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Drafting of legislation in compliance with model laws

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**INSTITUTE OF ADVANCED LEGAL STUDIES**  
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**DRAFTING OF LEGISLATION IN COMPLIANCE WITH MODEL LAWS**

**LLM IN ADVANCED LEGISLATIVE STUDIES: 2011-2012**

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## **DEDICATION**

I dedicate this paper to my son, Motlatsi Poloko, for your perseverance while I was away.

## **A. Introduction**

### *Abstract*

*Law making is an essential attribute of a state. Laws differ from one country to another and compliance with different legal rules may create problems. Uniformity of laws is an end in itself and its value lies in its practical benefits. The interest in the quality of legislative instruments is a major concern especially as regards the effectiveness of the national legislation.*

The proponents of globalisation have spearheaded drives for uniform laws and thus propagated model laws. These laws if not drafted in simple format may have effect on what is drafted at national level for those countries that choose to adopt them.

Model laws are aimed at harmonising legislation, improving current laws for resolving regulatory problems and tasks and bringing the laws closer to international standards of best practice. These laws are non-binding and are based on international principles of best standards which are recommended for use in national legislation. Model laws are often used as a means of achieving uniformity. Model laws have a quasi-legislative character and their status is unknown, inaccessible or not readily accessible.

International cooperation in the area of legislative drafting is challenging. Any change to the legislative initiative or legislative process has a direct bearing on the innermost workings of the state. Hence, drafting of legislation in compliance with model laws or standardised laws is

a setback in achieving effectiveness of the national legislation. The use of ready-made laws has the ability to promote regulatory quality, but not the overall legislative quality.

The paper will use Koen Muylle's criteria of assessing the quality of legislation in terms of its enforceability, consistency, comprehensibility, transparency, plainness, accessibility and clarity.<sup>1</sup> The paper aims to analyse and critique the challenges of drafting domestic legislation in compliance with model laws as regards the quality assurance of legislation and will use aviation draft model laws as a case study. It will further analyse the impact of model laws on the legislative process as regards their impact on the role of the significant players in the legislative process.

The purpose of standardising legal rules is to achieve conformity in the contents and quality of law across different countries.<sup>2</sup> It further ensures that there is consistency in the application, interpretation and enforcement of the law.<sup>3</sup> Conformity to all the above criteria's is difficult to achieve. Hence, it is on the basis of the above points that the paper aims to critically analyse how the drafting of domestic legislation in conformity with set standards impact on the drafting process as regards member state's obligations to expeditiously draft and implement domestic laws in an effort to respond to global crisis. The paper will also analyse and critique how the drafting of legislation using model laws and under immense pressure impact on the quality assurance of the legislative proposal. It also determines whether the use of model laws serve as a tool for enhancing the legislative process by reducing time which would otherwise be spent on drafting of complex and technical

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<sup>1</sup> Koen J. Muylle, 'Improving the Effectiveness of Parliamentary Procedure', *Statute Law Review*, (24), (2003),171.

<sup>2</sup> Katharina Pistor, 'Standardisation of law and its effect on developing countries', (Heinonline)107.

<sup>3</sup> Ibid.

legislation. The expectation as regards the use of standardised laws is that it accelerates the process of legal convergence and double the benefit of reducing the transaction costs for transnational investors and increasing the quality of legal institutions. The paper will also critically analyse how the use of set standards impact on the role that ought to be executed by the drafter in the drafting of legislation.

The paper uses Model laws set up by the International Civil Aviation Organisation, as a case study. I have chosen to use this example or case study, because ICAO as a quasi-legislative authority has the power, to promulgate standards and prescribe standards for governing of international aviation safety and obliging member states to implement these standards through their domestic laws. The work of ICAO provides a particularly interesting case study on how to react to unprecedented challenge that required a fast legislative response, involving not only many technical aspects but also had to apply globally. ICAO's reaction to the threat of terrorism provides an interesting example for effective law making.

We now live in a world which is more interdependent and increasingly more integrated and the legislative initiative has shifted. It is now significantly so within the ambit of both international and regional organisations. This prompts cross-cultural, legislative interaction as increasingly, international legal norms need to be implemented in, and aligned with, domestic laws. These organisations may take the legislative initiative, either by setting multi-lateral standards, drafting uniform codes or, in some cases enacting legislative provisions which nationals are required to transpose into their domestic law. There are perhaps dangers as well as advantages to this globalisation of legislative initiative, which are analysed in the later parts of this paper. Uniform solutions to legislative problems tend to lead to considerable



disruption when a uniform solution is replaced by another solution. Reaching uniform solutions may need compromise which in turn require rather open-textured drafting.<sup>4</sup> Perhaps the greatest weakness of the trend is its lack of democracy. It is a legislative process which may be far removed from those which it affects and in a sense negates trends towards bringing government closer to the people by way of regionalisation and devolution.<sup>5</sup> This lack of a democratic devolution may have other repercussions, thus those who draft the domestic law which responds to this globalisation of legislative initiative are generally unlikely to be involved in the international process.

The drafting of national legislation in compliance with Model laws is a setback in achieving effectiveness of domestic legislation. The term effectiveness appears to be elusive.<sup>6</sup> In the context of any legislation, effectiveness can only be reasonably measured against the goal which is pursued with the newly created rule. Key ingredients of effectiveness of new legislation, which aims at solving a global crisis, are not only the speediness of the legislative process, but also the binding nature of the rule in question.<sup>7</sup> Crisis requires effective legislation, both in terms of speedy creation and the promise of compliance.<sup>8</sup>

Law without compliance and enforcement is like poetry, it is pleasing to the ear, but has little to do with the practical world in which we live. The study of the efforts to achieve uniformity in international norms and compliance with international legal obligations reveals mixed success, even in areas where there is widespread consensus for the need to have international harmony. Thus, given the inherently sovereignty of the states, the heterogeneous levels of

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<sup>4</sup> Editorial 'The Globalisation of Legislation', *Statute Law Review*,(22)(2001),iv.

<sup>5</sup> *Ibid.*

<sup>6</sup> Stefan Kirchner, 'Effective Law Making in Times of Global Crisis',(Heinonline)275.

<sup>7</sup> *Ibid.*

<sup>8</sup> *Ibid*275.

economic ability and the diversity of political priorities, securing compliance with international obligations is rarely an effortless task.<sup>9</sup>

Commercial international aviation provides a useful case study of how world community seeks to achieve mutual self-interest by securing global harmony in law. The interplay between conventional international law, quasi-legal standards promulgated by international Organisations and national laws, regulations and procedures offers insights as to how complex international enterprises, such as Commercial Aviation, play on the world stage.<sup>10</sup>

Professor Michael Milde argues that the implementation of these laws by contracting states on a global level is a matter of grave concern and doubt.<sup>11</sup> The use of Model laws is a good example of possible limitations of compliance to conform national legislation to standards elaborated elsewhere while possibly facilitating international trade, also tends to reinforce 'law-giving' leadership of the drafting body, without assuring actual participation of the receiving states in the drafting process and without providing a link between the body in charge of asserting compliance with such standards.<sup>12</sup> The use of model laws as a means of technical assistance should be on quality of legislation rather than on world-wide or regional uniformity.<sup>13</sup> Thus, the compatibility of the new legislation with the national legal context is most important.

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<sup>9</sup> Paul Stephen Dempsey, Compliance and Enforcement in International Law: Achieving Global Uniformity in Aviation Safety,(Heinonline)3.

<sup>10</sup> *ibid.*

<sup>11</sup> Professor Michael Milde In Paul Dempsey, Compliance and Enforcement in International Law: Achieving Global Uniformity in Aviation Safety,(Heinonline)20.

<sup>12</sup> 'Uniform Law as means of Technical Assistance to Developing Countries',(Heinonline)71.

<sup>13</sup> *Ibid.*

The structure of this paper is as follows: **Part A** of the paper is Introduction and gives an overview of what Model laws entail and their impact on the drafting of national legislation. **Part B** discusses the problems of dependence on standardised rules with pre-existing legal order and will analyse that in terms of the following Quality Criteria: **1. Enforceability:** Lack of evaluation of the practicability of model laws in the national context impact on the quality assurance of domestic legislation. **2. Consistency:** It is crucial to ensure consistency in the language and terminology of model laws to the existing national legislation to enhance effectiveness of national legislation. **3. Comprehensibility:** Model law provisions are often convoluted and unclear, it is therefore crucial to ensure that transposition of model laws into domestic legislation uses language that will be understood in the national context. **4. Transparency:** Lack of consultation in the conceptualisation of model laws with policy implementer's impact on the quality assurance of the model laws when transposed into domestic legislation. **5. Plainness:** Model law provisions are often complex, detailed and technical, lack of drafting national legislation in a language that is easy to transpose and comprehend in the national context impact on quality of legislation. **6. Accessibility:** Those involved in the drafting and implementation of model laws at the national level are often not involved in the conceptualisation of model laws, this hamper on the feasibility and effectiveness of drafting national legislation. **7. Clarity:** Understanding and transparency enhance predictability of the law. Model laws are often drafted in convoluted language and their transposition into domestic legislation impact on the effectiveness of legislation. **Part C** of the paper is an analysis of the impact of model laws on the legislative drafting process and the quality control mechanisms available internally. It provides for an overview of the impact of model laws on the role played by legislative drafter and the Parliament in quality assurance of national legislation. It further provides an overview of implications of drafting in

compliance with international or regional obligations, such as time frame for compliance and the impact of draft model law instructions on the legislative process. **Part D** is conclusion and gives an overview of the impact of model laws on the drafting of quality national legislation. It also gives an overview of the pros and cons of model laws on the legislative process.

## **B. Impact of Model Laws on Quality of Legislation**

### **Analysis of Quality of Legislation**

Quality of legislation has become an increasing matter of social and political interest. This has been caused by broad concerns as to the complexity and lack of transparency of the decision-making process and the intrusiveness of national rules, which are criticised as inaccessible, unclear and unnecessarily inconsistent, to quote but a few. High quality legislation is necessary for the credibility of the legislator in a constitutional democracy.

The quality expectations are that the legislation must be clear, unambiguous, simple and precise.<sup>14</sup> These standards of quality legislation are effectively the pillars on which quality throughout the drafting process rests. The goal to achieve quality in use of model laws to draft national laws is inevitable and complex.

