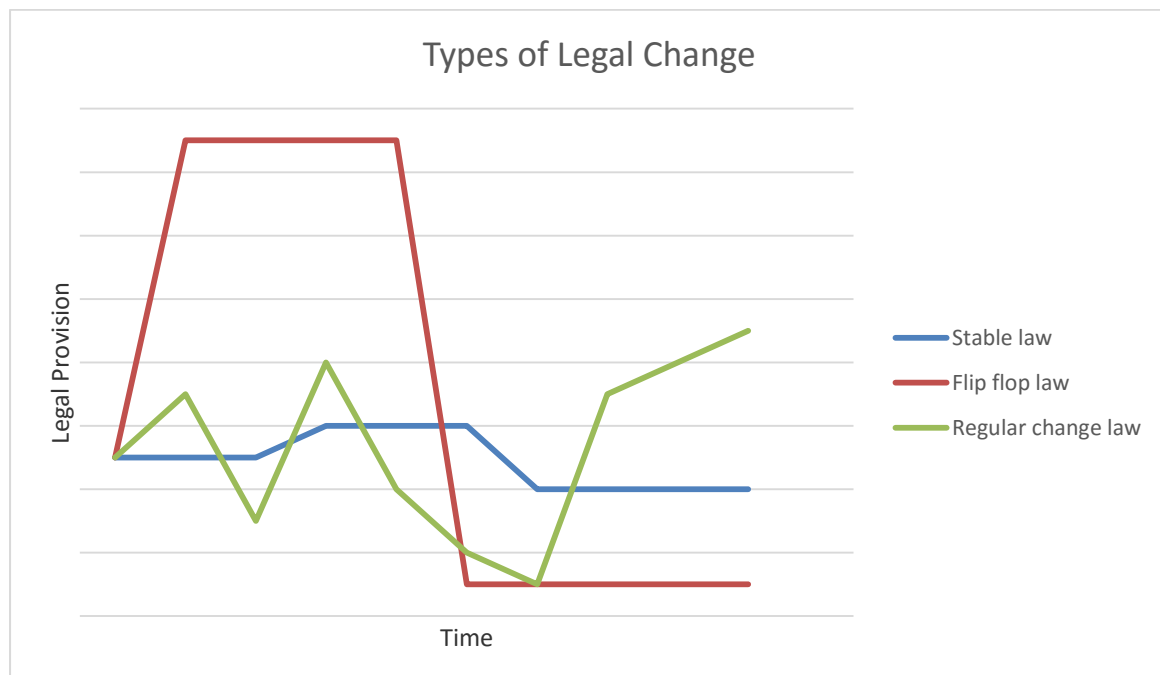
A stable law remains relatively constant over time. Laws can be unstable in two ways: (a) if the magnitude of the change is large, or (b) if the frequency of change is high.

Graphically this can be represented as set out below.

The stable law line represents law with small changes in magnitude happening relatively infrequently. A quantitative example could be the tax rate for a particular economic activity – it changes by a few percent points every couple of years.

The flip flop law line represents a law with large changes in magnitude. This could mean a complete reversal of a previous policy. An example could be gay marriage: it is unlawful, and then it is lawful, a complete change from the previous position, so the magnitude of change is large.

The regular change line represents a law that changes with great frequency. Every year the law changes (the magnitude of the changes could be large or small). An example could be laws on criteria for welfare payments. Each year the amount of welfare payments, their type, and the criteria for eligibility may change.



Although this is set out graphically above, this is an issue that is hard to quantify. Some legal change does have numbers attached to it (for example, the maximum sentence length) and this can be measured. Most legal change is however qualitative and therefore not easily measured.

3.4.2 Ameliorating the effects of unstable law

If there is a good reason why the law should not be stable, then the drafter must give effect to this policy. However, the drafter does have some tools to ameliorate the difficulties caused by unstable law. These are set out below.

3.4.3 Highlighting the change

The greater the magnitude of the change, the more prominent the change should be in the legislation. If a new provision represents a radical departure from the old law, then it should be flagged up or highlighted within the legislation. A large change makes law unpredictable, but we can ameliorate this unpredictability by telling citizens in the legislation itself that this is a large change. Drafters should always strive to draft legislation which communicates its central messages to citizens, this goal is even more important when the central message is a large change to the legal system. A legal provision can be given greater prominence in several ways: being included in the title of the Act, being included as part of a section heading, or its relative place in the legislation (towards the start, not at the end).

Take as an example the abolition of the death penalty in the UK. This could have been done via a standard Criminal Justice Act. Instead, it was done in the Murder (Abolition of the Death Penalty) Act 1965. Abolishing the death penalty was a major change and citizens were told about it at the very outset of the legislation. As another example, consider devolution for Scotland, contained in the Scotland Act 1998. The very first section states “There shall be a Scottish Parliament”.⁴⁷³ As Lord Rodger points out, this is a brilliant opening line.⁴⁷⁴ It is short, clear and resonant. However, for the purposes of predictability it is also excellent because it makes clear at the very outset the revolutionary changes that the Act is making.

3.4.4 Advertising the change

Legislation making major change can include an obligation to inform the public at large about that change. The previous drafting technique is about making clear the nature of the legal change within the legislation. But this technique inserts an obligation within the legislation to advertise the

⁴⁷³ S. 1(1) Scotland Act 1998.

⁴⁷⁴ Rodger in Feldman (n 441) 69.

change. This is perhaps best illustrated by way of an example. The Human Transplantation Bill (currently before the Northern Ireland Assembly) will make a substantial change to the law on organ donation. Previously a person would have to opt in (or actively consent) to their organ being donated after they die. Under the Bill, a person would have to opt out (or they would be deemed to consent) to donating their organ after they die. This is a complete change in the law and would have a major impact upon people. Therefore, in clause 1 of the Bill, there is included a duty upon government to

inform the public about the circumstances where consent to transplantation is deemed to be given, and the role of relatives and friends in affirming that deemed consent.⁴⁷⁵

So the unpredictability caused by a large change in law is ameliorated by including an express duty upon the state to tell the public about that change. Jowell, in expanding upon Bingham's definition calls for precisely this, arguing that the rule of law requires that 'fair warning should be given about any change in the law'.⁴⁷⁶

3.4.5 Long lead in time to change

Thring stated that laws shouldn't be commenced immediately after being made, that citizens should be given a chance to understand the law first.⁴⁷⁷ If the magnitude of change is large, then it is advisable for there to be a long period between the law being made and the law coming into force. This gives more time for citizens and government to get used to it and to make full preparations for the change. The unpredictability is smoothed out by allowing time for people to be made fully aware of the change. Taking the organ donation legislation again by way of an example, when this law was introduced into Wales, there was a provision within the legislation that stated that the law couldn't be commenced until at least two years after it was made.⁴⁷⁸ This was inserted to give enough time for the population to be told about the radical nature of the change. Investors argue for this kind of stability also:

if policy changes are announced with sufficient lead time, are in line with the overall direction of energy policy, are not retroactive and result from an extensive and objective consultation they are acceptable to investors.⁴⁷⁹

⁴⁷⁵ Human Transplantation Bill clause 1(1)(c).

⁴⁷⁶ Jeffrey Jowell, 'The Global Economy and the Rule of Law' (Global Law Summit, London, 25 February 2015) 1 <http://www.biicl.org/documents/504_sir_jeffrey_jowell_qc_-_global_law_summit_paper_25_feb_2015.pdf>.

⁴⁷⁷ Thring, *Practical Legislation: The Composition and Language of Acts of Parliament* (n 135).

⁴⁷⁸ Human Transplantation (Wales) Act 2013, s. 21(2).

⁴⁷⁹ Energy and Climate Change Committee (n 471) 9.

3.4.6 Dealing with rapid technological changes

One cause of frequent change in law is in order to respond to technological change. So, if a new technology is created, or allows for doing something in a different way, it requires new legislation to regulate it. Take as an example medicines law – the law which regulates pharmacies and the sale and use of medicines for human use. The law on prescription only medicines for human use is contained in the Human Medicines Regulations 2012. The following table sets out how many times it has been amended since it was enacted.⁴⁸⁰ These amendments are necessary as new types of medicines are constantly being created.

Year	Times Amended
2015	6
2014	4
2013	3

There has always been an arms race between societal innovation and legislative response. By this I mean that society finds a new way to do something (or a new loophole) and then legislation is enacted to regulate it (or plug the loophole). This then leads to fresh innovation and the cycle continues.

This is not a new phenomenon, Rodger gives examples going back to Roman times of laws regulating the sale of slaves being abused and then recast to combat the abuses.⁴⁸¹ However, there is an argument that technological advances speed up this arms race. Thus, according to Wadhwa, ‘these regulatory gaps exist because laws have not kept up with advances in technology. The gaps are getting wider as technology advances ever more rapidly’.⁴⁸² So previously, law might need to change once every 10 years in response to societal change, now it needs to change every 1 year in response to technological change. This can be condensed down to the common trope that law is not ‘keeping up’, or ‘keeping pace’ with technological change.⁴⁸³ Voermans presents a novel solution that partly

⁴⁸⁰ Including amendments to the Northern Ireland equivalent regulations.

⁴⁸¹ Rodger in Feldman (n 441) 77.

⁴⁸² Vivek Wadhwa, ‘Lawmakers Can’t Keep Up with Technology’ (*MIT Technology Review*) <<http://www.technologyreview.com/view/526401/laws-and-ethics-cant-keep-pace-with-technology/>> accessed 5 January 2016.

⁴⁸³ Lyria Moses, ‘Adapting the Law to Technological Change: A Comparison of Common Law and Legislation’ (2003) 26 *University of New South Wales Law Journal* 417. Michael Shapiro, ‘Is Bioethics Broke?: On the Idea of Ethics and Law “Catching up” with Technology’ (1999) 33 *Indiana Law Review* 17. Lyria Moses, ‘Recurring

addresses this problem. He advocates greater use of ICT in order to speed up the process for making legislation,⁴⁸⁴ allowing a more rapid response to technological change. However, this does not address the issue of stability in terms of the law changing far too frequently.

The interaction of technological change and legislation is clearly a broad field of enquiry. In this section, I consider only one aspect, how to maintain stability (and thus predictability) in the law in the face of technological change. On the face of it, there are two options, both of which lead to bad results. The first option is to repeatedly change the law to react to new technologies. This makes legislation unstable and unpredictable as it is constantly changing. The medicines law quoted above is an example of unstable legislation that is constantly changing. The second is to leave the law as it is. This results in uncertainty as citizens don't know if the old law applies to new technologies. For example, does the Theft Act 1968 apply to 'stealing' someone's wifi connection?

The normal solution which is proposed to this problem is to draft legislation in a way which future-proofs it. This means that current legislation will apply in the future, even if there are technological changes. This can be done by drafting legislation in a way which requires the least amount of subsequent change in response to future technologies – what is generally called 'technology neutral' legislation. Legislation is technology neutral if it 'neither imposes nor discriminates in favour of the use of a particular type of technology'.⁴⁸⁵ The theory is, that if the legislation simply specifies the end result, without specifying the means to that end result, it will not need to change as the different means to that end change.

Take a simple example, communicating a notice to a department. The table below sets out the different ways this requirement can be satisfied. As can be seen, there is a spectrum of ways to refer to technology. This links into the argument made by Whitley, that there isn't a simple binary choice between technology specific or technology neutral legislation, it is more a question of degree.⁴⁸⁶

Dilemmas: The Law's Race to Keep up with Technological Change' [2007] University of Illinois Journal of Law, Technology and Policy 239.

⁴⁸⁴ Wim Voermans, Hans-Martien ten Napel and Reijer Passchier, 'Combining Efficiency and Transparency in Legislative Processes' (2015) 3 Theory and Practice of Legislation 279. I don't fully agree with him that 'faster' legislation makes for better legislation as it may reduce the scope for mature deliberation and debate over whether a particular law is a good idea. However, he finds ways in which ICT can enhance consultation and deliberation while at the same time speeding up the process.

⁴⁸⁵ EU Directive 2002/21. Paragraph 18 of the preamble.

⁴⁸⁶ Edgar Whitley, 'On Technology Neutral Policies for E-Identity: A Critical Policy Based on UK Identity Policy' (2013) 8 Journal of International Commercial Law and Technology 134. 143

Technology status	Requirement in Legislation	Methods that can be employed
Technology specific	Notice must be posted	Written hard copy, sent through the post
Partially specific	Notice must be in writing	Hard copy letter Email Fax Text message
Technology neutral	Notice must be communicated	Hard copy letter Email Fax Text message Phone call Online form filled in (boxes ticked etc.) Facebook poke New forms of communication

In order to make legislation technology neutral, it is often necessary to focus more on principles rather than details. In this way, if the technology changes, the principles will remain constant and will be able to guide the interpreter. This is certainly the conclusion that John reaches, ‘rapid change is also a situation in which a non-detailed law is ideal’.⁴⁸⁷ This requires the drafter to look at the justification behind a suggested policy and to draft the rule in order to reflect the justification rather than looking simply looking at how the policy will be implemented with today’s technology. Taking a very facile example, the justification behind a rule making it a crime to shoot people is that we don’t want people to be injured. So the principle is ‘don’t injure people with a weapon’, and the detail is

⁴⁸⁷ John Ubena, *How to Regulate Information and Communications Technology: A Jurisprudential Inquiry into Legislative and Regulatory Techniques* (jure 2015) 101.

‘don’t shoot people with a gun’. In order to future proof this rule, we can use the principle as our rule, rather than the detail, so the rule will be ‘it is an offence to injure a person with a weapon’. If a new technology comes along (say the Taser), our broad principle rule will cover it. However, if we had drafted in a detailed way (‘it is an offence to injure a person with a gun’) then Tasers will cause problems as we don’t know if they fall within the detailed definition of ‘gun’.

Technology neutral drafting is a useful principle to bear in mind and it can work in some circumstances. However, to my view it is a weak drafting principle as there are four problems associated with it.

Firstly, we can’t predict what future technology will do. Our mode of thinking is constrained by current paradigms that may be rendered obsolete by future technologies. Or, as Moses puts it ‘the rule may also apply to conduct outside what could have been foreseen at the time of its creation’.⁴⁸⁸ Bingham himself specifically addressed this issue in relation to legislative drafting, stating that ‘the situation which has arisen is one which the draftsman could not have foreseen and for which accordingly he has made no express provision’.⁴⁸⁹ For example, laws preventing threatening communications would work 100 years ago with regards to threatening letters and will work today with regards to threatening emails. But we had no concept of ‘spam’ communications 100 years ago so the laws of then couldn’t possibly cope with spam emails today. So, even if we think we are writing technology neutral law today, the environment in which it operates tomorrow may have so fundamentally changed that the law will be out of date, no matter how technology neutral we may think it is.

Secondly, the more general the legislation becomes, the more it risks becoming vague and unfocused. If we wanted to really future proof criminal law, we would have a single law which states ‘it is an offence to harm another person’. Yes, this would always work, but it allows for no nuance, no way of reflecting different sorts of crime and harm.

Thirdly, in order to make something technology neutral, we may have to draft in more abstract ways. For example, if we specifically refer in legislation to ‘a smartphone’ then everyone can understand, but if we try to cover future technologies and refer to ‘a hand-held portable electronic communication device’ we introduce confusion. This is exactly the problem with the Regulation of Investigatory Powers Bill

⁴⁸⁸ Moses, ‘Adapting the Law to Technological Change: A Comparison of Common Law and Legislation’ (n 483). 400.

⁴⁸⁹ *Quintaville v Secretary of State of Health* [2003] UKHL 13, [7].

The instructions to parliamentary draftsmen were to make it technology-neutral, because everyone could see that the technology was moving very fast. Parliamentary draftsmen did an excellent job in doing that, but as a result I do not think the ordinary person or Member of Parliament would be able to follow the Act without a lawyer to explain how these different sections interact.⁴⁹⁰

Intelligibility is dealt with in chapter 4, but it touches directly here on future-proofing law. On this point, Smith stated that ‘unintelligibility is a direct consequence of the attempt to future-proof by technologically neutral, abstract drafting’.⁴⁹¹ Smith went on to directly link this to the rule of law requirement that people be able to understand law.

The fourth problem is more to do with democracy than the rule of law. If we have technology neutral, general principles law, then we are passing on the responsibility to react to new technologies to judges rather than legislators. We are leaving the job of regulating future technologies to judges on a case by case basis. This is what happened in *Quintaville*.⁴⁹² In that case, the question for the court was whether the Human Fertilisation and Embryology Act 1990 (which covered certain types of reproductive technologies) applied to a new type of reproductive technology. The court, taking a liberal and purposive interpretation, and looking at the intention of parliament, held that it did. In my view, *Quintaville* falls on the correct side of the line as the new technology was close enough in type to the old technology, requiring no fresh moral or ethical decision making about it – it was clear that as Parliament was intent on regulating similar reproductive technologies, it would have wished to regulate this reproductive technology if it had existed at the time the legislation was enacted.

However, it is a rather different proposition when a ‘new’ problem arises out of new technology. In that case, there is much less scope for extending the words of an Act to a novel problem. So, taking the example of piggy-backing on someone’s wifi, this is quite different from the law of theft in the Theft Act 1968 and it would be wrong for judges to decide on this rather than Parliament. Lord Wilberforce said:

there is one course which the courts cannot take, under the law of this country; they cannot fill gaps; they cannot by asking the question ‘What would Parliament have done in this

⁴⁹⁰ Sir David Omand, giving evidence in Home Affairs Select Committee, ‘Uncorrected Transcript of Oral Evidence’ (House of Commons 2014) HC 231-vii

<<http://www.publications.parliament.uk/pa/cm201314/cmselect/cmhaff/uc231-vii/uc23101.htm>>.

⁴⁹¹ Graham Smith, ‘Future-Proofing the Investigatory Powers Bill’ (BILETA, 11 April 2016)

<<http://www.slideshare.net/GrahamSmith9/futureproofing-the-ipbill-60769756>>.

⁴⁹² *Quintaville v Secretary of State of Health* [2003] UKHL 13.

current case – not being one in contemplation – if the facts had been before it?’ attempt themselves to supply the answer, if the answer is not to be found in the terms of the Act itself.⁴⁹³

One of Moses’ arguments is that courts are better than legislators at dealing with technological change, this is because they are quicker and can deal with new cases incrementally and by analogy.⁴⁹⁴ This is true, but it is a question of degree. If a judge can deal with a small jump in technology by a purposive and broad reading of existing legislation (what is termed ambulatory interpretation⁴⁹⁵), then this may be a cost effective way to deal with the problem. But anything more than a small jump, and anything which would require twisting the current legislation to fit the new facts would be undemocratic.

Drawing the line between acceptable and incremental extension of statute law by judges, and unacceptable new law-making by judges is very difficult and beyond the scope of this thesis. The rule of law principle for the legislative drafter is to use technology neutral drafting where this is feasible without (a) making uncertain law, and (b) delegating power to make law to judges.

3.5 Clear commencement

Legislation rarely comes into force immediately when it is made. Instead there will be a period between its making and its commencement (or coming into force, or coming into operation). As well as making the legislation less navigable, commencement provisions can make the legislation less predictable – how is the citizen to know when a new law will come into force? Consider an investor making a decision about whether to buy widgets. The law regulating the sale of widgets has changed, but that change has not yet been commenced. The legal position is therefore unpredictable and the investor does not have sufficient information on which to make a rationale business decision. If she knows the commencement date then she can plan accordingly (for example by increasing or decreasing the size of her offer). The unpredictability is entirely state imposed and should be eliminated so far as is possible.

Predictability will be enhanced if the citizen knows at the outset when the new law will come into force, or is given clear information about the commencement date. This can be done in several ways.

⁴⁹³ *Royal College of Nursing of the United Kingdom v Department of Health and Social Security* [1981] AC 800, 822.

⁴⁹⁴ Moses, ‘Adapting the Law to Technological Change: A Comparison of Common Law and Legislation’ (n 483).

⁴⁹⁵ Mark Bradley, ‘Ambulatory Approach at the Bottom of the Cliff: Can the Courts Correct Parliament’s Failure to Update Legislation?’ (2003) 9 *Canterbury Law Review* 1.

3.5.1 Commencement date on Act when Act is made

When the legislation is enacted, it ought to state on its face the actual date when it comes into force. This is the gold standard for predictability. If different provisions are to be commenced on different dates, this should be done as simply as possible, and should be represented as clearly as possible, for example in a table.

On some occasions, there may be a desire from within government to allow for some flexibility on commencement dates, thus there may be a request that a Minister is given a power to determine the commencement date at some point in the future. According to Leigh, 'this allows for flexibility, giving time for necessary administrative changes and for the law to be introduced according to political expediency'.⁴⁹⁶ As an example, see the Civil Evidence (Witnesses) Bill.⁴⁹⁷ This Bill allowed for (amongst other things) witnesses to give evidence via a video link. Because it was not clear how long it would take to set up video links in all the courts in Northern Ireland, there was a power to commence on a day determined by the Department of Finance and Personnel. So, when the technology was ready, the Bill would be commenced.

Unfortunately, this also provides an excuse for government inaction – without a fixed date, government may drag its heels in establishing the necessary machinery for the Act to be effective. Worse still, this makes legislation subject to executive caprice – if a Minister decides she doesn't like a particular statute, then she may simply decide not to commence it. The courts have directly addressed this point. In the *Fire Brigades Union* case they held that it was unlawful for the Minister to decide never to commence a statute, he was under an on-going obligation to at the very least consider commencing a statute.⁴⁹⁸

3.5.2 Presentation of commencement dates

If the actual commencement date does not appear on an Act, it is difficult for citizens to know if it has commenced. This lack of predictability has now been ameliorated by s. 104 of the Deregulation Act 2015. That section provides that a commencement provision can be amended after the event to include the actual date of commencement.

3.5.3 Clear repeal date

It is equally important that the end date of a law is clear and certain. There are several ways that legislation can cease to have effect. The most common way is express repeal by another statute.

⁴⁹⁶ Ian Leigh, 'The Prerogative, Legislative Power, and the Democratic Deficit: The Fire Brigades Union Case' (1995) 3 Web Journal of Current Legal Issues.

⁴⁹⁷ Northern Ireland Law Commission, NILC 10 (2011).

⁴⁹⁸ [1995] 2 AC 513.

So, a new law will make new provision about a subject, and it will then expressly repeal the old law regulating that subject. This gives the reader certainty. The bad way is implied repeal, where the new law is incompatible with the old law, and it therefore impliedly repeals the old law to the extent of that incompatibility. This is lazy law making which leaves the reader uncertain about what the actual law is. I agree with de Paula's conclusions that 'explicit clauses are always preferable to general revoking'.⁴⁹⁹

A relatively uncommon way to end law is the sunset clause. This is a clause in a statute which states when that statute will expire. In many ways, this is an excellent drafting tool for assisting predictability, as the user will know in advance when the statute will cease to have effect.⁵⁰⁰ However, as Bar-Siman-Tov points out, in many cases the point of temporary legislation isn't to give a definite end date to the legislation, it is to experiment to see if the temporary legislation actually works.⁵⁰¹ In fact a sunset clause can be misleading if the sunset date is continually extended, or the legislation continually renewed.⁵⁰²

The final way is the very undesirable situation where a law just becomes obsolete or falls into disuse. This makes predictability difficult because the reader won't know if the statute on the page will actually be still applied in practice. This is a very good argument for the work of Law Commissions in tidying up the statute book, and statute law repeal Acts in removing obsolete statutes.

3.6 Consistency

Consistency in drafting promotes predictability. The most basic drafting principle here is that a statute should not contradict itself – it shouldn't have 'simultaneous, mutually inconsistent meanings'.⁵⁰³ Kecskés points out that the Sarbanes-Oxley Act has internal inconsistencies due to its hasty transit through the legislature, 'proper attention was not given to the text of the bill, thus the approved Act contained duplicate provisions on sentencing which were likely to cause confusion'.⁵⁰⁴ Watkin points out the efforts by medieval lawyers to resolve inconsistencies in the text of the Justinian Digest

⁴⁹⁹ de Paula (n 349).

⁵⁰⁰ See further for example, Sofia Ranchordas, *Constitutional Sunsets and Experimental Legislation: A Comparative Perspective* (Edward Elgar Pub 2015).

⁵⁰¹ Ittai Bar-Siman-Tov, 'Temporary Legislation, Better Regulation and Experimentalist Governance: An Empirical Study' (2017) 11 *Regulation and Governance*.

⁵⁰² *ibid.*

⁵⁰³ Dorsey (n 421) 175.

⁵⁰⁴ András Kecskés, 'The Sarbanes-Oxley Act from a Legislative Viewpoint' (2015) 4 *Theory and Practice of Legislation* 27.

Faced with contradictions and inconsistencies in the Digest, the jurists who studied it responded with a humility to match that of the theologians, believing that through the application of reason, the essential consistency and unity of the compilation could be demonstrated.⁵⁰⁵

But in my view, this is a wasted effort. It would be much better to delete or avoid inconsistencies than to try to use sophistry to reconcile them.

Consistency means much more than simply avoiding direct contradictions within a single statute. If a novel statutory provision is introduced then citizens may not know how it will be applied. But if a statutory provision is introduced which is in resonance with previously interpreted and applied provisions, then citizens will have a reasonable assumption that this provision will be interpreted and applied in a similar way. For example, the UK statute book is littered with 'it is an offence to ...' and 'a person commits an offence if ...'. This consistency of language helps readers to quickly understand that an offence is being created. But if the provision states 'a crime has the following elements ...', then this lack of consistency with other statutes creates unpredictability – why is this different, is an offence being created?

However, consistency is not a strong drafting principle. As with predictability it is subject to the 'so far as is possible' caveat. Absolute consistency across the statute book, and blindly following precedent stifles innovation and the development of new drafting techniques. Greenberg entitles one of his chapters 'the pestilential power of precedent'⁵⁰⁶ and argues strongly in favour of individuality in drafting. Undue consistency also corrals drafters into existing paradigms which may not effectively deal with the exigencies of emerging social problems. Watkin questions whether 'received tradition can become invalid by the passage of time',⁵⁰⁷ his point is more about whether old accepted practices can continue in the modern age, but it applies equally to old accepted precedents.

What then does it mean to draft consistently? It is submitted that it means (a) similar policies in different statutes are given effect by similar legal provisions, (b) similar words used in statutes are intended to have similar meanings and (c) the statute book as a whole is generally harmonious. As will be explained further below, I have deliberately said 'similar' rather than 'the same'. Consistency is not the same as continuity or stasis. It doesn't mean that there is no change at all. Every statute is

⁵⁰⁵ Thomas Glyn Watkin, 'Publication Review: Law and Theology in the Middle Ages' [2004] *Ecclesiastical Law Journal* 353, 354.

⁵⁰⁶ Greenberg, *Laying down the Law* (n 92). Chapter 27.

⁵⁰⁷ Thomas Glyn Watkin, 'Consensus and the Constitution' [1994] *Ecclesiastical Law Journal* 232, 235.

drafted to effect legal change (otherwise there would be no point in enacting new legislation). Drafters are not in the business of keeping the law static. Consistency means that we draft legislation in a similar manner over time. Laws uses a colourful metaphor to describe this, drafters must not 'debase the coinage of communication'.⁵⁰⁸ Words are what we use to communicate, we must use them consistently and with respect in order that we are able to continue to use them (and for them to have the same meaning) in the future.

This is the drafting theory, but how do we give effect to it?

3.6.1 Words mean the same thing

Within a single statute, it is imperative that words have exactly the same meaning throughout the statute. So if a child is defined as someone aged under 18 in one part of a statute, then that meaning should be used throughout the rest of the statute. If you mean the same thing, use the same word, but if you mean a different thing, use a different word. 'Consistency in this context means being repetitive, that is using the same word rather than a synonym'.⁵⁰⁹ Unlike in literature where a synonym may stop the text from being boringly repetitive, in legislation repeating the word shows you intend the same meaning to apply. Elizabeth Barrett Browning could write 'How do I love thee? Let me count the ways' and then go on to enumerate them.⁵¹⁰ Good for poetry, bad for drafting.

An example of how confusing it can be to use the same phrase to describe two different things can be found in the Consumer Credit Directive.⁵¹¹ Article 14 is entitled 'right of withdrawal' and deals with the right of a consumer to withdraw from a credit agreement within 14 days. However, article 15 then goes on to talk about a 'right of withdrawal, based on Community law'. However, this right of withdrawal does not mean the same thing as the article 14 right of withdrawal, instead it means a separate and distinct right of withdrawal from a contract for the supply of goods and services. The reader is left scratching his or her head trying to figure out the meaning, before (hopefully) eventually realising that notwithstanding that the same words are used, the meanings are completely different.

It is superficially attractive to argue that words must also mean the same across the entirety of the statute book. So, if we say 'child' anywhere in legislation, it will always mean someone under the age of 18. However, this would not allow for necessary distinctions to be made in those different statutes. Take tax, electoral and immigration law and their definitions of 'resident' as an example.

⁵⁰⁸ Laws, 'Plus ca Change - Continuity and Change in UK Legislative Drafting Practice' (n 336). 142.

⁵⁰⁹ Martineau and Salernon (n 421) 59.

⁵¹⁰ Elizabeth Barrett Browning, 'How Do I Love Thee (Sonnet 43)'.

