Redrafting Process of the Income Tax Legislation in South Africa and India and Lessons from New Zealand, the United Kingdom and Australia

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The tax reform process may be thought of as being divided into three distinct stages. First, tax policies are formulated. Secondly, they are authorised legally. Thirdly, they are implemented. This article is a preliminary examination of the redrafting process of the income tax legislation in South Africa and India. It analyses and compares the approaches policy makers and governments have followed when dealing with issues that arise at each stage of the tax reform process. It also determines whether they have learned from the experiences in New Zealand, the United Kingdom and Australia.

1.0 INTRODUCTION

The first article in this series showed that South Africa and India executed measures to redraft their income tax legislation without an overarching plan. At best, they can be regarded as uncoordinated tax reforms. It is worth examining them in the light of lessons that the rewrite projects of New Zealand, the United Kingdom and Australia offer. It is uncertain whether South Africa and India intend to continue their efforts, which have not yet culminated in rewritten legislation. Regardless of their intention, the analysis may be useful to reflect on whether and how they can implement lessons learned from New Zealand, the United Kingdom and Australia. This article compares the processes of redrafting of income tax legislation in South Africa and India. However, before examining the process of tax reform, it is appropriate to define tax reform.

McIntyre and Oldman outline the description of tax reform.[1] Tax reform is any legislative change in a country's tax laws, which is the result of serious planning. Serious planning means a well thought attempt to adjust the tax system to accomplish certain pre-determined policy goals. It does not, however, involve ad hoc changes for political purposes in which the effects of changes on income distribution and economic stabilisation are ignored.

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1 Michael J McIntyre and Oliver Oldman "Institutionalizing the Process of Tax Reform" (1974) 15 *Harvard International Law Journal* 399.

McIntyre and Oldman argue that the process of tax reform consists of two steps. First, the formulation of a tax reform plan. Secondly, the implementation of that plan.[2] In certain situations, however, the two stages may overlap, and it is hard to separate them from each other. One such relevant situation is that the drafting of a tax Bill may be either the last step in formulating a plan, or an early step in implementing it.[3]

To some extent, Bird's model of the tax reform process resolves this difficulty by dividing the process into more distinguishable steps. Although Bird relied on McIntyre and Oldman, he added another stage between the formulation and implementation of tax reform: the authorisation of tax policies. According to Bird, the three stages of tax reform are as follows. First, tax policies are formulated. Secondly, they are authorised legally. Thirdly, they are implemented.[4] Therefore, in Bird's model, the drafting of a tax Bill is the last step in formulating a plan before its adoption. Two points emerge. First, the stages are inherently distinct. Secondly, logically, formulation should precede adoption; and adoption should precede implementation.[5] This article adopts Bird's approach to avoid confusion that may arise from the overlapping each step.

Considering that fundamental tax reform, such as redrafting an Income Tax Act, is inherently political, and that the political environment of South Africa is different from that of India, this article analyses how each has dealt with different issues at each of these stages and examines their approaches.

This article contains six sections. Except for the last section, they are structured as follows. They begin by providing a conceptual background to a specific issue at a particular stage of the reform process. Subsequently, they examine how South Africa and India have dealt with each issue so far. They end by comparing the approaches adopted by the two countries.

2.0 FORMULATION OF TAX POLICIES: SIMPLIFICATION

When developing a tax reform proposal, policy makers can adopt two approaches. First, they can focus what should be considered. Secondly, they can consider how the issues should be approached.[6] This section deals with the former; the Section 3 discusses the latter.

A point that emerges from studies[7] in various countries is that an essential precondition for tax reform is to simplify the tax system to ensure that it can be applied effectively in the generally low-compliance context of developing and transitional countries. Simplifying the tax system not only gives the administration simpler and potentially more enforceable laws to administer, but also provides taxpayers with simplified procedures.[8]

2 At 408.
3 At 408.
4 Richard M Bird "Managing Tax Reform" (2004) 58 *Bulletin for International Taxation* 42.
5 McIntyre and Oldman, above n 1, at 409; and Bird (2004), above n 4, at 43.
6 Bird (2004), above n 4, at 44.
7 Carlos A Silvani "Improving Tax Compliance" in Richard M Bird and Milka Casanegra de Jantscher (eds) *Improving Tax Administration in Developing Countries* (IMF, Washington, 1992) p 275; John F Due "VAT Treatment of Farmers and Small Firms" in Malcolm Gillis, Carl S Shoup and Gerardo P Sicat (eds) *Value Added Taxation in Developing Countries* (World Bank, Washington DC, 1990) p 64.
8 Richard M Bird "Administrative Dimensions of Tax Reform" (2004) 10 *Asia-Pacific Tax Bulletin* 134 at 136.

