



CLEAR LEGISLATION

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*What is clearly thought out is clearly expressed,
And the words to say it come easily.*
Boileau

INTRODUCTION

Clarity and intelligibility

"Clear" means easy to understand or intelligible. It also means unequivocal or unambiguous. For a document to be described as clear, it must not only be easy for its audience to understand but also convey the same message to those who read it. Order, neatness and precision are related concepts. What is orderly, neat and precise is also clear. On the other hand, disorder and imprecision lead to confusion and ambiguity.

Clarity and simplicity

Clarity is not the same thing as simplicity. A text is not necessarily clear because the subject it describes is simple; conversely, a text that deals with a complex subject is not automatically hard to understand. Consequently, a distinction must be made between clarity on one hand and simplicity or complexity on the other. The former concept relates to the presentation of a document's subject matter, while the latter ones refer to the nature of the subject matter itself. The fact that the reality we all experience is complex does not excuse the enactment of legislation that is hard to understand. On the other hand, it is not possible to guarantee that legislation, no matter how well drafted, will be easily understood by all members of the public in every area subject to it. All that can be aimed at is to

ensure that the legislative message, given the nature of its subject matter, is clear and intelligible to all the persons it addresses.

Subjective nature of the concept of clarity

The degree of a statement's clarity can be assessed in terms of formal criteria such as presentation, forms of communication, drafting and the logical expression of the ideas. But at the same time, it also depends on the assessment made by the intended recipient. The clarity of a document therefore depends on a combination of objective and subjective aspects. The concept of clarity is subjective to the extent that it depends on the knowledge, abilities, experiences and state of mind of the person whom the information addresses. Thus, a legal provision will seem perfectly clear to the person who drafted it, but a lawyer wanting to use it in support of a legal argument may well find it less clear, and the lawyer's client may not understand its meaning at all. For the judge who will have to interpret the provision in order to decide its applicability, this task is made all the more easy according to the extent that the legislature's intentions have been clearly expressed.

The subjective nature of clarity thus makes it impossible to argue absolutely that one document is clear and another is not. A statement can be described as clear only if it is easily comprehensible to the circle of individuals it addresses. The members of this circle must be able to understand with their current level of knowledge of the subject in question the meaning of the information in the form in which it is proffered. If the reader has to acquire new knowledge of the subject or turn to the statement's author or a specialist for explanations, it is no longer possible to speak of the information's clarity or ease of comprehension.

Ignorance of the law is no excuse

The well-known adage according to which ignorance of the law is no excuse implies that all members of the public have a right and a concomitant duty: the right to be informed of and to examine the rules that are in effect and the duty to obtain information on the content of these rules in order to comply with them. For this right to be exercised, legislation must not only be made accessible to the public but also be expressed in a manner that is sufficiently clear for it to be properly understood by every individual it affects.

Since a state's legal system affects all the areas of activity in which citizens, institutions and authorities are involved, very few individuals, if any at all, will be able to acquire an adequate knowledge of all the law's subjects so as to understand all the norms in effect. As in other professions, this situation naturally leads to specialisation among lawyers in the various branches of the law. We must therefore recognise that, in practice, it is not possible to produce legislation that as a whole is comprehensible to everyone, although this is an ideal that, as far as possible, we should attempt to attain.

In a democratic state, in which the legislature is formed from the people, the standards of clarity and intelligibility for enactments are high. Members of the public must be able to fully appreciate the contents and effects of proposed legislation and form an opinion before voting on it in a referendum or deciding whether to request that the issue be put to the popular vote. To the extent that enactments are not sufficiently comprehensible in themselves, it is essential that all necessary explanations be provided so that members of the public can make their democratic choices and exercise their democratic rights in full knowledge of the facts. Accordingly, it is unsatisfactory to enact legislation that is accessible only to parliamentarians and lawyers.

Clarity of legislation and clarity of enactments

This text considers the question of clarity in legislative messages from two points of view: legislation considered as a whole and particular enactments assessed on an individual basis.

The clarity of legislation as a legal institution depends on the clarity of the individual enactments that it comprises. A high-quality structure cannot be built with poor-quality bricks. The quantity of enactments, the system used to organise them and the connections made between them all play decisive roles, just as the way in which bricks are arranged and cemented into place contributes to the quality of the building.

