

Legislative Drafting: Back to the Basics

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Overview

- Legislative drafters and their resources
- Practical Guidelines
- Principles
- Select issues and practical examples
- Alternative drafting styles

„Legislative drafting“

- Simple definition: „Writing laws“
- Special terms, e.g. „Legistik“ (Austrian), „Rechtsförmlichkeit“ (German), „legistiek“ (Dutch), referring to the formal framework of legislative drafting ~ „legislative technique“
- „Technique“ or „art“?

„Legislative art“?

„... if five drafters were set on the same Bill, each might emerge with a different product. ... Now, if five different drafters would produce five different Bills, it suggests that legislative drafting is an art rather than a precise science.“

(Geoffrey Bowman, *The Art of Legislative Drafting*, 2005)

„Legislative art“?

- Plato: „nomothetike techne“ high-ranking among the „technai“ („arts“)
- „techne“ (purposeful creation, based on knowledge and experience) vs. „tribe“ (creation in compliance with rules)
- Experience enables to act situatively
- Terminological differentiation of „art“ and „technique“ is of modern origin

How to learn legislative drafting?

- „Techne“ combines „objective“ knowledge with „subjective“ experience
- Training vs. learning by doing
- Aristotle, Nicomachean Ethics:
„nomothetike techne“ as a particular application of prudence or practical mind – crossover to politics (focus on content of legislation)

Legislative attitude

Plato, Gorgias: Socratic analogies

	body-related		mind-related („political“)	
art/ technique	gymnastics	therapeutics	legislation	jurisdiction
„shady“ form	cosmetics	cooking	sophistic	rhetoric

Striving for the best vs. for the agreeable ...

The function of legislation

- „Gymnastics for society“: making society fit to stand/settle conflicts of interests, in particular about distribution of (material and immaterial) goods (rights)
- „Nomoi“ instead of „nomos“: creating law instead of recognizing law – law has become disposable, to be able to respond to changing societal challenges

Validity and acceptance of law

- „Nomos“ resting on unchanging truth
- „Nomoi“ reflecting societal interests – deliberation resulting in compromises between group interests
- Luhmann: *„The stability and validity of the law no longer rests upon a higher and more stable order, but instead upon a principle of variation. It is the very alterability of law that is the foundation for its stability and its validity.“*
- Validity based on legitimizing procedure

The steering function of law

- Two legislative schools: prescriptive vs. educational
- Prescriptive school: Poseidonios (against Plato): *lex „iubeat, non disputet“* (doceat) ... *„velut emissa divinitus vox“*
- Educational school: Seneca (against Poseidonios): *„... leges quoque proficiunt ad bonos mores, utique si non tantum imperant sed docent“*

Drafting law

- Today: core function of the „parliamentary complex“ (Habermas)/„lexecutive“ (Pichler), i.e. Parliament + administration
- Originally: monarch + counsellors (from Hammurapi to Henry VIII.)
- European tradition of parliamentary legislation commenced in 15th century England: „Billa continens in se formam Actus“

Legislative drafters

- Administrative officials and judges
- Private advisers to MPs, usually practising lawyers
- Since 19th century professional draftsmen employed by administration, since 20th century by Parliament, too
- 1869 Parliamentary Counsel Office established in the British Treasury (currently, part of the Cabinet Office)

Legislative drafters

„Intellectually, the draftsman’s skills are the highest in the practice of law. Judges at bottom need merely reach decisions ...; negotiators and advocates need understand only as much of a situation as will gain a victory for their clients ... But the documents survive, and to draw them up well requires an extraordinary understanding of everything they are supposed to accomplish.“
(Martin Mayer, *The Lawyers*, 1966)

Drafting process

- Understanding/analyzing the policy/ instructions (not always given in writing!)
- Designing/composing/scrutinizing/editing legislative documents (and accompanying material)
- Individual freedom in details (e.g., when to formulate definitions)
- Iterative process

Regulating legislation

- Henry Thring, Parliamentary Counsel to the Treasury, concluded that *„the subjects of Acts of Parliament, as well as the provisions by which the law is enforced, would admit of being reduced to a certain degree of uniformity; that the proper mode of sifting the materials and of arranging the clauses can be explained; and that the form of expressing the enactments might also be the subject of regulation“*

Guidance for legislative drafting

- Classical textbooks since 19th century:
- Henry Thring, *Practical Legislation* (1877, 2nd 1902)
- Courtenay Ilbert, *Legislative Methods and Forms* (1901)
- Robert von Mohl, *Die Abfassung der Rechtsgesetze* (1862)
- Ernst Zitelmann, *Die Kunst der Gesetzgebung* (1904)