South Africa[9] and India[10] aim to simplify their income tax law by rewriting their income tax legislation. However, they have defined neither the simplicity they wish to enhance, nor the complexity they wish to mitigate. Boucher[11] and Tran-Nam[12] consider defining tax simplicity or tax complexity to be a critical step in redrafting tax legislation. Policy makers must have a clear understanding of what causes tax legislation to be complex and of the type of audience (taxpayers or actual readers) of the legislation.[13]

Sections 2.2 and 2.3 of this article determine the nature of tax simplicity or tax complexity, which the South African and Indian reviewers have so far attempted to address. However, before undertaking that analysis, Section 2.1 discusses the definition of tax simplicity or tax complexity, which this article follows.

2.1 Definition of Tax Simplicity or Tax Complexity

Tax simplicity is a mirror image of tax complexity. They are multi-dimensional concepts. That is, people from different professional backgrounds will define these concepts differently depending on their biases, perspectives, or research interests.[14]

Tax simplicity encompasses "legal simplicity" and "effective simplicity", and tax complexity involves "legal complexity" and "effective complexity". Boucher[15] and Tran-Nam[16] define "legal simplicity" as the ease with which a particular tax law can be read and understood. Conversely, "legal complexity" is the difficulty with which a particular tax law can be read or understood.

Tran-Nam observes that legal simplicity or legal complexity is of primary concern to tax professionals. Legal simplicity or legal complexity of a tax law depends on two factors. First, the use of language to express the law. This includes plain English, active voice, grammar and logical structure. Secondly, the content of the law, which includes elements such as the tax base, discretions, uncertainties, exemptions, special concessions, allowable deductions, rebates and multiple tax rates.[17]

Effective simplicity refers to the ease of ascertaining tax liability correctly. Conversely, effective complexity represents the difficulty with which correct tax liability can be determined.[18] Essentially, concepts of effective simplicity and effective complexity deal with the wider issue of the degree of effort that taxpayers, tax administrators, law draftsmen and judges make to comply with a particular tax law.[19] An

9 National Treasury *Budget Review* 1997 (1997) <www.treasury.gov.za> at [7.5]. National Treasury, *Budget Review 2009* (2009) <www.treasury.gov.za> at 69.

10 Arbind Modi "Direct Taxes Code (DTC)" (2014) *National Institute of Public Finance and Policy One Pager* <www.nipfp.org.in>.

11 T Boucher "Tax Simplification Debate: Too Simplistic" (1991) 26 *Taxation in Australia* 277.

12 Binh Tran-Nam "Tax Reform and Tax Simplification: Some Conceptual Issues and a Preliminary Assessment" (1999) 21 *Sydney Law Review* 500.

13 Mark Burton and Michael Dirkis "Defining Legislative Complexity – A Case Study: The Tax Law Improvement Project" (1995) 14 *University of Tasmania Law Review* 198; Yige Zu and Lynne Oats "The Role of the Office of Tax Simplification in the United Kingdom and Lessons for Other Countries" in Chris Evans, Riël Franzsen and Elizabeth (Lilla) Stack (eds) *Tax Simplification: An African Perspective* (Pretoria University Law Press, Pretoria, 2019) p 64.

14 Graeme S Cooper "Themes and Issues in Tax Simplification" (1993) 10 *Australian Tax Forum* 417 at 421; Chris Evans, and Binh Tran-Nam "Towards the Development of Tax System Complexity Index" (2013) 35 *Fiscal Studies* 341 at 345; Tran-Nam, above n 12, 505.

15 Boucher, above n 11, at 278.

16 Tran-Nam, above n 12, at 505.

17 Tran-Nam, above n 12, at 506.

18 Tran-Nam, above n 12, at 506.

19 Tran-Nam, above n 12, at 507; compare, Boucher, above n 11, at 278.

effective approach to tax simplification is multi-faceted. It requires the simplification of tax systems, tax law, taxpayer communications, and tax administration. It also requires long term, fundamental approaches to simplification.