There are two aspects of the quality of legislation. Firstly, it concerns the substance of the law, which has to do more with the legislative policy and covers, the preparation of the new legislation and the assessment of existing legislation as regards the transposition and assessment of the proper application of such legislation.<sup>15</sup> The second aspect of quality of legislation entails the form of legislation (quality of legislative drafting) and how accessible it is to the public.<sup>16</sup> Hence, the paper will analyse how model laws impact on the quality of drafting domestic legislation and the quality assurance of the end product. The quality of

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<sup>14</sup> Varen Vanterpool, 'A Critical Look at Achieving Quality in Legislation', Eur. J.L. Reform, 16(2007)(Heinonline)195.

<sup>15</sup> Jean-Claude Piris, 'The Quality of Community Legislation: The View Point of the Council of Legal Service', In Kellermann and others, *Improving the Quality of Legislation in Europe*, (1998, Kluwer, The Hague)28.

<sup>16</sup> Ibid.

legislation is commonly attached to effectiveness.<sup>17</sup> Effectiveness is not limited to implementation, enforcement, impact and compliance, it may include both the legal norms and the following of such norms.<sup>18</sup> As our case study is to analyse the effectiveness of legislation drafted in compliance with aviation draft model laws, it is worthy to note that the quality of legislation has both a legal and an economic dimension. Such legislation will often be approached from either a legal or economic angle and may compromise on the quality assurance of the end product.

### **1.1. Enforceability**

Enforceability is a key ingredient of effective legislation.<sup>19</sup> A major element in the legislative process is to determine the effectiveness of proposed legislation.<sup>20</sup> Evaluation of the enforceability of legislation should be treated as an integral part of the law-making process.<sup>21</sup> In order to be effective, the rule of law requires that any regulatory rules be workable.<sup>22</sup> Thus rules must be feasible in both practical and economic terms. Member states are responsible for the enforcement of legal rules drafted in accordance with international obligations and the enforcement of such rules is dependent upon the existing national systems. A more comprehensive rule regarding the quality of rule-making applied in member states includes quality checks at the conception stage, of whether the rules envisaged are fit to be adequately enforced. Rules must be capable of being applied by those whom they concern, taking into account existing administrative and social structures.

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<sup>17</sup> Helen Xanthaki, 'On Transferability of Legislative Solutions: The Functionality Test', In *Drafting Legislation, A Modern Approach*, Constantin Stefanou and Helen Xanthaki (Ashgate Pub 2008)5.

<sup>18</sup> *Ibid*6.

<sup>19</sup> Kirchner (n 6)290.

<sup>20</sup> Alfred Kellermann, 'Guidelines on Quality of EU Legislation and Its Impact on Albania', *Eur. J. L. Reform* 183(2008),( Heinonline)198.

<sup>21</sup> *Ibid*199.

<sup>22</sup> J Paul Salembier, 'Designing Regulatory Systems: A Template for Regulatory Rule-Making', *Statute Law Review*, (23) (2002), 172.

The test for harmonisation of laws is the enforcement of the new law.<sup>23</sup> Even if it were possible to design a perfect law or to develop the best standards for a particular area of the law, the incorporation of the law into domestic legal system is not a guarantee for it to become effective.<sup>24</sup> Thus, the process of law making and the compatibility of the new rules with pre-existing ones as well as with given economic and political conditions is more important than the contents of the supplied rules.<sup>25</sup> Quality legislation must be easy to transpose and apply. It is crucial for those involved in the drafting of domestic legislation in compliance with model laws to ensure that the new law will be easy to transpose and fit within the existing national legal system. Assessment of enforceability of the new law is often disregarded, as legislation drafted in compliance with international obligation is drafted for purposes of compliance without taking into consideration the enforceability and practicality of the new law. This may have shortcomings as regards the enforceability of the new law, such as lack of the appropriate body or personnel and resources for the implementation of the new law. Draft model laws as transposed into domestic legislation should be integrated to form part of the already existing legal. It is worth noting that the provisions provided in the model laws may conflict with the existing legal system, hence calling for the recasting of the model provisions to accommodate them in the domestic legal system. It is also worth noting that because of the circumstances under which the domestic law is transposed and the technicality of the subject matter, the law is drafted and passed but fail the quality test of implementation as a result of foreign concepts introduced by the new law.

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<sup>23</sup> Pistor(n 2)106.

<sup>24</sup> Ibid107.

<sup>25</sup> Ibid.

In practice, those who implement and enforce the rules are often not involved in the development of draft model laws by international bodies. There is a need to ensure that community law is effective and properly implemented in the member states, a process to which ordinary people and businesses as well as administrators and courts actively contribute.<sup>26</sup> From the foregoing, it is explicit that there are inherent challenges in so far as the incorporation of the model laws into domestic legislation.

Section 37 of the SADC Draft Model law on Civil Aviation illustrates the workability of model laws at the domestic level, and it provides that:

The Director of Civil Aviation Authority shall have the power to assess violation of the Act and impose civil penalties prescribed in the regulations for such violation.....

The provision deals with the infringement notices as an alternative to criminal penalties, a legal concept which may not be enforceable in jurisdictions whereby the Public Prosecutions has the mandate to prosecute. It is imperative to note that the draft model law will introduce a new legal concept which will not only conflict with the already existing legal institutions, but will also be *ultra-vires* to the supreme law establishing the Public Prosecutions. Despite, the conflict with the already existing legal regime, the provision if incorporated in the domestic law will be difficult to implement.

The structuring of a legislative instrument that is legally effective and legally certain is an essential aspect of quality legislation. Legislative proposals should be subjected to careful

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<sup>26</sup> Piris(n 14)26.



analysis in relation to existing law, special responsibility areas and practicality.<sup>27</sup> It is therefore, crucial for the drafter to analyse rigorously the practical aspects of model laws and be satisfied that the scheme will work, and that the machinery proposed is practicable and that the legislation will be capable of enforcement.<sup>28</sup> Pistor provides that political factors should be taken seriously not only because they may delay or dwarf the standardisation, but because they have a strong impact on the reception of the standardised rule.<sup>29</sup> Thus, if rejected for political reasons, its unlikely that substantial efforts will be made to enforce it. It is therefore, worth noting that the drafting of legislation in compliance with model laws curtails the rigorous analysis of the legislative proposal as regards the practicability of the model law at the national level. Hence, evaluation of model laws should be treated as an essential tool in improving effectiveness of model laws at national levels. The efficacy of the harmonised rules depend to a large extend on the ability of different countries to enforce the rules.

## 1.2. Consistency

Consistency in legislative drafting is extremely important. Quality legislation simply cannot exist without consistency.<sup>30</sup> Quality legislation must be consistent with other existing legal rules, and must also be practical.<sup>31</sup> The workability of rules requires that any new rules that are introduced be consistent with existing rules, to avoid giving confused direction to participants that will decrease the efficacy of the regulatory system.<sup>32</sup> Drafting invariably involves issues relating to terminology and language. A careful balance is required in order to

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<sup>27</sup> GC Thornton, *Legislative Drafting*, (Butterworth's, London Dublin Edinburgh, 1996)133.

<sup>28</sup> Ibid138.

<sup>29</sup> Pistor(n 2)108.

<sup>30</sup> Lionel A. Levert, 'Work Methods and Processes in a Drafting Environment', *The Loophole*, 2011,36.

<sup>31</sup> Vanterpool(n 14)181.

<sup>32</sup> Salembier(n 20)173.

reconcile consistency in use (that the same word should always be used in the same meaning and the same meaning expressed with the same word).<sup>33</sup> Texts should be consistent and coherent as to the terminology used, their presentation and structuring. Without consistency the law lacks predictability.<sup>34</sup>

Differences in legislative styles be it domestically as a side effect of a ‘legislative silo’ or in transnational-domestic relations present challenges in the field of co-ordination of legislation as well as challenges in ensuring a domestic law fits when transnational or international law requires domestic implementation or transposition.<sup>35</sup> Drafting of national legislation in compliance with model laws is a setback in achieving the effectiveness of the domestic legislation in so far as consistency is concerned.

Uniform provisions are essential to save time in drafting and to improve quality through consistency. It is imperative for the drafter and the member states to ensure that the adoption and use of model laws in the drafting of national legislation does not compromise the quality of the national legislation, as use of model laws may impact on the consistency of the language and terminology of the national legislation. Problems of consistency and compatibility may arise where the rules and concepts used in the model law are also found in different national legislation.<sup>36</sup> This may cause misunderstandings and possible misinterpretation. Harmonisation of standards leaves ample room for ambiguity when

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<sup>33</sup> Gerhard Dannemann, ‘Drafting Principles of Existing European Contract Law’, In Constantin Stefanou and Helen Xanthaki, *Drafting Legislation: A Modern Approach*, (Ashgate Pub 2008),175.

<sup>34</sup> Xanthaki(n 17)11.

<sup>35</sup> Wim Voermans, ‘Styles of Legislation and their Effects’, *Statute Law Review*, (1)( 2011), 53.

<sup>36</sup> Alfred E. Kellermann, ‘Proposals for Improving the Quality of European and National Legislation’, *Eur.J. L. Reform*, (1999), (Heinonline)12.

translating them into specific domestic rules.<sup>37</sup> Foreign national concepts may be inconsistent with the pre-existing legal and social concepts in the law receiving country.<sup>38</sup> It is crucial to ensure that the model laws as transposed into domestic law are consistent and compatible with pre-existing laws to avoid misinterpretation or misunderstanding of the new legislation. Thus, without ensuring complimentary between the new law and the pre-existing legal institutions, harmonisation may distort the domestic legal framework. The standards should be fitted into the domestic legal system as their meaning and interpretation depends on the pre-existing rules. Consistency increases clarity and reduces the labour of the reader, while for parliamentary counsel it produces certainty by enabling them to rely on predictable outcomes from well-established and precedented approaches.<sup>39</sup> This is highly crucial in the drafting of legislation, as introducing new concepts may confuse the users of the statute book and create misunderstanding. Legislative drafters ought to be cautious when drafting legislation in compliance with draft model laws, as there is a potential danger to depart from the precedented traditional drafting style known by the readers, and as such introduce misinterpretation and misunderstanding. Consistency is principally to facilitate and speed interpretation and help understanding by the users, to avoid confusing the user, and to provide the user with something that is familiar and easy to navigate and to understand.<sup>40</sup>

Consistency in the language will promote consistency in the interpretation and recognise the need for coherency, both in language and substance in its components Acts. Consistency and conformity to the set standards are essential tools of effective legislation. It is worth noting that as regards the drafting of aviation legislation, the task is complex as the drafter has a duty

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<sup>37</sup> Pistor(n 2)106.