⁵¹¹ Directive 2008/48/EC.

The word 'resident' may mean quite different things in each of these statutes. This is quite right and proper as it reflects the different purposes behind each of these subjects. The criteria for taxing someone as a resident may be quite different from the policies behind letting them vote as a resident, or allowing their spouse to qualify as the spouse of a resident. The English word 'resident' is the best word to use in each of those separate statutes as it indicates to the reader what type of concept we are discussing. We would quickly run out of synonyms if we couldn't reuse a word already used in another statute.

What applies to words specifically defined in different statutes applies less so to ordinary 'working' words that aren't defined. Ordinary words should generally have the same meaning across the statute book. So, 'contravene' in one law should generally mean the same as 'contravene' in another law. This allows us to use words as the common currency of communication – they mean the same and can be exchanged easily across the statute book. So, when we use 'shall' or 'must' in different contexts in different laws it always indicate obligation, whereas when we use 'may' in different laws, we know that it always means discretion. But if we start being inconsistent, or giving words an unnatural meaning, we lose the predictability of repeated use and understanding. Sarat went further and argued that

when words lose their meaning and their capacity to bind those who use them, neither democracy nor the rule of law can long survive. In contrast, when citizens and officials insist on the integrity of language they nourish the hope that both will outlive current assaults on them.⁵¹²

There is a further difficulty with requiring a consistent meaning of words across the statute book. The meaning of words changes over time. So, if we used a word simply because it has appeared in an older statute, we may not get the same meaning. An extreme example can be used here by comparing the words we use to describe roads and bridges. In the Preamble to the Statute of Pious Uses 1634 the following purpose appears 'for the erection, building, maintenance, or repair of any bridges, causeyes, cashes, paces and highways within this realm'. O'Halloran and Cormacain give a brief indication of the etymology here: 'causeye' is the root of the word causeway, 'cash' probably comes from cashel – a wall around a group of churches and 'pace' is a passageway.⁵¹³ However, by the time we reach 1993, the following definition appears:

⁵¹² Austin Sarat, 'Loose Talk Came back to Haunt Trump in Judge's Travel Ban Ruling' *The Guardian* (16 March 2017) <<https://www.theguardian.com/us-news/2017/mar/15/trump-travel-ban-muslims-hawaii-judge-power-words>>.

⁵¹³ Kerry O'Halloran and Ronan Cormacain, *Charity Law in Northern Ireland* (Round Hall Ltd 2001). 253.

“road” means a public road, that is to say a road which is maintainable by the Department, and includes—

- (a) a road over which the public have a right of way on foot only, not being a footway;
- (b) any part of a road; and
- (c) any bridge or tunnel over or through which a road passes;⁵¹⁴

To use the words cash, causeways and paces today would be meaningless. Consistency of language does not mean blind and unthinking repetition of older words, that way lies not just stasis but obsolescence. As Xanthaki says, ‘semantic change is one important aspect of the fluidity and instability of the vocabulary we use’.⁵¹⁵

3.6.2 Consistent grammar

The rules of grammar allow us to reduce word length by using accepted shortcuts. For example, we can say ‘the defendant’s possessions’ rather than ‘the possessions of the defendant’ because we know how apostrophes work. In the same way as with words, consistently using grammatical rules correctly means that people have a better chance of understanding what we mean – they can predict the effect of our words and grammar. The same applies with punctuation.⁵¹⁶ But if we start abusing the rules of grammar, people cannot rely upon them as a reliable means of predicting the meaning of a statute. This doesn’t quite go as far as ‘bad grammar leads to bad men’,⁵¹⁷ but it does bear witness to Orwell’s comment that slovenliness of language leads to foolishness of thought.⁵¹⁸

An example of this can be found in the use of the third person plural pronoun where the noun is third person singular:

- (10) A member shall not be eligible for nomination as a chairperson of a standing committee if at the date of such nomination they are a chairperson of another standing committee or a statutory committee.⁵¹⁹

‘Member’ is singular, but ‘they’ is plural. This is a good example as it shows the limits of this drafting principle. Yes, the rules of grammar are being broken here. However, there is little confusion caused in this case as it is quite clear that, in spite of the infelicitous ‘they’ we are still talking about

⁵¹⁴ Roads (Northern Ireland) Order 1993, Art 2(2).

⁵¹⁵ Thornton and Xanthaki (n 66). 15

⁵¹⁶ Martineau and Salernon (n 421) 68.

⁵¹⁷ Howard Jacobson, *Pussy* (Jonathan Cape 2017).

⁵¹⁸ George Orwell, *Politics and the English Language* (Penguin 2013).

⁵¹⁹ Standing Order 53(10) of the Standing Orders of the Northern Ireland Assembly.

the singular member. Furthermore, it is being done for a good reason – to keep the language gender neutral (otherwise ‘they’ could perhaps revert to a gender specific pronoun such as ‘he’ or ‘she’).

Overall, consistent grammar is a weak drafting principle. It should be followed as a general rule, provided that there is no good reason to break it. Grammar is a good servant but a bad master. The other example is the grammatical “rule” against starting a sentence with a conjunction (although it isn’t quite the rule that it is sometimes thought to be). Sometimes effective communication of an idea is aided by starting the sentence with a conjunction. For example:

(1) It is an offence to have a weapon in a public place.

(2) But this does not apply to police officers.

3.6.3 Do similar things in similar ways

There are many common tropes in legislation: establishing a body corporate, granting a right of appeal, creating a criminal offence etc. If these are done in broadly similar ways, then it makes the legislation consistent and thus predictable. If the citizen is familiar with procedure X1 in a statute and then sees procedure X2 in a new statute, then they can be reasonably confident, based on their knowledge of X1 of how X2 will be applied.

An example is how the prohibition on extra-territorial legislation is expressed in relation to the Scottish Parliament and the Northern Ireland Assembly. Section 6(2)(a) of the Northern Ireland Act 1998 states:

(2)A provision is outside that competence if any of the following paragraphs apply—

(a) it would form part of the law of a country or territory other than Northern Ireland, or confer or remove functions exercisable otherwise than in or as regards Northern Ireland;

Section 29(2)(a) of the Scotland Act 1998 states:

(2)A provision is outside that competence so far as any of the following paragraphs apply—

(a) it would form part of the law of a country or territory other than Scotland, or confer or remove functions exercisable otherwise than in or as regards Scotland,

The words used are nearly exactly the same. The consistency means that anyone familiar with how extra-territoriality works in Scotland will be able to predict how extra-territoriality works in Northern Ireland. As with parallel structures discussed in chapter 2, using the same phrases makes things easier for the reader. The provisions on extra-territoriality in Wales are quite different, reflecting

the special nature of the Welsh legal jurisdiction (Wales isn't a separate jurisdiction, it is part of the legal jurisdiction of England and Wales, so the rules on extra-territoriality need to reflect this).

A bad example, culled from these above three Acts, is the power of the Secretary of State to make changes to the legislation of other parts of the United Kingdom which are consequent upon the changes made by the devolved legislatures, but which those devolved legislatures have themselves no power to make. So, in Northern Ireland, section 84(2) of the Northern Ireland Act 1998 states:

(2) Her Majesty may by Order in Council make such amendments of the law of any part of the United Kingdom as appear to Her Majesty to be necessary or expedient in consequence of any provision made by or under—

(a) Northern Ireland legislation; or

In Wales, section 150 of the Government of Wales Act 2005 states:

(1) The Secretary of State may by order make such provision as the Secretary of State considers appropriate in consequence of—

(a) any provision made by an Assembly Measure or Act of the Assembly,

In Scotland, section 104(1) of the Scotland Act 1998 states:

(1) Subordinate legislation may make such provision as the person making the legislation considers necessary or expedient in consequence of any provision made by or under any Act of the Scottish Parliament or made by legislation mentioned in subsection (2).

These three different provisions are all directed at the same end goal – a power to fix legislation in other parts of the UK in consequence of something done by one of the devolved legislatures. But the ways in which they are drafted is all quite different. Doing a different thing will of course require different words, but doing the same thing should require fairly similar words. The divergence between these three provisions doesn't seem to reflect any policy deviation, and the lack of consistency makes it hard for the reader to discern if different procedures are to apply in each of the different jurisdictions.

Sheridan approaches this from a technological and informatics perspective – identifying patterns in legislation to discern what works and what doesn't work.⁵²⁰ He sees pattern language as a method

⁵²⁰ Sheridan (n 182).

of describing good design practices, or a common vocabulary between users and professionals.⁵²¹ This reflects the fact that legislation normally follows consistent patterns, so repeating familiar patterns makes for greater consistency. Moving back to law, Spencer argues that we should have standardised templates in criminal law – a standard way of setting out the elements of an offence, the actus reus, mens rea, defences, exceptions, penalties etc – these make it much easier for the reader to understand and follow.⁵²²

3.6.4 Consistent presentation

Similar to the above point but broader, legislation should generally be presented in a consistent fashion. So if it normally begins with a preamble, enacting words then introductory provisions, then it should continue to do so. If the layout is left-aligned with section titles in bold and chapter heads centred, it should continue to do so. This kind of consistency also helps out with navigability.

3.6.5 Address the same issues

The above advice applies when the drafter is attempting to do similar things in different areas. Many times the drafter will be doing different things in similar areas because there is a different policy imperative. However, if similar issues will arise in each of these areas, then it is advisable to at least address each of these issues. So, if statute A establishes a body corporate X and sets out pay, pensions, legal status etc, then if statute B establishes a body corporate Y, it should also set out pay, pensions, legal status etc. These provisions may be quite different from each other, but at least the same headings, the same categories are being addressed.

3.6.6 Consistency and the development of new ideas

The greatest challenge faced by consistency is new ideas, new solutions and new ways of doing things. It has to be accepted that if the policy changes, then the legislation must change. But what if the policy doesn't change, but there is a better way of drafting the legislation? Or, half way between these two ends, the policy hasn't really changed, but in a new iteration, it can better cover some potential loopholes in the old law? Take the example of pre-emption rights in legislation privatising various public utilities. In the British Telecommunications Act 1981, Schedule 2 doesn't really deal with pre-emption rights at all. But by the time we reach privatisation of water in the Water Act 1989, schedule 2, para 2(6), does deal with pre-emption rights. Then in the Coal Act 1994, schedule 2, para 3(3), deals with pre-emption rights slightly differently. This is what Laws is describing when

⁵²¹ John Sheridan, 'Using Data to Understand How the Statute Book Works' (2014) 14 Legal Information Management 244. See further Big Data on the government legislation website dealing with pattern language for legislation, <<http://www.legislation.gov.uk/projects/big-data-for-law>> accessed 20/1/2016.

⁵²² Spencer (n 217).

he states 'just as an innovation in drafting may commit future drafters to a particular approach for the future, it can also condemn them for not having adopted a particular approach in the past'.⁵²³

Does a change (or an 'improvement') in a new statute mean that the old statute was wrong? If a new statute plugs a loophole, does this mean that in the act of doing so, the drafter is acknowledging that there was a loophole in the old statute? In my view, the decision must generally be taken in favour of the new, otherwise consistency would oblige us to continually wallow in the mud of unsatisfactory older law. But this also requires the assistance of judges who must accept that just because a thing is being done in a new way, it doesn't mean that the old way is wrong.

3.6.7 Consistency and changes in legal culture

The other challenge to be addressed in making legislation consistent is in dealing with changes in the legal culture that form the background and the context in which the legislation must be interpreted and applied. The most obvious change in the UK is the influx of human rights jurisprudence following the enactment of the Human Rights Act 1998. An older piece of law may have been perfectly acceptable when it is made, but if we try to be consistent and replicate it now, it may fall foul of the new imperative to make legislation that is in accordance with human rights. So, if an old precedent is being dusted off and inserted into a new statute, the classic modification to be made is to insert a right of appeal into it.

It is this argument that led the Attorney General for Northern Ireland to discount old cases and legislation when considering the validity of a new piece of legislation. He stated in evidence to a committee of the Northern Ireland Assembly

[the old Acts] antedate the Human Rights Act 1998 and particular provisions in that that deal with retrospectivity. So, I do not think that those old statutes offer us any assistance about what might happen now.⁵²⁴

An even more obvious example is changes in ideas surrounding gender equality. Whereas 100 years ago, it may have been deemed appropriate for legislation to talk about 'a man', it is far more appropriate for legislation to be in terms of 'a person'. The need for consistency doesn't require adherence to outdated concepts of gender bias.

⁵²³ Laws, 'Plus ca Change - Continuity and Change in UK Legislative Drafting Practice' (n 336). 143.

⁵²⁴ Report on the Civil Service (Special Advisers) Bill, 13 February 2013, NIA 97/11-15. page 75.

3.6.8 Need for consistent interpretation by judges

Consistent drafting is only one side of the equation. For legislation to be predictable, there must also be consistent interpretation by judges. So, words must be given their normal meaning by the courts, the meaning that has been given to them in the past. In addition, judges should be aware of the efforts of drafters to make legislation predictable. This is generally the case in the UK, for example Gillen J stated that ‘precision drafting rather than disorganised composition is presupposed’ when it comes to the words of a statute.⁵²⁵ However, the drafter’s purpose is thwarted when judges take a perverse approach to interpreting the clear words in a statute. Perhaps the nadir of perverse judicial interpretation was reached in *Liversidge v Anderson*.⁵²⁶ It was in this case that Lord Atkin made one of the most famous dissenting speeches of all time. In criticising the interpretation placed on a phrase by his fellow judges, Lord Atkin said

I know of only one authority which might justify the suggested method of construction: “When I use a word” Humpty Dumpty said in a rather scornful tone, “it means just what I chose it to mean, neither more nor less”.

However, the need for consistent interpretation by judges is not a legislative drafting principle. Although drafters can certainly seek to engage with the judiciary on some levels, it is beyond the scope of this thesis to investigate how judges reach their decisions.

3.7 Application in the real world

The law as stated on the statute book ought to be the same as the law applied in the real world. If this is not so, then legislation cannot be used to predict the legal effect of actions and the rule of law is breached. This seems so self-evident that it ought not to be worthy of discussion. However, there are many instances where the law on the statute book is not the same as the law applied. Some of these are set out below.

3.7.1 Law is ignored

In a state that doesn’t respect the rule of law, the government will flout the legislation. In a state without effective rule of law, citizens will ignore the law. There is little any legislative drafting principle can do to combat this.

⁵²⁵ *In the matter of an application by Christine Forde for judicial review* [2008] NIQB 40 at para. [47].

⁵²⁶ (1942) AC 206.

3.7.2 'The law is an ass'

The state ignoring the law is normally seen as a bad thing. However, there are occasions where 'the law is an ass' and when to ignore it seems sensible.⁵²⁷ Even if this is done for the benefit of citizens however, it seriously undermines respect for the rule of law. Greenberg cites an example where a new piece of legislation would prohibit Community First Responders (i.e. volunteer ambulances) from using the traditional Battenburg-style panels on their ambulances.⁵²⁸ This would have a serious impact on their ability to help people in an emergency. The police stepped in, and recognising the sterling work done by these organisations, stated that they would not prosecute anyone during an informal transitional period. This gave time to the organisations to re-organise how to provide their vehicles. Unfortunately, the legal basis for an 'informal transitional period' as granted by the police is flimsy at best, as there were no transitional provisions in the legislation. In fact it is a complete breach of the rule of law for the police to decide not to enforce the law. Greenberg, somewhat tongue in cheek suggests that the best way to deal with bad law like this is simply to ignore it.⁵²⁹ This is a pragmatic solution – if everyone knows the law is an ass, then everyone can simply ignore it. The huge drawback to this is that it seriously weakens respect for the rule of law.

Enright gives an historical example of this when Creon, the ruler of Thebes decrees that it is unlawful for Antigone to bury her brother's body.⁵³⁰ Antigone refuses to comply – 'she does not seek to justify her actions with the terms of Creon's law: she negates the law by handing it back to him, intact'.⁵³¹

There is one rather blunt drafting technique to deal with this problem – draft the law properly in the first place. If the legislation in this example had included an exemption for Community First Responders, or allowed for a formal transitional period, then the law would not have been stupid, and it would have been obeyed. Respect for the rule of law is enhanced if the law is not an ass.

3.7.3 Impossible law

In the world of the White Queen "the rule is, jam tomorrow and jam yesterday – but never jam today".⁵³² As well as diminishing respect for legislation, impossible law is unpredictable as it incapable of being applied in the real world.

⁵²⁷ The expression 'the law is an ass' means that the law is idiotic or asinine, rather than the modern, cruder meaning. The expression was first disseminated to a wider audience in the 1800s by Charles Dickens, *Oliver Twist* (New Ed edition, Penguin Classics 2007).

⁵²⁸ Daniel Greenberg, 'Coping with Bad Legislation: Strategy No. 1—Ignoring It' (2015) 36 *Statute Law Review* v. ⁵²⁹ *ibid*.

⁵³⁰ Anne Enright, 'Antigone in Galway: Anne Enright on the Dishonoured Dead' *London Review of Books* (17 December 2015) 11.

⁵³¹ *ibid* 11.

⁵³² Lewis Carroll, *Through the Looking Glass* (Collector's Colour Library 2011) 206.

3.7.4 Panglossian law

Panglossian legislation is legislation that assumes that all is for the best, in this the best of all possible worlds. So, it sets legal obligations which are wildly over optimistic, if not impossible. So, reducing carbon dioxide emissions to 80% of 1990 limits may be a tough target, but it is doable.⁵³³ However, a requirement that all homes are immediately carbon neutral right now would be impossible. Calabresi decried what he saw as a Panglossian view of what administrative agencies could actually accomplish within the legal framework⁵³⁴ but thankfully in the UK this kind of legislation doesn't really exist.

The drafting principle here is simple, ensure that requirements and assumptions contained within the legislation are realistic and achievable.

3.7.5 Law is inaccessible

If people can't access the law, they can't follow it. Chapter 2 sets out drafting principles to combat this.

3.7.6 Law is unintelligible

If people can't understand the law, they can't follow it. Chapter 4 sets out drafting principles to combat this.

3.7.7 Disconnect between language of the law and practice on the ground

Drafters must ensure that legislation is directly connected to the behaviour which it seeks to modify. The law was made for man, not man made for the law. Therefore, it is incumbent upon the drafter to determine what the actual intention of the law is and accurately reflect that intention rather than force citizens to do something which wasn't intended. So, if citizens are doing action X and we wish that to be lawful, then legislation must authorise action X. There is no point in the law authorising Y when everyone (citizens and the state) want X to be done. In this case everyone will follow Y even though the law actually says X. In discussing the Sexual Offences Bill, one parliamentarian stated: 'we need to reflect on what is happening out there in the real world and ensure that our laws do not attract ridicule'.⁵³⁵ More recently an editorial in the *New Scientist* objected to the Investigatory Powers Bill (dubbed the 'Snoopers Charter') because it 'asks for some powers that are nonsensical, because they bear little relation to how digital communications actually work'.⁵³⁶ Law is not predictable if there is a disconnect between the language of legislation and reality.

⁵³³ Climate Change Act 2008.

⁵³⁴ Guido Calabresi, *A Common Law for the Age of Statutes* (The Lawbook Exchange, Ltd 1982). 45.

⁵³⁵ Sandra Gidley, Hansard 15 July 2003 Column 224

⁵³⁶ Editorial, 'No Art to the Impossible' *New Scientist* (30 January 2016) 5 5.

The object and the legal description of the object should be the same. They should map as closely as is possible onto each other, otherwise the law moves into a parallel dimension divorced from reality. This means that drafters should strive to avoid a two-stage process of taking the thing, converting it into legal description, then when we come to apply it, comparing the thing to the legal description to see if it fits. The legal description of the thing should relate as directly as possible (linguistically and practically) to the thing itself. So, if we mean horse say horse, not four legged grazing animal. If we mean cookie say cookie, not 'the use of electronic communications networks to store information or to gain access to information stored in the terminal equipment of a subscriber or user'.⁵³⁷

Greenberg puts it this way 'everyone knows this is what is meant to happen even though the law says something different'.⁵³⁸ The example Greenberg gives is *Vehicle and Operator Services Agency v Kayes*.⁵³⁹ In that case, a particular industry (the Showman's Guild) had a long-standing agreement with the Agency that a particular type of vehicle (adapted for carrying showman equipment) was not to be regarded as a goods vehicle by virtue of falling under a particular statutory exception. When the court examined that particular statutory exception, it was quite clear that the vehicle did not fall within that exception. The court was able to find a reason to find this particular showman not guilty of holding a licence for a goods vehicle. However, it had clear difficulties with this agreement, stating:

I would very much doubt whether that would stand up to a legal challenge if such were brought because clearly it is very difficult to conceive that any showman's goods vehicle which would carry any sort of equipment for a show could be properly regarded as [falling within the exemption].⁵⁴⁰

What is the drafting solution to this? I suggest it is the same blunt answer as was given in relation to the law being an ass – draft the law correctly in the first place (or amend any mistakes). The judge in *Kayes* put this rather more diplomatically, saying:

I need do no more than to suggest that it would be sensible for that matter to be put on a proper legislative basis, maybe by some amendment to the relevant regulations, because I suspect the time may well come when someone challenges the agreement and I very much doubt whether it would survive any such challenge.⁵⁴¹

⁵³⁷ Art 5(3) Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector.

⁵³⁸ Daniel Greenberg, 'A Refreshing Decision; Or the Rule of Law in Action' (2012) 33 Statute Law Review 409.

⁵³⁹ [2012] EWHC 1498 (Admin)

⁵⁴⁰ *Kayes* [16].

⁵⁴¹ *Kayes* [16].

Bad law is one of the best ways to diminish respect for the rule of law. If everyone ‘knows’ what the law is (whether by reference to convention, or official guidance), regardless of what the law actually states, then we undermine the basis of even having law.

There is another example from Northern Ireland. The Autism Act (Northern Ireland) 2011 included an obligation for the Department to produce an autism strategy, a laudable aim. In the explanatory notes the deadline for this is described thus:

Section 2 requires the Department of Health, Social Services and Public Safety (“the Department”) to prepare and publish a strategy on autism within 2 years of the passing of the Act.

However, in the actual text of the Act it states:

2—(1) The Department must prepare a strategy on autism to be known as the autism strategy and must publish the autism strategy not less than two years after the passing of this Act.

The actual legislation requires that it cannot be published within 2 years, but that Department must wait at least two years and then publish the strategy. This is an obvious (and understandable) drafting mistake. However, it has resulted in the law not according with the practice. To put this another way, what everyone expects and wants isn’t the same as what the law requires. The law has become disconnected from reality. In one way it is perfectly understandable to make the argument ‘everyone knows that the strategy must be published within 2 years, the fact that there was a slight error in the legislation shouldn’t stop the timely publication of such an important strategy’.

However, once we start ignoring the law, where do we stop? We don’t live under the rule of à la carte law, where we get to pick and choose which laws we will follow.

In the autism strategy case, the actual date of the publication of the strategy is difficult to determine, not least because the document containing the strategy doesn’t actually state the date of publication.⁵⁴² A cynic might see in this obfuscation a realisation that the dates set out in the legislation aren’t entirely in accordance with the intended policy.

3.7.8 Things which aren’t in the law but which are intended to be applied in practice

If we want the law to be applied in a particular way, then we should make that clear in the law. This is another way of saying that the law must be inclusive of all relevant material. The drafting principle of inclusivity is dealt with in chapter 2.

⁵⁴² Northern Ireland Executive, The Autism Strategy (2013-2020) and Action Plan (2013 -2016)

3.7.9 Things which are in the law but which aren't intended to be applied in practice

If we want the law to reflect reality, then legislation must only contain provisions that it is intended will apply in practice. So, if a citizen sees provision X in the law, she will expect X to apply in practice. And if X doesn't apply in practice, then legislation cannot be used to predict the legal effect of the citizen's actions. Stepping back in time in the legislative process, if the legislators want a particular thing, then include that thing in the law. But if they don't actively want that thing, then don't include it in the law. Drafters have long said that excess matter in Bills, as in humans, goes septic.⁵⁴³ This applies doubly if the excess material is unused material.

There are three circumstances where things in the statute book aren't applied in practice.

Firstly, powers which are only to be exercised in certain circumstances, or on certain criteria being satisfied. The most obvious example are powers to be exercised in the case of an emergency. The Civil Contingencies Act 2004 is a good example of this. It makes express provision for a power to make regulations, but only in the case of an emergency. The reader will not be confused into thinking that these powers always apply. It is clear that they can only be exercised in an emergency. As long as the criteria for exercise of this powers is clear, then the legislation is predictable. Unpredictability only arises when the criteria for exercise of a power are vague.

Secondly, we can have 'just in case' provisions in a statute. Thornton argues that there must be a necessity for a power in legislation, his point is that if the power is already contained (expressly or impliedly) elsewhere, that there is no need for it.⁵⁴⁴ But my point goes further, it isn't about unnecessary duplication, but about actual use. A just in case power is inserted when a legislator doesn't think there is a current need for a particular power, but wants it inserted just in case it is necessary at some point in the future. As well as cluttering up the statute book, it makes legislation unpredictable as readers will assume that powers contained in the statute book are there for a reason, they are there to be used. But if they have only been inserted 'just in case' then the reader has a false impression of how the law will be applied in practice.

It is difficult to determine whether a general power in a statute has been used as it will depend on the history of how that power has been applied in practice, and these things are not recorded in an easily searchable format. However, it is much easier to determine whether a power to make

⁵⁴³ The source of this quote is hard to find. Bowman used it in 2005, Bowman (n 71). but ascribed it to an unnamed drafter. Carter referred to it in 2007, Ross Carter and Matthew Green, 'The Act Is Self-Explanatory ... or Is It? Explanatory Notes in New Zealand Legislation' (2007) 28 Statute Law Review 1. Laws used it in 2011, Stephen Laws, 'Giving Effect to Policy in Legislation: How to Avoid Missing the Point' (2011) 32 Statute Law Review 1.

⁵⁴⁴ Thornton and Xanthaki (n 66). 268.

subordinate legislation has been used. The exercise of powers to make regulations are recorded.⁵⁴⁵ Take therefore, as an example powers to make regulations under the Licensing (Northern Ireland) Order 1996. There are powers to make an order to vary opening hours,⁵⁴⁶ to make regulations relating to places of public entertainment where alcohol can be served,⁵⁴⁷ to make regulations relating to sale of alcohol at international airports,⁵⁴⁸ etc. However, none of these powers have been exercised. Why is a power inserted if it is never exercised? If citizens read the legislation they will not be able to predict its effect as it is subject to a possible change. Why introduce that element of unpredictability if that change will never arise. Of course, it is very difficult to say at the outset, when a Bill is being drafted – ‘do we really need this power?’ However, the momentum seems to be in favour of automatically including powers that are never exercised. In the Licensing Order example, these powers to make regulations were originally contained in the Licensing (Northern Ireland) Order 1990. They were not exercised under the 1990 Order, but in spite of this, they were then included in the 1996 Order (where they also remained unexercised).

Another example also has to do with alcohol, but the unpredictability is more obvious and more serious. The Scotch Whisky (Northern Ireland) Order 1988 regulates the sale of Scotch whisky in Northern Ireland. Whisky is defined in Article 2(2), but Article 2(3) then goes on to say:

(3) The Department may by order amend the definition of whisky in paragraph (2).

How can a whisky seller or distiller predict the legal effect of their actions when the definition of whisky is unpredictable? This power has never been exercised, so why was it inserted in the first place?

There is an increasingly common practice in legislation to include a power to make further consequential provision by subordinate legislation. An Act will generally make all necessary consequential amendments to other legislation. However, the new practice is to insert an additional power to make further amendments in future as a consequence of the legislation. Take as an example section 48 of the Pension Schemes Act (Northern Ireland) 2016:

Power to make consequential amendments

48. – (1) The Department may by regulations make provision that is consequential on any provision made by this Act.

⁵⁴⁵ Statutory Publications Office, *Index to the Statutory Rules and Orders: Northern Ireland* (28th edn, The Stationary Office 2007).

⁵⁴⁶ Art 49 (although this provision was repealed in 2011).

⁵⁴⁷ Art 52(1).

⁵⁴⁸ Art 53.

(2) Regulations under this section may amend, repeal, revoke or otherwise modify any statutory provision (whenever passed or made).

This is generally done not in response to a particular statute that hasn't been properly fixed in light of the new legislation (although that is wrong in itself also). This is a general power inserted just in case the legislators or drafters have missed something. In many ways it is a sweeper clause inserted to allow mistakes that haven't been corrected by the legislation to be corrected further down the line. This makes legislation very unpredictable. Previously the citizen could read the amending Act and know (from reading the schedule of consequential amendments) all changes that were being made. Now, the citizen is uncertain, not knowing what future consequential changes will be made.

Thirdly, we have legislation that is never commenced. The Easter Act 1928 included a power to fix the date of Easter. This legislation has never been commenced, yet it is still on the statute book, with the banner heading of 'prospective' (in the sense that this legislation may come into force at some point in the future). What is the user to think? This legislation is on the statute book, it was made 90 years ago and has never been repealed. But the law does not accord with reality, the words on the statute book do not correspond with what actually happens on the ground. Why on earth clutter up the statute book with material which will never actually be implemented?