The thoughts set out below are based on the legislation with which I am familiar, that of the Canton of Berne.² As they are very general in nature, they may well be widely applicable to the legislative activity of other countries.

HIERARCHY OF ENACTMENTS

General comments

A state's legal system includes various types of enactments that are divided into various levels, thus forming a hierarchy of norms. Each state has its own system and terminology to refer to the different types of normative documents. In terms of the clarity of legislation, the individual types of classification used are not important; rather, it is the overall classification at various legislative levels that requires our attention.

The normative levels are dictated by the structure of the authorities empowered to legislate and by the division of legislative powers among them. It is essential to create a simple and precise hierarchy of enactments that enables the maintenance of order in a state's legislation. The criteria for classifying enactments at the appropriate levels must be clear and easy to apply in order to avoid disputes about the correct level of regulation or, more widely, the designation of jurisdictional authority when a legislative project is undertaken. Legislation that is well organised can easily be viewed as a whole and is satisfying to consult. Accordingly, systematic organisation is one of the conditions that legislation must meet in order to be clear and accessible to the public.

Example of the legislation of the Canton of Berne

In the legislation of the Canton of Berne, the hierarchy of enactments extends from statements of principle to those of detail. The three main levels are the Constitution, laws and ordinances.

The Constitution is the basic law of the state. It is subject to mandatory popular vote. Then come the laws, which contain the rules of law in the form of general and abstract provisions. The fundamental and major principles of the law of the Canton must necessarily take the form of a law.³ The laws are enacted by the legislature and may be submitted to a referendum.⁴ At the bottom of the scale are ordinances, which are legislative enactments issued by the government. They contain operating provisions that make it possible to apply the rules set out in the laws. They may also include standards that, because of their scope, should appear in a

law but which the government is empowered to issue as a result of a delegation of authority expressly included in the law.

CHARACTERISTICS OF RULES OF LAW

General and abstract norms

All general and abstract standards that impose duties or confer rights on legal and physical persons, and also those that govern the organisation, jurisdiction or duties of the authorities or prescribe a procedure, are rules of law. Rules of law have various distinctive characteristics. They are general and abstract, in that they apply to an indefinite number of cases of the same kind and are addressed to an undetermined number of individuals. In this way they differ from administrative rulings, which are individual and concrete.⁵ Rules of law are also neither descriptive nor informative but directive in nature; this important point is sometimes forgotten by those responsible for drafting legislation. Legal norms are imposed on the basis of the power conferred on the legislative authority and are applied by the executive branch, with the use of force if necessary. They impose, authorise or prohibit acts or forms of conduct. They define procedures and organisations. Any provision that does not satisfy these imperatives does not have the status of a rule of law and should not therefore be included in an enactment.

Blueprint provisions

It often happens that legislation contains provisions of a programmatic nature. These provisions are norms in which the legislature sets out the intentions underlying the regulation it has imposed. Rules of this kind should be used only with great restraint because they do not have the characteristics of legal norms described above. However, they can be highly useful if employed with great care. In particular, they are used to define a restrictive legislative framework for use by the authorities empowered to promulgate legal norms at a lower level, such as provisions governing application or enforcement. These authorities are then required to make regulations to the desired effect while complying with the limits imposed by the higher law.

Definitions

The provisions that define concepts or terms do not fully satisfy the conditions set out earlier. For this reason, I consider that they should be used only where terms or concepts are used in a sense that differs either from their everyday meaning or the specialised language from which they are derived (legal, technical, economic and so on) or if their everyday meaning is vague. Subject to these conditions, the use of legal definitions is necessary for a full understanding of the enactment in question.

SIZE OF LEGISLATION AND NORMATIVE BURDEN

Need for an overall view of legislation

Even in the case of legislation that is well organised, it is necessary to ensure that it does not grow to the point where the overall view is lost, a situation that is described as legislative inflation. The more extensive and dense legislation is, the more difficult it becomes to understand and the greater the potential risk that it will include inconsistencies if not outright contradictions, with the result that certain parts of the legislation may become unclear. The legislature must therefore retain an overall view of its work in order to avoid losing control over it. To this end, legislative activity should be restricted to that which is strictly necessary. It is, of course, impossible to quantify an appropriate level of legislative activity in the abstract. The political authorities should be responsible for determining a suitable volume of legislation.