<sup>38</sup> Ibid.

<sup>39</sup> Stephen Laws, 'Consistency versus Innovation', *The Loophole*, (2009),1.

<sup>40</sup> Ibid.

to adhere to the internal standards such as the constitution, Interpretation Act just to name a few for purposes of consistency. Hence, when it comes to the task of drafting of laws done at international level, the task is too technical as there ought to be adherence to the internal set standards and ensure that there is no departure from the norm of drafting provisions. Since draft model laws have their own structures, system and terminology, they however lean heavily on the national legal systems, but the approach followed is of 'pick and choose'.<sup>41</sup> Hence, when transposed into domestic legislation, the result is often a blending of national legal concepts and notions into a composite rule system which is already not easily accessible or understandable for specialists in national law.<sup>42</sup> This may also hamper the substance of the rules, the terminology used and the techniques of drafting national legislation.

A complicating factor which relates more to the consistency of rule-making, results from the constraints imposed by the principle of vested powers. Thus, each system must be based upon the legal base granting the relevant competence. Decision making procedures often vary according to the legal base, which hence makes it impossible or undesirable for institutional reasons to use one legal base on different legal systems. Hence, this cause legislation to be inconsistent and incoherent when transposed into domestic legislation.

As regards the role of the drafter in the legislative process, the challenge is overwhelming, in that the freedom to choose the form and method may be greatly limited by the detailed nature of the model law. The downside of using harmonised standards in drafting of domestic legislation is the fact that they reduce the choices for domestic lawmakers in developing their

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<sup>41</sup> C.W.A. Timmermans, 'How to Improve the Quality of Community Legislation: The View Point of the European Commission', In Kellermann and others, *Improving the Quality of Legislation in Europe*, (1998, Kluwer, The Hague),41.

<sup>42</sup> Ibid.

own legal solutions, which might be a better fit for the problems they face, or for the institutional capabilities they have.<sup>43</sup> It is worth noting that the quality of a piece of legislation is not merely determined by its wording, rather by an assessment of its likely effects in combination with an economic analysis, in that high quality legislation is vital in exploiting the opportunities afforded by the international market.

Section 35 of the Draft model law on civil aviation Act illustrates how inconsistency can arise between model laws and existing legislation, it provides that:

The Director may make rules, orders, directives, circulars, notices regarding any matter which the Director may consider necessary in order that the objects of the Act may be achieved.

A careful forethought of every issue that is likely to impact upon the consistency and practicality of the proposal must be examined.<sup>44</sup> Quality in the substance of the law is therefore contingent on the extent of the analysis pursued by the drafter in addressing all relevant issues prior to commencement of drafting.<sup>45</sup> The model provision introduces inconsistency, as regards the power to make delegated legislation. It is worth noting that the provision is empowering the Director of Civil Aviation Authority to make delegated legislation, this would be *ultra-vires* the existing legal regime whereby the power to make delegated legislation is often delegated to the minister.

To illustrate further, section 49 provides that:

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<sup>43</sup> Pistor(n 2)106.

<sup>44</sup> Vanterpool(n 14)183.

<sup>45</sup> Ibid.

Any person who contravenes any provision of the Act or its regulations commits an offence, and upon conviction shall be liable to.....”

The provision can be confusing to those who are supposed to implement national legislation. Thus, if provisions which are supposed to attract penalties, have penalties stipulated under their respective clauses, it would then, not be ideal to have the general penalty clause. Perhaps, it would better if the provision is drafted by providing that “Any person who contravenes any provision of the Act or regulations to which no penalty is provided, is liable to a penalty of...” Also, it is worthy mentioning that if the provision is transposed in the national legislation where there are drafting techniques that should be adhered to by drafters, it could introduce inconsistency as far as the use of the word ‘conviction’ is concerned. Thus, some drafting conventions discourage drafting penalty clauses in that manner. Hence, if there is an oversight and the penalty clause is introduced in such manner, it would be inconsistent to the already existing legislation.

It is therefore crucial to ensure consistency in the drafting of national legislation in compliance with model laws. The language and the form of model laws must be consistent with the national existing legislation. Hence, to ensure that the new legislation drafted in compliance with model laws is consistent with existing legislation and harmoniously fits, it is crucial that the language and terminology is consistent. It is therefore crucial to ensure that the process of law-making using model laws is compatible with pre-existing legal system, as their meaning and interpretation depends on pre-existing rules.<sup>46</sup>

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<sup>46</sup> Pistor(n 2)99.

### 1.3. Comprehensibility

Model law provisions are often convoluted and unclear. The principle of the rule of law requires that rules must be drafted clearly enough to be understandable to participants, as a participant cannot be guided by an incomprehensible rule. Rules drafted in a complicated and convoluted fashion, while perhaps ultimately decipherable, require that participants seek expert help to interpret them, which raises the ultimate cost of regulatory compliance in economic terms.<sup>47</sup> If one is adopting legislation, they should enhance its quality and ensure that it is comprehensible.<sup>48</sup> It is worth noting that the supply of ready-made standards to domestic law makers does not facilitate the law making process, rather they actually impede the acquisition of knowledge.<sup>49</sup>

Rules are not free standing and can be understood only in the context of a given legal order. This is a serious constraint for legal transplantation because ‘the meaning of legal statements is a function of social norms, not of the speaker’s intention’. In other words, however perfectly designed a law that is supplied from the outside may be, its impact is ultimately determined by how it is understood by lawmakers, law enforcers, and law users at the receiving end.<sup>50</sup> Thus, assuming that a cognitive gap exists between any rule that is supplied and the understanding of that rule by its end-users, that gap will impede the effectiveness of the transplanted rule. It is therefore essential to ensure that the supplied rule is made simple, rather than detailed and complex.<sup>51</sup>

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<sup>47</sup> Salembier(n 20)172.

<sup>48</sup> Muylle(n 1)171.

<sup>49</sup> Pistor(n 2)112.

<sup>50</sup> Ibid.

<sup>51</sup> Ibid.

A different legislative style than that which the reader is familiar with can impede ready access to the text of the legislation and thus its comprehensibility, even where it is translated into domestic language.<sup>52</sup> It may compromise the integrity and coherence of national law.<sup>53</sup> Without ensuring complementarity between the new law and the pre-existing legal institutions, harmonisation may distort rather than improve the domestic legal framework, hence resulting in legislative proposals that are difficult to comprehend. The criterion of understanding in enacted statutes is a quality characteristic of the final process of the legislative process.<sup>54</sup> It is worth pointing out that despite the far reaching implications that result from drafting domestic legislation in compliance with set standards, it is worth noting that time plays a crucial role in the drafting of legislation. Hence, lack of time in the drafting of legislative proposals is detrimental to the quality assurance of the legislative proposal. Crabbe argues that legislative drafting is an exacting task that requires hours of intellectual concentration.<sup>55</sup> Hence, noting the fact that drafting of effective and comprehensible legislation requires hours of intellectual concentration, it can be argued then that the urgency to comply and draft legislation in haste for purposes of ensuring compliance with the ICAO obligations has far reaching consequences on the quality assurance of the national legislation. Driedger provides that as time is cut, the quality of the bill deteriorates.<sup>56</sup>

The ultimate user's demands of legislation are principally that it should be intelligible, and legally certain, that it is precise and clear. To draft a text that is legally certain, namely that is unambiguous and leaves as little room as possible for competing interpretations as to its

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<sup>52</sup> Voermans(n 35)40.

<sup>53</sup> Ibid.

<sup>54</sup> Peter Ziegler, 'The Status of Normalised Drafting: The Need for Theory Building and Empirical Verification', (Heinonline),352.

<sup>55</sup> VCRAC Crabbe, 'The Ethics of Legislative Drafting', *Commonwealth Law Bulletin*,(36)( 2010),13.

<sup>56</sup> E Driedger, *The Composition of Legislation*, (The Department of Justice, Ottawa),xix.



application and intelligibility or ease of understanding assumes secondary importance. Comprehensibility therefore plays an essential role in the effective implementation of national legislation. Language of model laws is too technical, hence, it can be too difficult to comprehend and translate into clear domestic legislation.

It is therefore essential for those involved in the drafting of new national legislation in compliance with model laws, to ensure that it is effective as regards its comprehensibility in the national context. Thus, however perfectly designed a law that is supplied from outside may be, its impact is ultimately determined by how it's understood by law makers, law enforcers and law users at the receiving end.

#### **1.4. Transparency**

Consultation affects the quality of legislation. Consultation is a key precondition for transparency in decision-making and, where undertaken, it should itself be implemented in accordance with highest transparency standards.<sup>57</sup> It is essential for the quality of legislation to uphold consultation with affected parties as a fundamental rule. In order to ensure the effectiveness of rule-making, a thorough consultation of interests involved must be carried out at an early stage of the decision-making.<sup>58</sup> Decisions which are taken before work starts on drafting of legislative text can have profound effect on the quality of the resulting legislation. Consultation with affected parties before a legislative proposal is finalised is important, not only in order to enhance the transparency and openness of the decision-making process, but also for the compliance, applicability and enforceability of the law.<sup>59</sup>

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<sup>57</sup> Kellermann(n 20)204.

<sup>58</sup> Timmermans(n 38)45.

<sup>59</sup> G Schader, In Kellermann and others, *Improving the Quality of Legislation in Europe*, (1998, Kluwer, The Hague),103.

Transparency must be seen as integral part of the drafting process and in particular as a prerequisite for maximising information flows from external sources.<sup>60</sup> Transparency also requires the routine use of consultation at all major intermediate phases of drafting.<sup>61</sup> The drafting process must be open, transparent, with full information to all interested parties, and consultation must be as wide as possible.<sup>62</sup> The legislative process must also be carefully planned and co-ordinated.

Quality in the form of the law concerns accessibility, namely transparency in the decision-making process and dissemination of the law.<sup>63</sup> Quality legislation must take into account the views of interested parties, all of which must be consulted before the proposed measure is put forward. Transparency means that the decisions of the executive and the legislature should be taken and implemented in line with defined rules and regulations.<sup>64</sup> It also means that information must be freely accessible and available to those who will be affected by such decisions and their implementation. Lack of transparency during the conceptualisation of model laws to interested parties is a bottleneck in ensuring that model laws are coherent with the whole body of legislation at the domestic level of member states.

Consultation is of particular utility in the evaluation of the effects of legislation, determining its real impact and possible side effects.<sup>65</sup> Transparency also entails the process of pre-

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<sup>60</sup> Sakari Arkio, 'Assessment of Draft Legislation in Finland', In Kellermann and others, *Improving the Quality of Legislation in Europe*, (1998, Kluwer, The Hague),228.