Perhaps the most egregious example of real world inapplicability of the words on the statute book is contained in section 21A of and Schedule 4A to the Northern Ireland Act 1998. These provisions deal with the arrangements for the appointment of the Minister (or Ministers) of Justice in Northern Ireland. As it was unclear precisely what arrangements would be agreed between the parties, the legislation entered into not one, but four parallel universes of what would happen if a particular arrangement was adopted.

1. Minister appointed by First Minister and deputy First Minister, approved by resolution of the Assembly.⁵⁴⁹
2. Minister appointed following resolution of the Assembly.⁵⁵⁰
3. Two Ministers acting jointly.⁵⁵¹
4. Minister and junior Minister appointed, with these posts being rotated.⁵⁵²

This was further complicated by Schedule 4A setting out a further twenty pages of just in case provisions relating to each of the four options. There was a pressing political reason for this

⁵⁴⁹ S. 21A(3).

⁵⁵⁰ S. 21A(3A).

⁵⁵¹ S. 21A(4).

⁵⁵² S. 21A(5).

inclusion of all this material in the statute book – it was needed to keep political parties committing to an evolving negotiation. However, as legislation, it promotes unpredictability. The only message the reader receives is confusion.

3.8 Implementation / Implementability

The legal effect of one's actions can only be predicted by reference to legislation if that legislation is actually implemented. So, if a new law provides fantastic rights for citizens, but no mechanism for the citizen to enforce those rights, the effect of that legislation is unpredictable and the legislation itself is largely worthless. Implementation requires two things, firstly a willingness for the state to implement the legislation on the ground. Secondly, processes and procedures within the legislation which allow for it to be implemented. The first isn't something that drafters can really do much about. The second is very much within their purview as they can ensure that implementation mechanisms are included within the legislation. There is both a quantitative and a qualitative aspect to implementation mechanisms in legislation. The quantitative one is that the implementation method exists, the qualitative one is that the implementation method is effective.

Benedetto draws a distinction between a substantive norm (the thing which must be done) and the consequential norm (the consequence of failing to do the thing), and she sees this as the difference between obedience and enforcement.⁵⁵³ These two things are clearly conceptually different. However, they must both be present if the law is to be implementable.

So, as a general principle, if a law imposes a duty upon a person to do a thing, there ought to be a clear understanding of what will happen if the person doesn't do the thing. This is most obvious in the criminal law where the duty and the consequence of failure to comply are wrapped up together – if you commit the criminal act, you are subject to the criminal penalty. In other areas of law this link is not always as obvious and sometimes needs to be implied. A good example is a time limit for a citizen to do a particular thing. If the citizen doesn't do the particular thing within the time, what is the effect? If a provision is mandatory, it means that if the thing isn't done in the required way, the thing is not regarded as having been validly done. If a provision is directory, it means that if the thing isn't done in the required way, it is still regarded as having been validly done.⁵⁵⁴ The distinction between mandatory and directory is not easy to discern. According to Thornton 'if the drafter makes no specific provision, the intention of the legislation will be ascertained, not according

⁵⁵³ Maria de Benedetto, 'Why Do We Need Effective Law?' (Conference: Effective Law and Regulation, Institute of Advanced Legal Studies, 7 July 2017).

⁵⁵⁴ See Thornton and Xanthaki (n 66). 275 for a discussion of mandatory versus directory provisions.

to any general rule of formula, but by construing the statute as a whole and considering the provision which has been disobeyed in its context in relation to the general object to be secured'.⁵⁵⁵

The necessity for a general inquiry into the nature of the legislation is a strong indication of a failure of drafting. The answer to the question 'what is the consequence if I fail to execute this obligation?' should be set out next to the obligation, or easily findable from the obligation. It should not require a close analysis of the legislation as a whole in order to discern the outcome from the general thrust of the legislative intent. So, rather than saying 'A notice must be served upon the Department within 28 days', it is better to say 'A notice is not valid unless it is served upon the Department within 28 days'. In the second formulation, the consequence of failure to comply is explicit, whereas in the first formulation, we know that there is a duty, but we are unclear what happens if there is a breach of that duty.

Contrast the obligations in the following two statutory provisions.

Enforcement notice: safety measures

71.—(1) This section applies in relation to a controlled reservoir where it appears to the Department that the reservoir manager has failed to comply with—

- (a) the manager's duty under section 36(1) (to ensure compliance with a direction in an inspection report or a pre-commencement safety recommendation),
- (b) the manager's duty under section 46(1) (to ensure compliance with a direction in a safety report).

(2) The Department may by notice served on the reservoir manager require the manager to comply with the duty before the end of the period specified in the notice.⁵⁵⁶

The preceding provisions of this Act set out obligations in relation to safety measures. Section 71 then goes on to make (I haven't quoted all the subsections) detailed provisions about what happens if a reservoir manager doesn't comply with those obligations. This is excellent legislation. The duty is clearly spelt out. Then consequences of failure are clearly spelt out. Contrast this with the following.

Formation of the Opposition

⁵⁵⁵ *ibid* 275.

⁵⁵⁶ Reservoirs Act (Northern Ireland) 2015.

2.—(1) Standing orders must make provision for the formation of an Opposition in accordance with this section.⁵⁵⁷

There is nothing to state what will happen if standing orders don't do this. There is no time frame in which the duty must be complied with. If the correct thing is done, there will not be a problem. But if the legislation isn't obeyed then we cannot predict the effect of a failure to implement. This makes for bad legislation.

The standing orders example flags up one additional difficulty with specifying the consequences of a failure to comply with a duty – the identity of the person having the obligation. If a duty applies to a citizen, then it is reasonable to indicate the consequences of non-compliance. But if the duty applies to a Minister (or other emanation of the state) then this becomes more problematic. The general custom in UK statutes is that only the duty is specified for the state, not the enforcement mechanism for failure to comply. The assumption underlying this is that the state respects the rule of law and will comply with its legal obligations. It is a matter of constitutional etiquette – the state respects the law and obeys it, and the law respects the state and doesn't threaten it with sanctions. In my view, this represents a reasonable compromise. Firstly, the statute book isn't cluttered up with provisions for enforcement of legal obligations on Ministers. Secondly the very act of enacting an enforcement clause for a Minister opens up the possibility to the Minister that they can refuse to comply with a legal obligation. Thirdly, the fact that no enforcement is specified in the legislation doesn't mean that there is no enforcement as the field of constitutional and public law gives many remedies where the state fails to act lawfully. Fourthly, it is reasonable to assume in the UK that the state will generally not wantonly disregard a direct legal obligation.

Voermans talks about implementation as being the Achilles heel of European integration.⁵⁵⁸ He is speaking in the context of European legislation being implemented into domestic law. However, his point is the same as the point being made here – the system is failing if legislation isn't being implemented.

The qualitative aspect of implementation means that the particular enforcement mechanism will genuinely lead to the law being properly applied. Take the regulation of car emissions by the EU as a bad example. Car emissions are governed by a plethora of EU Regulations.⁵⁵⁹ These set out the

⁵⁵⁷ Assembly and Executive Reform (Assembly Opposition) Bill.

⁵⁵⁸ Wim Voermans, 'Implementation: The Achilles Heel of European Integration' (2014) 2 Theory and Practice of Legislation 343.

⁵⁵⁹ Commission Regulation (EC) No 692/2008 on emissions from light passenger and commercial vehicles (Euro 5 and Euro 6) and on access to vehicle repair and maintenance information. The Regulations go all the way back to Euro 1.

manner in which car emissions are to be measured. Unfortunately these are to be assessed in a laboratory under rather artificial conditions. The headlines in car trade magazines and blogs indicate how unrealistic these tests are: How Emissions Tests Work, And Why They're Stupidly Unrealistic,⁵⁶⁰ 'Unrealistic' emissions tests could make some diesel models 'unaffordable', say European carmakers,⁵⁶¹ VW scandal highlights unrealistic lab tests.⁵⁶² The European Commission has eventually responded and is now talking about 'robust testing methods' and a Real Driving Emissions test.⁵⁶³ If the law requires car emissions of a certain level, then citizens will reasonably expect that the implementation of these measure results in emissions of a certain level. But if the implementation measures are not realistic then we cannot rely upon the words of the legislation as reflecting what actually happens.

Unfortunately, this qualitative aspect is difficult for drafters to effectively address as they are unlikely to have the scientific skills to know if a particular mechanism is realistic. At a minimum though, they can ask the questions when they are asked to draft the legislation – how will this work in practice? They can also apply their common sense – is a test in a laboratory sufficient for an activity that will be carried out in the real world?

The final point on implementation is a specific one on implementation by means of subordinate legislation. The standard position is that primary legislation sets out the main principles of the law (the powers and duties etc.), leaving some of the minor details to be filled in by subordinate legislation (time periods, notices, forms – some of the administrative machinery of the law). But, what if the legislation can't be fully implemented unless the subordinate legislation is made? For example, if an application under an Act must be made on a form, but the form is to be prescribed in regulations made under the Act – if the form isn't prescribed, the application can't be made. The usual approach is that Departments are given discretionary powers to make subordinate legislation 'the Minister may, by regulations ...'. However, necessary implementing provisions shouldn't be a matter of power, they should be a duty. So, in order for the law to be implemented, the drafter

⁵⁶⁰ 'How Emissions Tests Work, And Why They're Stupidly Unrealistic' (*Car Throttle*) <<https://www.carthrottle.com/post/how-emissions-tests-work-and-why-theyre-stupidly-unrealistic/>> accessed 21 January 2016.

⁵⁶¹ "'Unrealistic' Emissions Tests Could Make Some Diesel Models 'unaffordable', Say European Carmakers' (*International Fleetworld*) <[http://internationalfleetworld.co.uk/news/article.cfm?clk=0444&article_id=021978&urltitle=8216Unrealistic 8217-emissions-tests-could-make-some-diesel-models-8216unaffordable8217-say-European-carmakers](http://internationalfleetworld.co.uk/news/article.cfm?clk=0444&article_id=021978&urltitle=8216Unrealistic%208217-emissions-tests-could-make-some-diesel-models-8216unaffordable8217-say-European-carmakers)> accessed 21 January 2016.

⁵⁶² 'VW Scandal Highlights Unrealistic Lab Tests | Fleetcare' <<http://www.fleetcare.com.au/news-info/fleet-beat-blog/october-2015/vw-scandal-highlights-unrealistic-lab-tests>> accessed 21 January 2016.

⁵⁶³ European Commission, 'Press Release: Commission Welcomes Member States' Agreement on Robust Testing of Air Pollution Emissions by Cars'. 28 October 2015.

should be quicker to impose a duty upon a Department to make necessary implementing regulations.

This point was addressed by the Supreme Court in *RM(AP)*.⁵⁶⁴ At issue was the Mental Health (Care and Treatment) (Scotland) Act 2003 which gave rights to mental health patients which could in part be exercised via an application to a Tribunal. However, before this right could be exercised, it required the Scottish Ministers to make regulations setting out the necessary administrative machinery. The Scottish Ministers had failed to make these regulations before the Act came into force. The Supreme Court ruled that this failure was unlawful – essentially that they had an obligation to implement an Act of the Scottish Parliament which had been commenced.

3.9 Constraints on discretion

The legal effect of actions is predictable if legislation sets out rules which are automatically followed – if X is done, then Y is the unavoidable legal consequence of it. However, unpredictability creeps in if the automatic becomes instead the possible – if X is done, then Y may be the consequence. This most often arises where there is a discretion on the part of a decision maker. At its most basic level, this simply means that a decision maker has a power to do something, as set out in the table below. Discretion inevitably introduces unpredictability as it is difficult to predict how the discretion will be exercised.

Duty (automatic outcome)	Power (discretionary outcome)
If a person fills in the form the Department must grant the licence.	If a person fills in the form, the Department may grant the licence.

This point was sufficiently important to Bingham that discretion warranted being the second element of his conception of the rule of law:

Questions of legal right and liability should ordinarily be resolved by the application of the law and not the exercise of discretion.⁵⁶⁵

For Emon, ‘the possibility of government action based on will as opposed to reason or reasoned deliberation is a keystone that reveals the undercurrent of rule of law debates’.⁵⁶⁶ Within the framework of the second element, ‘law not discretion’ reflects notions of fairness and equality.

⁵⁶⁴ *RM(AP) v The Scottish Ministers* [2012] UKSC 58.

⁵⁶⁵ Bingham (n 5) 48.

⁵⁶⁶ Emon (n 430) 48.

However, for the purposes of element 1, it is equally relevant for the purposes of predictability. For this reason, it is considered in this chapter under the heading of predictability.

3.9.1 Rules v discretion

There is no simple and universal answer to the question over whether it is better to have rules, or better to have discretion. Dicey was opposed to discretion and thought it anathema to the rule of law.⁵⁶⁷ Hewart had a similar view, arguing that if Ministers could simply do what they thought fit, there was no proper rule of law at all.⁵⁶⁸ He cited following legislative example:

The expression 'land likely to be used for building purposes' shall include any land likely to be used as, or for the purpose of providing, open spaces, roads, streets, parks, pleasure or recreation grounds, ... and the decision of the Minister whether land is likely to be used for building purposes or not, shall be final and conclusive.⁵⁶⁹

This example is a negation of the rule of law as it allows the Minister to do whatever he wants. He could designate any land to be land for building purposes and it could not be called into question.

However, there has been a justifiable backlash against the view that any kind of discretion is bad for the rule of law.⁵⁷⁰ A certain amount of discretion is necessary for the effective administration of the modern state. Discretion gives flexibility. In fact, human rights jurisprudence cautions against the blanket application of automatic rules without the possibility of individual circumstances being taken into account.⁵⁷¹ Turpin states that 'we have today a better understanding of the necessity and value of discretionary power in many branches of public administration, in order that varying circumstances as well as the needs of justice in individual cases can properly inform the making of decisions'.⁵⁷² Davis calls for 'a proper balance between rule and discretion'.⁵⁷³

This section examines the way that discretion can be structured in legislation and the criteria for determining how much (or little) discretion there ought to be.

⁵⁶⁷ Dicey (n 26).

⁵⁶⁸ Lord Hewart, *The New Despotism* (Ernest Benn 1929).

⁵⁶⁹ S. 1(3) Town Planning Act 1925.

⁵⁷⁰ Gavin Drewry, 'Public Law' (1995) 73 *Public Administration* 41, 46.

⁵⁷¹ See discussion above with regards to *Thlimmenos v Greece*.

⁵⁷² Colin Turpin and Adam Tomkins, *British Government and the Constitution* (6th edn, Cambridge University Press 2007). 94.

⁵⁷³ Kenneth Culp Davis, *Discretionary Justice: Preliminary Inquiry* (Fifth Printing edition, University of Illinois Press 1971). 42.

3.9.2 Three legislative elements of discretion

The most basic way to draft a discretion provision is to say that a person may do a thing. This can be broken down into three elements. Firstly, there is the height of the hurdle to be cleared before discretion can be exercised. Secondly, there is the specificity of the criteria to be satisfied before the discretion can be exercised. Thirdly, there are the factors to consider whilst exercising discretion.

Element 1 – The height of the hurdle

There is a sliding scale for how easy it is to exercise discretion in a particular case. At the bottom of the scale, there is no hurdle at all, merely that “the official may do the thing”. The scale then proceeds upwards until there is a very high hurdle to be overcome ‘the official may do the thing in exceptional circumstances’. The table below sets out this scale in a non-exhaustive way. The exact ranking on the scale is subjective.

Height of hurdle	Legislative provision
low	The official may do X
	The official may, if he thinks fit, do X
	The official may, if reasonable (or just) do X
	The official may, if convenient, do X
	The official may, if necessary, do X
	The official may, in special circumstances, do X
high	The official may, in exceptional circumstances, do X

Element 2 – The specificity of the criteria

Sometimes there will no specific criteria to be satisfied before the discretion will be exercised, merely that the official may do X. This makes for the easiest kind of discretion to be exercised. More commonly, there will be a specific purpose for which the criteria must be exercised. So, in the Police and Criminal Evidence Act 1984, a court may exclude evidence if it would have ‘an adverse effect on the fairness of the proceedings’.⁵⁷⁴ In the Bail Bill, a court has discretion to refuse bail on the grounds that the defendant would fail to surrender to custody, commit an offence on bail, or interfere with witnesses.⁵⁷⁵ The Welsh Ministers can enact further subordinate legislation if it is ‘necessary or expedient for the purposes of giving full effect to any provision of this Act’.⁵⁷⁶

⁵⁷⁴ S. 78(1).

⁵⁷⁵ Clause 3(1).

⁵⁷⁶ Social Services and Well-being (Wales) Act 2014.

However, this is where the drafter needs to have an awareness of constitutional and administrative law. A bald power to do something in legislation will not be interpreted in a bald way by the courts. Instead, it will be subject to a host of administrative law implied criteria. So, it will be implied that this discretion is not to be exercised capriciously, but must be exercised for reasons, that those reasons are rational, that the decision maker has considered all relevant factors and ignored irrelevant ones etc.⁵⁷⁷ The House of Lords considered this point in relation to the discretion of the Home Secretary to release prisoners serving a mandatory life sentence.⁵⁷⁸ Lord Steyn stated that

Parliament does not legislate in a vacuum. Parliament legislates for a European liberal democracy founded on the principles and traditions of the common law. And the courts may approach legislation on this initial assumption.

So, in that case even though the statutory discretion was worded in very broad terms, concepts of reasonableness, legality and non-retrospectivity were read into it.

In basic terms, the more specific the criteria, the more predictable for the citizen what the outcome of the exercise of discretion will be.

Element 3 – other factors to consider

The legislation may sometimes state what factors the decision maker must take into account in exercising discretion. As with element 2, this element isn't always present. When it is present, then the decision maker must consider these factors and this thus acts as a constraint on the exercise of discretion. A bland requirement to 'take all relevant factors into consideration' is unhelpful – if it wasn't there would we expect the decision maker to take irrelevant factors into consideration? However, these factors can often be helpful in guiding the decision maker to the decision. The more detailed they are, the more predictable will be the exercise of the discretion. The factors can be exhaustive (only the factors listed in the legislation) or non-exhaustive (decision maker can consider any other factors not listed which are thought relevant).

3.9.3 How tightly does the discretion have to be constrained?

The section above sets out different ways in which discretion can be structured in legislation. A tightly constrained discretion would have (a) a high hurdle, (b) very specific criteria for exercise of the discretion and (c) many factors to take into account. A loose discretion would have exactly the opposite. But on what basis should the drafter decide to have a tight or a loose discretion? It isn't

⁵⁷⁷ There are many different formulations of what could be called the 'rules of natural justice'. For just one example, see the descriptions of 'due process and procedural fairness' in Simson Caird, Hazell and Oliver (n 365) 17.

⁵⁷⁸ *R v Secretary of State for the Home Department ex p Pierson* [1998] AC 539.

automatically the case that discretion should always be tightly constrained, there may be circumstances where maximum flexibility (and discretion) would be beneficial. As with so much of drafting, there is no right or wrong answer. But in this subsection, I will set out some principles which may assist in determining the tightness of the constraints on discretion.

Principle 1 is the consequences of the exercise of the discretion. The more serious the effects on the individual of the exercise of the discretion, the more tightly the discretion ought to be constrained. So, the decision to release a life sentence prisoner has a serious impact upon the liberty of the prisoner, so that discretion should be tightly constrained. A decision to award a bursary for education has less serious consequences and can be less constrained.

Principle 2 is reliance upon the integrity of the decision maker. The more trust reposes in the decision maker, the less constrained the discretion needs to be. So, a judge may be given a broad discretion in reliance upon judicial integrity and high standards of ethics and probity. Thus the rules of procedure for the Inquiry into Historical Institutional Abuse are 'to be such as the chairperson may direct'.⁵⁷⁹ This is because the chairperson has to be a high court judge. But if the decision maker doesn't have the same professional standards to adhere to, or is lower down the chain of decision making, it may be more appropriate to more tightly constrain their discretion.

Principle 3 is the existence of complaint or review mechanisms. The more prevalent these are, the less constraint need be placed on the exercise of discretion as any defects in that exercise can be remedied by the complaint or review mechanism.

A practical example may illustrate the exercise of these principles. The Inquiry into Historical Institutional Abuse has already been mentioned. The rules of the Inquiry are to be formulated by the Chairperson. He made a rule on late applications, ruling that they could only be accepted in 'truly exceptional cases'.⁵⁸⁰ This was after having regard to the amount of time people already had to submit applications, and other ways in which people could present testimony to the Inquiry. So, the discretion has a very high hurdle and there are factors to have regard to. There isn't a blanket rule, and the Chairperson, as a judge, would have regard to all relevant factors. This approach was validated by the court when the exercise of this discretion was challenged by a person refused permission to apply out of time.⁵⁸¹ Dealing specifically with the amount of discretion, the court

⁵⁷⁹ S. 6(1) Inquiry into Historical Institutional Abuse Act (Northern Ireland) 2013.

⁵⁸⁰ Anthony Hart, 'Remarks at Third Public Session of HIA Inquiry' <http://www.hiainquiry.org/index/chairman_s_address_130904_low_res.pdf> accessed 25 January 2016. 3.

⁵⁸¹ *In the matter of an application by DR for leave to apply for judicial review* MAG 9875 8/1/2016

stated that 'In relation to the conduct of proceedings before the Inquiry, significant discretion must be afforded to the Inquiry.'⁵⁸²

There isn't a clear dividing line between 'exercising discretion' and 'making a judgement'. The more tightly constrained a discretion is, the closer it appears to be making a judgement. It isn't necessary for the purpose of this thesis to set out that dividing line. All that is necessary is to adopt a drafting principle that generally a very wide discretion should be avoided, and to include the various elements above in making it tighter.

3.10 Conclusion

This chapter has shown the importance of predictability to the rule of law. Predictability means that there is an element of legal certainty, that citizens can read the legislation and have a reasonable chance at predicating what the legal effect of their actions will be. As well as highlighting the views of the prominent writers, it has also analysed why legislation is sometimes not predictable, usually because of real world problems.

The main examination has been of drafting principles. The most obvious of these is that legislation must be prospective, that it must take effect in the future, after it is made, not before it is made. I have provided a new taxonomy of Janus-faced legislation to describe the different ways that legislation may have a backwards facing component. I have argued that human rights jurisprudence provides the best guide for drafting principles here. The second drafting principle is determinacy, meaning that the law must be fixed and definite, that it must be unambiguous and precise. There is always a difficult balance to strike between precision and over-particularisation.

The third drafting principle is of stability, that the law remains relatively stable, and that we ameliorate the negative effects of rapidly changing law. A clear commencement date is the fourth drafting principle, that we know when the law takes effect from, as well as the date that it ceases. Consistency is the fifth drafting principle, consistency of words, of structure, of grammar and of general approach to legal problems. Consistent drafting makes it easier for citizens to predict the effect of legislation. The sixth principle is that legislation must be capable of being applied in the real world – so that there must be congruence between law on the page and law in real life. The next principle is that law must be capable of being implemented. This means that the legislation must contain effective implementation mechanisms within it, and must set out what happens if there is a breach of the law. The final drafting principle is that there must be a way to limit or standardise the application of discretion. The broader the discretion, the harder for the citizen to

⁵⁸² *Ibid.* [9].

know what the legal outcome will be. Although these drafting principles may be in accordance with principles that others have put forward, they are derived from the wellspring of the rule of law and gain additional validity from that.

All of these principles presuppose that the citizen is able to understand the law. Like a three-legged stool, without the ability to understand the law, the value of accessibility and predictability is worthless. All three values must be present. The next chapter derives drafting principles from the requirement that legislation is intelligible.

Chapter 4 Intelligibility

Introduction

Bingham's element 1 states:

Law must be accessible and **so far as possible, intelligible, clear** and predictable.

This chapter examines what it means for legislation to be intelligible and clear. Intelligible means able to be understood, to be comprehensible. Clear means that something is easy to understand or interpret. These two words are not the same, but they are similar. The difference between them is the degree of understandability, 'clear' indicating a higher degree (or greater ease) of understandability. To avoid long-windedness, in this chapter I will mainly use the term 'intelligibility' as the rule of law concept to mean making legislation easier to understand. This ties quite neatly in with Fuller's morality of aspiration concept, of striving to make legislation easier to understand, rather than a binary distinction between intelligible and unintelligible legislation. I do not undertake an epistemological analysis of the concept of a person 'understanding' legislation as this would be beyond the scope of the thesis. I am content with the bald statement that intelligible legislation is easier to understand. This principle can hardly be said to be new, the Latin phrase *leges ab omnibus intelligi debent* (laws should be understood by everyone) stems back to antiquity.

Part 1 looks at what intelligibility means, and what Bingham and others took it as meaning. It also inquires into why legislation is sometimes not intelligible, either in an unthinking way, or deliberately so.

Part 2 is the main part of the chapter and derives drafting principles from the rule of law requirement of intelligibility. These are that intelligibility should focus on the user, that amending legislation should be intelligible, avoiding excessive interconnectedness, using plain language, easification, good writing and also using examples.

Part 1 – The Theory of Intelligibility

4.1 The Importance of Intelligibility

Bingham said that laws must be, so far as possible, intelligible and clear.⁵⁸³ This mirrors Xanthaki's argument (albeit from the perspective of effectiveness of legislation rather than the rule of law) that good quality legislation ought to be clear.⁵⁸⁴ Bingham's reasons for this are the same as the reasons for making law accessible and predictable, he didn't deconstruct these elements into their

⁵⁸³ Bingham (n 5). 37.

⁵⁸⁴ Xanthaki, *Drafting Legislation*, (n 3).

constituent parts. To recap (from previous chapters) laws should be intelligible so that citizens can easily know what the law is. This is for three reasons. The first is to do with effectiveness of the law – if we can't understand what the law is, we can't obey it. The second is related, if we don't understand the law, we cannot take advantage of its provisions. The third is a commercial one, that commerce is improved if it is regulated by rules that are clear and easy to understand for commercial actors.

Two key reports make it clear that intelligibility of legislation is a fundamental requirement of the rule of law. Firstly, the Venice Commission on the Rule of Law stated that legislation must be clear and precise.⁵⁸⁵ Secondly, Lord Simon in the Renton Report stated that 'a society whose regulations are incomprehensible lives with the Rule of Lottery, not of Law'.⁵⁸⁶ Dickson recognised the importance of Bingham's definition and his short-hand way of describing the qualities of the rule of law was that it was accessible and understandable.⁵⁸⁷ Voermans expressly links intelligibility to the rule of law.⁵⁸⁸

Raz prefigured Bingham by stating in his principle 1 that law ought to be clear. His reason was that if law wasn't clear, it can't guide people. Therefore, law should not be obscure. This is a practical reason, which he develops further – that if a particular law is to succeed, people need to be capable of following it. And if they can't understand it, they can't follow it. Implicitly following Raz, Hashim, a legislative drafter from Malaysia directly considers the necessity of having clear law and answers that 'the most important reason is the rule of law'.⁵⁸⁹ Baratta adds a small twist to this, not only is it important that the law is intelligible to citizens, it must also be intelligible to the officials charged with implementing it, particularly in the context of domestic officials implementing EU law.⁵⁹⁰

Fuller's desideratum 4 is clarity of laws. Surprisingly he didn't go into great detail about what he meant by clarity, although he does talk about the opposite, 'obscure and incoherent legislation can make legality unobtainable by anyone'.⁵⁹¹ We can gain further insight from his exposition on eight ways to make bad law, where the fourth way is a failure to make rules understandable. This exposition puts him in conformity with Bingham's requirement for intelligibility.

⁵⁸⁵ Venice Commission (n 4). See para 46.

⁵⁸⁶ 'Report of the Renton Committee on the Preparation of Legislation' (n 129) 133.

⁵⁸⁷ Dickson (n 247) 20.

⁵⁸⁸ Wim Voermans, 'Legislation and Regulation', *Legislation in Europe: A comprehensive guide for scholars and practitioners* (Hart 2017) 24.

⁵⁸⁹ Noor Azlina Hashim, 'Plain Language: Give It a Try!' (2013) 39 Commonwealth Law Bulletin 423, 425.

⁵⁹⁰ Roberto Baratta, 'Complexity of EU Law in the Domestic Implementing Process' (2014) 2 Theory and Practice of Legislation 293.

⁵⁹¹ Fuller (n 6) 63.

Northern Ireland provides a practical example of this fourth way to make bad law when we consider its laws on abortion. The problem is that the lack of clarity in the legislation leads to confusion and fear for both women and medical practitioners. A newspaper report summarises the problem:

Because the law is so unclear, midwives say they are worried they may be committing a crime if they agree to help with an abortion. Some fear they could still be prosecuted for procedures they have assisted with in the past because of this legal uncertainty.⁵⁹²

As may be expected from someone whose writing on legislation was voluminous, Jeremy Bentham had much to say on the subject of intelligibility in statute law. His preferred solution was a Pannomion – ‘a complete body of proposed law, in the form of statute law’.⁵⁹³ One goal of the Pannomion was cognoscibility, meaning that the law is capable of being known. As he explained to US President James Madison, this meant that citizens would know what they are meant to do, or not meant to do. His Pannomion would be ‘a written, and visible, and intelligible, and cognoscible rule of action’.⁵⁹⁴

Bentham developed his theory of cognoscibility in further letters to US states in 1817 (Madison had politely rejected Bentham’s proposal to draft the entire US federal code). The properties desirable in a body of laws as set out in these letters include notoriety ‘only in so far as it is present to the mind can any idea be productive of any effect’.⁵⁹⁵ Another property was clearness of language.⁵⁹⁶ In Letter VIII he prefigured the plain language movement by nearly 200 years calling for legislation that was ‘all plain reading’.⁵⁹⁷

Underpinning all these criteria is the goal that ‘every man should be his own lawyer’⁵⁹⁸ and they can only do that if they can understand the law. The Lex scripta of the Isle of Man makes the same argument ‘the laws are plain, simple, summary – to all capacities intelligible ... that the door of justice is open to the poor and the rich’.⁵⁹⁹ This was precisely the root of the objection of a Canadian court to unintelligible tax law,

⁵⁹² Amelia Gentleman, ‘Northern Ireland Medics Fear Prison over Abortion Advice’ *The Guardian* (5 January 2016) <<http://www.theguardian.com/world/2016/jan/05/northern-ireland-medics-fear-prison-abortion-advice>> accessed 5 January 2016.