Normative density

The quantity of norms enacted depends on the normative density, which is determined by the legislative authority. By normative density I mean the degree of detail present in the regulations. Ordinarily, the normative density will vary according to the legislative level, with the lowest levels – that of ordinances – having the highest density. However, there are certain limits that this density should not exceed. In my view, the size of the legislation and its normative density must be determined in the light of two criteria: the public interest and the persuasive power of the norms.

Public interest test

By "public interest" I mean the general concern for making our society a community in which individuals can live and work in harmony and accordingly flourish. In a democratic system, which is designed to protect the fundamental freedoms of all individuals, the public interest is the factor that justifies restrictions of individual freedom to a reasonable extent for the benefit of the freedom of others. In accordance with this principle, legal norms should be imposed only if they serve the public interest. I am aware that the meaning of this concept and its implications vary considerably according to different political opinions. The imposition of norms under the pretext of serving the public interest may be used to justify both massive intervention by the state and strict limitations on its activities. In my view, the public interest requires the state to concentrate its activities in those areas that require the use of public power. The public interest requires individuals to be accountable for their acts and the consequences of those acts for their fellow citizens. Moreover, the legislature must bear this imperative in mind when it decides on the rules of conduct governing members of society.

Persuasive power of norms

The message conveyed by a legal norm will be easier for members of the public to understand if they are convinced that it is useful and justified. The legislature must make every effort to ensure that it does not impose prescriptions that litigants will regard as pointless, quibbling, unreasonable or prohibitive. If it fails to obey this imperative, the legislature could not only impede the communication of the legislative message to its audience but also overload the legislation itself, with the result that its normative density is increased and its overall view is limited.

To sum up, the legislature should issue:

- all the rules that are required for life in the community, but only such rules, because they serve the public interest;
- simple, common sense rules, because only such rules will convince the public of their usefulness and reasonableness.

TYPOGRAPHICAL PRESENTATION

A legislative enactment must be presented in a pleasant, well-spaced format. It is necessary to avoid a situation where an enactment's appearance puts off the reader. The choice of fonts is very important, as is the size of the paper. I have noticed on many occasions that I have read the same document in different ways according to whether it had been produced on an office printer (A4 format, Arial 11 points font) or by the firm that publishes the legislation of the Canton of Berne (A5 format, Univers 8.5 points font). Imperfections such as spelling mistakes, incorrect word divisions, a missing title or a defective character style have often been strikingly obvious in the document produced by the printing firm but entirely unnoticeable, even though they were identical, in the document taken from the printer. I ascribe this phenomenon to the fact that a smaller format and font offer a broader overall view of the document at a single glance. Furthermore, the characters in the Univers fonts have the distinctive feature of being quite separate from one another, with better spacing of the text as a result. The use of bold characters and italics for titles, combined with adequate spacing, makes it a simple matter to see the document's main topics and their organisation.

DESIGN OF LEGISLATION

The quality of legislation is influenced by the care that drafters take in its overall design. This matter is particularly relevant to the clarity test of legislation. Design refers to the fundamental factors that drafters must consider in determining the appropriate means of attaining the goal of a legislative mandate while respecting the approaches it imposes on them. These factors comprise:

- defining in detail the subject matter to be regulated and the results to be obtained;
- analysing the existing legal situation and considering what changes, if any, need to be made to laws already in effect: can current legislation simply be amended? or is it necessary to prepare new legislation? or are both operations required?
- determining the appropriate legislative level and normative density.

This procedure resembles the work done by an engineer in designing the plans for a building. His or her mandate indicates with a certain degree of

precision the type of building, its size, its shape and its site. The engineer's mission is to give the project concrete form by integrating the building within a specific environment, choosing the right construction materials and designing the interior. It is essential that all these elements be considered and determined before the actual construction work begins. If the plans are defective or confused, problems will inevitably occur during the actual construction stage and any errors or ambiguities in the design will have to be corrected at that later time, when it is least convenient or efficient to do so. The completion of a legislative project follows the same principles: it, too, must be based on a clear, precise and complete plan if it is to be a success. With regard to the clarity of legislation, a good design for a legislative project must, above all, ensure that new provisions and any amended ones are integrated into the existing legal scheme without the creation of contradictions, gaps or redundancies. A good design must make it possible to draft a clearly organised document with an appropriate and balanced normative density, one that accommodates all the necessary rules and only those rules. It provides a stable basis for the work of the drafters and serves as a guide to which they can refer throughout the process of preparing the draft.