<sup>61</sup> Ibid.

<sup>62</sup> Helen Xanthaki, 'Transposition of EC Law for EU Approximation and Accession', *Eur. L.J. Reform* (89)2005, (Heinonline)106.

<sup>63</sup> Helen Xanthaki, 'The Slim Initiative', *Statute Law Review*, (22) (2001),114.

<sup>64</sup> Kadija Kabba, 'Legislatures in Modern States. The Role of the Legislature in Ensuring Good Governance is Inadequate', A case study of United Kingdom and Sierra-Leone, *EUR. J LRL*, 2010(Heinonline)429.

<sup>65</sup> Kellermann(n 20)203.

legislative consultation. The involvement of interest groups with knowledge and experience in the relevant field will supply the drafter of the legislation with crucial information that may otherwise not be available. It is worth noting that this is a deficiency when it comes to drafting of legislation in compliance with model laws, drafters are often not involved at an initial stage, and are only confronted during the drafting stage. Often, there is little time to analyse and scrutinise the model law in an effort of ensuring its compatibility with the existing legal system, this ultimately will impact on the quality assurance of the end product.

Consultation processes are essential in terms of democratic values.<sup>66</sup> Consultation should commence early and be open and be open and transparent. Participants must also receive adequate and specific information, which often significantly improves the quality of the responses received.<sup>67</sup> The drafting process must be open, transparent, with full information of legislative dossiers available to all interested parties and consultation must be as wide as possible.<sup>68</sup>

Involving stakeholders in the research of the legislative proposal fosters an increasingly democratic law-making process.<sup>69</sup> A transparent process is important in its own right and greatly beneficial for the intended primary user of the legislation. Though in a democratic state, it is vital to adhere to the principle of transparency for purposes of good governance, this is a challenge as regards the process of legislating for purposes of adherence to international obligations. There is often a dilemma as regards adherence to the principle

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<sup>66</sup> R. Deighton-Smith, 'Assessment of Draft Legislation', In Kellermann and others, *Improving the Quality of Legislation in Europe*, (1998, Kluwer, The Hague),LIII.

<sup>67</sup> IbidIV.

<sup>68</sup> Helen Xanthaki, 'The Problem of EU Legislation: What on Earth is Really Wrong', *Common Market Law Review*, (38) (2001),658.

<sup>69</sup> Ann Seidman and others, *Legislative Drafting for Democratic Social Change, A Manual for Drafters*,(Kluwer Law International),173.

transparency and adherence to the time frame of implementing the legislative proposal for purposes of compliance with the international obligations. Time plays a crucial role as regards the legislative process. However, there is often insufficient time to hold stakeholders meetings or consult with those to be affected by the legislation and lack of information to those involved in the drafting process. Thornton provides that, a thorough and wide-ranging discussion with the instructing officer is a necessary part of the undertaking stage of the process.<sup>70</sup> Such discussions not only gives the drafter an opportunity to clarify the points that are unclear but also provides a check on how successful the legislative proposals in the instructions have been communicated to the drafter.<sup>71</sup> Thornton further points out that the importance of consultation during the drafting process is not generally recognised.<sup>72</sup>

Consultation with those that are to be affected improves the quality and effectiveness of the decision making.<sup>73</sup> It is worth noting that even if there is pre-legislative consultation, it is normally on the policy rather than on the draft legislation and its practicalities of its application and enforcement. Hence, it is worth arguing that lack of consultation with those to be affected by the legislative proposal and the drafter impact negatively on the effectiveness of the legislative proposal drafted in compliance with model laws. The process of pre-legislative consultation with the experts in the field to be legislated upon and the drafter, allows for flow of ideas and the practicability of the legislative proposal. Hence, it is not startling that drafting of national legislation which has to adhere to set standards by international organisations impacts on the effectiveness of the legislative proposal as regards lack transparency prior to the commencement of the legislative process. Drafters of the

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<sup>70</sup> Thornton(n 27)132.

<sup>71</sup> Ibid.

<sup>72</sup> Ibid.

<sup>73</sup> Editorial, 'Pre-Legislative Consultation', *Statute Law Review*, (1993),xv.

legislation at the national level are not involved in the legislative initiative, and as such this has far reaching implications on the quality assurance of the national legislation drafted in accordance with model laws. Even if consultation takes place, the process is curtailed, by lack of well thought-out policy. Pistor argues that the perfect construction of the law by legal experts for wide dissemination can deprive the law makers and law enforcers in the receiving countries of knowledge of living law, which is context specific.<sup>74</sup> Hence, model laws or the supply ready made rules sterilise the process of law-making.

Information about the existence of a norm and its contents is a prerequisite for any impact of the law beyond a shelf life. External consultation plays a role in maintaining the technical quality of legislation.<sup>75</sup> Pre-legislative consultation with the drafter by those involved in the policy formulation is an essential tool for effective legislation. Crabbe provides that conferences with departmental officials will make it possible to iron out areas of difficulty, as the parliamentary counsel will ensure that matters overlooked are dealt with, so that as the Bill is drafted it does not reflect the wishes and aspirations of the sponsors, but will be a workable piece of legislation for the benefit of the whole society.<sup>76</sup> Pre-legislative consultation with the drafter and the affected parties is therefore crucial and will ultimately improve the understanding and the credibility of actions by governments and prevent far too frequent amendments once the legislation is enacted.

It is essential for those involved in drafting of domestic legislation in compliance with model laws, and interested parties to be consulted during the legislative process, to be able to test the feasibility of the model law and contribute to a better and more effective implementation of

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<sup>74</sup> Pistor(n 2)99.

<sup>75</sup> Kellermann(n 20)204.

<sup>76</sup> Crabbe(n 55)17.

domestic legislation. In order to ensure the effectiveness of rule-making, a thorough consultation of interests involved must be carried out at an early stage of the decision-making. The effectiveness of rules adopted must also be assessed *ex post* to allow for abrogation or adoption where necessary.<sup>77</sup> Involvement of the drafter is likely to produce a draft more quickly and more in harmony with the existing legislation. As has been mentioned, it is worth noting that the supply of model laws can deprive the law makers in the receiving country of knowledge of living law, which is context specific. The process of consulting the drafter and other interested parties during the drafting process domestic legislation in compliance with model laws is essential as it renders feedback on the suitability and overall workability of the legislation. Hence, the process of consultation and scrutiny is a definitive contributing factor towards the attainment of quality legislation.

### **1.5. Plainness**

The use of plain language means the deferral of the language that is complicated, technical or convoluted in favour of plain, clear and ordinary language for its intended audience. Plain language is a tool for clarity, precision and unambiguity.<sup>78</sup> Plain language contributes to clarity and therefore serves effectiveness in drafting.<sup>79</sup> Drafting of legislation in plain language is an essential tool for achieving effectiveness of the legislative instrument. Acts of Parliament should be drafted in simple and accessible language in order to achieve the effectiveness of the legislation.<sup>80</sup> There are challenges in the attainment of simplicity of legislation due to globalisation, as the adoption of foreign words and expressions introduce

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<sup>77</sup> Timmermanns(n 38)45.

<sup>78</sup> Xanthaki(n 17)12.

<sup>79</sup> Ibid13.

<sup>80</sup> Muylle(n 1)171.

unnecessary and superfluous words and expressions which result in an increase in vagueness, ambiguity and verbosity among others.<sup>81</sup>

Rules drafted vaguely or ambiguously inevitably lead to disputes in their meaning, requiring the interpretive intervention of the courts, all of which decreases the efficiency of the regulatory system.<sup>82</sup> Often complex, detailed and technical language is used in legislative drafting and such language is increasingly recognised as obstructing plainness and adding to the expense of implementation.<sup>83</sup> It is worth noting that the language used in model laws is often too technical and complex. This a great challenge that confronts those involved in the drafting of domestic legislation. The drafter has to strive for plainness when drafting legislation, and avoid possibilities of introducing ambiguity when reducing the technical language of the model law. Plain language when used appropriately is a very effective tool.<sup>84</sup> The language of the legislative text and its intelligibility for the readers and users is one of the principal features by which quality legislation is judged.<sup>85</sup>

The use of model laws is to ensure uniformity in the application, interpretation and implementation of legislation. It is however, worth noting that model laws as artificial products have not been tested in any legal system. Therefore, judges and other law enforcers in different jurisdictions lack a common point of reference to interpret those concepts and this increases uncertainty for the end users of the law. However, where the model law is based on an existing national model, the national legal system may be used as a reference point for

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<sup>81</sup> Frederick Ruhindi, 'The Need for Simplicity in Legislation and Challenges in its Attainment', *The Loophole* 2009,4.

<sup>82</sup> Salembier(n 20)173.

<sup>83</sup> Voermans(n 35)46.

<sup>84</sup> Brian Hunt, 'Plain Language in Legislative Drafting, An Achievable Objective or Laudable Ideal', *Statute Law Review*, 24(2) (2003),112.

<sup>85</sup> Vanterpool(n 14)191.

further clarifications.<sup>86</sup> However, there are challenges for those involved in the drafting domestic legislation which has to adhere to model laws. Use of plain language in drafting domestic legislation in compliance with the model laws is likely to increase the incidence of vagueness and ambiguity, a consequence which drafters cannot allow to occur.<sup>87</sup> Legislation drafted in wide and general terms is likely to give rise to different interpretation and inevitable challenge.<sup>88</sup> At the other extreme, the more one tries to be exhaustive, the more vulnerable the legislation will be to omissions and potential challenges.<sup>89</sup> So achieving a healthy balance between the two extremes presents a great challenge to any legislative drafter.

Clear and simple legislation helps businesses and citizens to comply with the law without imposing excessive burdens and facilitates the task of authorities who have to enforce it.<sup>90</sup> It is worth noting that the challenge of drafting using model laws is a setback especially if the subject matter is technical and complex like aviation. The choice of words is dependent on the subject area. Thus, if model laws are couched in convoluted language, it is inevitable for domestic legislation to be in clear and simple language. Hence, it is crucial for those involved in the conceptualisation and creation of model laws, to commit as much energy to the pedestrian exercise of domestic incorporation as they do to the more alluring task of drafting new international models.<sup>91</sup> Hence, efforts to simple legislation lead to better results, namely efficiency.

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<sup>86</sup> Pistor(n 2)110.

<sup>87</sup> Hunt(n 79)116.

<sup>88</sup> Ibid.