⁵⁹³ Letter to James Madison, October 1861, quoted in Bentham, *Legislator of the World* (n 9) 5. Bentham was fond of these grand, sweeping institutions, his ideal jail was a Panopticon, a prison where one warder could see all the inmates.

⁵⁹⁴ *ibid* 18.

⁵⁹⁵ Letter III *ibid* 119.

⁵⁹⁶ Letter II Bentham, *Legislator of the World* (n 9).

⁵⁹⁷ Letter VIII *ibid* 163.

⁵⁹⁸ *ibid* 123.

⁵⁹⁹ Marsh-Smith and Wright (n 174) 12.

while there is little danger that the Act will ever become user-friendly or self-explanatory, it is of particular importance in a self-assessment tax system to promote an interpretation of provisions, where possible, that is comprehensible to the taxpayers themselves.⁶⁰⁰

Bentham was particularly dismissive of lawyers in his own time ‘say that a lawyer has no interest in the uncertainty of the law, as well might you say, that a gunpowder maker has no interest in war, or a glazier in the breaking of windows’.⁶⁰¹ Although not writing directly from the perspective of the rule of law, Bentham was adamant that legislation ought to be capable of being known by the people it was directed at.

4.1.1 The qualifier – so far as possible

As with predictability, intelligibility isn’t an absolute value. It isn’t something to be achieved at all costs, just ‘so far as possible’ according to Bingham. So, for Gower although it is good that legislation is readily intelligible, this isn’t to be achieved at the cost of sacrificing certainty.⁶⁰² As I set out below, there are sometimes good reasons why legislation is not as intelligible as it could be.

4.2 Why is legislation sometimes not intelligible?

There is unanimity across the spectrum of academics⁶⁰³ and practitioners⁶⁰⁴ writing on legislation and the rule of law that legislation ought to be intelligible. I have not found a single writer seriously arguing that legislation ought to be hard to understand. However, there is also widespread exasperation that legislation is frequently unintelligible. This comes from:

- Journalists who speak of legislation which is ‘torturous and laborious even by the standards of statute-speak’.⁶⁰⁵
- Judges who speak of ‘drafting quagmires’.⁶⁰⁶
- Parliamentarians who state that ‘we have simply no right to legislate in a manner which is incomprehensible to the people to whom the legislation is addressed’.⁶⁰⁷

⁶⁰⁰ *Will-Kare Paving and Contracting v Canada* [2000] 1 SCR 915, 948.

⁶⁰¹ *Ibid* 153

⁶⁰² E Gowers, *The Complete Plain Words* (HMSO 1986) 7.

⁶⁰³ Xanthaki and Thornton both devote chapters to clarity in their works, Xanthaki, *Drafting Legislation*, (n 3); Thornton and Xanthaki (n 66).

⁶⁰⁴ Office of the Parliamentary Counsel, ‘When Laws Become Too Complex - Inside Government’ (n 144). Para 3.4 states that a criteria of quality is law is clear. In virtually every issue of the *Loophole*, there is an article extolling the benefits of clarity in legislation.

⁶⁰⁵ John Lanchester, *The Guardian* Thursday 3 October 2013, ‘The Snowden files: why the British public should be worried about GCHQ’

⁶⁰⁶ Rt Hon the Lord Brightman, ‘Drafting Quagmires’ (2002) 23 *Statute Law Review* 1. See also the comments of judges on unintelligible statutes quoted in the appendix to ‘Report of the Renton Committee on the Preparation of Legislation’ (n 129).

⁶⁰⁷ Lord Simon of Glaisdale (26 June 1997) 581 HL debs Col 1648

- Drafters who give examples of unintelligible legislation.⁶⁰⁸

Why is there this paradox? All those involved in the legislative process want intelligible law, but they are the ones who don't produce it. I suggest that there are five reasons for this. Although there is overlap between these reasons, there are enough differences to warrant division into different categories.

4.2.1 Exhaustiveness / comprehensiveness

A law can be short and intelligible if it covers a single proposition which governs the vast majority of the populace. However, 'the vast majority' is not 'all' and so sometimes, for the purposes of certainty and predictability, it is necessary to go into more detail to cover all eventualities, not simply the most common ones. The difficulty is that this level of detail can obscure the main point and thus make the legislation less intelligible, or as John put it 'the detailed rules aim to achieve legal certainty, which in turn leads to over particularisation and incomprehensible regulation'.⁶⁰⁹

Take as an example legislation on a social security payment in Northern Ireland known as a welfare supplementary payment (WSP). There are a large number of different types of WSP which a person is entitled to if they (or their partner) meet certain criteria.⁶¹⁰ The legislation exhaustively sets out all these different criteria. But it then goes on to provide for what happens if a couple separate and what impact this has on entitlement. Furthermore, it makes provision for what happens if a person who is entitled to WSP in their own right subsequently forms a couple with another person who may also be entitled to a different type of WSP. This leads to the following 'challenging' provision

(5) Where case 1 or 2 applies, the amount of welfare supplementary payment to which A is entitled is reduced to the amount of welfare supplementary payment to which A would have been entitled under Part 3 if A had satisfied the conditions for payment on loss of carer premium on transition from disability living allowance to personal independence payment.⁶¹¹

The need for predictability necessitates a comprehensive provision, as people on benefits will get married and separate, and they need to know how that changes their entitlement to benefit. This is so even though the exhaustive nature of the provisions as a whole make the law less intelligible.

⁶⁰⁸ Ross Carter, 'Statutory Interpretation and the Rectification of Drafting Errors' [2012] New Zealand Law Review 207.

⁶⁰⁹ Ubena (n 487) 99.

⁶¹⁰ See for example the Welfare Supplementary Payment (Amendment) Regulations (Northern Ireland) 2017.

⁶¹¹ Regulation 22C, Welfare Supplementary Payment (Loss of Carer Payments) Regulations (Northern Ireland) 2016.

But there is not always a need for exhaustiveness. I previously stated that

Drafting practice in common law countries (particularly the UK) is to set out both the principles and the details. There is a noble desire for the law to cover every possible eventuality, but this sometimes means that the basics of the law become obscured. In civil law systems, the detail is usually not included.⁶¹²

The civil law system has much to recommend it in this respect. We don't need to expressly state every possible combination and permutation, nor state things which are common sense or which a reasonable reader would apply anyway. Take another example of a draft Bill on special measures for vulnerable witnesses giving evidence. Clause 3 begins

(1) A witness is eligible for assistance in giving evidence if the court considers that the quality of evidence given by the witness is likely to be diminished by reason of fear or distress in connection with testifying in the proceedings.⁶¹³

This is tolerably clear. However, the rest of the clause then continues with a long list of factors that the judge must consider when deciding whether a witness should have the benefit of a special measure in giving evidence.⁶¹⁴

Does the long list of factors to consider really assist either the court or the reader? In my view it is reasonable to expect a judge to have a modicum of intelligence and discernment. Although it may be helpful to have a list of factors to consider, these are surely things which any reasonable judge turning his or her mind to the question, would consider anyway. The overly prescriptive list is not

⁶¹² Cormacain, 'Have the Renton Committee's Recommendations on Electronic Access to Legislation Been Fulfilled?' (n 209).

⁶¹³ Civil Evidence (Witnesses) Bill in Northern Ireland Law Commission, 'Vulnerable Witnesses in Civil Proceedings' (2011) NILC 10.

⁶¹⁴ Those factors are:

- (a) the nature and alleged circumstances of the matter to which the proceedings relate,
- (b) the nature of the evidence the witness is likely to give,
- (c) the age of the witness,
- (d) any relationship between the witness and any party to the proceedings,
- (e) the behaviour towards the witness of-
 - (i) any party,
 - (ii) family members or associates of any party,
 - (iii) any other person who is likely to be a party or a witness, and
- (f) any views expressed by the witness.

The judge must then consider:

- (a) the racial group of the witness,
- (b) the domestic and employment circumstances of the witness,
- (c) any religious beliefs or political opinions of the witness,
- (d) the sexual orientation of the witness, and
- (e) any other matter that the court considers relevant.

necessary here, and tends to make the legislation less intelligible. The Renton report supports this move away from detail to towards principles in favour of intelligibility. However, in reviewing the impact of Renton ten years on, Lord Simon stated that

these recommendations have been completely disregarded; and statutes are still drafted in elaborate and incomprehensible detail to deal with every foreseeable combination of circumstances which might arise.⁶¹⁵

It has hard to be dogmatic on what level of prescriptive detail a statute should contain. If it renders the statute unintelligible, that would indicate removing it. If it isn't strictly necessary for the purposes of precision, that also indicates removing it. Following Orwell's suggestion, if text isn't strictly necessary, cut it out.⁶¹⁶ John reaches the same conclusion, that detailed law should only be used where necessary.⁶¹⁷

4.2.2 Complex policy

It is possible to work backwards from unintelligible legislation that is caused by the complexity of the law, which is caused in turn by the complexity of the legal policy behind the law. This is similar to unintelligibility arising through exhaustiveness, but it is more of a policy choice to have different rules applying in different situations. Complex policy is about creating policy distinctions between different cases when the law would work (from a legal perspective) without those different policy distinctions. An exhaustive law seeks to cover all eventualities, whereas a complex law will seek to introduce different rules for different circumstances.

An example may make things clearer. A simple policy is that the Ombudsman may investigate maladministration in public bodies.⁶¹⁸ However, the actual policy is more complicated, and so we need to have different rules for how the Ombudsman may investigate health and social care bodies,⁶¹⁹ general health care providers,⁶²⁰ independent providers of health and social care,⁶²¹ and universities.⁶²²

The decision to have a complex policy isn't a drafting decision, it is a political one. One thing the drafter can do is to point out that complexity leads to reduced intelligibility and to ask if there is a need for this amount of complexity. But with a complex policy, although the drafter can work to

⁶¹⁵ Lord Simon, 'Renton Report - Ten Years On, The' (1985) 1985 Statute Law Review 133, 135.

⁶¹⁶ Orwell (n 518).

⁶¹⁷ Ubena (n 487) 99.

⁶¹⁸ S. 14 Public Services Ombudsman (Northern Ireland) 2016.

⁶¹⁹ Ibid. s. 15.

⁶²⁰ Ibid. s. 16.

⁶²¹ Ibid. s. 17.

⁶²² Ibid. s. 18.

simplify the legislation, this will be more difficult than if the policy was simple. This is borne out by the official findings of the Office of the Parliamentary Counsel report on complexity in legislation. One of the headings of that report is ‘mapping the causes of unnecessary complexity’.⁶²³ The clear implication is that there is such a thing as ‘necessary complexity’. However, we should be clear here that the necessity is a political one, not a legal or drafting imperative. The House of Commons recognised the limits of drafting skill to make complex law more intelligible:

However, while the tax profession has welcomed the TLR’s outputs and made positive comment on the usability of the legislation it has produced, it has certainly not made the underlying tax law appreciably easier for the layman to navigate. Nor, as the Institute of Directors pointed out, has it clarified the underlying tax policy.⁶²⁴

4.2.3 Complexity masking a lack of direction

Complex (and unintelligible) legislation can sometimes mask a lack of understanding and certainty about what the law and policy are meant to be. It is hard to hide ignorance in an intelligible provision, much easier to do so in a long, meandering and incomprehensible one. Orwell was critical of this style of writing where ‘the slovenliness of our language makes it easier for us to have foolish thoughts’⁶²⁵ and ‘the writer either has a meaning and cannot express it, or he inadvertently says something else, or he is almost indifferent as to whether his words mean anything or not’.⁶²⁶

The OPC report on complexity in legislation bears witness to this. It notes one reason for ‘unnecessary complexity’ as being a dysfunctional relationship between policy and legislation, which can be caused by imprecise policy objectives, rushed instructions, public or media pressure, political contingencies and a failure to think things through.⁶²⁷ A drafter can’t weave straw into gold. If the policy is incoherent then the resulting legislation will be unintelligible.

4.2.4 Desire for solemnity

Which is more impressive: Moses comes down from the mountain with a stone tablet declaiming “thou shalt not kill”, or a drafting committee producing a piece of paper which says “It is an offence to kill”? There is a human desire for majesty and solemnity in our legislation – that not only must it be law, but it must look and feel like law. Greenberg has found a desire for ‘legalese’ in legislation so

⁶²³ Office of the Parliamentary Counsel, ‘When Laws Become Too Complex - Inside Government’ (n 144).

⁶²⁴ House of Commons, Treasury Committee, Principles of tax policy, Eighth Report of Session 2010–11 paragraph 45.

⁶²⁵ Orwell (n 518) 1.

⁶²⁶ Ibid, 2

⁶²⁷ Office of the Parliamentary Counsel, ‘When Laws Become Too Complex - Inside Government’ (n 144). See para 4.2.

that people (citizens, legislators) will be impressed by it, that they will accord it a higher status because of its weighty form.⁶²⁸ This is perhaps one reason why the enacting words in UK statutes are rather grandiose ('Be it enacted by the Queen's most Excellent Majesty...'). Bennion gives an example where his draft included the more intelligible 'tried his best' rather than the less intelligible 'used his best endeavours'. Rather than welcoming the plainer words, parliamentarians lamented it as 'amateurish'.⁶²⁹

The desire for solemnity can (for some drafters) morph into a desire for pomposity and ponderous language. Greenberg argued that in reality, people like a bit of pomposity in law.⁶³⁰ But legalese can be unclear.⁶³¹ This can lead to unintelligible and archaic phrases 'as aforesaid', 'hereinafter' etc. This is rather like the wizard in the Wizard of Oz making himself sound impressive by the use of smoke and mirrors. However, there is a sense in which the desire for solemnity is well-placed. If the rule of law means we are all subject to the law, we should enact law which is more likely to be respected and obeyed, and if legislation is phrased in too casual a manner, it is less likely to engender respect. Intelligibility shouldn't be sacrificed for solemnity, but neither should the use of demotic language dilute respect for legislation.

4.2.5 The nature of legislation

The nature of legislation itself is a barrier to intelligibility. Legislation is law enacted by Parliament and it must conform to the requirements of the medium. The various techniques available to other forms of communication are not available to it. For example, it cannot repeat itself, it cannot include unnecessary material, it cannot use an informal style. One particular limitation is the use of direct speech or the second person "you must have a licence" rather than "a person must have a licence". According to Stefanou, the idea of drafting in the second person has not been well received in the UK and has not been used.⁶³² Having searched through the UK statute law database the only "you" in it is in tax law (PAYE or "pay as you earn") and in forms which are directed to members of the public. As Pearce says 'the legislative drafter is obliged to follow a form that enables the bill as drafted to be debated in accordance with the standing orders of the parliament that is to consider it'.⁶³³

⁶²⁸ Greenberg, *Laying down the Law* (n 92) 219.

⁶²⁹ Francis Bennion, *Bennion on Statute Law* (Longman 1990) 38.

⁶³⁰ Daniel Greenberg, 'The Three Myths of Plain English Drafting' [2011] *The Loophole* 103.

⁶³¹ David Mellinkoff, *The Language of the Law* (Resource Publications 2004) 24.

⁶³² He cites evidence from the Tax Law Rewrite in the UK, see Constantin Stefanou, *Drafting Legislation: A Modern Approach* (Helen Xanthaki ed, 1 edition, Routledge 2008).

⁶³³ DC Pearce and RS Geddes, *Statutory Interpretation in Australia* (5th edn, Lexisnexis 2001) 3.

Part 2 Drafting Principles that Promote Intelligibility

4.3 Characteristics of the user

So far I have spoken about intelligibility without any qualification. But intelligibility does not exist in a vacuum, it has at least two dimensions:

- The statute to be understood
- The person who is to understand it

So, a general principle that legislation ought to be intelligible is too unfocused. Instead, the principle is that a particular piece of legislation ought to be intelligible by the persons who will use it.

4.3.1 Conception of legislation and relationship with human autonomy

To whom is legislation (or a particular piece of legislation) directed? Before answering this in a practical way, it is necessary to consider the theoretical and philosophical conception of legislation. One view is quite paternalistic, that legislation is bestowed upon the populace by the legislature and then applied to them by the government. This conception of law and state sees the citizen as the object of the legislation – the thing to which law is applied. Under this view, the citizen is the passive recipient of law. Bennion stated that ‘It may be positively dangerous to encourage non-lawyers to think they can understand legal texts unaided by expert advice.’⁶³⁴ The other perspective sees the citizen as more of an active participant in law. The citizen is the subject of the law, the citizen reads it, interprets it and then applies the law. The citizen has autonomy and volition such that the citizen is the end user of the law rather than the state.

If the citizen is the object, then the target audience of the legislation (i.e. the user) will be the various state actors (civil servants, ministers, judges, police etc.) It isn’t necessary that the law be intelligible to the citizen, what is important is that the government actors who are actually applying and enforcing the law understand it. But if the citizen is the subject, then the legislation needs to be intelligible to the citizen, it is the citizen who the drafter must have in mind when preparing legislation.

Most people would eschew the first conception of legislation as being the property of the state. Instead, they would value human autonomy and conceive of legislation which is to be directed at citizens and thus intelligible by them. So, at a high theoretical level, we can say that legislation ought to be intelligible by the citizen, although as will be seen below, we can sometimes subdivide this, and we can sometimes consider the user as the state.

⁶³⁴ F Bennion Letter to the Times 24 January 1995 ‘Don’t put the law into public hands’.

4.3.2 Target audience – the citizens using the legislation

Some laws are very broad and general in their application such that it is reasonable to assume that the citizenry as a whole will use them. For example, we all might be users of the criminal law on assault, or on driving a car. We could summarise this approach as *legislation must be intelligible to all citizens*.

The orthodox view is that criminal law and tax law applies to all citizens, and so must be drafted in a way that renders it understandable to them.⁶³⁵ But the position is not as straightforward as this, as much of the criminal and tax law will be irrelevant to most of the population. For example, the person on the street doesn't need to be able to understand the offences relating to registration and authorisation for radioactive substances.⁶³⁶ Only those working (in the main) in the nuclear industry need to be able to understand this. Taking another example, a small shopkeeper should be able to understand the provisions of income tax legislation which apply to them, but they don't need to know (taking a random provision from the tax legislation) the tax treatment of the expenses of management investment companies.⁶³⁷

Then there is legislation that clearly does not apply to the entirety of the populace. So, the law on the duties of company directors only needs to be intelligible to company directors (and perhaps a small number of others who use companies law).⁶³⁸ So, if a piece of legislation is addressed to a particular user group, it is only necessary that it be intelligible by that user group, not by the population as a whole. On rare occasions there has been research to identify the user group of a particular piece of legislation, with consequences for how that legislation is to be drafted.⁶³⁹ Bertlin notes the findings of some key empirical research on who are the users of legislation in the UK, and this has implications for how we draft specific pieces of law.⁶⁴⁰ This approach could be summarised as: *specific legislation must be intelligible to the specific citizens to whom it applies*.

⁶³⁵ For example, in a parliamentary debate as long ago as 1853, the Chancellor was urged to make tax law intelligible to everyone, quoted in a chapter on tax simplification in Robert Chote and others, *The IFS Green Budget: January 2008* (IFS 2008) <<https://www.ifs.org.uk/publications/4112>> accessed 20 July 2017. In recommending codification of the criminal law, the Law Commission spoke of criminal law as being a 'particularly public and visible part of the law ... should not be undermined by perceptions that it is intelligible only to experts', Law Commission for England and Wales, *Criminal Law: A Criminal Code for England and Wales*, vol 1 (HMSO 1989) 6.

⁶³⁶ Radioactive Substances Act 1993.

⁶³⁷ S. 75 Income and Corporation Taxes Act 1988.

⁶³⁸ Part 10, Chapter 2, Companies Act 2006.

⁶³⁹ Northern Ireland Law Commission, 'Consultation Paper: Business Tenancies' (2010) NILC 5.

⁶⁴⁰ Bertlin (n 234).

The Business Tenancies (Northern Ireland) 1996 Order is a specific law with a reasonably discrete group of users: landlords, business tenants and their advisers.⁶⁴¹ Do they form a semiotic community? They form such a community if they share a common understanding of words and phrases that the larger community do not share. Taking another example, there is a semiotic community of oil producers who understand the definition of 'light oil' within the meaning of the Hydrocarbon Oil Duties Act 1979. The technical definition ('not less than 90% by volume distils at a temperature not exceeding 210C') is probably meaningless for most people, but meaningful for them.

The key point is that the person who will use a particular statutory provision needs to be able to understand that provision. This requires a level of granularity or particularisation in the intelligibility of the legislation. A blanket exhortation that all citizens must understand all the law, (or even all of the criminal or tax law) is unnecessary and unrealistic. What is needed is focused intelligibility, that the person to whom the law applies needs to be able to understand it. This should be widened slightly, as users won't simply look at the single provision which applies to them, in searching for it, they will look at the provisions around it. So, the provision which applies to a citizen, as well as the provisions surrounding it (or the provisions set in their context) should be intelligible by the user of the legislation.

The danger though is that the drafter only considers one user group when drafting legislation, not the whole panoply of potential users. So, one might consider that the law on financial regulation only needs to be intelligible by those working in the finance sector.⁶⁴² But if a financial services provider becomes insolvent, there is a mechanism by which ordinary investors can claim compensation.⁶⁴³ Those provisions could be used by ordinary investors, so it is important that it is intelligible to them.

One useful rule of thumb is that any provision which states that a person must (or may) do a particular thing ought to be intelligible by any person who could reasonably be considered to be subject to it. So an obligation on a person in relation to the storage of nuclear waste should be written so as to be intelligible by a person who is storing nuclear waste. But an obligation on a person in relation to driving a car should be written so as to be intelligible by a person who is likely to be driving a car.

⁶⁴¹ I discussed this previously in Cormacain, 'A Plain Language Case Study: Business Tenancies (Northern Ireland) Order 1996' (n 427).

⁶⁴² Financial Services and Markets Act 2000.

⁶⁴³ Ibid. Part 15.

Participation of citizens in the law making process may be an ‘essential element of a due process of lawmaking’⁶⁴⁴, but it is not a requirement of the rule of law. However, if citizens have a role in the making of legislation, it is more likely that the legislation will be more intelligible as it will have been ‘tested’ by them first before it is enacted.

4.3.3 Target audience – state focused legislation

Despite disagreeing with the general conception of legislation as being bestowed upon citizens who are passive recipients of it, there are some instances where it is proper to consider the target audience as being the state. Some statutes are directed at the administration of the state. So if a statute sets up a new quango, the provisions of the statute regulating the constitution of that quango are really only of interest to the quango itself.⁶⁴⁵ If legislation restructures the health service or the education service, then it only needs to be intelligible to those governmental officials actually implementing this change, or as the EU suggests ‘texts may include technical requirements whose implementation falls to specialised officials in that field’.⁶⁴⁶

However, this is subject to a rather large caveat. Although the users of this legislation may be state officials, many ordinary citizens will have an interest in the policy choices and the impact upon them as citizens. So, intelligibility of the legislation as it passes through parliament is important as it helps citizens in their efforts to lobby for changes in that legislation, or to hold their elected representatives to account. Complex legislation may be fine for the health service administrator, but not for the patient trying to figure out if it means that their local GP practice will close down.

This becomes truly problematic if the interests of those charged with the administration of the legislation take priority over those who the legislation affects. The Supreme Court considered immigration rules in *Mandalia v Secretary of State for the Home Department*.⁶⁴⁷ It considered the audience of immigrants to whom the rules applied and stated ‘it is difficult for the applicants, for many of whom English is not even their first language, to navigate their way around the requirements. It may be, however, that, as intended, the system is not difficult for caseworkers to administer’.⁶⁴⁸ The idea that legislation is drafted for the benefit of the state rather than the citizen is anathema to basic notions of fairness.

⁶⁴⁴ Felix Uhlmann and Christoph Konrath, ‘Participation’, *Legislation in Europe: A comprehensive guide for scholars and practitioners* (Hart 2017) 73.

⁶⁴⁵ See for example Schedule 1 of the Equality Act 2006 setting out the constitution of the Equality Commission.

⁶⁴⁶ European Union, ‘Joint Practical Guide for the Drafting of Community Legislation’ (Office for Official Publications of the European Communities 2003) 13.

⁶⁴⁷ [2015] UKSC 59.

⁶⁴⁸ *Ibid*, para 2, my emphasis.

4.3.4 Target audience – special cases: those with a particular difficulty in understanding legislation

The principle set out so far is that legislation should be intelligible by its users. But there are some circumstances where it would be unreasonable to expect the end user to understand the legislation. Two prime examples are legislation governing children and legislation governing those who lack mental capacity. So, section 1 of the Children Act 1989 states that ‘the child’s welfare shall be the court’s paramount consideration’. These words are vital as they set out what is called the welfare principle, that the child comes first. But the phrase ‘paramount consideration’ is unlikely to be understood by a child, particularly a young child. Equally, depending upon the mental capacity (or lack of mental capacity) it may not be reasonable to expect a person to understand the Mental Capacity Act 2005. In special cases like these, it may simply not be possible to make the legislation intelligible to the end user.

4.3.5 Target audience – those who will always have an interest in the legislation

There are some groups who will always be users of the legislation, no matter what the legislation is. Legislators always need to be able to understand the legislation they are enacting, otherwise there is a substantial loss of legitimacy of that legislation. Therefore, legislation needs to be intelligible to them. However, notwithstanding the criticism of intermediaries set out below, it is reasonable to expect legislators to be briefed on legislation and to be assisted in scrutinising that legislation by experts.

Judges, and others involved in the legal system also need to be able to understand legislation. This specific user group can be assumed to have a high level of legal ability, so a requirement that legislation be intelligible to them will most likely be subsumed that the legislation is intelligible by the rest of the target audience. The reverse is also true, if a piece of legislation is unintelligible to a trained judge, what chance does the lay user have. For the sake of completeness, it is also reasonable to expect that juries may sometimes be end users of legislation. However, it is reasonable to expect that they will have substantial assistance from a judge in the form of directions when it comes to them understanding the law.

4.3.6 Intelligibility and law as a method of communication

Legislation performs at least two functions. The most obvious function is to make new law, in the sense that it brings law into being. But another function, as Crabbe points out, is to communicate that new law.⁶⁴⁹ Stefanou develops this concept stating that ‘law is a form of communication where

⁶⁴⁹ VCRAC Crabbe, *Legislative Drafting Vol I: V. 1* (Routledge-Cavendish 1993) 27.

legal relations are comprehended and appreciated through a communicative process.⁶⁵⁰ Roebuck goes further and argues that language is a code, and the purpose of it is to transmit a message.⁶⁵¹

So one text both does the thing and explains the thing. It is this second function to which intelligibility is more relevant. The first function is satisfied if the legislation is certain and precise, even if it very difficult to understand. It is only in conveying the information to the end user that intelligibility becomes important (or in Stefanou's analysis transmitting the message to the receiver). But this sets up an internal tension, because things which tend to make the legislation more communicable are not always conducive with making the law. Consider the following two statements on the obligation to have car insurance.

1. A person in charge of a motor vehicle must be in possession of a valid certificate of motor insurance.
2. Drivers, it is absolutely imperative, and I cannot stress this enough, that your car is insured.

The first statement makes the law, the second statement communicates it. They are both effective within their own paradigm, but not so effective when considering the other paradigm. Statement 1 is a definite statement of law, but doesn't perhaps convey the gravity of the command. Statement 2 conveys the importance, and is directed at the end user, but its use of repetition means it doesn't work as a legal obligation. But legislation doesn't have the luxury of containing two statements, it only has one. And so that one statement must seek to do both, making the law and communicating the law.⁶⁵²

In moving towards intelligibility for the purposes of communication, it is therefore vital not to lose sight of the fact that legislation is first and foremost the way of making law. As I previously stated, 'the primary purpose of a statute is not educative, it is to effect a change in the law',⁶⁵³ Repetition, tmesis, underlining, rhetoric, and many other devices which aid communication are incompatible with a document which makes law. So the principle of intelligibility is constrained by the function of legislation as a tool for making law. Methods which promote intelligibility within those constraints are to be welcomed, methods which break those constraints are unacceptable.

⁶⁵⁰ Constantin Stefanou, 'Is Legislative Drafting a Form of Communication?' (2011) 37 Commonwealth Law Bulletin 407, 408.

⁶⁵¹ D Roebuck, 'Plain, Clear and Something More? Criteria for Communication in Legal Language' (2014) 16 European Journal of Law Reform 633.