STRUCTURE OF LEGISLATION

Components

It is important to break down the subject matter to be regulated into as many units as there are norms to be imposed. The structure of the enactment is, in the final analysis, merely the product of bringing these units together to create larger, coherent units until the enactment is fully formed.

The methods of structuring an enactment are many and generally depend on the points of view and the tastes of the drafters. Generally speaking, it is appropriate to follow a logical sequence in designing enactments. Using this method, it should not be necessary, for example, to refer to a later provision in order to understand the terms of the provision being read or their scope. Provisions that prescribe the various steps in a procedure should be given in the natural successive order of these steps. The use of references to earlier passages within an enactment is often helpful in avoiding repetition. But this particular tool should be used sparingly to

save the reader from having to constantly leaf through the document. The same is true of references to other enactments.

Components of legislation in the Canton of Berne

In the legislation of the Canton of Berne, a norm is expressed in the form of an article. According to government directives on legislative techniques,⁶ a norm must as a rule be contained in a short and simple sentence. Of course, it often happens that a norm cannot be adequately defined in a single sentence, in which case the article is subdivided into paragraphs, each of which should not consist of more than one sentence. An article should not contain more than three paragraphs. Provisions that do not comply with this requirement often betray an imperfect design on the part of the persons who drafted them or the legislature, or they are the result of changes that the document has undergone. A paragraph may contain a list, if this makes the provision more comprehensible. To help readers find their way around a legislative enactment and to make the search for provisions easier, each article in the laws of the Canton of Berne has its own title placed in the left-hand margin and provides a brief description of the norm's subject.

In some cases, especially technical or financial regulations, it is simpler and clearer to supplement certain provisions with tables, graphs, formulas and even drawings. These elements are brought together at the end of the enactment in one or more schedules that form an integral part of the enactment. The connection between the provisions and the relevant schedules is clearly made by references in both the body of the enactment and the schedules.

General structure of legislation in the Canton of Berne

To aid those who consult legislation frequently, enactments should be drafted in accordance with the same format whenever possible. In very broad terms, the structure of an enactment is as follows:

Title and preamble

The title must be brief and distinctive without indicating all the aspects of the enactment's rules. It is followed immediately by a preamble. The preamble does not indicate the intentions of the legislature but rather

serves only to provide information on the authority that proposed the Bill and the authority that enacted it, together with the legal bases of a higher level (for instance, Constitution, law, federal law) on which the rules in question are based.

Area of application, object, general provisions

At the beginning of an enactment may be placed the provisions concerning the area of application and the purpose of the rules, together with the articles setting out the general norms, such as legal definitions and general conditions, that apply in all normal cases governed by the enactment.

Material regulation

There follow the provisions that, from a material point of view, set out the main body of the rules. It is the task of those who draft the bill to subdivide this part as clearly as possible by arranging together articles that have a material connection with one another.

Transitional provisions and final provisions

An enactment concludes with transitional provisions and the final provisions. Transitional provisions bring together all the rules that determine the application of the enactment in time, by reference either to the law it is designed to replace or to the existing situation that has not yet been the subject of such regulation. Final provisions include the indirect amendments that must be made to other enactments in order to ensure harmony in the legal system, repeal of the former law to whatever extent is necessary and provisions relating to the coming into force of the enactment.

Schedules

If necessary, there may also be schedules in the enactment.

Index of articles

The legislative directives of the Canton of Berne nowhere mention the possibility of including an index of provisions in an enactment. A few important or lengthy enactments contain one,⁷ but it should be noted that in no case does the index form an integral part of the enactment. The working group that developed the directives took the view that it was better not to include indexes. The resulting advantages, it was argued, were that indexes would not have to be updated every time enactments are amended, and that the risk of differences or contradictions arising between an index item and a subsequently revised enactment to which it referred would be eliminated. For an opposing view, my own experience of consulting extensive laws or ordinances with which I was barely familiar, if at all, leads me to conclude that any additional work that was required to create an index and, above all, to keep it up to date would be compensated for by the usefulness of such a tool, especially in the case of very important enactments that are consulted frequently.