Guidance for legislative drafting

- Modern textbooks since mid-20th century:
- Reed Dickersen, *Legislative Drafting* (1954, 1977); id., *The Fundamentals of Legal Drafting* (1965, ²1986)
- Hanswerner Müller, *Handbuch der Gesetzgebungstechnik* (1963, ²1968)
- G. C. Thornton, *Legislative Drafting* (1970, ³1987)

Guidance for legislative drafting

- Modern textbooks since mid-20th century:
- William Dale, *Legislative Drafting* (1977)
- Hans Schneider, *Gesetzgebung* (1982, 3rd 2002)
- Vincent Crabbe, *Legislative Drafting* (1993, 1998)
- Tobias Dorsey, *Legislative Drafter's Deskbook* (2006)

Legislative drafting rules

- Since mid-20th century codifications of drafting guidelines, not only within doctrine, but also as more or less binding rules (mostly, administrative rules)
- Traditionally, only a few aspects, like promulgation requirements, regulated by law
- Drafting rules often bipartite: drafting technique – legislative procedure

Legislative drafting rules

- Pioneering work: Dutch legislative drafting rules (1948)
- Belgian legislative drafting rules (1960)
- Often first step compilation, second step systematization and improvement: e.g., Austria (1970 and 1979)
- Currently, available in most legislative systems (except, e.g., UK)

Available resources

- Collection of legislative drafting manuals/aids (mostly from anglophone countries):
<http://www.ili.org/ld/manuals.htm>
- Commission manual:
http://ec.europa.eu/governance/better_regulation/documents/legis_draft_comm_en.pdf
- PLDG for Africa:
 - http://www.one-lex.eu/Activities/summerschool/materials/palmirani/Final_Drafting%20Guidelines_21_March_Abuja_no_Examples.pdf
 - <http://www.apkn.org/lrp/guidelines/guidelines> (rev., multilingual)

Practical Legal Drafting Guidelines for Africa

- Authors: C. J. Botha, Monica Palmirani, Giovanni Sartor
- Commissioned by UN/DESA
- Based upon the Joint Practical Guide of the EP, the Council, and the Commission
- Aspects only relevant to EU legislation eliminated, provisions based upon the Akoma Ntoso standard included
- Original version: 41, revised: 48 rules

Content

- Chapter I: General principles (guidelines 1-7)
- Chapter II: Structure of a legislative document (guidelines 8-17)
- Chapter III: Normative references (guidelines 21-26)
- Chapter IV: Amending acts (guidelines 27-36)
- Chapter V: Norms over time (guidelines 37-41)

Guideline 1

- *Legislation shall be drafted clearly, simply and precisely.*
- Possible conflict between the requirements of simplicity and precision (in such a case, it is usually – except within the „plain language“ approach – recommended to give preference to precision)
- Possible conflict between the requirement of clearness and a political demand for veiling the political intention

Guideline 2

- *The drafting of a legislative act shall take account of both the end-users to whom the act is intended to apply, in order to enable them to identify their rights and obligations, and the persons responsible for applying the act.*
- Strong tension between legal language and everyday language of „end-users“
- Practical experience: the more participation (even as an option only), the more likely is a regulation to be drafted in the „end-users‘ language“

Guideline 3

- *Provisions of acts shall be concise and their content should be as uniform as possible.*
- Structure of provisions is to represent content
- Internal vs. external consistency (the same with regard to terminology, cf. guideline 5)
- Consistency with other legislation is to be taken into account – in case of substantive inconsistency, abrogation of prior provision (preferably to be made explicit, cf. guideline 30)

Guideline 4

- *Sections and sentences should be simple. Overly long articles, sections and sentences, unnecessarily convoluted wording and excessive use of abbreviations should be avoided.*
- Basic concept: one sentence – one idea, one article/section – one provision/rule
- Complex matters require complex provisions require complex sentences?
- Luhmann: „reduction of complexity“ main function of positive law
- Abbreviations to be defined, and to be used in a consistent way

Guideline 5

- *The terminology used in a given act shall be consistent both internally and with acts already in force, especially in the same field. Identical concepts shall be expressed in the same terms, as far as possible without departing from their meaning in ordinary, legal or technical language.*
- Some inconsistency of terminology within legal order seems unavoidable over time (e.g., 19th century codifications vs. modern acts)
- Practical problem: EU vs. national legislation
- Legal concepts beyond everyday language
- Explicit definition vs. implicit reception (of, e.g., technical standards)

Guideline 6

- *Legislative texts should use gender-neutral language, avoiding gender-specific terms.*
- Ulpian's „*Verbum hoc ‚si quis‘ tam masculos quam feminas complectitur*“ no longer accepted
- Avoid gender-specific nouns (e.g., „man“: to be replaced by „person“, „human [being]“ or „individual“) and pronouns (e.g., by replacing them with nouns, or by using both the masculine and feminine pronouns)

Guideline 7

- *When a legislative text is expressed in different official languages, all linguistic versions must be identical in structure and substantive meaning.*
- Mutually translating legislative texts within the legislative process between different official languages may even contribute to clearly elaborating the intended meaning (unlike ex-post translations, which rather run the risk of distorting the intended meaning)
- Practical examples: Switzerland vs. EU!