⁶⁵² Although explanatory notes attached to legislation may perform this other function.

⁶⁵³ Cormacain, 'A Plain Language Case Study: Business Tenancies (Northern Ireland) Order 1996' (n 427) 41.

Pennisi goes further than this and argues that for specialized discourses (including legislation), there is in fact a need for two separate texts, one for specialists and one for the lay person.⁶⁵⁴ The communicative purpose of the lay text is informative. This could be seen as the logical extension of what I have argued above, that communicating information to the lay person is not the primary purpose of legislation. However, I think Pennisi's argument goes too far as it provides an excuse for drafters to retreat back into unintelligibility, safe in the knowledge that a second text will communicate the law to users. Although there is much that is admirable about government providing additional material to help explain the law to lay readers, this does not take away from the obligation to make the legislation itself intelligible to lay users.

Having argued that intelligibility shouldn't lead to certainty being subverted, it is also necessary to argue in the other direction – just because legislation is there to make law, doesn't mean that we should ignore its communicative dimension. Ilahi points out that some critics of the plain language movement 'deny any communicative role of the legislation and are of the view that the legislation is only meant to change and contain (not explain) the command of the law'.⁶⁵⁵ This is a wilfully blind view as it completely ignores the fact that legislation is also about communication.

4.3.7 Role of intermediaries

So far, my argument has been that legislation ought to be intelligible by its users. However, is this a realistic requirement to impose upon the drafter of a statute? For many people, legislation is not consumed directly, but it is interacted with by way of an intermediary – someone who mediates between the law and the citizen. The most obvious intermediary is the lawyer who advises the client on the client's legal rights and responsibilities under the legislation. But there are other intermediaries: the accountant who advises on tax law, the Citizen's Advice Bureau worker who advises a client on social security benefits, the campaigning charity who advises members on the impact of a proposed new law. The government itself can act as an intermediary, advising citizens on the changes made by a new law by producing guidance notes. This approach can be summarised as: *legislation must be intelligible to intermediaries, who must then produce guidance that is intelligible to citizens.*

What are the consequences of this for intelligibility? If the drafter knows that the citizen will be making use of an intermediary, then all that is necessary is for the legislation to be intelligible to that intermediary, not the end user (the citizen). This is precisely what Bennion argued for.⁶⁵⁶ Legislation

⁶⁵⁴ Giulia Pennisi, 'Legislative Provisions in Context: A Linguistic Approach' (2016) 37 Statute Law Review 101.

⁶⁵⁵ Mazhar Ilahi, 'Plain Language Movement: A Case Study of the Islamic Republic of Pakistan' (University of London, Institute of Advanced Legal Studies 2012) 31.

⁶⁵⁶ F Bennion Letter to the Times 24 January 1995 'Don't put the law into public hands'.

will be the primary source of information, but the citizen will use the secondary source provided by the intermediary. Developing Stefanou's theory on legislation as communication, it is the effectiveness of this secondary source as a means of communication that is important. The mediated information doesn't have to fulfil the function of 'making the law', only of 'communicating the law', so it can take advantage of those communicative techniques which are prohibited to the drafter of the legislation.

There are five broad objections to the argument that legislation only needs to be intelligible to the intermediary.

The first is the practical one, that the secondary source (the information provided by the mediator) may not accurately reflect the actual content of the law. In processing and transmitting the legislation, the intermediary may simply get it wrong. There is always the risk that in transcribing the information, the transcriber will make an error. So, it is much better for the legislation itself to be intelligible so that it doesn't need to be mediated.

The second objection is that the use of intermediaries sets up a self-fulfilling loop which justifies unintelligibility of legislation. The loop works like this: legislation is unintelligible, so we need an intermediary to render it intelligible to the layperson, if the layperson is using an intermediary then the legislation only needs to be intelligible to the intermediary. So the use of intermediaries justifies setting low standards of intelligibility in legislation.

The third objection relates back to the rule of law and the conception of legislation as something which is made for us and which we are subject to. Sullivan is scathing in her criticism of what she terms as law being oracle rather than canon.

The statute book as oracle, however, invites a different kind of response. Messages sent through oracles call for interpretation; they have to be deciphered to be understood. The words of an oracle are pregnant with meaning, but the meaning is obscure and incomplete. They may provide a fixed basis for law, a stable entry point, but they say different things to different people. For this reason, official interpreters are needed to establish privileged readings of the text that can, when necessary, displace the vulgar readings of the uninitiated.⁶⁵⁷

Law as oracle as Sullivan describes it (or law through intermediaries as I describe it) divorces the citizens in whose name the law is made from the law itself. It reframes them once again as passive

⁶⁵⁷ Ruth Sullivan, 'Some Implications of Plain Language Drafting' (2001) 22 Statute Law Review 145, 156.

recipients of the law, who can't be trusted to interpret and apply it themselves. There is an interesting historical parallel here. Before the Reformation in Europe, the Christian religion was seen as something 'owned' by the religious classes who then instructed the laity on their obligations. The Bible was in Latin, and its message was mediated by the clergy. However, one of the fundamental changes made by the Reformation was the move to the vernacular Bible and the removal of the priest as the mediator between the person and God.⁶⁵⁸ The individual was trusted to find their own route to salvation via their own reading of the Bible (although still within the limits set out by the wise masters!).

It is fundamentally undemocratic and antithetical to the rule of law if the persons who will use legislation cannot be expected to understand it, and must employ others to explain it to them. Legislation isn't quantum physics which is intrinsically complex and hard to understand by its very nature⁶⁵⁹. Legislation is a human construct so it must be susceptible to human reasoning. It infantilises citizens to say that they are much too stupid to even attempt to comprehend the law, that they must be spoon-fed it via a lawyer. Legislation is not there for lawyers, it is there for the citizen.⁶⁶⁰ Barnes considers both sides of this argument, but doesn't come down on one side or the other.⁶⁶¹

The fourth objection is another practical one – how is the drafter to know what legislation will be consumed directly by the citizen and what will be mediated? Or alternatively, when is it reasonable to assume that intelligibility needs only to be directed at the intermediary?

The fifth objection stems from another of Bingham's elements of the rule of law, that the law applies to everyone equally.⁶⁶² If legislation is only understandable via the use of intermediaries, then we make legislation accessible only to those who can afford to pay for intermediaries. As Anatole France caustically remarked 'In its majestic equality, the law forbids rich and poor alike to sleep under bridges'.⁶⁶³ There is no equality in legislation that is only intelligible by those who can afford lawyers.

⁶⁵⁸ Article 24 of the Augsburg Confession of Faith (1530) states that 'Paul commanded to use in the church a language understood by the people'.

⁶⁵⁹ It was said in 1919 'that only three persons in the world can understand [Einstein's theory of] relativity'. See further Jean Eisenstaedt, *The Curious History of Relativity: How Einstein's Theory of Gravity Was Lost and Found* (Princeton University Press 2006).

⁶⁶⁰ House of Representatives Standing Committee on Legal and Constitutional Affairs, 'Clearer Commonwealth Law: Report of the Inquiry into Legislative Drafting by the Commonwealth' (Parliament of the Commonwealth of Australia 1993). See para 6.12.

⁶⁶¹ Jeffrey Barnes, 'The Continuing Debate about "Plain Language Legislation": A Law Reform Conundrum' (2006) 27 *Statute Law Review* 83.

⁶⁶² Element 3, Bingham (n 5).

⁶⁶³ Anatole France, *The Red Lily, Complete* (1894).

The final point is not an argument against the use of intermediaries, it is that intelligibility can help those intermediaries as well as helping the lay reader. Some empirical research has shown that lawyers can struggle with intelligibility as much as non-lawyers.⁶⁶⁴

4.3.8 The consequences for intelligibility in considering the user

Proceeding from the conclusion that law ought to be intelligible to the person who is using it, what are the consequences for legislative drafting? The main consequence is that the language used must be appropriate to the target audience. So if the target audience is the populace at large, the legislation must be intelligible to them. This doesn't mean reducing the language to the lowest common denominator in terms of simplicity, but it does mean using language that most ordinary people could reasonably expect to understand. It doesn't mean using the wrong word merely because the wrong word is easier or more common-place. Provided that the user could readily identify the meaning of the uncommon (but correct) word, then that word should be preferred.

I previously discussed this in relation to the legislation on tenancies and a definition that included the phrase 'the effluxion of time'.⁶⁶⁵ This is not a common phrase in regular English usage. The Shorter Oxford English Dictionary on Historical Principles defines it as 'the action or process of flowing out: an outflow'. Aiyar includes effluxion of time within a legal dictionary and defines it, with reference to tenancies as

the conclusion or expiration of an agreed term of years specified in the deed or writing, or expiration arising in the natural course of events, in contradistinction to the determination of the term by the acts of parties or by some unexpected or unusual incident or other sudden event.⁶⁶⁶

The requirement of intelligibility would suggest substituting a simpler synonym for effluxion, such as 'passage of time', or 'expiry of time'. Both of these phrases are more intelligible to readers and neither of them requires the use of a dictionary for the reader of average intelligence. Neither 'expiry' nor 'passage' captures the precise meaning which effluxion conveys. If time effluxes, it runs out. It conveys the notion that there was a fixed quantity of time and now that time has naturally flowed out – there is none left. The passage of time or the expiry of time do not give that same sense of the fixed quantity running out by a natural process. Effluxion may not be as readily

⁶⁶⁴ Bertlin (n 234) 47.

⁶⁶⁵ Cormacain, 'A Plain Language Case Study: Business Tenancies (Northern Ireland) Order 1996' (n 427). Some of the following text appeared in this article.

⁶⁶⁶ P Ramanatha Aiyar, *The Law Lexicon* (Wadhwa Nagpur 2007).

understandable but it is the more precise term. So effluxion is the more accurate word to use, even though we lose some intelligibility.

It is when we come to consider legislation to be used by a specific group that there are more important consequences for drafters. If legislation is to be used by a particular group, then it is reasonable to use language and concepts that are readily intelligible by that group, even though these may not be intelligible by the populace as a whole. So technical language, or even jargon might be acceptable for that legislation as it would be intelligible by that audience. So, the ordinary reader may struggle to know what an ampoule is (a small sealed capsule containing a liquid), but for vets it is perfectly acceptable for legislation to talk about storing a batch of donors in the same ampoule.⁶⁶⁷

4.3.9 The reality of citizens using legislation

Much of what I have argued above is predicated on the right of citizens to understand legislation which affects them. But what actually happens in practice? There is little point in expending time and effort on making legislation intelligible to citizens if citizens don't actually read it. Bingham acknowledged this point when he joked that criminals don't check out the legislation before they decide to rob a bank. Hunt in particular has been critical of the desire to make legislation intelligible to a public who don't read legislation. In fact he went so far as to call it an unwise assumption that 'that members of the public are interested in reading raw legislation'.⁶⁶⁸

At the level of high theory, we are all treated as if we knew the law – it remains a legal maxim that ignorance of the law is no defence. Contrary to what Hunt originally asserted, there is now empirical evidence on the readership of legislation. A major study was carried out by the National Archives and the Office of the Parliamentary Counsel.⁶⁶⁹ That research made for very interesting reading. The official UK legislation website has 2 million separate visitors each month. About 60% of the visitors were found to be non-lawyers who used legislation for work (the examples given were police officers, human resources professionals or council officials). Then there were members of the public seeking to use law to enforce their rights. The final user group was lawyers of all kinds.

The results of this research give empirical weight to the central argument of this chapter that legislation ought to be intelligible to the user. There are huge numbers of non-lawyers using legislation. Legislation ought to be drafted in a way which is intelligible to them. Although bank-robbers might not read up on the Theft Act 1978, substantial numbers of citizens do read legislation.

⁶⁶⁷ The Bovine Embryo (Collection, Production and Transfer) Regulations 1995, Schedule 7, paragraph 18.

⁶⁶⁸ Brian Hunt, 'Plain Language in Legislative Drafting: An Achievable Objective or Laudable Ideal?' (2003) 24 Statute Law Review 112, 115.

⁶⁶⁹ Bertlin (n 234) 25.

Ilahi prefigured the UK research when he argued in 2012 that even though the public at large may not read the entirety of the statute book, they will be interested in that portion of it which affects them.⁶⁷⁰ Furthermore, he went on to argue that even if not everyone reads the law this ‘does not absolve the State of her responsibilities to strive for making the laws easier to understand’.⁶⁷¹

4.4 Intelligibility of amending legislation or of the legislation as amended

The thing to be understood is the legislation. In a simple world with a simple statute book this statement is straightforward and without nuance. But the world and the statute book are not simple. One complication is that a law rarely stands alone, complete in itself. Instead it is woven into an existing tapestry of laws. Most legislation is amending legislation in that it amends existing legislation. There are therefore two potential targets for intelligibility:

1. The amending legislation (the most recent law which changes the existing law)
2. The legislation as amended (the existing law, taking into account those changes)

Although the distinction may seem Jesuitical, there is a crucial difference between the amending legislation and the legislation as amended. The first is the change itself, the second, the thing changed. For example, the Children and Social Work Act 2017 works in part by making multiple amendments to the Children Act 2004. So, is the goal to make the 2017 Act intelligible, or the 2004 Act intelligible? Or are they both important, or is one more important than the other? Is it like Heisenberg’s Uncertainty Principle (the more precise your knowledge about an object’s speed, the less precise you are about its location) – the more you know about the change, the less you know about the object being changed? Before addressing this, it is important to first set out how amending legislation works.

4.4.1 How amending legislation works

Amendments normally work in one of two ways: textual amendments and non-textual amendments. A textual amendment makes a direct change to the text of the old law.⁶⁷² Thornton refers to this as ‘direct and textual’.⁶⁷³ The following is a direct textual amendment from the Children and Social Work Act 2017

⁶⁷⁰ Ilahi (n 655) 35.

⁶⁷¹ *ibid.*

⁶⁷² Crabbe (n 649) 137.

⁶⁷³ GC Thornton, *Legislative Drafting* (Butterworths 1996) 405.

29. In section 66(3) of the Children Act 2004 (regulations subject to affirmative procedure), after “12B(1)(b)” insert “, 16B (whether alone or with regulations under section 16F), 16E(3)”.

So the 2017 Act delves into the text of the 2004 Act and inserts new material into it.⁶⁷⁴

A non-textual amendment makes an indirect change to the existing law, not by changing the text of the existing law, but by requiring it to be read in a different way.⁶⁷⁵ The key point is that there is nothing on the face of the existing law indicating that it is to be read in this particular way. Thornton refers to this as ‘indirect, referential and cumulative’.⁶⁷⁶ I think that ‘cumulative’ is slightly misleading here as textual amendments are also cumulative in the sense that they build on top of each other. A non-textual amendment doesn’t always refer directly and specifically to all the law that it amends, it can instead make a general or global reference. For example, the Department for Employment and Learning Act (Northern Ireland) 2001 changed the name of the government department. Instead of going through the statute book, identifying each instance where the old name was used and changing it, it instead stated that all references to the old name were to be read as references to the new name. This kind of non-textual amendment is very common, particularly when there are a very large number of ‘cosmetic’ changes to the law being made.

4.4.2 Different users, different needs

When it comes to intelligibility of amending legislation versus legislation as amended, different users have different needs. Parliamentarians need to understand the law in front of them (the amending law) as they need to understand what they are enacting. Professionals working in the field will most likely know the existing law, and only need to know what the changes are. Lay persons most likely don’t need to know the minutiae of when various amendments are made, they just need to know what the law as amended is.

In my view, textual amendments are most in accordance with the rule of law. This is because it is more important for citizens to know what the law actually is, rather than how the law has changed. The textual amendment makes it easier to read and understand the law as amended. The non-textual amendment is more difficult to find as it isn’t part of the text of the existing law. Furthermore, the non-textual amendment requires the reader to jump through the difficult intellectual hoop of reading a text ‘as if’ it actually said something else.

⁶⁷⁴ See also Chapter 2 and the difference between the law as enacted and the law as amended

⁶⁷⁵ Crabbe (n 649) 137.

⁶⁷⁶ Thornton (n 673).

Ilbert was of the view that non-textual amendments were good for legislators 'for parliamentary purposes [non-textual amendment] is the most convenient, because under it every member of Parliament who knows anything of the subject learns at once the nature of the amendment proposed'.⁶⁷⁷ But although legislators are an important user group of legislation, legislation is not made for their benefit, but for the benefit of society as a whole. It is more important for citizens to understand the law through its lifespan than it is for legislators to understand it at its birth.

The preponderance of views in the drafting community agree with the argument that textual amendments are generally to be preferred. For Samuels 'textual amendment, substitution of a new section for the old section, is desirable in principle'.⁶⁷⁸ Berry⁶⁷⁹ and Thornton agree.⁶⁸⁰ Textual amendments are far more common, both in the UK and around the Commonwealth. Non-textual amendments may be easier for drafters (less statutes to check and cross refer to) but they do not assist understanding where it is most needed.

As ever though, it is wise not to be dogmatic. Sometimes a non-textual amendment can be made with little loss of intelligibility but large gains in other directions. Going back to the departmental renaming legislation example. If we required textual amendments each time a departmental name changed, the statute book would quickly be littered with thousands of pointless cosmetic changes. If a textual amendment doesn't cause problems with intelligibility, its use can be justified.

But even if a non-textual amendment can be intelligible, it can cause uncertainty, precisely because the impact of the non-textual change hasn't been considered in every single place where it will be applied. Let's say there is a Dogs Act which regulates dogs, and let's say we now want to regulate cats. We could make textual amendments to the Dogs Act, by adding "or cat" after every single "dog". We could draft an entirely new Cats Act which replicates the Dogs Act. Or we could make a non-textual amendment that in the Dogs Act a reference to a dog shall be taken to include a reference to a cat. If we do the job right and make a new Act, or make textual amendments to the Dogs Act, we will see that parts of it don't work for cats – for example a lead for a dog may make sense, but not for a cat, or there may not be dangerous breeds of cat in the same way that there are dangerous breeds of dog. But with non-textual amendments, we don't check those things, we

⁶⁷⁷ Ilbert (n 141) 259.

⁶⁷⁸ Alec Samuels, 'The Courts and Legal Services Act 1990: An Exercise in Drafting' (1991) 12 *Statute Law Review* 76, 77.

⁶⁷⁹ Duncan Berry, 'Keeping the Statute Book up to Date: A Personal View' (2010) 36 *Commonwealth Law Bulletin* 79, 98.

⁶⁸⁰ Thornton (n 673) 407.

simply make a global change without looking at the detail and consequence of what that change means in all circumstances.

The key point is what actually works, not an automatic rule that textual is good and non-textual bad. Generally, textual makes legislation more intelligible, as well as more certain. In some circumstances, where the application of the law is tightly constrained, a non-textual amendment will be both intelligible and certain.

4.4.3 Drafting solutions to dealing with amendments

I previously set out some thoughts on tools to enhance clarity in amending legislation.⁶⁸¹ In this section, I expand upon and develop that list. The following can assist intelligibility both of the law as amended, and of the amending legislation.

Access to the law as amended

In chapter 2 I argued that accessibility included a requirement for access to the law as amended. If this is done, then the fact of an amendment, in itself, causes zero intelligibility problems. This can be done via a statute law database, or (as Samuels⁶⁸² and Lord Simon⁶⁸³ argued) via reprints of the law as amended. If the reprint or database is by the state, then it will be quasi-authoritative, even if it doesn't have the authority of an actual Act of Parliament. Beatson saw the value of this in Scotland where an unofficial version of the law as amended was reprinted 'because without it the new law was utterly incomprehensible'.⁶⁸⁴ Teasdale is also of the view that the reprints (along with consolidations etc.) were valuable tools for improving the quality of the statute book.⁶⁸⁵ The same conclusion was reached by the Renton Committee.⁶⁸⁶

Bare textual amendments

A bare textual amendment makes the amendment in the smallest possible number of words. So, if an amending statute changes the penalty for an offence from 2 to 3 years, the amendment is

In section 6(2), for "2" substitute "3".

⁶⁸¹ Ronan Cormacain, 'Keeling Schedules and Clarity in Amending Legislation' (2013) 15 *European Journal of Law Reform* 96.

⁶⁸² Alec Samuels, 'Consolidation: A Plea' (2005) 26 *Statute Law Review* 56.

⁶⁸³ Lord Simon, 'Statute Consolidation: Interim Techniques' [1985] *Public Law* 352.

⁶⁸⁴ J Beatson, 'Common Law, Statute Law and Constitutional Law' (2006) 27 *Statute Law Review* 1, 4.

⁶⁸⁵ Jonathan Teasdale, 'Statute Law Revision: Repeal, Consolidation or Something More?' (2009) 11 *European Journal of Law Reform* 157.

⁶⁸⁶ 'Report of the Renton Committee on the Preparation of Legislation' (n 129).

A bare amendment has the benefit of brevity, but gives the reader of the amending statute very little idea about the nature of the change being made.

Expansive textual amendment

An expansive textual amendment develops the idea of a bare textual amendment. But instead of amending the one or two words which are actually changing, it sets out the whole provision in its amended form. So, the amendment is

For section 6(2) substitute ‘A person guilty of an offence under this section is liable to imprisonment for a term not exceeding 3 years’.

The only thing which is actually changing is the number 2 to 3, but the amendment restates the entirety of the subsection, letting the reader at least know what the nature of the amendment is. The EU suggest this as the best way to proceed ‘preference shall be given to replacing whole provisions (articles or subdivisions of articles) rather than inserting or deleting individual sentences, phrases or words’.⁶⁸⁷ This is at least intelligible. The reader can understand what is in front of her, although the exact nature of the change may not be clear.

Consolidation with amendments

A consolidation repeals all the previous legislation on the point, and re-enacts it with the amendments included within it. Lord Simon thought it the best way to deal with legislation which has been amended multiple times.⁶⁸⁸ His fellow judge, Lord Hailsham had the same view – ‘statute law revision and consolidations are both valuable ways of improving the statute book’.⁶⁸⁹ Consolidation is a statutory duty of the Northern Ireland Law Commission⁶⁹⁰ and the Law Commissions and England and Wales and Scotland.⁶⁹¹ The value of them is reflected in the fact that special parliamentary procedures exist to make consolidation acts easier to pass through Parliament.⁶⁹²

⁶⁸⁷ ‘Interinstitutional Agreement of 22 December 1998 on Common Guidelines for the Quality of Drafting of Community Legislation’ 1999/C 73/01. Guideline 18. This point is reiterated in European Union (n 646). Robinson points out that this isn’t binding though, William Robinson, ‘Manuals for Drafting European Union Legislation’ (2010) 4 *Legisprudence* 129.

⁶⁸⁸ Lord Simon (n 683).

⁶⁸⁹ Lord Hailsham, ‘Addressing the Statute Law’ (1985) 6 *Statute Law Review* 4, 7.

⁶⁹⁰ Justice (Northern Ireland) Act 2002, s. 51(1).

⁶⁹¹ Law Commissions Act 1965, s. 3(1)(d).

⁶⁹² Consolidation of Enactments (Procedure) Act 1949, Standing Orders of the House of Commons, Standing Order 58.

Consolidation helps the reader to see what the law as amended is. However, it isn't particularly good at showing what the changes being made to the law are. This is because the changes aren't flagged up in any way, all that a consolidation does is set out the new law.

Repeal and restatement

Repeal and restatement is consolidation but at a smaller level. Instead of repealing the entirety of the old law and passing a new consolidated act, only the old provision is repealed and restated in a new law. The courts have in the past expressed a preference for this 'where possible, statutes, or complete parts of statutes, should not be amended but re-enacted in an amended form so that those concerned can read the rules in a single document'.⁶⁹³ This approach also finds favour with Lovgren.⁶⁹⁴ As with consolidations though, this renders the amending law less intelligible, as it is hard to know what exactly is being changed. An up to date statute law database would render repeal and restatement unnecessary.

Textual amendment with explanatory material

A textual amendment with explanatory material builds upon a bare textual amendment, but uses explanatory material (within the actual legislation) to give a narrative to what is happening. So the amendment is

In section 6(2) (penalty for offence of burglary) for "2 years" substitute "3 years".

Material in parenthesis can be used to describe the section that is being amended, and slightly more expansive amendments can be made than are strictly necessary. The reader can have a reasonably good idea of the subject matter of the amendment, and also the nature of the change being made. As I previously argued 'the drafter might amend more words than are strictly necessary, but the nature of the amendment will be more intelligible to the reader'.⁶⁹⁵ The amending legislation is intelligible, and if that amendment is updated into the statute law database, the law as amended will also be intelligible.

Official / Unofficial guidance

The state can also issue official or unofficial guidance on the law as amended. This can be a version of a consolidation, although without actually being legislation. In fact, the existence of such guidance was cited as a reason why there was no formal consolidation in the Social Security Fraud

⁶⁹³ *Merkur Island Shipping Corporation v Laughton* [1983] 2 AC 570, 595.

⁶⁹⁴ AC Lovgren, 'The Location of Textual Amendments in Bills' (1988) 9 Statute Law Review 27.

⁶⁹⁵ Cormacain, 'Keeling Schedules and Clarity in Amending Legislation' (n 681) 103.

Bill 2000/01.⁶⁹⁶ Although this may make the law as amended intelligible, it is a poor substitute for actual legislation. Although guidance can be a useful adjunct to legislation, if used instead of legislation, it attacks the rule of law – it is rule of pamphlet, not rule of law. As the Society of Public Teachers of Law said

We view with considerable misgiving the widespread practice of government by circular, with no legal force. Legislation is so complex that administrators ... use circulars instead of text.⁶⁹⁷

Brightman made a similar criticism, although he extended this to the output of commercial organisations as well.⁶⁹⁸ The point he was making was that although these sources may be useful, they didn't have the authority of an actual Act of Parliament.

Keeling schedules

A Keeling schedule is a schedule in amending legislation which sets out the legislation as amended. So, the London Local Authorities Act 2012 amended the City of Westminster Act 1999 by way of textual amendments in the body of the 2012 Act. Then, in a schedule to the 2012 Act it set out the 1999 Act as amended (including both all the amendments made before 2012 as well as the amendments made by the 2012 Act). So, in one statute, the reader can see the changes as well as the thing being changed. The amendments are done by way of textual amendment, and the schedule is essentially a restatement, or consolidation of the law. But the schedule, as part of a statute, is as authoritative as any other statute.

The Keeling schedule is a little known legal device in the UK.⁶⁹⁹ It was named after Edward Keeling, the MP who first used it and its use was endorsed by the Prime Minister in 1938.⁷⁰⁰ It is used very rarely, on average once a year since 1938. However, practically everyone who has considered it has recommended it: the Renton Committee,⁷⁰¹ the Statute Law Society,⁷⁰² Bates,⁷⁰³ Brightman,⁷⁰⁴

⁶⁹⁶ (28 March 2001) 624 HL debs col 264.

⁶⁹⁷ Society of Public Teachers of Law, 'Preparation of Legislation' (1974) 13 Journal of the Society of Public Teachers of Law 96, 99.

⁶⁹⁸ Brightman (n 606) 6.

⁶⁹⁹ Crabbe gives 9 lines to it in a 300 page book on drafting Crabbe (n 649). Thornton doesn't mention it at all Thornton (n 673).

⁷⁰⁰ HC Debs 26 July 1938 Vol 338 col 2919

⁷⁰¹ 'Report of the Renton Committee on the Preparation of Legislation' (n 129).

⁷⁰² Statute Law Society, 'Statute Law: The Key to Clarity' (1972). See paragraph 31. Statute Law Society, 'Statute Law: Radical Simplification' (1974). See paragraph 101 to 120.

⁷⁰³ T Bates, 'Monitoring of Current Legislation by the Statute Law Society' (1981) 1 Statute Law Review 39.

⁷⁰⁴ Brightman (n 606).

Beatson,⁷⁰⁵ Samuels,⁷⁰⁶ Hand,⁷⁰⁷ Berry,⁷⁰⁸ and Simon.⁷⁰⁹ Zander said it was a 'simple and attractive idea'.⁷¹⁰ Carr said it would improve the statute book.⁷¹¹ Hailsham 'will always do what I can to encourage ... a Keeling schedule'.⁷¹²

In the absence of a properly accessible statute book that contains the law as amended, Keeling schedules perform a vital role. In addition, they are particularly useful when amending legislation is passing through Parliament – the legislators can see both the amending law, and what the law will look like after they enact the changes. There are a number of problems with them however. Firstly, as Bennion argues, they can 'uselessly clutter up the statute book'⁷¹³ as all they do is collate (and then repeat) material already in the statute book. Secondly, they take up important parliamentary and drafting resources – instead of just adding a textual amendment, the drafter must manually update the legislation, and parliament must debate and pass a bill containing the law as amended.⁷¹⁴ Thirdly, they give rise to the possibility of re-opening a contentious point which has already been resolved by the legislature – an amendment may deal only with a non-controversial point, but in passing a Keeling schedule on the entire legislation, parliament may then have a chance to debate afresh one of the contentious points contained within it. Fourthly, if a statute is continually amended, the Keeling schedule will either itself have to be continually revised, or it will swiftly become out of date.

In my view, Keeling schedules can improve intelligibility of the law as amended. However, they are very much second best when compared to a proper statute law database containing all the law as amended. Technology should render them obsolete, and with that technology the calls for their use (despite what I have previously argued⁷¹⁵) have less strength.

