

# STANDARDISING STATUTORY WRITING WORLDWIDE: AN AMERICAN PERSPECTIVE

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## Abstract

*In this article, a career drafter of United States Federal legislation expresses his views on the prospects for standardising legislative drafting techniques worldwide.*

*Specifically, the article--*

- briefly traces the evolution of United States Federal legislative drafting, with an emphasis on the pragmatic, problem-solving character of the drafting, devoid of academic theory;*
- sets forth a 5-step framework for understanding current Federal legislative drafters practice, which may serve as a checklist for converting a legislative proposal into actual draft legislation;*
- critiques, using the 5-step American approach, particular examples of legislation from Commonwealth countries and the United States to recommend areas where drafting may be standardised worldwide; and*
- identifies specific rule-of-law values that would be promoted by increased standardisation.*

The standardisation of statutory writing is both a worthy goal and a growing trend worldwide. The United States, through the evolution of its Federal legislative drafting practices, has furthered that goal, with the effect not only of enhancing the quality of our domestic law but also of serving as a model internationally. This American model emerged only after many years of trial and error in drafting an ever-increasing volume of

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legislation<sup>2</sup> but now may save legislative drafters of emerging democracies this self-corrective process. A look at how this model emerged and what this model teaches, therefore, seems warranted.

But first, before we proceed further, let us be clear about what we mean by "standardisation". Narrowly viewed, "standardisation in drafting" is nothing more than applying a uniform structure to legislation, ensuring that the style, numbering, and margin indents are consistent throughout each bill.<sup>3</sup> This uniformity of style is entirely arbitrary and, by itself, does not favour the legislation of any one country. In another, broader sense, however, "standardisation in drafting" is the application of those techniques, methods, and rules that ensure that legislation is written well within the context of our democratic values. In short, "standardisation" means best practices in legislative drafting, and it does not mean uniformity in legislative procedures, conformity of drafting processes, or efficiency in the substantive law.<sup>4</sup> In theory, then, standardisation of drafting can aid the legal system of any democracy.

The American experience in standardising legislative drafting began on a promising note. In the 1780s, James Madison promoted the idea of skilled national legislative drafting as a counter to "fluctuating and undigested" state laws, which he disdained. Not long afterwards, at the Constitutional Convention principally driven by Madison, a committee was appointed to compose the final draft of the Constitution. This Committee of Style and Arrangement in short order consolidated substantive provisions, rephrased sentences, and economised language, greatly improving the coherence and readability of the document<sup>5</sup> and giving a practical example of Madison's conception.

In explaining the Constitution, the *Federalist Papers* took note of the need for skilled legislative drafting at the national level:

It will be of little avail to the people that the laws are made by men of their own choosing, if the laws be...so incoherent that they cannot be

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<sup>2</sup> In 2013 alone, the Office of the Legislative Counsel of the United States Senate prepared approximately 30,000 drafts of bills, resolutions, and amendments.

<sup>3</sup> For example, a drafter who wishes to standardise headings in a bill will have a choice between centering a heading above a section or embedding the heading within the section and should apply the same heading style to each section throughout the bill.

<sup>4</sup> But see Ann Seidman, et al., *Legislative Drafting for Democratic Social Change* (2001), which associates effective legislative drafting with the promotion of socio-economic change.

<sup>5</sup> It is not pure coincidence that this work was performed by one of the best writers at the Convention, Gouverneur Morris, a passionate advocate of national power.

understood...or undergo such incessant changes that no man who knows what the law is today can guess what it will be tomorrow.<sup>6</sup>

Perhaps these concerns drove the First Congress, which was comprised in part of former delegates to the Convention, to create temporary legislative committees, each assigned to draft one bill only<sup>7</sup> and then disband.

But the later establishment of permanent congressional committees, having jurisdiction over an array of legislation but ill-staffed<sup>8</sup> to draft that legislation, made it inevitable that the actual drafting would be outsourced to Executive departments and to lawyers in private practice. This congressional abdication in writing law continued roughly 130 years until the early 1900s when the growth in the number and confusion of statutes demanded action.