Guideline 8

- *All acts of general application shall be drafted according to a standard structure. The enacting clauses are preceded by a preface and possibly by a preamble, and they may be followed by annexes or schedules.*
- „Preface“: embedded metadata (e.g., type of act, enacting organ, date of enactment, etc.)
- „Preamble“: „educational“ legislation, missing in „positivist“ legal traditions
- Term „enacting clauses (EU manual: terms)“ easily to be mistaken – better, e.g., „substantive provisions“

Guideline 9

- *The full title of an act shall give as succinct and full an indication as possible of the subject matter which does not mislead the reader about the content of the enacting clauses.*
- Differentiation between titles of new acts and amending acts (which should enumerate the acts to be amended, cf. guideline 35)
- Restriction of subject matter in most U.S. states:
„No law shall embrace more than one object, which shall be expressed in its title“ (MI Const.)

Guideline 10

- *Where appropriate, the full title of the act may be followed by a short title.*
- Depending on jurisdiction, the short title may only be determined in a provision of the law body
- Additionally to the short title, abbreviation possible
- Depending on legal tradition, the short title may unrestrictedly replace the full title in quotations, and its use may be compulsory or not
- Problem: „private“ collections of short titles (and title abbreviations) within legal doctrine

Guideline 11

- *In some legal traditions citations may be used to set out the legal basis of the act and the main steps in procedure leading to its adoption.*
- **General experience:** the more tradition-oriented a normative system is, the more attention is paid to the enacting clause (e.g., UK: *„BE IT ENACTED by the Queen's [King's] most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:“*)

Guideline 12

- *In certain acts purpose clauses (recitals) may be used to set out concise reasons for the chief provisions of the enacting clauses, without reproducing or paraphrasing them. They must not contain normative provisions or political exhortations.*
- Element of „educational“ legislation, missing in „positivist“ traditions
- Danger: political propaganda (e.g., NS Germany)
- Not in use, e.g., in Austria, Germany, France
- EU: surrogate for explanatory notes

Guideline 13

- *The enacting clauses of legislation shall not include provisions having a non-normative nature, or restating the contents already expressed in the same act or in legal provisions already in force.*
- Substantive provisions forming the core element of „prescriptive“ legislation
- To be in line with legal provisions already in force, (external) references are to be made, unless restating would serve clearness better (cf. guideline 21)

Guideline 14

- *Where appropriate, an article/section shall be included at the beginning of the enacting clauses to define the subject matter and scope of the act.*
- „Subject matter“: more than paraphrasing the title
- „Scope“: categories of situations of fact or law and persons to which the act applies

Guideline 15

- *Where the terms used in the act are not unambiguous, they should be defined together in a single article/section at the beginning or at the end of the act. The definitions shall not contain autonomous normative provisions.*
- „Unambiguity“ may vary between technical and ordinary language
- Terms defined are to be used with the specified meaning throughout the act
- All terms defined should be used within the act
- Definitions must not contain terms that need to be defined either

Guideline 16

- *As far as possible, the enacting clauses shall have a standard structure (subject matter and scope – definitions – rights and obligations – provisions conferring implementing powers – procedural provisions – implementing measures – penal provisions – transitional and final provisions).*

Guideline 17

- *The structural subdivisions of the enacting clauses of an act are set out in higher division, subdivision, basic element.*
- Structure highly dependant on legal tradition; indexing (numbering and lettering) since age of enlightenment
- Basic element (highest-level text element) usually article/section
- Higher-level structural elements, e.g., chapters, subchapters, parts, subparts
- Lower-level structural elements, e.g., subsections, paragraphs, subparagraphs, alineas, items

Guideline 18

- *Technical aspects of the act shall be contained in the annexes/schedules, to which individual reference shall be made in the enacting clauses of the act and which shall not embody any new right or obligation not set forth in the enacting terms except for the legal acts attached to other acts.*

Guideline 19

- *Annexes/Schedules in the strict sense and non-autonomous legal instruments annexed are used as a means of presenting provisions or parts of provisions separately from the body of the enacting terms.*
- Examples: forms, lists, plans, images, etc.
- Specific Anglo-Saxon tradition: schedules annexed to amending act contain amendments, whereas amending act itself just renders the schedules effective