⁷⁰⁵ Beatson (n 684).

⁷⁰⁶ Samuels, 'Consolidation: A Plea' (n 682); Samuels, 'The Courts and Legal Services Act 1990: An Exercise in Drafting' (n 678).

⁷⁰⁷ C Hand, 'Drafting with the User in Mind - a Look at Legislation' (1983) 4 Statute Law Review 166.

⁷⁰⁸ Berry (n 679).

⁷⁰⁹ Lord Simon (n 683).

⁷¹⁰ M Zander, *The Law-Making Process* (6th edn, Cambridge University Press 2004) 29.

⁷¹¹ C Carr, 'British Isles: Legislation' (1949) 31 Journal of Comparative Legislation and International Law 1.

⁷¹² Lord Hailsham (n 689) 8.

⁷¹³ Bennion, *Bennion on Statute Law* (n 629).

⁷¹⁴ Bates (n 703).

⁷¹⁵ Cormacain, 'Keeling Schedules and Clarity in Amending Legislation' (n 681).

4.5 Excessive interconnectedness of legislation

Legislation is interconnected if one provision refers to another provision, either within the same statute or in a different statute. Legislation suffers from excessive interconnectedness if the number and density of interconnections makes the legislation harder to understand. So, if a reader can only understand s. 10 of the Companies Act by also looking at s. 50 and s. 60, and s. 100 of the Insolvency Act and s. 52 of the Directors Act, then there are too many jumps, too many connections. Excessive interconnectedness requires a reader to read multiple provisions simultaneously, to have multiple books open at once, or on screen to have multiple windows up. Legislation by its very nature is interconnected – none of it works in a vacuum. What I am arguing here, is that excessive interconnectedness is bad because it restricts the ability of the reader to understand a law.

There are three broad ways in which legislation can be interconnected:

1. Legislation which amends other legislation
2. Legislation which contains (internal and external) signposts (see further chapter 2)
3. Legislation which refers to other provisions within it (internal cross-references) or to provisions in other legislation (external cross-references)

4.5.1 Excessive interconnectedness and amending legislation

The orthodox view is that multiple layers of amendments make legislation unintelligible. I have previously pointed to Article 48 of the Police and Criminal Evidence (Northern Ireland) Order 1989 as an example of bad legislation because it has been amended so many times.⁷¹⁶ This is not a recent criticism, Parliament stated in 1875 that

A reference to parts of several Acts of Parliament, some of which are repealed, some amended, and others kept alive, subject to the provisions contained in the amending Bill ... makes the Statute so ambiguous, so obscure, and so difficult of comprehension that the judges themselves can hardly assign a meaning to it.⁷¹⁷

The problem goes back even further. Sir Francis Bacon in 1616 wanted to reform a situation where we had 'statutes heaped one upon another'.⁷¹⁸ Whether textual or non-textual, the argument has been that continually amending a statute make it less and less intelligible. Cross references can be 'a

⁷¹⁶ *ibid.*

⁷¹⁷ 'Report from the Select Committee on Acts of Parliament' (1875). See page iv.

⁷¹⁸ Quoted in Berry (n 679).

boon to the drafter but a bane to the reader'⁷¹⁹ and Spencer sees over-referential drafting as contributing to the impenetrability of the statute book.⁷²⁰

However, subject to two caveats, I no longer see multiple amendments as posing a problem for intelligibility. The first caveat is that the amending legislation is clear, perhaps by using the drafting techniques set out above in section 4.4.3. The second caveat is that the legislation is truly accessible, as set out in chapter 2, so that the reader can easily see the statute as amended. If this is the case, then it doesn't really matter that a section has been amended 10 times, so long as the reader can read it with all those amendments contained within it. Multiple amendments do not, of themselves, make legislation unintelligible. It doesn't really matter what the provenance of each particular provision is, as long as the reader can read it easily.

4.5.2 Excessive interconnectedness and signposts / cross references

The more cross references that are needed to understand a provision, the more jumps that are necessary across the statute book, the less intelligible (and navigable) that statute is. This point applies equally whether the interconnection is a direct reference (for example 'director has the meaning given in the Directors Act') or a signpost (for example 'see the Directors Act for further information on the duties of directors'). A cross reference is necessary in order to give legal certainty to a provision, a signpost is inserted to make the legislation more intelligible. But once these start to mount up, then we start to lose intelligibility. The reader is placed in a spinning roundabout, trying to take in information from 360 degrees, and getting dizzy and dizzy with each revolution.

There are three drafting solutions to this. Firstly, we can reduce the number of cross references. A signpost should only be used if it will make the legislation easier to understand. It should be a helpful aid to direct the reader to further information if the reader feels they need to know that other information. It should not be compulsory in order for the reader to understand the legislation in front of her. A cross reference should only be used if necessary. It will often be easier for the reader for a definition to be repeated in a statute rather than require the reader to go to another statute to read the definition. Rather than require the reader to go to the Directors Act for the definition of director, it may be better to instead copy out that definition and repeat it in the current Act.

But even this simple drafting solution is subject to exceptions. A short definition may be repeated instead of referred to. But a long definition, or a provision which is to be applied to the current Act may stretch over several pages. A short cross reference here may be better than adding several

⁷¹⁹ Martineau and Salernon (n 421) 73.

⁷²⁰ Spencer (n 217).

pages of text to the current Act. Furthermore, there may be definitions of general importance, where it is important that the same definition applies across the statute book. If we want to update that definition, it is easier if we only have to update it in one place, rather than in multiple places. For example, if company is defined only in the Companies Act, then if we want to extend that definition by adding single member companies to it, we only need to make one amendment. But if company is defined in the Companies Act, Insolvency Act, Directors Act etc, then if we want to update it, we need to amend the definition in three different places. This opens up the possibility of making mistakes where some definitions are updated but others aren't.

Secondly, we can avoid circular references – ‘a reference to another provision which itself refers back to the provision which referred to it’.⁷²¹ This kind of cross reference traps the reader in a referential circle, going round and round in a loop to try to understand a provision.

Thirdly, we can avoid serial references - ‘a reference to another provision, which itself refers to a third provision and so on’.⁷²² This also sets the reader on a wild goose chase, chasing down cross references in more and more different statutes before eventually being able to understand the original statute.

4.6 Plain language

4.6.1 What is plain language?

According to Eagleson

Plain English is clear, straightforward expression, using only as many words as are necessary. It is language that avoids obscurity, inflated vocabulary and convoluted sentence construction. It is not baby talk, nor is it a simplified version of the English language. Writers of plain English let their audience concentrate on the message instead of being distracted by complicated language.⁷²³

Drafters have specifically considered this in the context of legislation, stating that ‘plain language is language which is direct and straightforward. It is designed to deliver its message to its intended readers clearly, effectively and without fuss’.⁷²⁴ Kimble⁷²⁵ and Thomas⁷²⁶ both advocate its use in legislation. Gashabizi, another drafter, agrees ‘plain language is an approach to organising and

⁷²¹ European Union (n 646) 53.

⁷²² *ibid.*

⁷²³ Robert Eagleson, *Writing in Plain English* (Commonwealth of Australia 1990) 4.

⁷²⁴ Office of the Scottish Parliamentary Counsel, ‘Plain Language and Legislation’ 2.

⁷²⁵ Kimble (n 130).

⁷²⁶ Thomas (n 131).

writing documents which makes materials clear and understandable to the user while making use of everyday language'.⁷²⁷ Xanthaki includes plain language as one of the elements in achieving high quality legislation.⁷²⁸ Although it is possible to find arguments against the effectiveness of plain language drafting,⁷²⁹ there is unanimity on the question of what plain language is, and what it strives to achieve.⁷³⁰ According to Tanner, the use of plain language in legislation can be demonstrated to improve its intelligibility.⁷³¹ For Karpen legislation should be 'formulated in a clear, plain language'.⁷³²

The term I use here is plain language, rather than plain English. This is for two reasons. Firstly, taking into account the Welsh statute book, the UK as a whole comprises at least one bilingual jurisdiction,⁷³³ so 'English' by itself is not accurate. Secondly, I take a broad approach to language as covering not simply the words on the page, but structure, formatting, layout and numbering.⁷³⁴

Thornton becomes almost poetic in describing the problems that plain language seeks to overcome, referring to legislation as 'a veritable cobweb of words and in the forest of their verbosity, the reader dare not enter, or, if he enters, he is apt to get lost in no time'.⁷³⁵ If there was a competition for the most vivid description of unintelligible legislation, it would go to Lord Harman who spoke of

Wading through a monstrous legislative morass, staggering from stone to stone and ignoring the marsh gas ... 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.⁷³⁶

There are three broad criticisms of plain language. These are relatively minor or 'quibbles' as Dorsey puts it.⁷³⁷ They are not arguments in favour of unintelligibility, merely criticisms of plain language as a tool to achieving intelligibility.

⁷²⁷ Alain Songa Gashabizi, 'In Pursuit of Clarity: How Far Should the Drafter Go?' (2013) 39 *Commonwealth Law Bulletin* 415, 419.

⁷²⁸ Xanthaki, *Drafting Legislation*, (n 3).

⁷²⁹ Greenberg, 'The Three Myths of Plain English Drafting' (n 630); Samuels, 'Thou Shalt Not Steal' (n 82); Hunt (n 668); Butt (n 128).

⁷³⁰ Judith Bennett and Christopher Balmford, 'The International Plain Language Movement: A Business Plan' (1994) 31 *Clarity (Journal of the International Association of Plain Legal Language)* 37.

⁷³¹ Edwin Tanner, 'Legislating to Communicate: Trends in Drafting Commonwealth Legislation' (2002) 24 *Sydney Law Review* 529.

⁷³² Karpen and Xanthaki (n 108) 13.

⁷³³ In Northern Ireland, the Administration of Justice (Language) Act (Ireland) 1737 still applies and this requires statutes to be in English. However, there have long been proposals for an Irish Language Act which would change this.

⁷³⁴ This broad approach is expressly used by the Scottish drafters, Office of the Scottish Parliamentary Counsel (n 724).

⁷³⁵ Thornton and Xanthaki (n 66) 53.

⁷³⁶ *Davy v Leeds Corpn* [1964] 3 All ER 390. 394.

⁷³⁷ Dorsey (n 421) 187.

The first criticism, made by Greenberg, is that plain language gives a false sense of knowledge to the reader.⁷³⁸ The argument is that, since the language is plain and the words simple, the meaning is therefore clear to the lay reader. But this may be false because the meaning of a word may not be in accordance with the plain language meaning, or a word or phrase may be freighted with legal meaning which places a different complexion on how it should be interpreted. Greenberg's example is the use of the word 'person' in legislation. Citizens may automatically assume that this is a human being, not being aware that it can extend to legal persons (corporations with a legal personality) as well as to unincorporated associations.⁷³⁹ If a statute is only to extend to human beings, then the word used in the statute will be 'individuals'. It is better, according to Greenberg, that the language is obscure so the reader knows they don't understand it, rather than being plain so that the reader thinks they understand it, when in truth they actually misunderstand it.

There is some weight to this argument, even though it seems counter-intuitive. I don't attempt brain surgery because I know I am ignorant of the subject, but an amateur who "thinks" he knows could cause irreparable brain damage. However, to my mind there are four counter-arguments which displace the notion that plain language is not helpful in improving the quality of legislation.

Firstly, don't use words where the plain and ordinary meaning of the word is different from the meaning you intend it to have. This isn't simply ambiguous, it is downright misleading. In the EU, there is a list of *faux amis*, words which have one meaning in one language, but a different meaning in another language.⁷⁴⁰ Using a word which normally means one thing to mean another thing is a deliberate *faux ami*, but without the excuse of a different language. In fact, the EU recognise this very drafting problem, stating that 'if a word has one meaning in everyday or technical language, but a different meaning in legal language, the phrase must be formulated in such a way as to avoid any ambiguity'.⁷⁴¹

Secondly, it isn't critical if there isn't 100% congruence between the ordinary meaning of the word and the technical meaning of the word, so long as the lay reader will get the gist of the word. So the lay reader will know that 'person' includes them, even though they may be ignorant that the penumbra of meaning also extends to bodies corporate and unincorporated associations.

Thirdly, don't attempt to simplify language by using an ordinary word which is inaccurate and could ultimately mislead. Instead, use the precise legal word, even if that will hinder intelligibility. So, in

⁷³⁸ Greenberg, 'The Three Myths of Plain English Drafting' (n 630).

⁷³⁹ By virtue of the Interpretation Act 1978 in England, Wales and Scotland, and by virtue of the Interpretation Act (Northern Ireland) 1954 in Northern Ireland.

⁷⁴⁰ European Commission, 'How to Write Clearly' (2011).

⁷⁴¹ European Union (n 646) 21.

the legislation setting out how land will be assessed for rates (local land tax), a unit liable to rating is called a hereditament.⁷⁴² If the legislation eschewed ‘hereditament’ for an ordinary English word like land, or building, then Greenberg’s criticism would be correct, and the user would have a false sense of understanding. Better then to use the proper word rather than use an imprecise word. But as Eagleson said, plain language isn’t about dumbing down, and it doesn’t require precision to be sacrificed.

Fourthly, we can go beyond the third argument by clever use of definitions. We can use the ordinary and plain word throughout the text, the word that readers will generally understand. But then we can define that word using the correct and technical legal language. So, in the hereditament example above, we could use the word “property” throughout the legislation when we are talking about what is liable to rates. Then at the end, we can define property to mean a hereditament, with the full technical meaning of hereditament. This is one working example of what Xanthaki calls the ‘layered’ approach, where different layers of complexity exist in the legislation. The ordinary reader will gain sufficient understanding at the first layer when they read “property”, and the technical reader will gain sufficient understanding at a subsequent layer when they read the definition of “property”.

The second criticism, made by Dorsey, is that plain language elevates intelligibility over certainty. In fact, he states that we should ‘beware’ plain language.⁷⁴³ As I have already pointed out, there is a tension between intelligibility and certainty, but this does not mean they are diametrically opposed to each other. Legislation should strive to achieve both. Dorsey goes rather too far when he argues that ‘precise but unclear might be exactly what the client wanted. Your duty as a drafter is to give effect – with 100% faithfulness – to what the client wants’.⁷⁴⁴ Although it is true that the drafter owes a duty to the client, this does not override the obligation to the rule of law. In my counter-argument to the first criticism above, I pointed out that plain language does not require imprecision, and that the correct legal word can still be used. Both proponents and opponents of plain language are correct here – there is no point in being precise if you are unclear, but equally there is no point in being clear if you are imprecise.

The third criticism, noted by Xanthaki,⁷⁴⁵ is that it is too simplistic a solution to merely require all legislation to be in plain language. It can certainly help with intelligibility, but it is not a panacea. As noted above, sometimes complexity cannot be removed from legislation, for reasons outside the

⁷⁴² Rates (Northern Ireland) Order 1977.

⁷⁴³ Dorsey (n 421) 186.

⁷⁴⁴ *ibid* 187.

⁷⁴⁵ Thornton and Xanthaki (n 66).

control of drafters. This ties in with one of Greenberg's complaints – that there is nothing innovative about the desire to use plain language. One only has to look at Thring, writing 150 years ago and telling legislative drafters that 'clarity is the main object to be aimed at in the drafting of Acts of Parliament'.⁷⁴⁶ Plain language is a tool, which used correctly can promote intelligibility. The automatic or mechanical application of it though, without considering clarity and precision more generally, will not always promote the rule of law.

4.6.2 Plain language techniques

What follows are some specific plain language techniques, tools which are aimed at improving intelligibility in legislation. For a more in-depth consideration of these techniques, see Thornton⁷⁴⁷ and Turnbull⁷⁴⁸.

Short sentences

According to Thornton 'studies in linguistics show that a sentence of above 15 -20 words is incomprehensible'.⁷⁴⁹ The EU state that 'unnecessarily long sentences are a serious obstacle to clarity in European Commission documents'⁷⁵⁰ and suggest an average sentence length of 20 words (although this advice is consistently ignored if one reads any preamble to any EU legislation). A sentence which rambles on over several lines is difficult to understand, because by the time the reader has reached the end, they may have forgotten the start. Brevity, by which I mean expressing legislation in short sentences, does lend itself to intelligibility, 'clarity is helped by the use of short sentences'.⁷⁵¹ Oscar Wilde can write a sentence 119 words long,⁷⁵² drafters cannot.

Uncomplicated sentences

But brevity by itself is insufficient in sentence construction. We also need to make sentences less complicated by reducing the number of concepts contained within them. A sentence is complicated (and hence more difficult to understand) if it contains multiple rules, conditions, provisos, persons, exceptions etc. This harks back to Thring's statement that 'enactment in its simplest form consists of legal subject and legal predicate',⁷⁵³ that is to say

1. A person

⁷⁴⁶ Thring, *Practical Legislation: The Composition and Language of Acts of Parliament* (n 135) 73.

⁷⁴⁷ Thornton and Xanthaki (n 66).

⁷⁴⁸ Mark Turnbull, 'Clear Legislative Drafting: New Approaches in Australia' (1990) 11 *Statute Law Review* 161.

⁷⁴⁹ Thornton and Xanthaki (n 66) 60.

⁷⁵⁰ European Commission (n 740).

⁷⁵¹ Office of the Parliamentary Counsel, 'Drafting Guidance' (n 114) 2.

⁷⁵² Oscar Wilde, *The Picture of Dorian Gray* (Modern Library 2006).

⁷⁵³ Thring, *Practical Legislation: The Composition and Language of Acts of Parliament* (n 135) 73.

2. Must do (or not do) a thing

To this we can add the condition, case or circumstance in which the rule applies

1. A person
2. Must do (or not do) a thing
3. In a particular case / circumstance

If subject, predicate and condition are simple, then all three can be expressed in a single, uncomplicated sentence. For example

The members shall be appointed by the Department.⁷⁵⁴

The court must refuse to hear an application under a provision listed in subsection (2) if it considers that the applicant does not have a sufficient interest in relation to the missing person's property or financial affairs.⁷⁵⁵

However, once these categories start filling up, it becomes increasingly difficult to understand a single sentence which still contains them all. Mackinlay refers to this as 'syntactic discontinuity' if there is too much of separation of two elements of the same phrase by the insertion of another element.⁷⁵⁶ So, if there are multiple legal subjects, predicates or cases, then it can be better to separate these out into different sentences. We can then have the outline framework at the start, followed by further sentences which explain the details. For example

1. A person, as defined in subsection (2)
2. Must do the thing described in subsection (3)
3. In the circumstances set out in subsection (4).

There is no hard and fast rule about how many concepts are "too many" for a single sentence. But at some point, intelligibility will decrease the more concepts are packed in, and it will be better to chop a long sentence up into smaller sentences. Paradoxically, this can mean that a longer section is more intelligible than a shorter section as instead of one long provision, we have several shorter ones.

Division into paragraphs

⁷⁵⁴ S. 6(3) Charities Act (Northern Ireland) 2008.

⁷⁵⁵ S. 19(1) Guardianship (Missing Persons) Act 2017.

⁷⁵⁶ Jane Mackinlay, 'Syntactic Discontinuity in the Language of the UK and EU Legislation' <http://www.esp-world.info/Articles_7/Syntactic%20DiscontLegal.htm> accessed 10 June 2017.

This flows on from the above point and follows Thornton’s advice on paragraphing.⁷⁵⁷ Division of a provision into paragraphs allows for a more logical structure for that provision. It allows the reader, at a glance, to see the division into the different elements of subject, predicate and case. For example:

4 (1) A person is entitled to welfare supplementary payment under this Part if the person meets –

- (a) the IS entitlement condition,
- (b) the disability-related premium entitlement condition,
- (c) the PIP refusal condition, and
- (d) the termination of disability-related premium condition.⁷⁵⁸

The reader sees at a glance that there are 4 conditions that must be satisfied, and the following paragraphs then set out in greater detail what each of these conditions are. However, if a list is short, it may be better to keep it all together rather than unnecessarily break it into paragraphs.

Active not passive voice

In general terms, writing is more intelligible if it is in the active voice rather than the passive voice.⁷⁵⁹ When it comes to legislation, it is imperative that citizens know what duties fall upon them: “the thing must be done” is unclear compared to “the person must do the thing”. As a bad example, in relation to consumer credit agreements ‘All the contracting parties shall receive a copy of the credit agreement’.⁷⁶⁰ Is the government to send out the agreements, or the creditor, or the consumer, or a credit intermediary?

Of course, context can provide the identity of the person upon whom the duty does fall, particularly if this is set up by what comes before. So, if a person must make an application for a licence, it is acceptable for the following provision to refer to application requirements in the passive voice, as it is clear that the person making the application must comply with them.

Main point first

⁷⁵⁷ Thornton and Xanthaki (n 66) 66.

⁷⁵⁸ Regulation 4(1) Welfare Supplementary Payment (Loss of Disability-related Premiums) Regulations (Northern Ireland) 2016.

⁷⁵⁹ Thornton and Xanthaki (n 66) 64.

⁷⁶⁰ Article 10 Consumer Credit Directive, Directive 2008/48/EC.

The main point ought to come first, both at the level of an individual section, and at the level of the Act itself. Law isn't poetry, open to nuance and a multitude of subjective opinions, nor is it an adventure novel where there can be a twist at the end of the story. It is instruction to the citizens with consequences for failure to comply, so it must get its message across from the start. Starting with the main point first allows the reader to understand the legislation from the outset, rather than struggling through minor points of detail without knowing where they are going. So, if a section is going to ban cars from the city centre, it should begin with this bold statement, rather than by starting with definitions of cars and city centres.

It can be more difficult to do this at the level of the Act itself, as often Acts will have several main points. But the more important the provision, the closer it should go to the start, particularly with single purpose Acts. For example, the main purpose of an Act was to ban criminals from acting as special advisers to government ministers, so in the second section, the first line reads:

Subject to subsection (2) and section 3, a person is not eligible for appointment as a special adviser if the person has a serious criminal conviction.⁷⁶¹

Use of negatives (and double negatives)

Legislation is easier to understand if it is expressed in the positive rather than the negative.⁷⁶² 'An application must be in writing' is better than 'an application will not be accepted unless it is in writing'. Double (or triple or more) negatives are a barrier to understanding as the reader must first jump an intellectual hurdle before understanding a provision: 'please untick this box if you do not want to receive marketing material' is not as good as 'tick here to receive marketing material'.

Front-loading of sentences with conditions

Watson-Brown counsels against front-loading sentences with conditions.⁷⁶³ This is a specific outworking of the general advice for uncomplicated sentences. Front-loading means that the conditions for application of the rule appear in a long list before the rule itself appears. I previously argued that 'it is difficult for readers to link the first part of the sentence to the last part of the sentence if they have to push their way through four conditions in the interim'.⁷⁶⁴

Formatting and numbering

⁷⁶¹ S. 2(1) Civil Service (Special Advisers) Act (Northern Ireland) 2013.

⁷⁶² Thornton and Xanthaki (n 66) 65.

⁷⁶³ Anthony Watson-Brown, 'Defining "Plain English" as an Aid to Legal Drafting' (2009) 30 Statute Law Review 85.

⁷⁶⁴ Cormacain, 'A Plain Language Case Study: Business Tenancies (Northern Ireland) Order 1996' (n 427) 40.

As with paragraphing, formatting and numbering can help to visually organise sentences.

(1) An indentation can indicate how a provision only relates,

(a) to certain cases, or

(b) to other cases.

(2) Before a return to the more general proposition.

Formatting can break up ‘a large slab of unbroken text’⁷⁶⁵ and white space on a page allows for a separation of concepts on the page, which leads to greater intelligibility.

Structure

A logical structure makes legislation more intelligible. This is dealt with in chapter 2.

Archaic, technical, jargon and foreign words

Thornton recommends avoiding archaic words, legalese and foreign words.⁷⁶⁶ Classic examples, often favoured by lawyers, are hereby, as aforesaid etc. Thornton’s advice is sound, although sometimes the precise word may be a foreign one, such as ultra vires. A phrase such as ultra vires has a very particular meaning, built up through case law, and so it can be risky to jettison it for an English concept such as “beyond the powers”. As stated previously, depending upon the target audience, a technical word, or even a word which is jargon can be acceptable, if it is intelligible to those who will be using the legislation.

Visual aids, supplementary aids

Legislation doesn’t have to be just words. We can use maps, diagrams, formula, tables, flow charts etc. Research in the UK has found that users find it easy to understand mathematical calculations if they are written out as a formula rather than written out longhand in words.⁷⁶⁷

Use of present tense

Legislation should be in the present tense. Legislation always speaks, meaning that we should write the law as if it will be applied right now.

Splitting the verb

⁷⁶⁵ Office of the Parliamentary Counsel, ‘Drafting Guidance’ (n 114) 20.

⁷⁶⁶ Thornton and Xanthaki (n 66) 77.

⁷⁶⁷ Bertlin (n 234).

The greater the distance between the person and the thing they are to do, the more unintelligible the legislation. Xanthaki suggests that we shouldn't split the verb.⁷⁶⁸ This is another outworking of the basic plain language technique of avoiding complicated sentences.

Avoid nominalisations

If there is a simple verb, use it, rather than turning it into a noun and adding another verb.⁷⁶⁹ So, it is simpler to say that "a constable may investigate" rather than "a constable may carry out an investigation".

Separate out provisos

A proviso is an additional qualification or restriction at the end of a provision which colours how that provision is to be applied. Thring cautioned against their misuse,⁷⁷⁰ Coode spoke strongly against them,⁷⁷¹ as did Driedger⁷⁷² and Thornton.⁷⁷³ There are certainly times when they can be used, but if they are used, they should be separated out and stand alone, rather than appear at the end of a long sentence. Considering the following example, which deals with several plain language techniques.

Firstly, we have the original provision from 1996:

2. Action which is or may be investigated by the Attorney General with a view to the institution of proceedings under section 31 or 46(9) of the Local Government Act (Northern Ireland) 1972.

Provided that, if, after the Attorney General has decided not to proceed with such an investigation into such action or not to institute such proceedings in respect of it, or after the final determination of any such proceedings in respect of such action, a person aggrieved complains that such action resulted in his sustaining injustice in consequence of maladministration and that such injustice has not been remedied, the Commissioner may, if satisfied that there are reasonable grounds for that complaint investigate such action, notwithstanding any limitation of time imposed by Article 10(6).⁷⁷⁴

⁷⁶⁸ Thornton and Xanthaki (n 66) 65.

⁷⁶⁹ *ibid* 70.

⁷⁷⁰ Thring, *Practical Legislation: The Composition and Language of Acts of Parliament* (n 135) 83.

⁷⁷¹ Coode (n 141).

⁷⁷² Elmer Driedger, *The Composition of Legislation: Legislative Forms and Precedents* (2nd edn, Department of Justice 1976).

⁷⁷³ Thornton and Xanthaki (n 66) 86.

⁷⁷⁴ Paragraph 2, Schedule 3, Commissioner for Complaints (Northern Ireland) Order 1996.

Then we have the new version from 2016, restated in plain language, using several of the techniques discussed in this part.

4. (1) Action which is or may be investigated by the Attorney General with a view to the institution of proceedings under section 31 or 46(9) of the Local Government Act (Northern Ireland) 1972.

(2) But the Ombudsman may investigate that action, notwithstanding any limitation of time imposed by section 26, if conditions 1 and 2 are satisfied.

(3) Condition 1 is that—

- (a) the Attorney General has decided not to proceed with an investigation,
- (b) the Attorney General has decided not to institute proceedings, or
- (c) there has been a final determination of those proceedings.

(4) Condition 2 is that—

- (a) a person aggrieved complains that the action resulted in the person aggrieved sustaining injustice in consequence of maladministration and that such injustice has not been remedied, and
- (b) the Ombudsman is satisfied that there are reasonable grounds for that complaint.⁷⁷⁵

4.7 Easification

Easification is a linguistic tool designed to make legal text more accessible, readable and easier to understand.⁷⁷⁶ It provides the perspective of linguists on the rule of law requirement of intelligibility, it comes from a different professional background, but the end goal is the same. Therefore, it can be used as a drafting principle derived from the rule of law. For Pennisi, 'linguistics can provide a method by which drafters can assess the effectiveness of their draft'.⁷⁷⁷

Easification analyses legal discourse – the construction and organisation of language. It needs to be distinguished from simplification – which is a separate linguistic tool which produces an additional (and simpler) form of the text. Simplification is therefore not relevant to legislative drafting, although it is relevant to the production of explanatory material which may accompany the

⁷⁷⁵ Paragraph 4, Schedule 5, Public Services Ombudsman Act (Northern Ireland) 2016

⁷⁷⁶ Prof Dr KL Bhatia, *Textbook on Legal Language and Legal Writing* (Universal Law Publishing 2010) 56.

⁷⁷⁷ Pennisi (n 654) 101.

legislation. Easification makes legislation more intelligible, simplification allows for the creation of additional material to shed light upon the legislation.