Action came in 1916 when the House of Representatives contracted with a law professor and former Law Librarian of Congress, Middleton Beaman, to conduct a pilot project demonstrating how legislation could be drafted in a systematic, almost scientific manner. After two years Mr. Beaman had so impressed the House leadership with the quality of his services that they decided to "institutionalise" him by making him the head of the newly created Legislative Drafting Service, established by a provision of the Revenue Act of 1918. Later, the Legislative Drafting Service was divided into the separate Senate and House Legislative Counsel offices that exist today and that perform the same function.

While the use of these offices has always been discretionary, their work became increasingly recognised and demanded until it accounted for the bulk of all Federal legislation written. Initially, the techniques employed by these congressional drafters varied depending on who was doing the drafting, which Act was being amended, and even for which House of Congress the legislation was being drafted. But there is an irresistible pull of standardisation that over time largely obliterated these variations and forced uniformity in drafting techniques.

Since the 1980s, drafts professionally prepared for Congress have become both more highly structured and more plainly expressed than those at anytime in our history. American practice became highly systematised, largely the result of an emerging

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<sup>6</sup> Alexander Hamilton or James Madison, *The Federalist No. 62* at 2:190 (1788).

<sup>7</sup> Such was the way the Federal court system was established through the drafting of the Judiciary Act of 1789, often viewed as the most significant of Congress' enactments.

<sup>8</sup> Not until the Legislative Reorganization Act of 1946 did Congress have professional committee staffs.

consensus among individual drafters about what constitutes best practices. In other words, this was a "bottom up," not a "top down" development.

In an effort to produce a manual for this system, in 2013 I wrote a book<sup>9</sup> that describes in detail the five steps that I routinely took while drafting a piece of legislation for a United States Senator. Namely, I would "legalise", "formalise", "integrate", "organise", and "clarify". Let's examine each of these steps to see how they might apply to drafting legislation internationally.

The first and most important step in transforming any proposal for public policy into draft legislation is to "legalise"<sup>10</sup> it. This is shorthand for saying that the drafter's first concern must always be to capture the intended legal effect of the legislator. Failure to "legalise" makes legislation nothing more than a political treatise, inoperative as law.

A "legalised" draft eschews descriptive language for the language of duties, delegations, and rights. Such a draft also employs special enforcement provisions where necessary and avoids conflict with the national constitution. The treatment of these elements by African legislation with which I am familiar has been uneven. A common mistake is the lack of accountability caused by the vesting of duties in a Government ministry, agency, or office rather than with a specific official.

Where the mandatory language of duty is used, the drafter should consider including criminal penalties, civil sanctions, or funding cut-offs. Clearly, the degree to which a mandate may be enforced determines its effectiveness. I note the anomaly that United States criminal penalty provisions expressly state a criminal intent *mens rea* requirement but similar provisions in the legislation of Commonwealth countries do not. In addition, all criminal offence provisions need to avoid vagueness, which violates basic constitutional notions of fundamental fairness and due process.

Having "legalised," the drafter is now ready for the second step in drafting: choosing the legislative vehicle. We might call this step "formalising" as the drafter is largely guided by the formalistic requirements of the constitution, statutory law, and the rules of the national legislature. In the United States Congress the formatting of bills, resolutions, and amendments to bills and resolutions is strictly regulated and is influenced by the American lawmaking process.

Legislative amendments in particular are an important source of text for congressional enactments. In parliamentary democracies, on the other hand, where bills presented by the Government predominate, bills may not be substantively amended by committee and are not as frequently amended in parliamentary debate. Even worse,

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<sup>9</sup> Arthur J. Ryneason, *Legislative Drafting Step-by-Step* (Carolina Press, 2013).

<sup>10</sup> "Legalising" is not to be confused with drafting legalese, which the author adamantly opposes.

some foreign bills authorise their own amendment, post-enactment, administratively through so-called "subsidiary legislation."<sup>11</sup> In the United States, neither an administrative regulation<sup>12</sup> nor a congressional resolution<sup>13</sup> adopted short of the full lawmaking process may alter existing law. To do so would violate important separation of powers principles underlying our Constitution.

Another formatting advantage that United States bills have over those of Commonwealth countries is that they maintain a unified text. A Commonwealth country typically appends a "schedule" to the end of a bill as a place to locate further detail to the provisions of the bill. These schedules, however, do tend to have substantive content, which raises the question of how a drafter is to determine what should appear in a "schedule". A distinction between general and detailed provisions in a bill is impossible to maintain and not legally justifiable in my opinion.<sup>14</sup> Perhaps a "schedule" may be justified in a parliamentary democracy, however, if it is limited to content that a ministry may change through "subsidiary legislation" but doing this effectively turns the end of a statute into a regulation. Very odd. Why not simply delegate the regulatory authority initially and be done with it?