Guideline 20

- *Legal acts attached to other acts form an integral part thereof. Informative annexes have no legal validity.*
- Legal meaning of an attachment is to be stated clearly in the act

Guideline 21

- *References to other acts shall be kept to a minimum. References shall indicate precisely the act or provision to which they refer, and they shall be comprehensible and clear.*
- Tension between the requirement of restricting external references to a minimum and that of avoiding to restate the content of provisions already in force (cf. guideline 13)

Guideline 22

- *Both internal and external references shall be precise to enable the reader to easily consult the act to which reference is made, and to favour their automatic detection.*
- References have to follow the quotation rules (with regard to title, possibly publication organ/number, and structural elements)
- Differentiation between dynamic and static references

Guideline 23

- *References to acts of the same legal systems shall be, in principle, dynamic while references to acts of other legal systems shall be, in principle, static.*
- Statically referring to acts belonging to other normative systems is due to their dynamic content not being at the disposal of the legislator, who thereby would delegate legislative authority

Guideline 24

- *References may have to be adopted consequently to changes in the text referred to.*
- In case of dynamic references, check whether changed content of provision referred to is still in line with intention of the reference
- In case of static references, check whether reference to changed content would better fit intention
- Permanent monitoring of legal dynamics required!

Guideline 25

- *Circular references and serial references must be avoided.*
- Circular reference: reference to another provision which itself refers back to the provision referring to it
- Serial reference: reference to another provision which itself refers to a third provision, etc.

Guideline 26

- *A reference made in the enacting clauses of a binding act to a non-binding act shall not have the effect of making the latter binding.*
- In case a non-binding regulation, e.g., a technical standard, is to be rendered binding force, its content should be integrated in the act

Guideline 27

- *Every amendment of an act shall be clearly expressed. Amendments shall take the form of a text to be inserted or repealed in the act to be amended. Preference shall be given to replacing whole provisions (articles/sections or subdivisions of articles/sections) rather than inserting or deleting individual sentences, phrases or words.*

Guideline 28

- *An amending act shall not contain autonomous substantive provisions nor amendment of amending acts.*
- In practice, differentiation between amendment and autonomous substantive provisions may be difficult
- In the same way, amendments of amending acts may not always be avoided

Guideline 29

- *An act not primarily intended to amend another act may set out, at the end, amendments of other acts which are a consequence of changes which it introduces. Where the consequential amendments are substantial, a separate amending act should be adopted.*
- Consequential amendments should anyway be mentioned in the title (cf. guidelines 9, 35)

Guideline 30

- *Any act or provision rendered inapplicable or redundant by virtue of a new act shall be expressly repealed, as obsolete acts and provisions.*
- Explicit (formal) abrogation preferable to implicit abrogation, for reason of clearness of the legal system
- In practice, clearing the legal system from obsolete acts and provisions is one of the major lackings of many legal systems
- Specific problem: Supremacy of EU law overrides conflicting national law without repealing it

Guideline 31

- *References to amended provisions need to be considered.*
- Cf. guideline 24
- Taking into account references made to a provision to be amended is a challenge to legal knowledge management
- Legislative drafting requires legal knowledge management!

Guideline 32

- *Amendment provisions shall be explicit, univocal and coherent. Each amendment must concern a whole textual unit.*
- Amending provisions have to contain the following elements: action type of amendment (e.g., replacement, insertion, deletion), reference to provision(s) to be amended, quoted text
- Amendments of complete units of texts to be preferred (cf. guideline 27)

Guideline 33

- *Amendments are classified according to a taxonomy. For each qualification is associated a standard form to express it.*
- Akoma Ntoso classification: textual modification, modification of meaning, modification of scope, temporal modification, legal system modification
- Akoma Ntoso templates for amendment types

Guideline 34

- *Avoid as much as possible substantive modification, by explicitly modifying the text of the amended act.*
- Associated with guideline 28
- Reason given: transparency

Guideline 35

- *The title of an amending act must include the complete reference of the act being amended.*
- Cf. guideline 9
- Form of reference dependant on legal tradition, or formal rules

Guideline 36

- *The amendment to annexes/schedules shall be made in the annexes/schedules to the amending act.*
- Highly dependant on specific legal tradition, and the respective role assigned to annexes/schedules

Guideline 37

- *Acts of general application enter into force on the date specified in them or, in the absence thereof, after a period following that of their publication established by upper law. In some cases the entry into force is postponed for providing sufficient time to adapt.*

Guideline 38

- *Only considerations of urgency may justify entry into force prior to the due period after publication.*
- Entry into force ex-nunc („effet immédiat“) postulated by legal theory of enlightenment (Art 2 Code Civil)
- Retroactive entry into force (ex-tunc, „effet rétroactif“) is often seen as being less agreeable, but is admissable in many legal systems, usually with the exception of penal provisions (Art 7 ECHR)