<sup>89</sup> Ibid.

<sup>90</sup> Xanthaki(n 68)655.

<sup>91</sup> Kent Anderson, 'Testing the Model Soft Law Approach to International Harmonisation: A Case Study Examining UNCITRAL Model Law on Cross-Border Insolvency', (Heinonline),23.



The language of the legislation and on ‘getting it right’, will assist in improving the overall quality of the statute book.<sup>92</sup> Language that is clear entails the use of words and sentence structures that are simple, concise, containing no unnecessary elements, and unambiguity.<sup>93</sup>

Plain language will help to expose errors, inconsistencies and ambiguities inherent in model laws, as errors are harder to find in dense, convoluted prose.<sup>94</sup> Errors are more easily discerned when sentences are shorter and texts broken down into more easily comprehensible units.<sup>95</sup> To illustrate, section 31(3) of the Draft Model Law on Civil Aviation Act illustrate lack of simplicity, it provides that:

An investigation of an accident or incident involving:

(a) civil aircraft occurring within Military sites in the territory of the state of the Authority shall be joint responsibility of:

(i) the Minister and the Military with respect to the power to investigate or arrange by contact or otherwise for the investigation of, accidents or incidents involving civil aircraft registered by the Authority, and for the purpose of determining the facts, conditions and circumstances relating to the accident or incident and the probable cause thereof;

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<sup>92</sup> DR Rick Bigwood, *The Statute: Making and Meaning*, (Wellington LexisNexis 2004),90.

<sup>93</sup> Vanterpool(n14)188 .

<sup>94</sup> Peter Butt, ‘Modern Legal Drafting’, *Statute Law Review*, (23) (2002), 22.

<sup>95</sup> *Ibid.*

(ii) the Authority with respect to taking any corrective action intended to prevent similar accidents or incidents in the future based on the findings of the accident or incident investigations authorised under this section;

(b) civil aircraft involved in an accident or incident with a military aircraft in the territory of the state of the Authority or within the military site shall be the joint responsibility of the Authority and the military with respect to taking any corrective action intended to prevent similar accidents or incidents in the future based .....

(c) an aircraft of the armed forces of any foreign state occurring in the territory of the state of the Authority shall be the responsibility of the Military.

Such a complicated long clause may not only be difficult to understand, but also quite complex to translate. An overzealous attempt at precision may result in redundancy and verbosity.<sup>96</sup> The sole aim of plain language drafting<sup>96</sup> is to render the text more comprehensible without changing its meaning, that aim is not always realisable as the conversion of model texts into plain language often has the unintended effect of changing the meaning of legislation.<sup>97</sup> Redrafting the model provision by compressing what might be complex concepts into a shorter provision, may lead to uncertainty and difficulties of interpretation.

It is therefore essential to ensure that model laws are drafted in clear language to ensure easy of transposition into the domestic legal system. Plain language is also effective in exposing

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<sup>96</sup> Hunt(n 79)117.

<sup>97</sup> Brian Hunt, 'Plain Language in Legislative Drafting: Is it Really the Answer?', *Statute Law Review*,(23) (2002), 34.

poor or inadequately considered policy. Thus, if the subject matter is technical, there is no escape from using technical or complex language in drafting of domestic legislation.

### **1.6. Accessibility**

Access to legislation is a key element of the rule of law. Drafting of legislation in compliance with model laws is a bottleneck in achieving the effectiveness of domestic legislation as regards accessibility of legislation. The accessibility of legislation is a two-fold concept, one aspect is the transparency of the decision making procedure leading up to the adoption of a new piece of legislation and the other on how to improve the dissemination of existing legislation and its accessibility.<sup>98</sup> Accessibility of legislation amounts to more than just the readability and comprehensibility of the legislative text.<sup>99</sup> The overall accessibility of legislation is also determined by the way it's formally and informally communicated. It is worth noting that in the context of the legislative process, accessibility goes beyond the issue of ability to obtain the law, but whether the intended users of the legislation will be able to understand it once it is implemented.<sup>100</sup> Muylle provides that Acts of parliament are difficult to apply, worded in obscure terms, too technical and complex and hence incomprehensible and inaccessible to citizens.<sup>101</sup>

Drafters play a vital role as regards ensuring access to legislation to the end users and those intended to implement it. However, it is worth noting that the task of ensuring accessibility of legislation to citizens to legislation drafted in compliance with model laws is a challenge. The

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<sup>98</sup> Jean-Claude Piris, (n 25)31. Provides that community legislation is the fruit of, at times, carefully crafted compromises between the various national positions, generally in technical fields. It does not differ greatly from national legislation, which likewise grows from compromises struck firstly between the ministries involved and then within government and parliament and sometimes even regional bodies.

<sup>99</sup> Voermans(n 35)49.

<sup>100</sup> Daniel Greenberg, 'Access to Legislation-Legislative Counsel's Role', *The Loophole*, (2009),5.

<sup>101</sup> Muylle(n 1)171.

readability and comprehensibility of aviation legislation drafted by international experts is too technical for a lay person to comprehend. In the quest of striving for effective legislation as regards accessibility, the drafter has to strike a balance of drafting legislation in clear and simple terms and ensuring that there is no room for misinterpretation when reducing the complexity of the model law. Harmonisation of standards leaves ample room for ambiguity when translating them into specific domestic rules. As such in a quest to ensure that the law is accessible and drafted in a way that will be easily understood, there is a potential danger of even introducing more complexity by introducing new legal concepts. Drafters therefore have a role in ensuring that the intended legislative proposal fits harmoniously well into the existing legal system, as regards consistency in the use of terminology to ensure that there is no room for ambiguity or misinterpretation.

It is worth noting that in an effort of striving to ensure accessibility of legislation to citizens, a lot of time and resources is spent on untangling the complex language in model law to ensure that it harmoniously fits in the existing legal system. This is a setback, in that despite all the efforts and expertise, the domestic legislation will still suffer some flaws, due to lack of knowledge in the area and the pressure to respond to the international calls. It is worth noting lack of accessibility of the model laws to those involved in the drafting process of domestic legislation is a major setback. Thus, it is crucial for the drafters to be involved at an earlier stage and advice on the feasibility of model laws at the national level. Hence, involving them only during the drafting stage when the model laws have been approved comes with resistance when it comes to recasting and making changes to the provisions in the model laws.

It is therefore crucial for those involved in the drafting of national legislation to have access to draft model laws prior to drafting of domestic legislation. Transparency and accessibility in the procedure and the publication of drafts are criteria that have to be shaped according to the concrete institutional context. Access to draft model laws will enhance the drafting of quality of domestic legislation, it will offer those involved in the transposition of draft model laws and law enforcers an opportunity to evaluate the effectiveness of the model law at the national level.

### **1.7. Clarity**

Clarity is an important aspect in legislative drafting. It helps to eliminate ambiguity and vagueness.<sup>102</sup> Clarity or clearness is defined as the state or quality of being clear and easily perceived or understood.<sup>103</sup> It depends on the proper selection of words, on their arrangement and on the construction of words. Clarity in the language of the law enhances understanding and transparency of legislation.<sup>104</sup> Without clarity, the law lacks predictability. Xanthaki provides that democratic states seeking to induce transformation require that the law is understood and followed by common people. Thus, clear law will cut high costs to inaccessible law related to enforcement, application and interpretation of texts whose meaning is under doubt.<sup>105</sup> The rule of law demands that, as much as possible, people should know in advance what the law demands of them, more specifically markets impose a similar imperative, for without predictability entrepreneurs are less likely to invest.<sup>106</sup> This is more apparent in the context of our case study relating to the drafting of aviation legislation which is not only meant for combating terrorism, but to also foster a secure international and

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<sup>102</sup> Crabbe(n 76)19.

<sup>103</sup> Xanthaki(n 17)9.

<sup>104</sup> Ibid.

<sup>105</sup> Xanthaki(n 17)11.

<sup>106</sup> Seidmanns(n 69)255.

regional business. Hence, it is crucial that the legislation is clear and precise for purposes of ensuring ease of understanding by the users. Clarity includes the use of plain language and the avoidance of too many cross-references and of political statements without legislative character.<sup>107</sup> Martineau argues that forms often use arcane language, compound expressions, and redundant legal phrases. It is worth noting that model laws are often convoluted with long sentences and statements that lack legislative character. Use of vague and not well-defined notions will jeopardise the drafting process and even complicate enforcement of legislation.

Unclear drafting refers to the nature of the decision-making. Model laws are often a product of intergovernmental negotiation and to obtain compromises, artful wording is used to conceal diverging positions.<sup>108</sup> Hence, transposition of such convoluted language into domestic legislation will present great challenges to the readability of legislation. The intelligibility of accurately articulated legislation is therefore an essential quality criterion. A law created wholly of words and technical phrases will probably be precise, but not clear so as to be capable of being understood by the non-expert.<sup>109</sup> Thornton provides that clarity, in the legislative context, requires simplicity and precision and that the solution to clear and precise legislation lies in the compromise between the precision of the technical language and the ready comprehensibility of the ordinary use of words. The tension between complexity of material and simplicity of expression must be recognised and a reasonable balance achieved. It is therefore, crucial to ensure that the language and terminology used in the domestic

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<sup>107</sup> Xanthaki(n 68)659.

<sup>108</sup> Timmermanns(n 38)41.

<sup>109</sup> F Capelli, In Kellermann and others, *Improving the Quality of Legislation in Europe*, (1998, Kluwer, The Hague),130.

legislation drafted in compliance with model laws entails the use of sentence structures that are simple, concise and unambiguous.

### **C. Analysis of Impact of Model Laws on the Legislative Drafting Process**

Quality control systems alone will do little to improve the quality of legislation. It is the quality of those involved in the legislative process that plays a vital role.<sup>110</sup> The internal procedures within member states play a key role in the quality-control of domestic legislation. In pursuit of quality in legislation, it must be emphasised that there are many players who must contribute to this achievement throughout the legislative process.<sup>111</sup> There is no doubt that the drafter and the parliamentarians play the most significant role in the testing and scrutiny of the feasibility of model laws in the national context and they are a key component in the quality control process. It is noteworthy that drafting of legislation in compliance with draft model laws impact on the role of the drafter and of parliament, to draft and pass laws that meet the quality criteria analysed in Part B. This part seeks to analyse the impact of draft model laws on the legislative process, which ultimately impact on the quality assurance of the legislative proposal in the national context.