The third step is to integrate the proposed new law with prior law, preferably by amending the law. When done by singling out individual words or phrases, these amendments are called "cut and bite." When, on the other hand, a whole unit of a statute is rewritten, the amendment is referred to as a "restatement." Many emerging

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<sup>11</sup> See, e.g., the Legislative and Regulatory Reform Act 2006 (United Kingdom), derisively referred to as the "Abolishment of Parliament Act". See also, section 467 of the Companies Act, 2013 (India), which states in pertinent part:

"Power of Central Government to amend Schedules:

(1) Subject to the provisions of this section, the Central Government may, by notification, alter any of the regulations, rules, Tables, forms and other provisions contained in any of the Schedules to this Act."

<sup>12</sup> A regulation is unlawful if found to be "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right". 5 U.S.C. §706(a)(2)(C) (originally enacted by the Administrative Procedure Act).

<sup>13</sup> *INS v. Chadha*, 462 U.S. 919, 951 (1983).

<sup>14</sup> In some Commonwealth countries, amendments to prior law, labeled "consequential amendments", are reserved for placement within a "schedule". The author believes it makes more organisational sense to group related provisions together, whether they are amendatory or "freestanding."

democracies prefer to "repeal and replace" whole statutes<sup>15</sup> rather than engage in time-consuming "cut and bite" amendments. This is a form of restatement on a massive scale. Continual rewriting of the law is a questionable strategy for it may unnecessarily open up previously closed political wounds. Certainly if "repeals and replacements" are done solely for expediency, they are a mistake.<sup>16</sup> Foreign drafters should find the alternative of "cut and bite" amendments more attractive if they adopt American techniques to amend statutes because of the consistency and economy in the expression of our amendatory language.

While American amending techniques are commendable, what they amend is less so. In the United States, every amendment drafter has to decide what version of Federal law to amend: an Act of Congress or a title of the United States Code? The decision is made difficult by the failure of the United States Congress to reenact all Federal general and permanent law as positive law within the United States Code, a project that is proceeding at a snail's pace. The practical impact is that inexperienced drafters are not correctly targeting statutory amendments nor conforming those amendments to the proper style. In short, what constitutes authoritative Federal law is in transition and hardly presents a model for standardisation worldwide!

The fourth step in drafting any legislation is to organise its text by systematically sequencing sections and the provisions within each section.<sup>17</sup> The United States approach that places the short title, purposes, and definitions ahead of substantive provisions and that places oversight, funding, and effective dates at the end has much merit and seems to be gaining traction abroad.<sup>18</sup> In particular, it is logical to define terms before the reader encounters their actual use. It also makes sense to popularise a law by placing the catchy short title at the beginning rather than at the end of the bill.

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<sup>15</sup> See, e.g., the replacement of the Institute for Democratic and Legislative Studies with the National Institute for Legislative Studies, both legislative support agencies for the National Assembly of Nigeria, by the National Institute for Legislative Studies Act, 2011 (Nigeria). The author believes that the same result could have been achieved, and a repeal avoided, simply by amending the Institute for Democratic and Legislative Studies Act, 2007 (Nigeria).

<sup>16</sup> Admittedly, however, there are situations where laws promulgated under previous military regimes cannot be allowed to stand.

<sup>17</sup> Numbering systems within a section are arbitrary, and the system used by the United States is at odds with that of Commonwealth countries, which use the following system: Subsections: (1), (2), (3), etc.; Paragraphs: (a), (b), (c), etc.; Subparagraphs: (i), (ii), (iii), etc.

<sup>18</sup> Treaties, e.g., use a similar system.

The placement of both sections accordingly represents a reversal in practice by the United States but one from which other countries may learn.

Surprisingly, Commonwealth countries tend to handle definition sections<sup>19</sup> poorly. These countries almost uniformly abhor numbering or designating their definitions, thereby making it virtually impossible to cross-reference an already defined term from one Act of Parliament to another. In addition, many African bills do not alphabetise terms within a definition section. An additional quirk is the use of the phrase "unless the context otherwise requires" to caveat the meanings given to definitions. What this phrase adds is anyone's guess. In a few bills, terms do not appear in definition sections at all but are buried within the text by the now-discredited practice of placing the parenthetical phrase "hereinafter referred to as\_\_" after the term intended to be defined. In long bills this may require a lengthy rummaging through text to locate the original reference.