Guideline 39

- *Entry into operation (efficacy) may be deferred after entry into force. Exceptionally, and subject to the requirements of the principle of legal certainty, a legal provision may have retroactive effect.*
- The scope of application of legal provisions has to be defined (cf. guideline 14), also in terms of time
- Overlapping application of new and „surviving“ law possible, but under precisely defined conditions only

Guideline 40

- *Retroactive effect must be explicitly indicated.*
- Retroactive effect should be expressed by giving specific dates but not by formulating conditions only

Guideline 41

- *Provisions laying down dates, time limits, exceptions, derogations and extensions, transitional provisions (in particular those relating to the effects of the act on existing situations) and final provisions (entry into force, deadline for transposition and temporal application of the act) shall be drawn up in precise terms.*

Four basic principles

- Developed by Robert Walter (1963), elaborated by Gerhart Holzinger (1988)
- Economy
- Clearness
- Systematism
- Formalism
- Possible divergences, e.g. economy vs. clearness

Principle 1: Economy

- Avoid superfluous provisions, in particular non-normative provisions
- Use the technique of generalization instead of casuistry (implication: delegation of authority to executive organs, problem: organized interests insisting on explicit rules)
- Use references instead of restating rules, if clearness is not impaired
- Explicitly abrogate obsolete regulations

Principle 2: Clearness

- Precisely determine the range of application of provisions (who, where, what, when), as well as the behaviour required, permitted or forbidden, and the respective conditions, the consequences for non-compliance, finally all exceptions, and their respective conditions
- Legal provisions usually using linguistic code, choose adequate language combining precision with intelligibility (in case of both demands conflicting, give preference to precision)

Principle 3: Systematism

- Take into account the systematic order of the legal system at large
- Codify, if politically feasible, coherent domains of law, or at least consolidate laws
- Give legal regulations a structure adequate to their content, separate substantive from formal provisions and, among the latter, organisational from procedural ones
- Use consistent terminology

Principle 4: Formalism

- Use the prescribed formal elements (like title and enacting clause), types of structural units, indexing style, reference style, and abbreviation style
- Take into account constitutional or legal requirements on the formal arrangement of provisions (e.g., labelling provisions amending the constitution)
- Observe the procedural requirements, from consultation to promulgation

Golden rule for legislative drafters

- In Switzerland attributed to Eugen Huber, in Germany alternately to Rudolf von Ihering or Gustav Radbruch
- *„The legislative drafter shall be thinking like a philosopher and speaking like a peasant.“*
- Norms are to be conceived on an abstract level but formulated in the citizens' perspective and language

Practical advice and examples

- Style/usage in writing laws
- Architecture/organization of legal regulations
- *„There are two things wrong with almost all legal writing. One is its style. The other is its content.“ (Fred Rodell)*

Style/usage

- Use short sentences
- Use positive statements
- Use the active voice
- Avoid ambiguity and inconsistency
- Avoid old-fashioned terms
- Language-specific issues

Length of sentences

- As a rule, short sentences are easier understandable than long ones
- Avoid subordinate sentences
- Sometimes, reducing complexity of matter to simplicity of expression is a challenge
- To avoid verbal repetition, one list-like structured long sentence may be preferable to a series of short sentences
- In a list, do not separate the subject from its predicate, and specify in the introductory sentence the operation indicator for the listed elements

Example 1

„ A section, which is the basic structural unit of a law and indicated by numbers, may be divided into paragraphs, which are indicated by numbers in parentheses, the paragraphs in turn may be divided into sub-paragraphs, which are indicated by lower case letters in parentheses, and the sub-paragraphs may be divided into items, which are indicated by roman numerals in parentheses.“

Example 1

- (1) The basic structural unit of a law is a section. Sections are indicated by numbers.
- (2) Sections may be subdivided into paragraphs. They are indicated by numbers in parentheses.
- (3) Paragraphs may be subdivided into sub-paragraphs. They are indicated by lower-case letters in parentheses.
- (4) Sub-paragraphs may be subdivided into items. They are indicated by roman numerals in parentheses.

Example 1

The hierarchical order and indexation of structural units of laws is as follows:

Structural unit	Indicated by
section	numbers
paragraph	numbers in parentheses
subparagraph	lower-case letters in parentheses
item	roman numerals in parentheses

Example 2

„A legislative drafter who in a draft regulation either uses sentences longer than 20 words, or constructs sentences in the passive voice, or uses a circular reference, commits an offence, unless ordered to do so by the minister in charge.“

Example 2

- (1) A legislative drafter commits an offence if in a draft regulation using one or more of the following:
 - (a) a sentence longer than 20 words,
 - (b) the passive voice,
 - (c) a circular reference.
- (2) As an exception to para. (1), the drafter does not commit an offence if following an order by the minister in charge.