#### **1.1. The Role of a Drafter**

The responsibility of ensuring high quality legislation lies in the hands of the drafters themselves.<sup>112</sup> They are the guardians of the statute book.<sup>113</sup> They are experts. They have (or should have) the last word, when it comes to drafting techniques, terminology, structure of a Bill etc. Effectiveness can be viewed as the drafter's contribution to the efficacy of the drafted legislation.<sup>114</sup> The common concept of quality in legislation, with effectiveness as its flagship, is promoted by drafters around the world.<sup>115</sup> Drafters play a vital role as regards the

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<sup>110</sup> Kellermann(n 36)29.

<sup>111</sup> Vanterpool(n 14)173.

<sup>112</sup> Levert(n 30)36.

<sup>113</sup> Ibid.

<sup>114</sup> Xanthaki(n 17)5.

<sup>115</sup> Ibid17.



drafting of legally effective and clearly expressed legislation that best meet the instructor's policy.<sup>116</sup>

A central skill for a drafter is to be able to draft in way that is harmonious with the rest of the statute book and therefore minimise the risk of a successful challenge of legislation based on unintentional variations in word choice or structure.<sup>117</sup> There is need for more and more original legislative drafting.<sup>118</sup> Drafter's must be technically, professionally and maturely equipped to respond to the new challenges that confront their respective countries. Crabbe provides that, there are no model problems and that there can never be model solutions, he further provides that:

“A competent parliamentary counsel does not need a model law. The need is to draft the Bill to solve the problem at hand which may be cultural, economic, political, social or otherwise, not reliance on models which turn out on proper examination, to be intended for other situations not germane to those at hand”.<sup>119</sup>

Quality of legislation depends in a large measure on the contribution of the drafter and the processes followed to develop, consult, enact and review the proposal.<sup>120</sup> It is worth noting that as much as drafter's contribution improves the quality assurance of legislation, it is without doubt that the process of drafting effective national legislation can be thwarted by use draft model laws. Thus, model laws may have far reaching consequences on the effectiveness of the end product. This holds true in that, drafting of legislation using draft bills drafted

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<sup>116</sup> Stephen Argument, 'Legislative Counsel and Pre-Legislative Scrutiny', *The Loophole*, (2010),62.

<sup>117</sup> Sandra C Markman, 'Training of Legislative Counsel: Learning to draft without Nellie', *Commonwealth Law Bulletin* (36)2010, 31.

<sup>118</sup> Crabbe(n 65)22.

<sup>119</sup> *Ibid.*

<sup>120</sup> Driedger(n 56)xxiv.

elsewhere and under stringent conditions have far reaching implications on the quality of the assurance of the end product.

The identification of effectiveness as a common value of drafters leads to the acknowledgement of a common concept of in the definition of quality in legislation, not only in the EU, but in the Common wealth and beyond.<sup>121</sup> It is imperative to analyse the role of the drafter in the drafting process and give an overview of how compliance with set model laws may conflict with the role of the drafter. Markman argues that legislative drafters do not have the primary responsibility for the efficiency and effectiveness of the legislative they are asked to draft and they should be conscious of the workability of what they create. The drafter's role is not to merely translate drafting instructions into legislative language, but to also produce a legislative instrument that is fit for purpose.<sup>122</sup> Bowman provides that the drafter's main and most valuable function is to subject policy ideas to a rigorous intellectual analysis.<sup>123</sup> Hence, it can be argued that in the context of using draft model laws, the drafter's ability to rigorously analyse the proposal will be hindered by instructions presented in the form draft model laws. Thus, in terms of drafting legislation, it is crucial for the drafter to understand and analyse the legislative proposal and determine whether it will be an effective legislative proposal fit for the purpose. It can therefore be argued that the compliance with model laws is a setback in the drafting of effective national legislation, in that any enactment should be analysed for its compatibility with existing laws.<sup>124</sup> Crabbe provides that legislative drafting does not consist in copying precedents nor in polishing what others have drafted.<sup>125</sup>

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<sup>121</sup> Xanthaki(n 17)17.

<sup>122</sup> Sandra Markman, 'It's Just your Imagination, Some Thoughts on the Role of Parliamentary Counsel in Ensuring Practicability of Legislative Instruments', *The Loophole*, (2011),1.

<sup>123</sup> Geoffrey Bowman, 'Why is There a Parliamentary Counsel Office', *Statute Law Review* (2005-2006),70.

<sup>124</sup> DR Miers & AC Page, *Legislation*, (London, Sweet & Maxwell, 1982),79.

<sup>125</sup> VCRAC Crabbe, *Legislative Drafting*, (Cavendish Pub, Limited, 1993),14.

The Report on the use of uniform or model laws as technical assistance provides that use of technical assistance in the form of model laws should be on quality of legislation rather than on world-wide or regional uniformity.<sup>126</sup>

It is worth noting that compliance to international organisations by member states as regards ensuring that national laws are in conformity with the prescribed model laws is normally done under haste circumstances. Thus, states are normally put under immense pressure to ensure compliance by drafting and implementing the laws in conformity with the set model laws. It is on the basis of this circumstances that the paper seeks to analyse and critique how the drafting of legislation under such circumstances impact on the role of the drafter in the quest of drafting high quality legislation and the role of the legislature in the effective scrutiny of legislation and passing of effective and enforceable legislation.

It is without doubt that the quality of the drafting of the legislative proposal rests on the competence of the drafter. There are dilemmas that confront drafters in the drafting of national legislation in compliance with model laws, such as standardised drafting or use of drafting techniques. These drafting techniques are a means of improving the quality of domestic legislation. Drafting techniques include the use guidelines, manuals and checklist as means of improving the quality of legislation. They are essential for purposes of clarity, uniformity and transparency of the law and consequently for legal certainty, which is one main elements of the rule of law.<sup>127</sup> Drafters are often obliged to adhere to set drafting traditions, which have been fine-tuned many a time by their legislatures and it can be argued that they instil the hands-on knowledge and long-standing traditions of their mature

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<sup>126</sup> 'Uniform Laws as a means of Technical Assistance', (n 12)71.

<sup>127</sup> Jan H. van Kreveld, 'The Main Elements of a General Policy on Legislative Quality: Dutch Experience', In Kellermann, and others, *Improving the Quality of Legislation in Europe*, (1998, Kluwer, The Hague),97.

legislatures.<sup>128</sup> They serve as tools for both the drafter and the end user of the statute book as regards consistency in the form and representation of legislation. Hence, the issue that could baffle the drafter when drafting national legislation is to strike a balance in use of the drafting techniques and drafting in compliance with model laws.

The use of model laws or supply of ready-made rules may impact on quality criteria such as consistency, drafting style and terminology. Hence, to provide high-quality services, any organisation needs effective processes.<sup>129</sup> Ensuring such high quality of domestic legislation, a lot of time would be spent on ensuring that the foreign concepts in model laws fit harmoniously into the existing domestic legal system and conform to the internal set standards of quality control mechanisms. However, it could be argued that the translation of the model law into the language of the domestic legal system could open room for introducing some inconsistency as regards interpretation of the new legal concept. Hence, Serge argues that uniform provisions are essential to save time in drafting and to improve the quality through consistency and clarity.<sup>130</sup>

The drafter plays a crucial role in the preparation of a legislative draft that will be tested and scrutinised for its quality and must be drafted so that it is simple, clear and accessible to its audience.<sup>131</sup>

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<sup>128</sup> Xanthaki(n 68)667.

<sup>129</sup> Serge(n 103)6.

<sup>130</sup> Ibid.

<sup>131</sup> Vanterpool(n 14 )173.

### 1.1.1. Draft Model Law Instructions

As a general rule, drafters should work on the basis of drafting instructions and not on the basis of a document that is already in the form of a Bill.<sup>132</sup> Thus, when working from the instructions that are prepared in the form of a Bill, drafter's waste precious time deconstructing the draft in order to properly understand its underlying policy and to make sure the policy is complete and workable, and then reconstructs the Bill according to accepted drafting standards.<sup>133</sup> A drafter, who makes use of a form, which includes use of draft model laws, must first overcome the 'psychological barrier to critical judgement'.<sup>134</sup> Thus, the drafter should be aware of this barrier not only when reviewing the form to be used in drafting but also in reviewing another lawyer's draft that appears to be on a pre-printed form. Forms can be helpful tools, but present basic problems.<sup>135</sup>

Draft Bill instructions confuse the role of the instructor and the drafter is almost certain to raise difficulties to construction and mislead.<sup>136</sup> They slow down the process because the drafter has to penetrate behind the words of the draft to gain the knowledge of the relevant facts and divine the intent.<sup>137</sup> Draft bill instructions do not tell the drafter what the problem is, and how it is to be remedied, but tells the drafter how the author thinks of an unstated problem can be remedied. Drafting of a Bill needs to be approached as a unique exercise and that a drafter's job is to carry out a ruthless analysis.<sup>138</sup> It is worth noting that before the drafter can commence the drafting of legislation, they must receive reasonably complete

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<sup>132</sup> Levert(n 30)34.

<sup>133</sup> Ibid.

<sup>134</sup> Robert J Martineau and Michael B Salerno, *Legal, Legislative and Rule Drafting in Plain English*, (Thomson West),28.

<sup>135</sup> Ibid.

<sup>136</sup> Thornton(n 27)130.

<sup>137</sup> ibid.

<sup>138</sup> Geoffrey Bowman, 'The Art of Legislative Drafting' Eur. J.L. Reform (2005),(Heinonline)4.

legislative proposal from the sponsors. Drafting instructions that come in the form of draft bills have far reaching consequences as regards the role of the drafter and the quality assurance of the legislation. Thus, the supply of ready-made standards to domestic law makers does not facilitate the legislative process, rather they impede the acquisition of knowledge.<sup>139</sup> The drafter who is presented with a draft measure would not be discharging their duties, even if they assumed that a proper legislative plan had been conceived and that proper provisions had been chosen to carry it out.<sup>140</sup> The drafter cannot confine themselves merely to a superficial examination of the outward form of the measure and drafting does not consist in polishing what others have written.<sup>141</sup> Thus, law does not operate in a vacuum, hence, use of draft model law instructions should take cognisance of the cultural, economic and political conditions in which it is intended to operate.<sup>142</sup> Thus, the drafter's job involves much more than simply putting other people's ideas and words into the form of legislative instruments.<sup>143</sup>

Instructions that come in the form of model laws, without adequate information on the problem to be solved, impede the drafting of quality legislation, as the drafter will spend more time trying to understand the foreign concept and how it can be fitted in the existing legal system.