For Bhatia, there is an implicit criticism of the form of legislation where it is 'considered advantageous to condense all the necessary information into a single sentence'.⁷⁷⁸ This produces difficulties with cognitive structuring – the ability of the brain to process many different concepts at the same time. The solution is good cognitive structuring which is about 'facilitating the cognitive and syntactic processing of long sentences with multiple qualifications inserted at various points often adding excessive information load at various points in the syntactic arrangement of legislative provisions'.⁷⁷⁹

Pennisi expands upon this and gives practical examples about how legislation can be improved by these techniques.⁷⁸⁰ This involves parsing sentences by reference to their different components: case, condition, sub-condition, legal subject, legal action. Where one of these components splits into binomials or multinomials, then that split can either be removed and placed elsewhere, or the text can be reformatted to show that split as a clear and logical sub-clause. So, if a long line of text has multiple conditions, and multiple references, it can be re-organised into a clearer format of:

IF

 X or Y applies

THEN a person must

 Do A or B

Easification gives academic weight to what many drafters already do in practice – to write out all the elements which are to go into a provision, and if there are too many elements, to split them into different provisions, or use formatting and numbering to show divisions and sub-divisions. Pennisi also sees the value of focusing on the core regulatory message as soon as possible, and using other devices already discussed in relation to plain language, such as active not passive voice. Easification represents a more formal and empirically grounded form of plain language techniques and is a useful additional tool in enhancing intelligibility.

⁷⁷⁸ Prof Dr KL Bhatia, 'Drafting Legislative Provisions: Challenges and Opportunities' [2010] *The Loophole* 5, 11.

⁷⁷⁹ Prof Dr KL Bhatia, 'Linguistic and Socio-Pragmatic Considerations in Legislative Drafting' (2014) 2 *Theory and Practice of Legislation* 169, 179.

⁷⁸⁰ Pennisi (n 654).

4.8 Good writing

Paul Romer, former Chief Economist at the World Bank stated that ‘if a document is well written, anyone with a copy can read it and convert the codified knowledge stored in text back into human capital’.⁷⁸¹ Legislation is more likely to be understood if it is well written. The concept of good writing isn’t one applying just to legislation, it is to all writing. A detailed inquiry into good writing is beyond the scope of this thesis. However, we can take one of the best proponents of good writing in the English language and examine his findings on the issue.

George Orwell, the author of *1984* and *Animal Farm*, was obviously not a drafter. Orwell’s first two questions for a writer are: what am I trying to say and what words will express it?⁷⁸² Bowman, former First Parliamentary Counsel in the UK set out his approach to drafting.⁷⁸³ He summed up his drafting philosophy very simply: first decide what you want to say, second, say it. This is uncannily similar to Orwell’s command. Therefore, we can see if Orwell’s solutions correspond to the drafting principles adopted by drafters.

Orwell’s rules for good writing are:

- Avoid tired metaphors.
- Never use a long word where a short one will do.
- If it is possible to cut a word out, always cut it out.
- Never use the passive where you can use the active.
- Never use a foreign phrase, a scientific word or a jargon word if you can think of an everyday English equivalent.
- Break any of these rules sooner than say anything outright barbarous.⁷⁸⁴

His first rule would not be popular amongst drafters, particularly those who rely heavily upon precedents in their drafts. Unlike most writers, drafters are under no pressure to say something novel, in fact the reverse pressure usually applies – to use the same words which have been proven to have worked in the past. However, the rest of Orwell’s rules can find direct analogues in drafting principles – even down to the exhortation that the rules should be broken if necessary.

4.9 Examples

The dictionary definition of an example is a thing characteristic of its type, or an illustration of a general rule. The preponderance of views in the drafting community is that examples make legislation more intelligible. Greenberg stated that ‘there is possibly no innovation that could do

⁷⁸¹ Paul Romer, ‘Writing’ <<http://wb-ce.org/writing.html>> accessed 26 May 2017.

⁷⁸² George Orwell, *Politics and the English Language* (Penguin 2013) 12-13.

⁷⁸³ Bowman (n 98).

⁷⁸⁴ Orwell (n 518). 19.

more to help the readers of legislation and bring additional clarity to the statute book'.⁷⁸⁵ Barnes likes them because they give a concrete illustration of the rule.⁷⁸⁶ Piper is a fan because they help readers understand a general principle.⁷⁸⁷ For Flesch 'whenever you write about a general principle, show its application in a specific case; ...tell a pointed anecdote. These dashes of color are what the reader will take away with him'.⁷⁸⁸ Dorsey is unusual in opposing examples.⁷⁸⁹

4.9.1 Different ways of drafting an example

Examples can be drafted in several ways. The most obvious is to say "for example".

A local authority may meet an adult's needs under subsection (3) where, for example, the adult is terminally ill (within the meaning given in section 82(4) of the Welfare Reform Act 2012).⁷⁹⁰

This is a relatively new way (in the UK) to give an example. Much more common place is the "inclusionary example" technique. Under this technique the general rule is given, followed by a few specific things that the rule is expressly stated to include. This is an example, even though the phrase "for example" isn't used.

the results of the ballot, including in particular—

- (i) the total number of votes cast,
- (ii) the number of persons who voted in favour of the imposition of the BRS,
- (iii) the number of persons who voted against its imposition,⁷⁹¹

There are two variations (at least) on this inclusionary example. The first is to give the rule, and then follow it by "without prejudice to the generality of the foregoing, this includes ..." The second is slightly shorter, after the rule is stated it is followed by "including, without limitation ...". The purpose of these two variations is to make it clear that the use of an example is not intended to limit the general application of the rule, so that if something falls outside the example, it may still fall within the rule.

⁷⁸⁵ Greenberg, *Laying down the Law* (n 92) 237.

⁷⁸⁶ Jeffrey Barnes, 'Shining Examples' [2004] *The Loophole* 8.

⁷⁸⁷ Ben Piper, 'What, How, When and Why—making Laws Easier to Understand by Using Examples and Notes' [2007] *The Loophole* 74.

⁷⁸⁸ Rudolph Flesch, *The Art of Readable Writing* (Collier Books 1962) 38.

⁷⁸⁹ Dorsey (n 421) 187.

⁷⁹⁰ S. 19(4) Care Act 2014.

⁷⁹¹ Schedule 1, paragraph 20, Business Rate Supplements Act 2009.

4.9.2 Appropriate cases where examples can be used

Examples do help the reader to understand legislation and ought to be used. The following are cases where it is appropriate to do so.

Firstly, where the rule must be expressed in a precise (perhaps even technical way), but we need also to convey meaning to the user. In this case, we can give an example of the most common circumstance where the rule will be used. The rule will cause the casual reader to scratch their head, but the example will make it clear.

Optical instruments for capturing or storing images (for example a camera) are prohibited inside a prison.

The rule may be expressed in a broad and technical way, in order to capture many different devices, but the reader may not understand what we are talking about here. However, when we give the example, the reader straight away gets the gist of the provision. The example is short, it allows for a precise rule, but also for an illustration to make the rule intelligible.

Secondly, where we want to give an indication to the reader the various kinds of activities or circumstances that it is envisaged the rule will cover, in order for them to better understand how the law may be used.

Persons must be compensated if they are abused in a care home, including

1. Physical abuse
2. Sexual abuse
3. Emotional abuse

Abuse is a wide term, by giving examples, we are setting out the different sorts of circumstances we envisage where compensation will be paid. This can be useful especially when we are making a provision which empowers a public authority, or gives rights to citizens as it helps them to be aware of the breadth of the rule. A rule which allows a local council to take measures to help children with special needs at school sounds useful. But it is more illuminating if the rule then says “this may include setting up additional facilities for those children, or employing an additional teacher or assistant to help in the classroom”.

Thirdly, where there is a particularly contentious or problematic case which may crop up often, and we want to ensure that it falls within the rule. If we don't include an example, there could be arguments about whether the case is included within the rule

The notice must be in writing (including by way of a text message).

Legislation must be as clear as possible, so there is no doubt whatsoever about what it covers. So, if there is a question mark over whether text messages can constitute a notice, then the legislation isn't working. Better then to make it absolutely crystal clear that text messages are included so that there is no confusion. However, this particular use of an example is a little problematic as it can allow for shoddy drafting in the first place, on the basis that any shoddiness will be remedied by the example. This is a common ground to attack the use of examples in legislation which is explored more below.

4.9.3 Difficulties with examples

These above cases are all what Piper would call a "textual example".⁷⁹² He contrasts this with "narrative examples". Unfortunately, although he gives 'examples' of these, he doesn't actually define them. I would tentatively put forward the distinction between these two. A textual example is a brief statement of a case to which the rule applies. A narrative example is a longer, narrative statement illustrating how the rule will apply in detail. The following is a textual example:

A vehicle, for example a car, must not be allowed into a park.

The following is a narrative example:

A vehicle must not be allowed into a park.

So, if Fred is driving a car and approaches the gates to the park, he must stop at the gates and is not allowed to go any further.

In my view, a narrative example goes beyond illustration and becomes an exposition and explanation of the legislation. Although such exposition can be useful, and does have a place (possibly in explanatory notes, or official guidance) that place is not in legislation as it is not making law, merely describing the effect of that law. In mathematics, this would be called a "worked example" as it follows through all the steps of the formula (or rule) to show how we reach the end result. But the legislation ought to be clear enough without the need for a worked example, the rule should be clear in itself without needing to be repeated with some sample facts thrown in to show how it will apply. A narrative example doesn't illustrate a case to which the law applies, it is an explanation or restatement of the rule itself.

The second difficulty with an example is where the example conflicts with the rule itself. This sets up a clear tension or ambiguity in the legislation, should the rule be followed or the example? In the UK, whatever is contained in the text of the legislation is part of the legislation. This obviously

⁷⁹² Piper (n 787).

creates huge problems for the interpreter if two different parts of the legislation conflict. This is the height of bad drafting, far from being an aid to intelligibility, it creates confusion. If the drafter is faced with this situation, then the drafter needs to either revise the way the rule is expressed, or delete the example.

The third difficulty is related to the second, and it is where the particularisation of the example may colour how the rule will be used in practice. Barnes thought that this would be a good thing 'while in theory an example does not close off a discretion but merely illustrates it, the example may provide a strong message that it is a desirable, or at least a safe course'.⁷⁹³ Although this is not wrong, it is problematic. The rule is there to prescribe or proscribe a general course of action, but if the example is too specific, it may influence users into thinking that only the example, or things like the example, are the things that are prescribed or proscribed.

Take a hypothetical case where we want a broad new offence "it is an offence to obstruct the administration of justice". Let's say we add to that "for example by bribing a judge". This example may start readers thinking along the lines of courts and judges, and not thinking about other types of obstruction, for example threatening witnesses or lying to police officers. This is linked to the principle of statutory interpretation known as *ejusdem generis*.⁷⁹⁴ That principle means that the scope of general words in legislation may be limited in their application by reference to specific words which follow them. Bennion's example is 'having in possession or conveying in any manner', where the normal broad meaning of possession is limited in its sense by the narrowing concept of conveying.⁷⁹⁵

The fourth difficulty is where an example isn't used just as an illustration of a rule, but is instead (or additionally) used to help justify or explain the rule. Barnes argued that an example 'can illustrate the reason for the general rule'.⁷⁹⁶ I think that this is wrong, as it politicises the law. It is of course important that law is justified, but that justification should take place at the time it is made, and amongst those debating the law. If we start including reasons / arguments / justification for law within the law itself, we are clogging up the law with propaganda. Take a bad example from the EU:

⁷⁹³ Barnes (n 786) 17.

⁷⁹⁴ Jones, *Bennion on Statutory Interpretation* (n 294) 1231.

⁷⁹⁵ *ibid.*

⁷⁹⁶ Barnes (n 786) 19.

Member states shall specify a time period of at least seven days during which the consumer will have sufficient time to compare offers, assess their implications and make an informed decision.⁷⁹⁷

The law is that the consumer has a 7 day time period before a mortgage agreement is concluded. The reason behind that is to give the consumer time to think through the offer and look at alternatives. But the use of this example above conflates law and justification in a confusing way. Do consumers break the law if they don't compare offers?

4.10 Conclusion

This chapter has demonstrated the importance of intelligibility to the rule of law. Bingham, Raz, Fuller, Bentham and others have all argued that the law must be clear and understandable to readers. However, reality can sometimes deviate from this practice, and I have set out reasons why sometimes legislation isn't intelligible.

The main focus of the chapter has been on drafting principles derived from the rule of law requirement of intelligibility. Firstly, we need to consider the user of the legislation, and target the legislation specifically at them. So rather than a general principle that legislation ought to be intelligible to citizens, there is a more focused requirement that a specific piece of legislation ought to be intelligible to those who are likely to use it. I also considered the inherent tension between the function of bringing the law into being, and communicating that law to users.

The second drafting principle examined in greater detail the thing to be understood in the context of amending legislation. There can be a clash between making amending legislation intelligible versus making the legislation as amended intelligible. A more expansive style of amendment, making use of explanatory material in parenthesis can help here. The third drafting principle is to reduce, where possible the number of interconnections in legislation. The more the reader has to jump around between different provisions, the more difficult it is for them to understand the legislation.

The fourth, fifth and sixth drafting principles all considered specific techniques to make language easier to understand, to better communicate the message. The most familiar one to drafters is the plain language movement. This is specifically designed, by use of drafting techniques, to make legislation clearer. Easification brings more academic rigour to this approach, trying to set out in a more scientific way this approach of making language easier to understand. Good writing is a

⁷⁹⁷ Article 14, Mortgage Credit Directive 2014/17/EU.

broader approach to making text more readable. All three of these approaches reflect the rule of law requirement of making legislation intelligible.

The final drafting technique is the use of examples. Examples help to explain legislation and show how it works in practice

This concludes the chapters on the drafting principles. In the final chapter I examine the conclusions and assess whether or not the hypothesis has been proved.

Chapter 5 Conclusion

5.1 Proving the hypothesis

The hypothesis was that legislative drafting principles could be derived from element one of Bingham's definition of the rule of law, and that these principles would facilitate the drafting of legislation in accordance with the rule of law. Element one was that legislation ought to be accessible, predictable, clear and intelligible.

5.1.1 Accessibility

In Chapter 2 I examined accessibility – that citizens must have access to legislation. Bingham, Fuller, Raz and Locke, along with others spoke of the importance of accessibility. There are difficulties with access, in terms of the cost of it, the volume of legislation, its interconnectedness and the speed with which we make new legislation.

I derived three drafting principles. Firstly, the text of the law must be available to citizens: this means both the law as enacted, and the law as it applies at any given point in time. In addition, citizens need to know what law applies in the different parts of the UK. As well as the bald text of the legislation, the legislation must also be contextualised, by referring to other legislation (and non-legislative texts) which have a direct impact upon how the law will be used. Finally, legislation must be drafted to promote findability, to make it easier for the user to find the particular statutory provision which is relevant to them.

Secondly, legislation ought to be drafted in a way which makes it more navigable. It must be well-mapped and signposted so that users can find their way around it as easily as possible. There are many specific drafting techniques to enhance navigability: descriptive short titles of Acts, avoiding omnibus legislation, descriptive section headings, logical structure for Acts (including, where appropriate, parallel structures), signposting of other relevant provisions, sensible numbering, and avoiding 'hidden' provisions.

Thirdly, legislation must be inclusive of all important legal information. If something extraneous to the legislation will have a direct influence on it, the reader of the legislation will have a misleading impression of what the law does. This is particularly the case where a broad power is included in an Act, but a ministerial statement is made that, notwithstanding this broad formulation, the power will only be exercised in limited ways.

5.1.2 Predictability

In Chapter 3 I examined predictability – that users ought to know what the legal effect of their actions will be by reading the legislation. Bingham, Locke, Fuller and Raz all argued from this

perspective. There are sometimes reasons why legislation is not predictable, for example if it is as a result of a political compromise which papers over ambiguities.

I derived eight drafting principles. Firstly, law must be prospective, that is to say, it must take effect in the future and not go back in time to have a legal effect before it is made. I made a fresh taxonomy of Janus-faced legislation to highlight the different ways in which legislation can apply over time: retroactive legislation, retrospective legislation and legislation which affects existing rights. There is no absolute rule that legislation must always be prospective, what is necessary is a consideration in each individual case, by reference to criteria set out in the European Convention on Human Rights.

Secondly, legislation must be determinate, it must be fixed and certain. In order to be determinate, it has to be unambiguous and it has to be precise. There is however a difficult line between exhaustive to cover all circumstances, and being over-precise and burdening the legislation down with too much detail. Thirdly, legislation must be relatively stable, so that the law today is reasonably similar to the law tomorrow. This doesn't mean that the law should remain set in stone, but it does mean that there must be good reason for legal change. In addition, the destabilising effect of frequent or large legal change can be ameliorated by highlighting the change, advertising it or giving a long lead in time for it. Dealing with rapid technological change is a challenge for the stability of legislation, but this can be partially solved by drafting more in general principles and less in technical detail.

Fourthly, legislation should have a clear commencement. The date the law comes into force should be immediately obvious to the reader without having to search for additional legislation setting out commencement dates. Fifthly, legislation should be drafted in a consistent manner. So words should mean the same thing in a statute, grammar should be applied consistently (and in accordance with normal grammatical rules), similar things should be done in similar ways, and the same issues should be addressed. But as with stability, this doesn't mean ossification, legislation can also innovate where that helps the user.

Sixthly, the law on the statute book should be the same as the law applied in the real world. So the law shouldn't be ignored, it shouldn't be foolish, impossible or Panglossian. There shouldn't be a disconnect between legislation and practice. Nor should there be things in the legislation which aren't intended to be applied in practice. Seventhly, legislation should be capable of being implemented. So, the legislation must contain implementation mechanisms, it must contain sanctions. As well as saying what must happen, it ought to also say what is the outcome if the person fails to comply with a duty.

Eighthly, there must be constraints on the exercise of discretion. The more freedom a decision maker has, the less predictable their decision will be. There are ways in which legislation can circumscribe the discretion available to a decision maker, while still allowing for some flexibility.

5.1.3 Intelligibility

In Chapter 4 I examined intelligibility and clarity, meaning that the law must be capable of being easily understood by users. Bingham, Raz and Fuller all argued that law must be intelligible, and Bentham argued that it must be cognoscible. There are some sound reasons which can make the law more complex and less intelligible, for example where the law seeks to be exhaustive, or where there is a complex policy.

There are seven drafting principles. Firstly, legislation need not be intelligible in the abstract but must focus on the characteristics of the user. So if a statute will be used by a specific user group, it must be intelligible to that user group. Although citizens will sometimes use intermediaries to understand legislation, it should always be drafted so that it is understandable by citizens, not just by intermediaries. Secondly, both the legislation as amended and the amending legislation need to be intelligible. So users need to know both what the changes being made to the law are, as well as what the law will be like after those changes. It is possible to do this by creative use of textual amendment with explanatory material.

Thirdly, we should avoid excessive interconnectedness of legislation. The more times a reader has to jump from provision to provision, from statute to statute, the less intelligible the legislation is.

Fourthly, drafters can make use of plain language techniques. Plain language is part of a broader movement to make writing easier to understand. There are many specific plain language techniques, such as shorter sentences, simpler words, active not passive voice etc.

Fifthly, we can use easification techniques. These are specific linguistic tools which have been used by professionals in that field to make language easier to understand. Sixthly, we can use good writing techniques. As with plain language, these are tools to make for a better quality of writing. Seventhly, we can use examples in legislation to make things clearer for readers. Examples both set out specific matters which fall within or outside the law, as well as providing an illustration of how the law will be applied in practice.

5.1.4 Derivation of drafting principles

All these legislative drafting principles derived from the starting point of element one of Bingham's definition of the rule of law. There is a clear line between the rule of law and the drafting principles which flow from it. The process used deductive reasoning, so in each case I asked if legislation has to

have these characteristics, what are the drafting principles which will give effect to it? Some of these drafting principles may be familiar to those in academia or practice (for example the use of plain language). Some of the individual techniques may resonate with drafters (for example descriptive short titles). In other cases (for example navigability and inclusivity) these are relatively fresh concepts which haven't been presented in this format before. Critically, these are not simply 'good ideas' for drafting legislation, rather they are principles grounded in the rule of law and derived from the rule of law.

The originality of this thesis stems from the interaction between legislative drafting and the rule of law. Although others have written about what makes for "good" legislation, this can be subjective and piecemeal, based upon what individual drafters or academic consider as "good". Xanthaki's thesis goes beyond this as it does have a methodologically sound basis for determining "good" legislation (the functional approach). However, this thesis roots "good" legislation not in the idea of what is functionally effective, but on the agreed notion of respect for the rule of law. This is a value to which all have agreed, and if we have all agreed on the validity of the rule of law (albeit we may disagree about some of the content) we are logically bound to respect drafting principles which derive from it. This moves drafting principles away from a technical point for drafters to discuss, which can be ignored when suited by others, into a fundamentally important method by which we respect the rule of law.

5.2 Is the hypothesis built on sound foundations?

The hypothesis is only valuable if it is built upon provable and relevant assertions. Underpinning the hypothesis are three assumptions. Firstly, that the rule of law is a cornerstone of the legal system in the UK. Secondly, that legislation is the most important source of law. And thirdly that drafters have a key role in the legislative system such that they can influence the form and content of legislation. Without these three assumptions, then even if the hypothesis is correct, it offers little of practical value.

5.2.1 Importance of the rule of law

There are a number of arguments for the importance of the rule of law.

Firstly, the UK legislature itself has declared the importance of the rule of law. Part 1 of the Constitutional Reform Act 2005 is entitled the rule of law. Section 1 states that the Act does not affect the existing constitutional principle of the rule of law. Section 17 amends the Promissory Oaths Act 1868 so that the Lord Chancellor's oath includes a promise to 'respect the rule of law'. In a country without a codified constitution, these are important provisions.

It is true that this is the only place in the UK statute book with an express commitment to something called 'the rule of law'. However, many of the fundamental constitutional statutes in the UK give effect to some of the key precepts of the rule of law. Magna Carta 1215 is probably the single most important law on the UK statute book, and a key source of the rule of law.⁷⁹⁸ The same basic principle, that citizens can only be punished in accordance with the law, is behind the Petition of Right 1628. Some key provisions of the Bill of Rights 1689 (Parliament's 'bargain' with the new King) were that there was no divine authority to overrule the law, that there was no power to suspend laws without the consent of Parliament and that there was no power to dispense with laws.

Secondly, judges have many times stressed the importance of the rule of law. Lord Neuberger, President of the Supreme Court, gave an interview warning of the dangers of governments ignoring judicial judgements.⁷⁹⁹ The Lord Chief Justice of Northern Ireland also speaking in an extra-judicial capacity, said that we were a 'society subject to the rule of law'.⁸⁰⁰ Lord Steyn called the rule of law an 'overarching principle of constitutional law'.⁸⁰¹

Judges also say the same when speaking in a judicial capacity. Lord Hope stated that 'the rule of law enforced by the courts is the ultimate controlling factor on which our constitution is based'⁸⁰² and the European Court of Justice agrees.⁸⁰³ Lord Steyn ruled that 'unless there is the clearest provision to the contrary, Parliament must be presumed not to legislate contrary to the rule of law'.⁸⁰⁴ The Supreme Court restated this when it stated that 'there is no principle more basic to our system of law than the maintenance of rule of law itself and the constitutional protection afforded by judicial review'.⁸⁰⁵

Thirdly, the international community, by means of international treaties and declarations, highlight the importance of the rule of law.⁸⁰⁶ The General Assembly of the United Nations has affirmed the

⁷⁹⁸ Geoffrey Bindman, 'Magna Carta Lives' (2014) 164 *New Law Journal* 7.

⁷⁹⁹ Owen Bowcott and legal affairs correspondent, 'Senior Judge Warns over Deportation of Terror Suspects to Torture States' *The Guardian* (5 March 2013) <<http://www.guardian.co.uk/law/2013/mar/05/lord-neuberger-deportation-terror-suspects>> accessed 15 May 2013.

⁸⁰⁰ 'Law Chief: Informed Criticism Fine' *BBC* (2 May 2013) <<http://www.bbc.co.uk/news/uk-northern-ireland-22389117>> accessed 8 May 2013.

⁸⁰¹ Lord Steyn, 'Democracy through Law' [2002] *European Human Rights Law Review* 723, 727.

⁸⁰² *Axa General Insurance v Lord Advocate* [2011] UKSC 46, [51] and see also *Jackson v Attorney General* [2005] UKHL 56.

⁸⁰³ *Kadi v Council of the European Union* [2009] 1 AC 1225.

⁸⁰⁴ *R v Secretary of State for the Home Department ex p Pierson* [1998] AC 539, 591.

⁸⁰⁵ *R (Cart) v Upper Tribunal* [2011] UKSC 2 at [122].

⁸⁰⁶ See Universal Declaration of Human Rights 1948, European Convention on Human Rights, Statute of the Council of Europe, Consolidated Version of the Treaty of the European Union which all mention the rule of law.

importance of the rule of law a number of times⁸⁰⁷ as has the Secretary General.⁸⁰⁸ One of the Millennium Development Goals is to ‘strengthen respect for the rule of law in international as in national affairs’.⁸⁰⁹ The Organisation for Security and Co-operation in Europe in its 1990 Copenhagen Document welcomed the commitment of all participating states to build democratic societies based upon the rule of law.⁸¹⁰ The Organisation for Economic Co-operation and Development has attempted to define it.⁸¹¹ According to Zamboni ‘practically all Western legal and political orders have adopted the rule of law’.⁸¹²

Fourthly, lawyers themselves recognise the importance of the rule of law.⁸¹³ The Declaration of Delhi 1959 arose out of a gathering of over 185 lawyers and declared the importance of the rule of law. There is no express reference in the Codes of Conduct for professional lawyers in the UK to an obligation to respect the rule of law, although there are references to respecting the administration of justice,⁸¹⁴ independence and integrity,⁸¹⁵ and serving the interests of justice.⁸¹⁶ The International Bar Association includes respect for the rule of law as an obligation on all lawyers.⁸¹⁷

Fifthly, politicians regularly cite the importance of the rule of law. Respect for the rule of law is part of the Pledge of Office of all Northern Ireland Ministers.⁸¹⁸ No Northern Ireland Minister can therefore be appointed unless they pledge to uphold the rule of law. Former Prime Minister David Cameron gave a speech to the Foreign Policy Centre. He was trying to describe the shared values of what it meant to be British and he said ‘We can do it in a single phrase, freedom under the rule of law’.⁸¹⁹ There is even a guide to the rule of law for politicians.⁸²⁰

⁸⁰⁷ (A/RES/61/39, A/RES/62/70, A/RES/63/128)

⁸⁰⁸ A/61/636.

⁸⁰⁹ A/RES/55/2, Para 9.

⁸¹⁰ Preamble to Copenhagen Document (1990), OSCE.

⁸¹¹ Equal Access to Justice and the Rule of Law, OECD Development Assistance Committee (DAC) Mainstreaming Conflict Prevention (2005).

⁸¹² Zamboni, ‘Legislating Politics’ (n 65) 156.

⁸¹³ John Hostettler, *Champions of the Rule of Law* (Waterside Press 2012).

⁸¹⁴ Code of Conduct of the Bar of England and Wales (8th edition, 2010) paragraph 301(a)(ii), Code of Conduct of the Bar of Northern Ireland paragraph 4.01.

⁸¹⁵ Paragraph 307(a) in England, in Scotland, Guide to the Professional Conduct of Advocates (5th edition, 2008) paragraph 2.1, 2.2.

⁸¹⁶ Paragraph II of the Declaration of Perugia on the Principles of Professional Conduct of the Bars and Law Societies of the European Community 1977, incorporated into the Scottish Guide.

⁸¹⁷ Ed Neate (ed), *The Rule of Law: Perspectives from Around the Globe* (Lexisnexis 2009).

⁸¹⁸ Pledge of Office, 1.4(cd).

⁸¹⁹ David Cameron, ‘Speech to the Foreign Policy Centre’ (Foreign Policy Centre, 24 August 2005). See further speech on Extremism, Individual Rights and the Rule of Law in Britain, 26/2/2008, Equality and Human Rights Commission.

⁸²⁰ Raoul Wallenberg Institute, *Rule of Law: A Guide for Politicians* (Raoul Wallenberg Institute 2012).

Finally, some of the strongest proponents for the rule of law are economists. Their view is that rule of law gives legal stability, certainty and promotes the protection of contractual and property rights.⁸²¹ These are preconditions to economic growth and law is a 'springboard to economic development'.⁸²² The Economist magazine published an article entitled 'Economics and the Rule of Law: Order in the Jungle' wherein it was argued that 'economists have repeatedly found that the better the rule of law, the richer the nation'.⁸²³ Barron talks of the World Bank's 'discovery' of the rule of law as a means to promote economic development.⁸²⁴ Indeed, the World Bank has an index on its website where rule of law indicators can be compared to economic progress.⁸²⁵ As Barro says 'the general idea of these indexes is to gauge the attractiveness of a country's investment climate by considering the effectiveness of law enforcement, the sanctity of contracts, and the state of other influences on the security of property rights'.⁸²⁶ Carothers dampened this enthusiasm somewhat by pointing out that there was little empirical evidence that linked the rule of law with development.⁸²⁷

5.2.2 Importance of legislation

Under UK constitutional theory, legislation is the highest form of law. Case law is subservient to it. In terms of scope of subject matter covered, legislation regulates much more than common law regulates.⁸²⁸ In the modern era, judges are much more likely to apply legislation to the facts of a case than they are to develop the common law themselves. Constitutional supremacy and scope of subject matter are two reasons for the hegemonic nature of legislation.