Positive statements

- Positive statements usually are more easily to be understood than negative ones
- Turning a negative into a positive statement may, however, change the meaning

Example 3

„Any law that has not been issued or amended after the 31 December 1945, is rendered ineffective.“

Example 3

„Any law that has been issued or amended before 1 January 1946, is rendered ineffective.“

Example 3

„Any law that has been issued before 1 January 1946, and has not been amended since that day, is rendered ineffective.“

Active voice

- Though using the passive voice has a long tradition in law-writing, modern textbooks recommend using the active voice
- Usually easier to understand
- Using the active voice forces the drafter to specify who is, e.g., obliged/entitled etc. to particular action
- If this is not to be specified, use the passive

Example 4

„Any draft bill is to be sent out for consultation to the other ministries before it is submitted to the Council of Ministers.“

Example 4

„The ministry in charge has to send out any draft bill for consultation to the other ministries before the minister submits it to the Council of Ministers.“

Ambiguity and inconsistency

- Check whether a formulation would allow different interpretations
- Check whether, at least within one piece of draft legislation, one concept is always labelled with the same term, and one term is associated with one and the same concept only (e.g., „Sache“ in sections 90 vs. 119 para. 2 BGB)
- In case of possible doubt about the meaning of a term in the given context, define it

Example 5

„This Act applies to contracts of sale of goods made on or after (but not those made before) 1 January 1894.“

(Section 1 para. (1) of the Sale of Goods Act 1979 [UK])

Example 5

„This Act applies to contracts of sale of goods concluded on or after (but not those concluded before) 1 January 1894.“

Digression: definitions

- „*'When I use a word,' Humpty Dumpty said, in a rather scornful tone, 'it just means what I choose it to mean - neither more nor less.'*“ (Lewis Carroll, Through the Looking Glass)
- Freedom of defining terms within legislative drafting?

Digression: definitions

- *„The term new building means any building pulled or burnt down to or within ten feet from the surface of the adjoining ground.“ (Darlington Improvement Act 1872)*
- Observe minimum requirements on association of terms with their (possible) use in everyday language
- Highlight defined terms? E.g., Australia: asterisking of defined terms within a law

Old-fashioned terms

- (Spoken) languages are continuously changing
- Legal systems usually have a rich terminological legacy
- Strike the right balance between modernizing legal language, to improve understanding, and clinging to terminological legacy, to preserve consistent terminology

Example(s) 6

- thereof
- heretofore
- notwithstanding

Example(s) 6

- of it
- until now
- in spite of

Language-specific issues

- Every national language may have a „legalese“ of its own, whose adequacy needs to be scrutinized
- Examples from English:
- Specific deontic meaning of „shall“ in legalese – better simply use present tense, or, if necessary for understanding, „must“, „has to“, etc.
- Pairs of words originally used to avoid ambiguity (e.g., „will and testament“, „lands and tenements“), later just to give emphasis – better use one precisely defined term

Architecture/organization

- Naming laws
- Structural organization and indexation
- List format
- Algorithms
- Relationship statements and references
- Amendment techniques

Naming laws

- Concept of an act as a closed unit of legal content, dealing with one set of matter specified in its title, became widely accepted through enlightenment (era of codification of legal domains!)
- Some constitutional systems oblige legislatures to only produce such closed units (e.g., most U.S. states)
- Title of a bill was to limit the scope of parliamentary deliberation and amendment

Naming laws

- In early legal systems, the law was seen as an entity comprising all matters to be regulated (if well organized, grouped along matters, e.g. Twelve Tables)
- From this traditional view, all law-making, once accepted a concept, was amending the law through acts, which included adding new regulations to it
- Titles came up for practical reason, though, e.g., in Hungary till end-19th century no titles, just numbering

Long/short title

- See long title as a description, short title as the name of an act (though in some jurisdictions just a non-obligatory „nickname“)
- Long title is to describe the way an act will impact existing law (e.g., by legally adjusting or readjusting a particular matter, or by amending particular acts)
- Short title (naming title) is the label under which the act is to be referred to: short, precise, univocal, easy to speak aloud, often followed by year of enactment, in some jurisdictions by abbreviation

Example 7

„Bill for an Act to authorise legislative drafters to use plain language, and to oblige them to cling to provisions for the structural organization of laws“

Example 7

„Bill for an Act on the style and structure of draft legislation (Legislative Drafting Act 2009)“

or just

„Bill for an Act on legislative drafting (Legislative Drafting Act 2009)“

Structural organization/indexation

- (Hierarchically) structuring acts and indexing their structural units was advocated by enlightenment, too
- Until then often an endless string of provisions, each introduced by „... *and be it further enacted that ...*“
- Whereas continental codifications already well structured, in the UK division of acts into sections only laid down in Lord Brougham's Act (1850)
- Different traditions