Model laws are often drafted by international experts who may not be familiar with the legal system of the receiving states. This imposes a tasking exercise on those drafting domestic legislation, to ensure that the model law is harmoniously fitted into the existing domestic law.

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<sup>139</sup> Pistor(n 2)102.

<sup>140</sup> Driedger(n 56)xix.

<sup>141</sup> Ibid.

<sup>142</sup> Crabbe(n 125)12.

<sup>143</sup> Markman(n 117)28.

Robinson argues that drafting does not consist in polishing what others have written, that even assuming that a perfect bill is submitted, the drafter must still subject it to the complete drafting process.<sup>144</sup>

From the foregoing, it is explicit that the use of model laws in the legislative drafting imposes a lot of challenges as regards ensuring their practical enforceability in the law-receiving country. The structure of the draft is likely to be confused and the language is likely to be inconsistent.<sup>145</sup> Standardisation reduces the choices of law makers in developing their own legal solutions and it leaves ample room for ambiguity when translating them into specific domestic rules. The process of law-making, the compatibility of new rules with pre-existing ones as well as with the economic and political conditions is more important than the contents of the supplied rules. Without ensuring complementariness between the new law and the pre-existing legal institutions, harmonisation may distort rather than improve the domestic legal framework, as the language of the draft model is likely to be inconsistent with the existing domestic legal framework.

It is therefore, essential for the comprehensible drafting instructions, which will ultimately assist in the production of quality legislation that is clear, simple and intelligible.<sup>146</sup>

### **1.1.2. Urgency to Comply with International Obligations**

One of the most important factors for good law making is time.<sup>147</sup> Adequate opportunity must be given to all those involved in preparing legislation to properly complete a full range of the

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<sup>144</sup> William Robinson, 'Polishing what others have written: The Role of the European Commission's Legal Revisers in drafting European Community Legislation', *The Loophole*, (2007),1.

<sup>145</sup> Thornton(n 27)130.

<sup>146</sup> Vanterpool(n 14)175.

tasks required to produce a bill. Thus, it is essential that legislation is designed and written according to a precisely delineated and rigorously implemented procedure.<sup>148</sup> Time is an essential tool in the preparation of legislation, it is therefore crucial for those involved in the drafting of legislation to have ample opportunity to rigorously analyse the practicability of model laws at the national level.

The structuring of a legislative instrument that is legally effective and certain is an essential aspect of quality of legislation.<sup>149</sup> This aspect is deemed crucial for the proper implementation of the legal rules by the authorities and also for the better understanding by the public of such rules.<sup>150</sup> However, the drafter's quest of structuring legally effective legislative instruments is inevitable when it comes to the drafting of domestic legislation within set time frames. Time is the enemy<sup>151</sup> when it comes to the drafting of legislation which has to conform to international obligations. The pressure to get a Bill introduced and enacted is often intense. Inevitably, the quality of the measure can be affected. There is no time to do a 'perfect job'. Thus, in the rush to pass and implement legislation, the quality of the legislation is compromised.

Drafting of legislation requires hours of concentrated intellectual labour. It is worth noting that drafting of national legislation for purposes of compliance with international obligations is often done under unrealistic circumstances, and this may impact on the quality assurance of

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<sup>147</sup> Serge Lortie, 'Providing Technical Assistance on Law Drafting', *Statute Law Review*, 31(1),(2010),5.

<sup>148</sup> *Ibid.*

<sup>149</sup> Vanterpool(n 14)186.

<sup>150</sup> *Ibid.*

<sup>151</sup> Zione Ntaba on 'Pre-Legislative Scrutiny', In Constantin Stefanou and Helen Xanthaki, *Drafting Legislation A Modern Approach*. 'The work is urgent. It has to be done by at any cost during the limited time available. When a draft is cumbersome with hundreds of provisions requiring careful, patient and detailed scrutiny, time is the enemy. All this involves time and concentration. There is often a constant battle between urgency and limited time.'



the legislative proposal. Member states often have an obligation to enact and implement domestic legislation within a given time frame. There is no doubt that, such hasty decisions impact on the quality assurance of model laws and inevitably on the drafting of high-quality domestic legislation. As time is cut, the quality of the legislative proposal deteriorates.<sup>152</sup> Muylle provides that, Acts of Parliament should be clear and comprehensible, that modern legislation does not meet these objectives due to the fact that they are drafted in haste and as such impacting on their editorial quality.<sup>153</sup> The Renton Report also provides that the pressure under which legislative counsel work may affect the quality of their output. It notes that by the time instructions are received there is no room for the drafter to take decisions which will make for simplicity and clarity, as the pressure to get things done is usually great.<sup>154</sup>

Late decision-making often causes implementing problems, partly because the national administration becomes saddled with an implementation term which is too short and partly because the legal subjects have too little time to respond to the new situation. Noting the fact that model laws are often complex as regards their language, it is crucial for the drafter to critically analyse and understand them for translation into clear and simple language. The urgent need by Governments to have the legislation drafted and implemented within the set time frame has a negative impact on the drafting process. Thus the drafter's aspirations to draft legally effective legislation will be thwarted by the Governments aspirations to have the legislation drafted under unrealistic conditions. Hence, this creates a dilemma for the drafter as regards striking a balance between quality assurance of the legislative product and the need to adhere to the sponsoring ministries aspirations. The drafter has a prime interest in

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<sup>152</sup> Ibid.

<sup>153</sup> Muylle(n 1)171.

<sup>154</sup> Renton Committee Report, *The Preparation of Legislation*, (HL 1975),43.

maintaining the quality of the end product<sup>155</sup> as custodian of the statute book.<sup>156</sup> The drafter has to ensure that the bill is drafted in clear unambiguous language and that it integrates with existing legislation. Drafting of national legislation for purposes of compliance with international obligations and fulfilling the aspirations of the government has far reaching consequences on the effectiveness of the legislation as it results in legislation which is not legally effective.<sup>157</sup>

It is worth noting that the use of model laws is useful in the later stages of drafting process. They are often used when time is of essence, but they deprive the drafting team of the wealth of innovative solutions.

Finally, lack of time hampers the drafting process as there is little time to gain an understanding of the practicability of model laws on the receiving states. Thornton provides that drafting of legislation must be subjected to the five stages of drafting. It is without doubt that the pressure to comply with regional or international obligations would hinder the drafter from complying with the five stages of drafting. Thus, there is little time to understand and analyse the practicality of the legislative proposal and to assess if the legislation is capable of enforcement. There is no time to design and compose an effective legislative proposal, as the process requires a considerable degree of mental discipline, which is often lacking due to the fact that instructions come in 'laydrafts' which often lack an in-depth comprehensive analysis of their feasibility in the receiving countries. There is lack of time to subject model laws to a rigorous intellectual analysis. Late decision making also causes implementing problems,

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<sup>155</sup> Colin Wilson, 'Managing Increasing Government's Expectations with Respect to Legislation While Maintaining Quality', *The Loophole*, (2009),22.

<sup>156</sup> Stephen Laws, 'Role of Legislative Counsel, Wordsmith or Counsel', *The Loophole*, (2008),43.

<sup>157</sup> Miers & Page(n 124)82.

because the national administration becomes saddled with an implementing term which is too short and partly because the legal subjects have too little time to respond to the new situation.<sup>158</sup>

## **1.2. Role of Parliament in the Legislative Process**

Lack of pre-legislative scrutiny by legislative counsel will result in parliament being presented with 'half baked' bills.<sup>159</sup> The contribution of scrutiny to quality legislation is undeniable. Scrutiny of Bills by Parliament is an essential quality control measure for effective legislation. The quality or effectiveness of legislation can be measured by the effectiveness of the parliamentary procedures. To prevent legislative defects, the intervention of national representatives is therefore essential. Karpen argues that the political pressures push for drafts through the parliamentary machinery, lacking time to deliberate and work on the details, legal terms, transparency etc, as a result many laws are inaccessible for citizens and even experts.<sup>160</sup> Drafting of legislation to meet the aspirations of government has far reaching consequences on the scrutiny of legislation by parliament. Parliament requires sufficient time to thoroughly scrutinise the bills, but they often lack the time.<sup>161</sup> Demands for immediate legislative action deprive Parliament of its valuable role to critically analyse legislative proposals brought before them. Muylle argues that one way of improving effectiveness of the legislative process is to ensure that bills examined by parliament are well written. Language of domestic legislation drafted in compliance with model laws will hamper

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<sup>158</sup> WRJ Van Den Henden, In Kellermann and others, *Improving the Quality of Legislation in Europe*, (1998, Kluwer, The Hague),69.

<sup>159</sup> Andrew Kennon, Analysis- 'Pre-legislative Scrutiny', *Public Law*, (2004),477.

<sup>160</sup> Ulrich Karpen, 'Improving Democratic Development by Better Regulation', In Constantin Stefanou and Helen Xanthaki, *Drafting Legislation A Modern Approach*, (Ashgate 2008),157.

<sup>161</sup> Muylle(n 1)171.

the role of parliament in enhancing quality legislation, thus, in adopting legislation, they should enhance its quality.<sup>162</sup>

It is crucial for the elected representatives of states to be able to discuss, in the open and upstream in the process, national legislation. They must be in a position to draw attention to the foreseeable difficulties as regards enforcement and practicability of the legislative proposal. Thus, parliamentarians are in a position to convey a message that is elaborate, well-balanced, comprehensive and relevant to the interests of the nation and context specific. This will offer them an opportunity to evaluate the effectiveness of domestic legislation drafted in accordance with model laws and ensure that it is context specific and harmoniously fit into the domestic legal system. An effective parliament is therefore crucial in voicing the concerns of the electorate by ensuring that the executive can justify each measure that it proposes to legislate upon.<sup>163</sup> It is without doubt that their role can be curtailed by over elaborate, vague and technical legislation and the lack of time to vigorously scrutinise the legislative instruments drafted in compliance with model laws. Excessive legislative output is also a bottleneck in quality assurance of legislation by parliament. This, will ultimately impact on the parliamentarians role of a quality control check of bills. Though, it can be argued that parliamentarians lack the expertise, it is then crucial to ensure that they are presented with well drafted legislative proposals, in order for them to enhance its quality.<sup>164</sup> Thus, Parliamentarians can influence the law-making process and improve the overall quality of

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<sup>162</sup> Ibid.

<sup>163</sup> Denis Kibirige Kawooya, 'Act of Parliament: The Role of Parliament in the Legislative Process', Eur. L. J. Reform, (12) (2010), (Heinonline),45.