ACCESSIBILITY OF LEGISLATION

Publication of legislation

Enactments are binding on the general public only if they have been published in appropriate legal form. The state cannot expect its citizens to comply with the law if it fails to bring the law to their attention. This is a recognised principle of the rule of law. The form and conditions of the publication of legislation currently in force are very important matters. The legislation of a state can be considered a living thing, in that it constantly changes as some enactments are amended and others are repealed and replaced by new legislation. These changes, which in some places are made with great frequency, make it difficult for people to access the law that is in force.

Official and Systematic Compendiums of the laws of the Canton of Berne

Presentation, contents and updating

The Canton of Berne, like the Swiss Confederation and other cantons, has two compendiums of its laws: an official one⁸ for the publication of the legislature's enactments; and a systematic one,⁹ which contains only the laws that are in force. The Systematic Compendium of the Laws of the Canton of Berne (*Recueil systématique des lois bernoises*) is arranged by subject and published in loose-leaf format organised in binders. Since July 2000, the complete contents of this consolidation have also been made accessible on the Internet.¹⁰ The information is first updated in a computerised database. The updated data is then transferred to the Internet about every two to three months. It is also published concurrently by the printer commissioned to compose the supplements to the print edition, which is updated every six months, on 1 January and 1 July. For official and formal purposes, only the text published in the Official Compendium (*Recueil officiel*), which is available only in printed form, is authentic.

Use

The Systematic Compendium (*Recueil systématique*) contains only those laws that are in force. Amendments made to provisions are provided with notes at the foot of the page indicating the date on which they were amended. Furthermore, an Appendix, designed in the form of a list and placed at the end of each enactment, contains various information – date of enactment, title, date of coming into force – for the enactments amending the enactment in question. With this information it is possible to follow an enactment's stages of development from its first appearance in the Official Compendium (*Recueil officiel*).

The Systematic Compendiums also accompanied by a table of contents that includes for each enactment the number assigned to it when it first appeared in the Official Compendium, together with, where appropriate, a list of the numbers of all the amending enactments. The table of contents is printed shortly after the cut-off date for the updating of the printed form of the Systematic Compendium. It is also available on the Internet,¹¹ where it is updated once a month after the Official Compendium has been published.

The combined resources of the Official Compendium and the Syste-

matic Compendium make it possible for the user to determine the contents of an enactment at any time, simply, quickly and without any risk of error. To confirm the current terms of an enactment before the publication of the revised Systematic Compendium, a reader merely has to look in the table of contents for any amendments that may have been made and then, if necessary, consult them in the Official Compendium. To learn about any changes to the enactment since the last cut-off date, a reader merely has to consult the enactments published in the Official Compendium from that date on.

AMENDMENT OF ENACTMENTS

Inclusion of amendments in the current legislation

Amending enactments is a regular part – in terms of the volume of documents, even the biggest part – of legislative activity. As far as clarity of legislation is concerned, the amendment of enactments is a delicate task in two respects: not only must the amendments be perfectly integrated into the enactment concerned but the amended enactment must also be consistent with the rest of the legislation. If we take as an example the conversion of a building located in a municipality, the changes in the structure must harmonise with, on the one hand, the lines of the building and, on the other hand, the aesthetics of the street.

It often happens that amendments to legislation are not made with as much attention as would be desirable. Often, time limits are too short and the close consideration of the material or the wider consequences on other legislation is neglected. The volume and complexity of the body of legislation as a whole mean that in some cases it is very difficult to determine with certainty all the implications that a legislative amendment can have for the legal system. In these circumstances, a reduction in the volume of the legislation could only make the job of the drafters easier.

Usefulness of the Official Compendium and the Systematic Compendium

The practical matter of the revision of enactments well illustrates the importance of an effective system for the publication of laws. For in order to be able to amend an enactment, it is necessary to know which parts of it

are in force. As was noted above, the Systematic Compendium and the Official Compendium, used together, make it possible to determine at any time the exact content of any provision in the legislation of the Canton of Berne that is in force. But even with such instruments, it is still difficult to amend enactments since an extensive knowledge of a number of areas of the legislation and a high degree of precision are required.

LANGUAGE OF ENACTMENTS

Principles

Enactments are addressed to the members of the public, who are the recipients of the normative message. In order to be clear and readily understood by everyone, the language of enactments must be as close as possible to ordinary, everyday language with regard to syntax and vocabulary. However, the language of legislation also has its own unique features that must be observed.

Sentences must be both short and simple. Each sentence must contain no more than one idea. As far as possible, multiple subordinate clauses expressing conditions or other qualifications to the main clause should be avoided.