Structuring traditions

	Anglophone systems	Francophone systems
Higher-level units	chapter, part, division, subdivision	book, title, chapter, subchapter
Basic unit	section	article
Lower-level units	subsection, paragraph, subparagraph, item, subitem	number, alinea

Structuring principles

- Formal structure of a regulation is to represent logical structure of its content
- E.g., topic by topic, action by action, addressee by addressee
- Separate substantive from formal provisions, and, among the latter, organisational from procedural ones
- Give the general rule (and the conditions for its application) first, then the exceptions (and the conditions for their respective application)

Indexing

- Since coherent hierarchical indexation was the rule (one more legacy of enlightenment), mostly combinations of roman and arabic numerals, capitals and lower-case letters
- Different renumbering traditions, e.g. indicate insertion of higher divisions and basic textual units (e.g., sections) but renumber textual subdivisions
- Roman numerals becoming outdated, shift towards arabic numerals (e.g., UK in 2001)
- Experiments with decimal classification/ numbering since 1970s, but only in a few cases sustainably successful (e.g., Lower Austria)

Structuring hints

- Organize your thoughts, in preparation of drafting, by, e.g., sketching a logic tree or completing a table (e.g., Australia: „blueprints“)
- To check drafting, take the reader's view: if reading the text from the beginning to the end, has the reader at any given point been provided with all information in that order required for accomplishing understanding?
- Use a check list to scrutinize whether you have met all formal structural requirements

Example 8

„Section 10. Consultation procedure

- (1) Once the minister has approved a draft bill, it is sent out for consultation.
- (2) The consultation process being finished, the draft bill is submitted to the council of ministers.
- (3) The deadline for providing comments on a draft bill may not be shorter than four weeks.
- (4) The other ministries, the provincial administrations, and the municipalities are to be invited to provide their comments on a draft bill, whereas NGOs may be invited to do so.“

Example 8

„Section 10. Consultation procedure

- (a) Once the minister has approved a draft bill, the ministry sends it out for consultation.
- (b) The ministry invites the following to provide comments:
 - (i) the other ministries,
 - (ii) the provincial administrations,
 - (iii) the municipalities.
- (c) The ministry may invite NGOs to provide comments.
- (d) The deadline for providing comments must be at least four weeks.
- (2) The consultation process being finished, the minister submits the draft bill to the council of ministers.“

List format

- In case a provision contains several coordinate components (e.g., conditions), list them
- Put the logical operator in the introductory clause, to immediately provide the reader with information about the kind of logical relationship (and to make easier future amendments)

Example 9

„An act is unconstitutional, if it contains
(1) a reference to an ineffective regulation,
(2) one or more misspellings, and
(3) the term ‚notwithstanding‘ or the term
‚hereinafter‘.“

Example 9

„An act is unconstitutional, if it contains all the following:

- (1) a reference to an ineffective regulation,
- (2) one or more misspellings,
- (3) one or both of the following terms:
 - (a) notwithstanding,
 - (b) hereinafter.“

Algorithms

- Laws often contain sequences of instructions that may be deemed (and, why not, presented in a formalized way as) algorithms
- Whereas narrative and formula-like algorithms are quite common, decision trees or flowcharts are used in a few jurisdictions only, and even there rather supplementing than replacing narrative prescription (e.g., Australia)

Example 10

„The remuneration due to a legislative drafter is calculated by multiplying the number of sections produced, after subtracting the number of misspellings, with the rate applicable under section 5.“

Example 10

„The remuneration due to a legislative drafter is calculated as follows:

$$R_d = (S - M) \times R_a$$

where

R_d = remuneration

S = number of sections produced

M = number of misspellings

R_a = rate applicable under section 5.“

Relationship statements/references

- The law at large, and the individual acts, seen as logically coherent entities, the relationships between their elements have been a main focus of both judicature and doctrine since Roman law
- To avoid a scope too large for interpretation, (internal and external) relationships between rules are to be made explicit
- If making references, pay utmost attention to their formal and logical precision

Internal references

- Referencing instead of repeating: may make legal regulations less readable but better understandable
- Are qualifying internal references, e.g. of the type „general rule – exception“, to be made explicit bidirectionally or just unidirectionally?
- Two schools: plain language school in favour of unidirectional references (recommended to be made in the qualifying rule); in the interest of clearness (and automatic processability) it may be preferable to make bidirectional references

Example 2

- (1) A legislative drafter commits an offence if in a draft regulation using one or more of the following:
 - (a) a sentence longer than 20 words,
 - (b) the passive voice,
 - (c) a circular reference.
- (2) As an exception to para. (1), the drafter does not commit an offence if following an order by the minister in charge.