Beginning in the 1980s, the United States Congress largely adopted an organisational style for its sections known as "tax style."<sup>20</sup> Under this style, virtually every whole sentence in a bill is preceded by a caption that describes the content of the sentence. The insertion of so many captions require the use of additional margins, with the result that fewer words are fitted to a page. When first told that I had to adopt this style, I cringed. It requires some extra work. But I soon came to see that, by forcing me to label each provision, "tax style" exposed gaps in my thinking and improved my drafting. More importantly, "tax style" greatly enhances the transparency and predictability of legislation and makes the legislation easier to research. Thus, "tax style" is our friend and represents a fertile area for the improvement of foreign legislation.

This leaves as the final drafting step the clear expression of the text, what I call "clarifying." Careful word choice, of course, is essential to avoid ambiguity and achieve precision. The rules for effective writing are not new,<sup>21</sup> are known worldwide, and I shall not repeat them here. I do want to highlight a trend and an issue, however.

Worldwide, drafters have been moving toward a plainer, more straightforward choice of words, no doubt in response to the "Plain English" movement. American drafters in recent years have substituted, for example, "that" or "the" for "such," "strike and insert" for "strike out and insert in lieu thereof," and "under" for "pursuant." For as

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<sup>19</sup> Also known as "interpretation" sections.

<sup>20</sup> "Tax style" is not the most attractive term in light of the complexity of tax law, but the drafter needs to overlook the label as the style is applicable to legislative text of any content.

<sup>21</sup> See, e.g., George Orwell *Politics and the English Language* (1946).

long as I can remember, words like "*Provided, That*,"<sup>22</sup> "said," "aforementioned," and "heretofore" have not been used. I always believed that I was drafting in "plain English". These substitutions and deletions should be made worldwide, where applicable.

But the question is how plain is "plain English?"<sup>23</sup> Does it require conversational phrasing such as the use of contractions and possessive apostrophes? Generally, I think the answer should be "no!"<sup>24</sup> The drafter should want to avoid any source of ambiguity and preserve a degree of solemnity in the law. The use of apostrophes also increases the risk that an easy clerical error will alter meaning. While this puts me at odds with several drafters in the United Kingdom<sup>25</sup> and Australia<sup>26</sup> and perhaps

elsewhere, I do firmly believe that the law should be expressed in a formal way, using proper English. I would not, for example, substitute "must" for "shall". This may put me on the wrong side of history, but I hope not. So, it remains to be seen whether the "plain English" movement will be a divisive or unifying force among drafters.

To summarise, "standardisation in drafting" is not the preserve of any one country's drafters but is an emerging consensus on best practices to which the United States can make an important contribution. "Standardisation" is a natural development in professional legislative drafting and, as the techniques, methods, and rules of professional drafting become widespread globally, it is inevitable that standardisation will also. This is so because best practices in legislative drafting are propelled by rule-of-law values. In a democracy, the standardisation of statutory writing must promote the values of transparency, accountability, predictability, enforceability, and constitutionality, and as our commitment to democracy deepens, our attachment to these values does also. Without these values, we write law without a compass and wear legislative shackles of our own making. In the words of the American Founding Father, Washington, at the time of the writing of the United States Constitution, "[l]et us raise a standard to which the wise and honest can repair."

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<sup>22</sup> "Provided, That" is still used in appropriations Acts of the United States over the objections of professional drafters.

<sup>23</sup> Section 3(3) of the Plain Writing Act of 2010 (5 U.S.C. 301 note) defines "plain writings" as "writing that is clear, concise, well-organised, and follows other best practices appropriate to the subject or field and intended audience."

<sup>24</sup> The author does acknowledge the value of possessive apostrophes in the rare sentence where repeated use of the same possessive cause's awkwardness, such as where gender-neutrality is sought.

<sup>25</sup> See, e.g., section 49 of the Anti-social Behaviour, Crime and Policing Act 2014 (U.K.).

<sup>26</sup> See, e.g., Parliament of Australia *Plain English Manual*.