A document is clear when it provides the reader with information about its author's intentions. This condition cannot be met when the legislature establishes norms indirectly by means of suggestions, silences or implicit assumptions. Such processes seem to me to be acceptable only when the explicit wording can be taken by the recipient of the message to be the expression of something obvious and thus a superfluous statement.

Precision and conciseness

As a rule, norms are drafted in the present indicative tense. This is the tense of action and affirmation, and it can make general statements without referring to a specific time frame. It therefore lends itself perfectly to the expression of prescriptions, both general and abstract, that impose duties, confer rights, assign jurisdictions or govern an organisation. In some cases, the future tense can also be used to indicate a duty, although it is often more appropriate to use the terms "shall" or "must". The le-

gislature must indicate its intentions clearly. Does it wish to impose an obligation or is it giving litigants room to manoeuvre? Must the authority be given discretionary power? Norms must be worded in such a way that the reader has no doubt as to their prescriptive and imperative nature or as to whether a discretionary power has been conferred on the authority responsible for making a ruling in a particular case. Where a norm refers to a fact or situation that must occur before the norm applies, the verb may then appropriately be used in a past tense, preferably the present perfect. Use of the passive voice is still far too widespread among lawyers who draft legislation.

In a legal norm, each word has its own importance. All elements that are not essential to expressing the wishes of the legislature must be omitted. Thus, purely stylistic formulas, value judgments or comments have no place in the rules of law. Enactments are functional documents that are not to be embellished with frills. Moreover, the essential content of a norm should not be confused with material that more appropriately belongs in a commentary: only those elements that are required to express the intentions of the legislature are part of the norm. Elements that relate to the norm's application in connection with a specific case are commentary.

Terminology

The choice of appropriate terms is also very important. The law has its own highly specific vocabulary, as do technical, scientific, economic and other fields. The language of legislation of course must also use the technical terms of the field to be regulated. The use of such terms clearly can impede a proper understanding of a legislative document by persons who are unfamiliar with the subject in question. But this difficulty can easily be overcome through the use of a dictionary or other specialised work. In general, a specialised vocabulary presents a far less serious obstacle to the clarity of a written message than does uncertainty as to the message's exact meaning caused by illogicality in the development of the ideas, the use of synonyms that merely approximate one another and other hindrances to understanding. The legislature must not only use the exact terminology of the area being regulated but also apply it rigorously and uniformly in all related legislation. The use of synonyms or different phrases to express one and the same idea creates doubt and confusion in the mind of the reader as to the true content of the message that the author wished to

convey. Even where the frequent repetition of a term in an enactment or a single norm seems cumbersome from a stylistic point of view, it is usually necessary in order to guarantee the clarity of the expression. In no case may the person drafting an enactment yield to the temptation to "simplify" the language of the law or the specialised language of the area to be regulated. If drafters do not adhere to this principle, they are no longer creating legislation but popularising legislation.

WORK METHOD

In my view, legislation is teamwork. Even when a bill or an ordinance is prepared by only one person, it must be ensured that this person has specialist support for his or her work.

Generally speaking, the drafting team should consist of people who are fully familiar with the substance of the subject to be regulated, lawyers with experience in legislation and, in the case of politically sensitive projects, representatives of the main political groups in the legislature. In broad outline, it can be said that the specialists in the field will determine what must be regulated in order to attain the objectives of the legislative mandate. A policy will precede the choice to be made among the various possibilities proposed for the regulations, and the lawyers will be responsible for setting out the ideas in the correct form and language in terms of both the law and legislative techniques. Genuine co-operation should be established among the three categories of teammates to ensure productive interactions between the knowledge and judgment each brings to the process.

The involvement of political representatives, however, creates a risk that discussion within the team will result in compromise as a result of the wide variety of views. In these conditions, the result of the work is usually a very general document in which the intentions of the authors cannot be clearly discerned. However, this risk is ever-present since legislation in any form is the work of a political authority. Simply put, the influence of partisanship on the clarity of a legislative message can be mitigated if the natural diversity of opinion is taken into account at the beginning of a legislative project.

INFLUENCE OF DEBATE IN THE LEGISLATURE ON THE CLARITY OF LEGISLATION

Among the many factors that may reduce the clarity of legislation, debate in the legislature over a drafted bill undoubtedly takes first place. The special demands that result from parliamentary debate are also the most difficult to meet.