Example 2

- (1) Subject to para. (2), a legislative drafter commits an offence if in a draft regulation using one or more of the following:
 - (a) a sentence longer than 20 words,
 - (b) the passive voice,
 - (c) a circular reference.
- (2) As an exception to para. (1), the drafter does not commit an offence if following an order by the minister in charge.

External references

- For citation, use the official short title, if any, or the correct full title, and precisely specify the structural unit you are referring to (e.g., „section 10 para. 5“ instead of „section 10“)
- Always check the current version of the provision you are referring to (even if you know it by heart)
- Determine whether references are dynamic or static ones (e.g., by a general clause)

Example 11

„Legislative drafting is a hazardous activity in accordance with the respective provisions of the Act on Health Protection in the Workplace and subject to the protective measures laid down therein.“

Example 11

„Legislative drafting is a hazardous activity in accordance with section 10 para. 1 of the Act on Health Protection in the Workplace, [source,] as amended.“

Amendments

- Law is a set of operational instructions, to be observed within the context of general logical and specific interpretation rules
- Amending act is a particular kind of set of operational instructions ordering rules to be implemented in a way taking into account the amendments made
- Each new act is an amendment of the law as a whole, but acts amending existing „original“ or „principal“ acts are specifically called „amending acts“
- When does an „existing“ act become a „new“ one?

Amendment types

- Simplest typology: addition/deletion
- Addition: add new text to existing text
- Insertion: add new text within an existing structural text unit (or a new text unit between existing ones?)
- Replacement: replace existing text by new text
- Repeal: delete existing text
- Cut-off: suspend efficacy of existing text
- Amendment by implication: e.g., through explicit amendment of a definition („amendment of meaning“)
- Operations performed on text may, in principle, also be performed on, e.g., graphics

Amendment techniques

- „Textual“ amendment: replacing textual units of a scope sufficient to bear understandable meaning, e.g. indexed structural units (even if other formal type of amendment than replacement, e.g. insertion)
- „Referential“ or „blind“ or „non-textual“ amendment: referring to the structural unit to be amended and giving instructions about the fragment(s) of text to be added/deleted, without any meaning being intelligible (constitutionally forbidden in several U.S. states, but, as far as relying on the concept of „meaning“, wide scope for arbitrary decisions)

Amendment styles

- Required: precise citation of rule to be amended, amendment operator, quoted text
- Amending act: amending one act only or several acts (if larger number, „omnibus bill“)
- Amending schedule (in Anglo-Saxon jurisdictions): one schedule attached to the amending act (which is reduced to the enacting clause) amending only one or several acts, or several schedules amending only one or several acts
- Mixed act: combining new „original“ or „principal“ act with amendment of others
- Different jurisdictional styles, e.g. re. renumbering

Drafting amendments

- Similar challenges in drafting bills for amending acts and parliamentary amendments (except for being under even more time pressure when doing the latter)
- Always check whether the text you are proceeding from is the current one
- Be precise in citation as well as in describing the operation to be performed
- Produce target text to check correctness of operator (and for readers' convenience)
- Produce synopsis of target text and text in force, or (U.S. style) highlight (underline) addings and strike out deletions („change log“)

Example 12

„Throughout all legislation in force, cultural subsidies ar raised at 20 %.“

Example 12

?

Drafting amendments, revised

- New approach (Tasmania): write target text with change log (taken over from U.S. practice) and then have operational instruction automatically generated
- Change log mark-up included in a Change Description Document (SGML), from where not only amendment operator is generated, but after adoption of amendment also consolidation repository is fed (EnAct system, operational since 1998)
- Currently, Austria is considering to adopt (and adapt) the concept

Consolidation

- Consolidation is an executive act virtually to be done in any case of applying the act amended
- For practical purpose it is advisable to do consolidation in writing once and make the consolidated version available to all appliers
- In most jurisdictions, this is done in a non-authentic way, either by public authorities (e.g., Switzerland: AS and SR) or by private enterprises
- Traditionally, loose-leaf collections; nowadays, databases, within Europe more and more provided by public authorities
- Non-authentic consolidation is, of course, not a legal source

Consolidation

- Tasmanian approach would anticipate consolidation and supersede ex-post intellectual consolidation work
- So far, authentic consolidation is the exception (e.g., Lower Austria), due to risk of intellectual mistakes and contradictions between two authentic texts
- Intermediate instruments, e.g. „re-promulgation“
- Reliable algorithm deducing amendment from anticipated consolidated text might allow to make authentic consolidation the rule

Thank you for your attention!

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