<sup>164</sup> Muylle(n 1)173.

legislation. The enactment of quality legislation must be construed by Parliament as a democratic responsibility, and by the people as democratic right.<sup>165</sup>

Hence, it is crucial for parliamentarians to fully scrutinise a given legislative proposal with the view to securing the greatest quality in the legislation drafted in accordance with model laws.

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<sup>165</sup> Vanterpool(n 14)202.

#### **D. Conclusion/Recommendations**

The objective of this paper was to assess the impact of model laws on the quality assurance of domestic legislation. While good arguments can be found to justify the standardisation of laws, the likelihood of them to have any beneficial impact hinges on several factors. The standards need to be fitted into the domestic legal system. However, they are not freestanding and their meaning and interpretation depends on pre-existing rules.

Model laws have a quasi-legislative character, and their status is virtually unknown, inaccessible or not readily accessible. Model legislative texts should in accordance with fundamental quality requirements be clear, consistent, comprehensible, accessible, accurate, effective and enforceable.<sup>166</sup>

A statute is the ultimate instrument of state intervention.<sup>167</sup> Any change to the legislative process has a direct impact on the innermost workings of the state, hence, this makes international cooperation in the area of legislative drafting all the more challenging.<sup>168</sup> The problem with uniformity is that even the most perfect human drafting process cannot make objectively 'right' decisions.<sup>169</sup> In order to achieve uniformity of law, some states adopt the model law as close verbatim as possible, which has potential effects. Verbatim adoption increases the proposals potential effect on state enactments because legislatures may adopt some provisions of uniform proposals simply to maintain uniformity rather than because of

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<sup>166</sup> Kellermann(n 36)11.

<sup>167</sup> Robert C. Bergeron, 'Globalisation of Dialogue on the Legislative Process', *Statute Law Review* (23) (2002), 89.

<sup>168</sup> *Ibid.*

<sup>169</sup> Larry Ribstein & Bruce Kobayashi, 'Uniform Laws, Model Laws & Limited Liability Companies', (Heinonline),951.

the preferences of local legislators and interest groups.<sup>170</sup> Model laws prevent potential ‘herding’ by state legislators, where they ignore their private information and blindly follow leader states.<sup>171</sup> This has a negative impact on the effectiveness of domestic legislation, as member states will blindly adopt model laws in their domestic legal framework, without taking into cognisance the enforceability or workability of the model law in the domestic legal system. This ultimately results in hasty adoption of model laws into domestic laws which do not meet the fundamental quality criteria analysed in Part B.

The key perspective is that legislation is a basic tool of government and that carefully and expertly crafted legislation is fundamental to a properly functioning democracy.<sup>172</sup> Model laws are a setback in achieving effectively crafted legislation. Uniformity may impose a ‘dull blanket’ and stifle experimentation.<sup>173</sup> Thus, the supplies of ready-made standards impede the acquisition of knowledge and sterilises the process of law making.<sup>174</sup> Seeking to harmonise the laws of multiple political states in any one particular area of international business transactions is a daunting enough task, given the wide range of legal approaches that the states may have taken in any area.<sup>175</sup> For legislatures and drafters, the point that needs to be reiterated is that ineloquently incorporating even relatively minor divergences from the model law will prevent realising the benefits of harmonisation.<sup>176</sup> It is important that adoption is not undertaken simply by unreflectively jumping on an international bandwagon without considering past domestic experiences, thus endorsing a model law with only a single or no

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<sup>170</sup> Ibid.

<sup>171</sup> Ibid960.

<sup>172</sup> Arkio(n 53)227.

<sup>173</sup> John Goldring, ‘Globalisation, National Sovereignty and the Harmonisation of Laws’,(Heinonline),1.

<sup>174</sup> Pistor(n 2)102.

<sup>175</sup> A. Brooke Overby, ‘UNCITRAL Model Law on Electronic Commerce’, (Heinonline),220.

<sup>176</sup> Anderson(n 91)23.

changes does little to promote their own interests.<sup>177</sup> In an effort to improve the quality of legislation, it is crucial that adoption of model laws is based on experience and of correcting the errors revealed by practice. It is vital for states to benchmark from others the implications of adopting model laws and take into cognisance the quality criterions of such laws at the national level.

The criterion variable is a quality characteristic of the final product of the legislative product. As international law brings states more closely in terms of globalisation, it is crucial for the states and those involved in the legislative process to ensure the quest for quality assurance of their domestic legislation, rather than compromise on the quality of domestic legislation for purposes of enhancing international trade and recognition. Model law provisions should be clear, consistent, comprehensible, accessible, transparent, effective and enforceable, for ease of transposition into domestic legislation of receiving states. In practice, the achievement of these quality criterions at national level is unattainable, as the freedom to choose the form and method may be greatly limited by the detailed nature of the model law.<sup>178</sup> It's commonly known that in legal matter, 'the devil lies in the details', these details are not included in the standards, the laws to be enacted by different countries, however, will need to be much more specific. The perfect construction of law by legal experts for wide dissemination can deprive lawmakers and the law enforcers in the receiving countries of knowledge of living law which is context specific.<sup>179</sup> Thus, use of model laws may deprive the drafting team of the wealth of innovative solutions that can be identified through the analysis of legal systems further afield.

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<sup>177</sup> Ibid23.

<sup>178</sup> Kellermann(n 36)12.

<sup>179</sup> Pistor(n 2)99.



The quality criteria analysed in Part B of the paper are essential tools for the effectiveness of any legislative proposal. It is crucial for member states to analyse these elements as quality control mechanisms, before embarking on any legislative project. A failure to take into cognisance of such tools and procedures may result in defective and ill-considered decisions, which will ultimately impact on the overall quality assurance of the statute book. It is worth noting that this is not a matter of careful drafting, but of assessing the possible effects of the model laws and the adequacy or receptivity of existing structures to have the rules properly implemented, applied and enforced. Investigation into the implications and application of an enactment, whether prospective or retrospective can be a factor in improving the effectiveness and efficiency of our law production.<sup>180</sup> It will help to realise political decisions and to balance costs and benefit of legal solutions. Evaluation of legislation can't bring about the 'perfect law' but it can improve the quality of legislation, which is something that is lacking as regards the drafting of domestic legislation in compliance with model laws.

From the analysis of transposition of model laws into domestic legal system, it is explicit that the differences in legislative styles present challenges in the field of co-ordination of legislation as well as challenges in ensuring that a model law is compatible with the domestic legal system. The differences in legislative style in accessibility, transparency, enforceability, all point to potential best practice to achieve greater legislative effectiveness.

Despite the challenges imposed model laws, they can serve as tools and offer guidance for the novice legislative drafter as a starting point. If the model law is well drafted, it can be used as a template for the actual draft, requiring that it be supplemented and tailored to the particular

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<sup>180</sup> Heinz Schaffer, 'Evaluation and Assessment of Legal Effects Procedure Towards a More Rational and Responsible Law Making Process', *Statute Law Review*, (22) (2001),152.

drafting task. Despite the deprivation of knowledge and level of critical analysis imposed by the use of model laws, they can save the drafter considerable time in more technical and new areas of the law and when time is of essence and as such can expedite the drafting process.

In a world where states are drawing nearer under the influence of globalisation and the subsequent rise of international and transnational law, domestic legislation and its distinctive features are no longer isolated and difficult to access. Model laws can also be appraised as regards their efficiency by states that lack the legislative resources to draft and analyse complex legislation.

Despite the constraints that face the drafter as regards the use of model laws, the drafter still has a duty to devise legislative solutions that are effective and legally permissible. Though, draft model Bills may serve as a guide and useful tool to a drafter, it is worth mentioning that it is essential for the drafter to ensure that the model law as transposed into domestic laws falls within the ambit of the existing legal regime and does not conflict with the constitution and other existing legislation. Bergeron argues that the ideal legislative process for any given country is the one that best implements that country's constitution.<sup>181</sup>

For domestic laws to be effective, they need to have local constituencies with a strong interest and understanding of the laws. This is the prerequisite for the new law to become part of the continuous process of legal change, without which the formal legal system will remain largely irrelevant. Legal standards developed at supranational level are typically distilled from legal practice in individual countries without their merits having being tested in a functioning legal system. The generality of standards opens the possibility to subscribe to

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<sup>181</sup> Bergeron(n 167)90.

them without necessarily implementing them.<sup>182</sup> Member states will simply comply and have the legislation in place for purposes of avoiding sanctions. Hence, this will defeat the whole purpose of enacting model laws. It is also worth noting that time plays an essential role as regards the effectiveness of the transposition of model laws into domestic legislation. Drafting of national legislation within set-time frames by states signatories, is a setback in drafting quality national legislation that meets all the quality criterions.

The concerns for quality legislation should apply at both international and national level and there should be a mutual connection in strive for quality legislation. The nature of model laws will continue to make it difficult to draft high quality domestic legislation. The increasing quantity of legislation at national level, will increasingly make it difficult to assess the effects of the new legislation on the existing body of law, however well drafted the new law appears to be. A high standard legislation is a precondition for credible government action. Hence, those involved in the conceptualisation of model laws should ensure their quality, which should inevitably be applied at the national level. If model laws are badly drafted, inevitably the quality of national legislation will be affected. As our case study focused on the potential implications of drafting national legislation in compliance with model laws, it is essential that economic desirability and political feasibility are brought down to the legal standards, which in turn have to fit within the margins of the existing legal system. Thus, fitting the new law into system of the statutes will reveal damage to other statutes.<sup>183</sup> Legitimacy, consistency and effectiveness are in this respect key-words. These are essential tools that reduce uncertainty and contribute to improving the substantive quality of legislation.

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<sup>182</sup> Pistor(n 2)102.

<sup>183</sup> Jack Stark, *The Art of the Statute*, (Littleton, Colorado, 1996),18.

Making legislative drafting a professional endeavour and more importantly, distancing the process from politics, has enormous benefits in terms of impact on the effectiveness and quality of legislative activity.<sup>184</sup> The best strategy to counter down the challenges of standardisation is to ensure that countries have the capacity to enforce the newly adopted law. Thus, the key to success for any given country will be the establishment of effective legal institutions. Instead of developing legal standards by legal experts, law makers around the world should be given access to alternative legal solutions found in living legal systems. This would enable domestic agents to identify problems and find solutions that are adequate and potentially effective given the institutional constraints their country faces.<sup>185</sup>

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<sup>184</sup> Bergeron(n 167)86.

<sup>185</sup> Pistor(n 2)127.

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