Seeley was correct (increasingly so) that we live in a 'legislation state'.⁸²⁹ It is thought that all wrongs can be righted by legislation. Waldron shares this view, 'every day another demand emerges for new legislation to deal with some difficulty or to reorganize some aspect of social affairs'.⁸³⁰ As Turner said 'the belief is widely held, that there is no human situation so bad but that legislation properly designed will effectively be able to cure it',⁸³¹ although Turner astutely notes that failure to legislate is normally a charge levied by the opposition parties rather than by the government. Those

⁸²¹ Seidman, (n 7), 88 (footnote 15).

⁸²² Stephen Holmes, 'Can Foreign Aid Promote the Rule of Law?' (1999) 8 East European Constitutional Review 68, 68.

⁸²³ 'Economics and the Rule of Law: Order in the Jungle' [2008] *The Economist* <<http://www.economist.com/node/10849115>> accessed 12 May 2013.

⁸²⁴ Gordon Barron, 'The World Bank and Rule of Law Reforms'.

⁸²⁵ <http://info.worldbank.org/governance/wgi/index.asp> <accessed on 12 May 2013>.

⁸²⁶ Robert J Barro, 'Determinants of Democracy' (1999) 107 *Journal of Political Economy* S158, S173.

⁸²⁷ Thomas Carothers, *Promoting the Rule of Law Abroad: The Problem of Knowledge* (2003).

⁸²⁸ Xanthaki, 'Legislative Drafting: A New Sub-Discipline of Law Is Born' (n 112).

⁸²⁹ JR Seeley, *Introduction to Political Science: Two Series of Lectures* (Macmillan and Co 1911). 146.

⁸³⁰ Jeremy Waldron, *The Dignity of Legislation* (Cambridge University Press 1999). 7.

⁸³¹ Alexander Turner, 'Steering the Ship of State - Functions of Parliament' (1980) 10 *Victoria University of Wellington Law Review* 209, 209.

charged with drafting government bills are aware of this too, stating that ‘Legislation is perceived as a sign of action and therefore it is a powerful communication tool’.⁸³²

5.2.3 Importance of drafters in the legislative process

Drafters occupy a key role in the legislative process. Only they turn policy ideas into law. Although the legislature decides what the law will be, the drafter determines how it is constructed. The actual words used in the statute book are theirs, as Greenberg states ‘in principle the wording of an Act is entirely a matter for the senior Counsel to whom the Bill has been assigned’.⁸³³ The form of legislation will nearly always be determined by the drafters. Even the substance of it will reflect the drafter’s advice.

Carter shares this view, ‘legislative counsel’s contribution is not determinative but is, even so, critical’.⁸³⁴ Palmer, writing in the foreword to a report of the New Zealand Law Commission stated that ‘the professional expertise of Parliamentary Counsel is the essential quality control that is required in the production of statute law’.⁸³⁵ For Driedger, quality in legislation depends upon the ability of the drafter.⁸³⁶ Carter concluded that advice ‘within legislative counsel’s unique expertise, is particularly likely to be followed’.⁸³⁷ For Zamboni, although non-legal experts contribute to the external effectiveness of legislation, when it comes to internal effectiveness (making the law valid), this is the key function of legislative drafters.⁸³⁸

5.2.4 Practical value of the hypothesis

The following assumptions have been shown to be correct: that the rule of law is important, that legislation is the key source of law, and that drafters have a key role in the legislative process. Therefore, legislative drafters have a crucial opportunity to give effect to the rule of law by the way in which they draft legislation. It is therefore valid to give them legislative drafting principles which can properly reflect the rule of law. The hypothesis is sound, and it also has a practical value.

5.3 Validity of hypothesis by reference to practice

I have shown that the hypothesis is internally sound as it logically derives from Bingham’s definition of the rule of law. However, it can also be checked against practice to see if it resonates with the

⁸³² Office of the Parliamentary Counsel, ‘When Laws Become Too Complex - Inside Government’ (n 144).

⁸³³ Greenberg, *Laying down the Law* (n 92). 21.

⁸³⁴ Carter (n 70). 51.

⁸³⁵ Law Commission, ‘Review of the Statutes Drafting and Compilation Act 1920’ (New Zealand Law Commission 2009) 107. iv.

⁸³⁶ Driedger (n 772).

⁸³⁷ Carter (n 70). 52.

⁸³⁸ Zamboni, ‘Legislative Policy and Effectiveness’ (n 123).

views of others on drafters and the rule of law, and generally accepted legislative drafting principles. If it does so, then it is evidence that the conclusions in this thesis are valid.

5.3.1 Drafters as ‘guardians of the statute book’ and protectors of the rule of law

Not only are drafters important to the process of making law, they also have a special responsibility for the content and integrity of the statute book. This is perhaps best summed up in the description of legislative drafters as ‘guardians of the statute book’. Although it is unclear who first coined this phrase, it has been used by Bromley,⁸³⁹ Burrows,⁸⁴⁰ Levert,⁸⁴¹ Elliot,⁸⁴² and Poloko.⁸⁴³ In a similar vein, drafters have been called custodians of the statute book by Donelan,⁸⁴⁴ and Wolmarans.⁸⁴⁵ Erasmus endorsed Bennion’s use of the phrase ‘keepers of the statute book’⁸⁴⁶ as a description of drafters, ‘what a lovely word that – keeper – with its echoes of custodian, preserver and protector’.⁸⁴⁷ Erasmus makes the point that politicians come and go, but laws (and even drafters) are there for longer. Laws makes exactly the same point when he considers drafters as being advocates for the integrity of the statute book.⁸⁴⁸ He argues that they are responsible for maintaining legislative language at a high standard so as not to debase the ‘coinage of communication’ between the legislature and the executive.⁸⁴⁹ Wilson argues that drafters have a special responsibility for the coherence of the statute book.⁸⁵⁰ Archer argues that responsibility to protect the statute book also belongs to the Law Officers i.e. the Attorney General and Solicitor General.⁸⁵¹ Daintith and Page consider this point in detail, describing drafters as custodians of legal values who have a duty ‘to the law and the statute book’.⁸⁵²

⁸³⁹ Melanie Bromley, ‘Whose Law Is It? - Accessibility Through LENZ: Opportunities for the New Zealand Public to Shape Law as It Is Made’ [2009] *The Loophole* 16.

⁸⁴⁰ John Burrows, ‘Legislation: Primary, Secondary and Tertiary’ (2011) 42 *Victoria University of Wellington Law Review* 65, 69.

⁸⁴¹ Lionel Levert, ‘Work Methods and Processes in a Drafting Environment’ [2011] *The Loophole* 23, 36.

⁸⁴² David Elliot, ‘What Is Plain English?’ (1990) 11 *Statute Law Review* 237, 238.

⁸⁴³ Lesedi Poloko, *Drafting of Legislation in Compliance with Model Laws* (Unpublished LLM thesis 2012) <http://sas-space.sas.ac.uk/4703/1/Lesedi_Poloko_LLM_ALS_Dissertation.pdf>.

⁸⁴⁴ Edward Donelan, *Review of the Irish Statute Book: A Guide to Irish Legislation by Brian Hunt* (First Law Book Review 2008) <<http://www.francisbennion.com/pdfs/non-fb/2008/2008-002-nfb-review-of-brian-hunt-book.pdf>>.

⁸⁴⁵ Jacques Wolmarans, ‘An Argument for Codification of Provincial Legislation and the Establishment of an Independent Legislative Services Agency for KwaZulu Natal’.

⁸⁴⁶ Francis Bennion, ‘More on Godfrey Carter CBE Deceased’ *The Times Register (Lives Remembered)* (9 September 2003) <<http://www.francisbennion.com/pdfs/fb/2003/2003-017-lr006-more-godfrey-carter.pdf>>.

⁸⁴⁷ Janet Erasmus, ‘Keepers of the Statute Book: Lessons from the Space-time Continuum’ [2010] *The Loophole* 7. Elliot also endorsed Bennion’s phrase, David Elliot, ‘Access to Statute Law in New Zealand’ (1990) 20 *Victoria University of Wellington Law Review* 131, 150.

⁸⁴⁸ Laws, ‘Drawing the Line’ (n 87).

⁸⁴⁹ *ibid.* 32.

⁸⁵⁰ Wilson (n 76).

⁸⁵¹ Peter Archer, *The Role of the Law Officers* (Fabian Society 1978).

⁸⁵² Daintith and Page (n 69). 254.

Not only are drafters regarded as guardians of the statute book, they are also regarded as having a special obligation to the rule of law. Gashabizi, a Rwandan drafter, said that it is ‘a cardinal principle of the rule of law that citizens should know in advance their rights and obligations under the law’.⁸⁵³ His context was arguing in favour of clarity in legislation. Hashim, a Malaysian drafter presents a case for adoption of plain language drafting.⁸⁵⁴ She cites several reasons for this ‘but to the writer the most important reason is the “rule of law”’.⁸⁵⁵ Greenberg, a British drafter said that ‘a good Parliamentary drafter is ... totally dedicated to the rule of law’.⁸⁵⁶ Davies, a Welsh drafter cites both Fuller and Bingham as evidence for his contention that legislation in Wales should be accessible in Welsh.⁸⁵⁷ Seidman, an American drafter said that a ‘Third World drafter cannot avoid the obligation to draft to enhance the rule of law’.⁸⁵⁸ Seidman puts the case particularly strongly, not only should the form of the legislation respect the rule of law, but it must be drafted in such a way that it maximises compliance with the rule of law on the ground. This requires the drafter to have a substantial policy input into legislation. One of Elliot’s (a Canadian drafter) arguments in favour of high quality legislation is that it enhances respect for the rule of law.⁸⁵⁹ Bartole concludes that ‘the drafting of the legislative acts is strictly connected with the establishment of the rule of law’.⁸⁶⁰ For Bartole, if the drafters aren’t experts in the rule of law, then those experts must also be brought into the process of making legislation. For Lovric, an Australian drafter, if there is a loss of experienced legislative counsel this poses a risk not just to the drafting office, but to the rule of law itself.⁸⁶¹

Laws a former First Parliamentary Counsel in the UK didn’t expressly state that drafter should obey the rule of law. However, he has stated that the rule of law (in particular Fuller and Bingham) ‘provide[s] a useful pragmatic guide to drafters on how to avoid producing legislation that cuts across the grain of the values of the law’.⁸⁶² Another former First Parliamentary

⁸⁵³ Alain Songa Gashabizi, ‘In Pursuit of Clarity: How Far Should the Drafter Go?’ (2013) 39 Commonwealth Law Bulletin 415, 416.

⁸⁵⁴ Hashim (n 589).

⁸⁵⁵ *ibid.* 425.

⁸⁵⁶ Greenberg, *Laying down the Law* (n 92). 31, he cites the importance of the rule of law again at 222, 271.

⁸⁵⁷ Hughes and Davies (n 181). The job description for Welsh drafters states that ‘we also seek to draft legislation in a way that is consistent with the government’s responsibility to the rule of law’, Welsh Government (n 73).

⁸⁵⁸ Seidman (n 18). 86.

⁸⁵⁹ David Elliot, ‘Drafting Legislation: Challenges and Improving Ways’ (Lebanon Parliament, 16 February 2012) <<http://www.davidelliott.ca/legislativedrafting.htm>>.

⁸⁶⁰ Sergio Bartole, ‘Law-Making Principles under the Rule of Law’ (2012) <<http://www.venice.coe.int/WebForms/documents/?pdf=CDL%282013%29016-e>>. 64.

⁸⁶¹ Daniel Lovric, ‘A Strategic View of Drafting Training for Tomorrow’s Needs’ [2013] *The Loophole* 7, 15.

⁸⁶² Laws, ‘Legislation and Politics’ (n 352). 96.

Counsel has expressly referred, not only to the rule of law but to Bingham’s definition of the rule of law and then went on to say that ‘For legislative drafters, and for the government’s online publishers, this is a fundamental part of our mission’.⁸⁶³ According to Feldman ‘one of the tasks of lawyers in politics ... to uphold respect for the values of the rule of law among ministers, civil servants and parliamentarians’.⁸⁶⁴

Daintith and Page set out a non-exhaustive list of the kind of things that drafters should object to.⁸⁶⁵ Although this list isn’t headed ‘the rule of law’ it contains many elements which form part of the rule of law. They go on to say that ‘in the absence of a higher law by which a sovereign Parliament is bound, the concept of legal policy as interpreted by Parliamentary Counsel is as close as our system has traditionally come to a check on the “constitutionality” of legislation’.⁸⁶⁶

5.3.2 Current drafting practice in the UK

As stated in Chapter 1 a key UK source of drafting principles is the Good Law project, run by the Office of the Parliamentary Counsel.⁸⁶⁷ For the purposes of validating the conclusions of this thesis, I have avoided referring to Good Law throughout this thesis. In the table below, I set out the points made by the Good Law project and cross refer them to sections of this thesis which make similar points.

Good law point	Corresponding point in thesis
Difficulties of understanding statutes, particularly due to their volume, piecemeal nature and frequent amendments	volume of legislation (2.2.2) dynamic nature of legislation (2.2.4) need for stability in legislation (3.4)
Government drafters use Plain English writing styles	Use of plain language (4.6)
Legislation should be clear	Intelligibility (chapter 4 generally)
Legislation should be coherent	Intelligibility (chapter 4 generally) consistency (3.6)

⁸⁶³ Richard Heaton, ‘Making the Law Easier for Users: The Role of Statutes’ (Institute of Advanced Legal Studies, 14 October 2013) <<https://www.gov.uk/government/speeches/making-the-law-easier-for-users-the-role-of-statutes--2>> accessed 20 January 2016.

⁸⁶⁴ David Feldman, ‘Looking Back and Moving on’, *Law in Politics, Politics in Law* (Hart Publishing 2015). 257.

⁸⁶⁵ Daintith and Page (n 69). 254-256.

⁸⁶⁶ *ibid.* 254.

⁸⁶⁷ ‘Good Law - GOV.UK’ <<https://www.gov.uk/guidance/good-law>> accessed 11 July 2017.

Legislation should be accessible	Accessibility (chapter 2 generally)
Complexity in legislation	Why legislation is sometimes not predictable (3.1.1)
Architecture of statute book	Navigability (2.4) In particular, structure (2.4.4)
Publication and improving navigation	Navigability (2.4)
Language and style	Plain language (4.6) Good writing (4.8) Examples (4.9)
Will reader be able to understand legislation	Characteristics of the user (4.3)
Content – how much detail	Precision (3.3.2)

Some points of Good Law do not find an analogue in this thesis (for example Good Law makes valid points about whether law is necessary). But as this thesis deals only with drafting principles derived from the rule of law, those points are not relevant. Equally, this thesis contains many points that Good Law does not make. Again, that is to be expected as Good Law comes from a different perspective.

However, there is much common ground between Good Law and this thesis. The drafting principles referred to in Good Law resonate with the drafting principles derived in this thesis. There is nothing in either work which flatly contradicts the other work. We can therefore conclude that the conclusions reached by this thesis at the very least are not contrary to the conclusions reached by another source on the nature of legislative drafting principles. This provides an additional layer of validity to the findings of this thesis.

5.4 Benefits of the hypothesis: core values it supports

I have proven the hypothesis and shown that it resonates with practice and the views of others on the rule of law and drafting. I have also demonstrated that the rule of law is valued. In this section, I go a step further and show that there are direct benefits to society in the hypothesis. It isn't simply a moot point about drafting styles, of interest only to those involved in jurisprudence. Instead, drafting legislation in accordance with the rule of law provides direct and tangible benefits to citizens. The rule of law isn't some dusty legal principle to which we presume adherence, it has to be constantly justified and validated.

This section sets out core values which are respected by legislation drafted in accordance with the rule of law. These core values are protected if legislation is accessible, predictable and intelligible.

5.4.1 Observance of rules

One of the prime purposes of legislation is to regulate human conduct. The reason why we pass a law outlawing theft is to stop people stealing. But human conduct cannot be regulated by a law if humans don't know what the law is. This is at the root of Raz's theory of the rule of law – if we are to obey the law, we must know what the law is.⁸⁶⁸ The vast majority of legislators want their laws to be obeyed, and the first pre-requisite for this is that those laws are accessible. Austin changes the focus slightly on this point – accessible laws offer guidance and information for those who are bound to obey them.⁸⁶⁹ This is essentially the same point though – we can't obey rules unless we know them.

If citizens can't understand the rules, then they can't obey them. Although sometimes it is enough for legislation to simply be left on the page, by and large, legislation is made by governments in order to have effect.⁸⁷⁰ If the function of legislation is to effect social change, to be observed by citizens, to be implemented by government, then this will be severely hindered unless the legislation is intelligible to those observing and implementing it. Sitting behind the rule of law requirement of intelligibility is the practical need for legislation to be observed.

5.4.2 Fairness

If you are going to be held liable under a law, it is only fair if you know what that law is. The citizens of Fuller's Rex got very annoyed when they were subject to secret laws. In Kafka's *The Trial*, Joseph K is subjected to a travesty of justice when he is prosecuted under a law which is not disclosed to him.⁸⁷¹ Inaccessible laws aren't fair because people have no opportunity to modify their behaviour to avoid the consequences of breaches of those laws. If you can predict the legal consequences of your actions, then it is fair to hold you to those consequences. However, if it is difficult for you to know what those consequences will be, it is unfair to hold you to them.

The *Haw* case provides a bad example of unpredictable legislation having an unfair effect upon a citizen.⁸⁷² The legislation was s. 132 of the Serious and Organised Crime and Police Act 2005 which made provision for regulating demonstrations in Parliament Square. A person would be guilty of an offence if they didn't do various things 'when the demonstration starts'. Unfortunately for the

⁸⁶⁸ Raz (n 7).

⁸⁶⁹ Austin and Austin (n 197).

⁸⁷⁰ Xanthaki, *Drafting Legislation*, (n 3) 2.

⁸⁷¹ Franz Kafka, *The Trial* (Verlag Die Schmiede 1925).

⁸⁷² *Haw v Secretary of State for the Home Department* [2006] EWCA Civ 532.

prosecutor, Mr Haw 'started' his demonstration long before the Act was made. Although the Divisional Court ruled that 'starts' meant 'starts',⁸⁷³ the Court of Appeal ruled that 'starts' actually meant 'starts or continued'. He was therefore convicted of the offence.

The case is important for several reasons. For present purposes though, it is the lack of predictability which is problematic. A citizen is entitled to read the law and be reasonably able to predict its effect. If an offence relates to conduct when a demonstration 'starts' then it is unfair that judges read this as meaning that it relates to conduct when a demonstration 'starts or continues'.

Particularly when it comes to criminal law, or tax law, it is unfair to suffer a detriment by virtue of law which is unintelligible. As Leith said 'a fundamental rule of law is that those governed by the law have the right to know what the law is'.⁸⁷⁴ If I can't understand a law, it is unfair to hold me to account under it. This is perhaps the source of the various interpretative rules against doubtful penalisation set out by Bennion.⁸⁷⁵

5.4.3 Respect for human autonomy

Accessible law treats humans as rational beings who can make decisions about their conduct based upon correct information. Accessible law therefore respects the value of human autonomy and human freedom to choose. If we know what a law is, we can properly plan our activities. Bentham distinguishes us from 'brutes' because of our ability to plan for the future, and this is one reason for having a system of known laws.⁸⁷⁶ For Waldron, part of the dignity of legislation is that people 'need to be able to plan around the law's demands in the autonomous organisation of their lives'.⁸⁷⁷

Predictable legislation means that we credit citizens with the ability to make up their own minds about their courses of action. It also means that we credit them with the ability to read and understand legislation. So predictable legislation respects human autonomy.

5.4.4 Certainty

Accessibility gives greater certainty to people about the content of the law. The desire for certainty reflects the core values set out above, in particular the possibility of planning your conduct. Bentham cites this as the principle of security which 'requires that events, so far as they depend upon laws, should conform to the expectations which the law itself has created'.⁸⁷⁸

⁸⁷³ [2005] EWHC 2061 (Admin).

⁸⁷⁴ Philip Leith and Cynthia Fellows, 'BAILII, Legal Education and Open Access to Law' (2013) 4 European Journal of Law and Technology <<http://ejlt.org//article/view/209>>.

⁸⁷⁵ Jones, *Bennion on Statutory Interpretation* (n 294).

⁸⁷⁶ Jeremy Bentham, *Principles of the Civil Code* (John Bowring ed, William Tait 1843).

⁸⁷⁷ Waldron, *The Rule of Law and the Measure of Property* (n 32). 53.

⁸⁷⁸ Bentham, *Principles of the Civil Code* (n 876).

There is a subset of certainty which is particularly important – economic certainty. Accessible laws promote economic certainty which in turn promotes the economic wellbeing of a nation and its attractiveness to international investors. The English courts recognised this a long time ago – ‘In all mercantile transactions the great object should be certainty; and therefore, it is of more consequence that the rule should be certain, than whether the rule is established one way or the other’.⁸⁷⁹ Bingham himself stated ‘the successful conduct of trade, investment and business generally is promoted by a body of accessible legal rules governing commercial rights and obligations.’⁸⁸⁰ The World Bank measures how open a country is to business.⁸⁸¹ One criterion is that regulations are transparent, which it defines as regulations that are clear and accessible to anyone who needs to use them.⁸⁸² A jurisdiction may have fantastic intellectual property laws for example, but if no one can read them, no-one will register IP rights there. In the Isle of Man, Marsh-Smith could not be more explicit about why they were creating an online database of legislation ‘For a sophisticated jurisdiction like the Isle of Man looking to attract outside investment it was clearly unacceptable that Manx legislation was obtainable only by subscription and a trip to the Tynwald library.’⁸⁸³

Predictable legislation allows for long term planning. If a company knows that the long term target is to reduce greenhouse gas emissions, then it can plan its energy policy accordingly.⁸⁸⁴ If a retailer knows there is a legal obligation that goods must be of a satisfactory quality, it can arrange its production processes accordingly.⁸⁸⁵ It is for this reason that major legal reforms are not taken regularly. For example, the referendum on Scottish independence was seen as a ‘once in a generation’ activity.⁸⁸⁶ Certainty has also been enshrined in legislation. For example, the Northern Ireland Act 1998 allows for a border poll to determine if the people of Northern Ireland want to remain in the UK or be part of the Republic of Ireland. However, the Act provides that there must be at least 7 years between border polls.⁸⁸⁷

⁸⁷⁹ *Vallejo v Wheeler* (1774) 1 Cowp 143, 153

⁸⁸⁰ Bingham (n 5). 38.

⁸⁸¹ World Bank, *Doing Business 2013: Smarter Regulations for Small and Medium-Sized Enterprises* (World Bank and International Finance Corporation 2013).

⁸⁸² *ibid.*

⁸⁸³ Marsh-Smith and Wright (n 174).

⁸⁸⁴ Climate Change Act 2008.

⁸⁸⁵ Consumer Rights Act 2015.

⁸⁸⁶ The Scottish Government, *Scotland’s Future: Your Guide to an Independent Scotland* (The Scottish Government 2013).

⁸⁸⁷ Paragraph 3 of Schedule 1 to the Northern Ireland Act 1998.

5.4.5 Constitutional check on power

If the rules are known by the ruled, it is more difficult for the rulers to break them. So, it can be said that accessible legislation is a check on state power. This is Locke's view⁸⁸⁸ as well as Fuller's.⁸⁸⁹ Ronald, in the context of executive legislation, viewed 'publicity as a safeguard for holding the rule-making officials in check'.⁸⁹⁰ Carr said that laws should be published 'so that the public, in being informed of its ante-natal opportunity to criticise and the place where copies of the proposed rules can be obtained, is indirectly informed that legislation is impending'.⁸⁹¹ Although, Carr's argument is more about the value of consultations than the need for accessible legislation. More recently Irresberger and Jasiak see publication of legislation as providing a measure of 'democratic control' over the government.⁸⁹² For Shinar, the rule of law is 'first and foremost about tempering official power'.⁸⁹³

Our laws obtain their democratic legitimacy by being voted through by parliamentarians. If the parliamentarians don't understand what they are voting for, we lose a major part of that legitimacy. Furthermore, if the parliamentarians don't understand legislation, they cannot effectively scrutinise it. Intelligible legislation enhances democratic legitimacy.

5.4.6 Democratic governance

If legislation is uncertain, then at some point, someone will have to decide on its actual meaning. The two key actors who will most commonly make this decision are the courts and the executive. So if a word in a statute is vague and citizens are arguing over its meaning, the authoritative decision on meaning will generally be made by a court. Or if the command contained in a statute is imprecise, then the executive, in implementing that command, will reach its own decision on meaning. The problem with this is that there is a lack of democratic accountability. We vote for the legislature and they are meant to pass laws making the key decisions. And if we don't like those key decisions we can lobby to change the law, or vote out those legislators. But citizens don't have the same rights when it comes to judges or officials making key decisions. Unpredictable legislation creates a vacuum which can lead to a lack of democratic power, as VanSickle-Ward states 'policy-making by the bureaucracy and the courts poses a serious challenge for democratic governance'.⁸⁹⁴

⁸⁸⁸ Locke (n 8).

⁸⁸⁹ Fuller (n 6).

⁸⁹⁰ James Ronald, 'Publication of Federal Administrative Legislation' (1938) 7 Geo Was L Rev 52.

⁸⁹¹ Cecil Carr, *Delegated Legislation* (Cambridge University Press 1921).

⁸⁹² Irresberger and Jasiak (n 261).

⁸⁹³ Shinar (n 46) 6. (advance access online publication).

⁸⁹⁴ VanSickle-Ward (n 348) 6.

5.5 Extension of the hypothesis

This hypothesis is capable of being extended beyond the parameters set out in this thesis in two ways. Firstly, by reference to other elements of Bingham's definition of the rule of law and secondly by reference to other jurisdictions. However, there are some caveats to this.

5.5.1 Extension to other elements of the rule of law

As a reminder, Bingham's full list of the 8 elements of the rule of law are:

1. Law should be accessible, intelligible, clear and predictable
2. Questions of legal right and liability to be resolved by law, not by exercise of discretion
3. Law should apply equally to all
4. Government should exercise powers in good faith
5. Law must protect fundamental human rights
6. Courts must be able to resolve legal disputes
7. Adjudicative procedure of the state must be fair
8. States must comply with international legal obligations as well as domestic ones

The key limitation in extending this hypothesis is in the distinction between the form and the substance of the law. When it comes to the form of the law, then there is a vital role for legislative drafting principles as there is a clear nexus between those principles and the way legislation is formulated. Element one is directly concerned with the form of the law and is therefore appropriate to use it as a touchstone for drafting principles. The other elements have much less to do with the form of the law and more to do with its content.

Element 2 can be used to derive drafting principles - this is an aspect of predictability that I have already dealt with in this thesis. So, we can have drafting principles that limit the number of times that officials have discretion, and we can also constrain the exercise of that discretion.

Element 3 has one very important drafting principle which can be derived from it – gender neutral drafting. If law is to be equal, then it must apply equally to all genders. It is not enough to say “a man must do XYZ” and then in an Interpretation Act state that “a reference to a man includes a reference to a woman”.⁸⁹⁵ This excludes 50% of the population from the face of the

⁸⁹⁵ Christopher Williams, 'The End of the "Masculine Rule"? Gender-Neutral Legislative Drafting in the United Kingdom and Ireland' (2008) 29 Statute Law Review 139.

law. It is now generally accepted that gender neutral drafting is the best drafting practice,⁸⁹⁶ and the rule of law adds further weight to this argument.

The other elements of the rule of law deal in the main with the content of legislation rather than its form. Therefore, any derivation of drafting principles would be minimal. This is not to say that the rule of law isn't vitally important for drafters. As has already been pointed out, they are a key cog in the legislative system and already regard themselves as guardians of the statute book. So there may not be further drafting principles from the rule of law, but drafters should ensure that the content of legislation gives effect to the rule of law.

5.5.2 Extension to other jurisdictions

Although the focus of this thesis has been on the UK, it is possible to extend its conclusions to other jurisdictions. This is subject to those jurisdictions being adherent to the rule of law and taking an approach to the rule of law which is generally in accordance with Bingham's definition. Under the heading of the importance of the rule of law, much of the evidence cited came from outside the UK. Respect for the rule of law isn't just a UK, or even a Western fixation, and Tamanaha gives an impressive list of world leaders who all profess support for it.⁸⁹⁷ So it is a reasonable assumption that the conclusions in this thesis are able to be replicated in other jurisdictions. Some of the drafting principles are jurisdiction specific (for example on the use of section headings) but most are of general import.

5.6 Concluding remarks

The rule of law is a fundamentally important bulwark against the abuse of state power. It provides protections to citizens which have been hard-won over the centuries. Respect for it has to be refreshed every generation. Legislative drafters have a unique opportunity to ensure that the protections given by the rule of law continue and are respected and developed in our legal system. They can do so by standing up for the values of the rule of law, by ensuring that legislation is always accessible, predictable and intelligible. This thesis has drilled down into those concepts and given specific tools and specific drafting techniques to protect the rule of law and ultimately make for a better society.

⁸⁹⁶ S Petersson, 'Gender Neutral Drafting: Historical Perspective' (1998) 19 Statute Law Review 93.

⁸⁹⁷ Tamanaha (n 48) 2.

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