Those who draft legislation can make every possible effort to develop a well-organised draft that is balanced in terms of its structure, homogeneous in its normative density and faultless in terminology. Yet a few minutes of debate and a few votes in the legislature can wreck this work and destroy its unity by introducing individual amendments made on the basis of political considerations. This situation cannot be changed since it is an inherent feature of legislative activity and a reflection of the proper exercise of responsibility by those who make the necessary legislative decisions.

The most serious weaknesses of a Bill can sometimes be corrected before second reading in the legislature. Fortunately, the actions of the legislature rarely have the effect of making draft legislation obscure – on the contrary, the legislature's intentions often become more clearly expressed as the result of a comparison of the new wording with the original and the statements of the members of the legislature who request changes. Loss of clarity more typically arises in connection with an enactment's other provisions if the amendments produce inconsistencies or a lack of precision. The possibilities in this regard are numerous. Thus, for example, the introduction of a norm that is excessively detailed compared with others in an enactment will probably affect only the homogeneity of the normative burden but not reduce the enactment's intelligibility. In other cases, the clarity of the enactment may be reduced.

Legislative drafters must recognise that parliamentary debate will always threaten carefully drafted legislation through individual amendments, the impact of which the legislature does not, and also cannot, take the time to consider in depth.

CONCLUSION

Clear legislation presupposes a simple and precise hierarchy of enactments. The legislature must limit its activity to that which is strictly necessary, that is to say enacting the norms that are required by the public interest and that appear to the public to be necessary and reasonable.

The clarity of an enactment depends first on the care taken by the drafters in its design. During this phase of the work, decisions are made that will determine the quality of an enactment: the subject to be regulated, the legislative level, the normative density and the structure. The drafters will ensure that simple, concise and precise language is used and that both legal terminology and the specific terminology of the field being regulated are used rigorously and uniformly.

The publication of legislation in both official and systematic consolidations, which together enable the user to consult the law in effect at any given time, completes the list of conditions that must be met if we are to ensure clarity in our legislation.

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NOTES

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² The Canton of Berne is one of the twenty-six cantons making up the Swiss Confederation.

³ See article 69, paragraph 4, of the Constitution of the Canton of Berne. Such norms are held to include :

- a. those that prescribe the major principles governing the legal status of individuals;
- b. those that set out the purpose of public contributions (meaning taxes of all kinds), the way in which they are calculated and the persons who are subject to them;
- c. those that determine the purpose, nature and the framework of major benefits provided by the Canton;
- d. those that determine the major outlines of the organisation and duties of the authorities;
- e. those that impose new tasks on the Canton.

⁴ A referendum must be held if not fewer than 10,000 members of the public sign a petition for a vote (called a referendum) within a period of three months.

⁵ According to article 5, paragraph 1, of the federal law dated 20 December 1968, respecting administrative procedure (RS 172.021), administrative rulings are measures taken by the authorities in individual cases on the basis of federal public law for the purpose of :

- a. creating, modifying or cancelling rights and obligations;
- b. confirming the existence, non-existence or extent of rights or obligations;
- c. rejecting applications designed to create, modify, cancel or confirm rights or obligations or declarations to the effect that such applications are inadmissible.

This definition also applies to the administrative rulings of the Canton of Berne. In civil and criminal proceedings, decisions are made by the judicial authorities (the courts) and are referred to as judgments or judicial decisions.

⁶ Directives of the Canton of Berne dated 22 March 2000, respecting legislative procedure. They can be obtained from the State Chancellery at the following address : print.azd@sta.be.ch.

⁷ Cantonal Constitution, Code of Civil Procedure and Code of Criminal Procedure, each of which also includes an alphabetical index to its contents. The compilation of legislation respecting construction provides only an alphabetical index of the subjects covered.

⁸ *Recueil officiel des lois bernoises (ROB)*, consisting of one volume per year containing all the enactments of the legislature in order of appearance. Each enactment bears a number, and they are issued together in twelve parts, published monthly. At the beginning of the following year, the consolidation of the preceding year is augmented by four tables of contents arranged by the numbers of the enactments, the date of enactment, the number in the systematic consolidation and the key words they contain.

⁹ *Recueil systématique des lois bernoises (RSB)*.

¹⁰ www.sta.be.ch/belex/f/

¹¹ See note 10.