Tran-Nam observes that, although the determinants of effective simplicity include legal simplicity, the two concepts are not always compatible.[20] He also notes that tax simplicity is a comparative concept.[21] That is, it makes more sense to infer that a proportional income tax schedule A is simpler than a progressive income tax schedule B, rather than concluding that the proportional income tax schedule A is simple.[22] This article, however, uses legal simplicity and effective simplicity to ascertain the nature of complexity or simplicity that Indian and South African reviewers are trying to address. It does not use these concepts as standards of comparison between the South African and Indian income tax legislation.[23]

New Zealand, the United Kingdom and Australia rewrote their income tax legislation so that it was both readable and easily understood by expert users. Their focus was to enhance legal simplicity. They did not address major issues of a policy nature, but rather addressed only limited policy issues. Consequently, with constant change of aspects other than policy, the underlying complexity of their tax legislation remained unaddressed. Scholars suggest that these countries should have considered addressing the broader issues encompassing effective simplicity.[24] Doing so would have resulted in a very different project. Reorganisation would almost certainly have been a key part of effective simplicity. Clarity around major policy issues and improving the tax administration interface would also have been included.[25]

Scholars have also distinguished between "fundamental complexity" or "necessary complexity", and "unnecessary complexity".[26] In a tax measure, "necessary complexity" may exist because of real-world commercial complexity – such as complex financial transactions and complex commercial structures – which cannot be simplified easily.[27] Ulph suggests that, when measuring complexity, it makes sense to measure the extent to which taxation is unnecessarily complex, rather than overall complexity.[28]

20 Tran-Nam, above n 12, at 508; Evans and Tran-Nam, above n 14, at 346.

21 Tran-Nam, above n 12, at 505.

22 Tran-Nam, above n 12, at 505.

23 The following studies have taken the same approach: Adrian Sawyer "Rewriting Tax Legislation – Can Polishing Silver Really Turn it into Gold?" (2013) 15 *Journal of Australian Taxation* 1; Jinyan Li and Teressa Pidduck "International Tax Simplification in South Africa through Managing Substantive Complexity and Improving Drafting Efficiency" in Chris Evans, Riël Franzsen and Elizabeth (Lilla) Stack (eds) *Tax Simplification: An African Perspective* (Pretoria University Law Press, Pretoria, 2019) p 295; Sharon Smulders, Karen Stark and Deborah Tickle "Statutory and Effective Complexity for Individual Taxpayers in South Africa" in Chris Evans, Riël Franzsen and Elizabeth (Lilla) Stack (eds) *Tax Simplification: An African Perspective* (Pretoria University Law Press, Pretoria, 2019) p 204.

24 Sawyer, above n 23, at 18; Adrian Sawyer, Marina Bornman and Greg Smith "Simplification Lessons from New Zealand" in Chris Evans, Riël Franzsen and Elizabeth (Lilla) Stack (eds) *Tax Simplification: An African Perspective* (Pretoria University Law Press, Pretoria, 2019) p 154; Malcolm James "Tax Simplification: The Impossible Dream?" [2008] 4 *British Tax Review* 392 at 412; Sol Picciotto "Constructing Compliance: Game-playing, Tax Law and the State" (2007) 29 *Law and Policy* 11 at 24; Binh Tran-Nam "Tax Reform and Tax Simplicity: A New and 'Simpler' Tax System?" (2000) 23 *University of New South Wales Law Journal* 241 at 249.

25 New Zealand has focussed on enhancing effective simplicity in the Business Transformation Project currently underway. See Sawyer, Bornman and Smith, above n 24, at 154.

26 David Ulph "Measuring Tax Complexity" (2013) The Office of Tax Simplification <www.assets.publishing.service.gov.uk>; Tamer Budak, Simon James and Adrian Sawyer "International Experiences of Tax Simplification and Distinguishing between Necessary and Unnecessary Complexity" (2016) 14 *eJournal of Tax Research* 337.

27 Gareth Jones and others "Developing a Tax Complexity Index for the UK" (2014) Office of Tax Simplification <www.gov.uk/government> at 14.

28 Ulph, above n 26, at 5.

Some scholars recommend that a policy of tax simplification should be implemented strategically rather than on an ad hoc basis.[29] The advantage of this approach is that it takes account of competing factors in tax design and reform, so that complexity is seen in the light of other considerations and trade-offs. Budak, James and Sawyer use this approach to measure in particular the extent to which taxation is unnecessarily complex.[30] They follow the model advanced by James and Edwards who list ten stages in developing a strategic plan.[31] Budak, James and Sawyer suggest that the degree of unnecessary complexity can be measured at each stage. The stages are: identification of aims of taxation; consideration of methods to achieve them; analysis of economic criteria; examination of administrative constraints and considerations; identification of risks regarding unnecessary complexity; analysis of behaviour; consideration of the relationship between different policies; development of strategies; planning and implementation of strategies including intended outcomes; and, monitoring and evaluation of the strategies against the plan.[32] This article does not describe the strategic approach and demonstrate its application in more detail because it focuses broadly on the formulation stage of a rewrite.

James remarks that New Zealand, the United Kingdom and Australia achieved limited improvements because they tackled the complexity of tax legislation without appropriate attention to reasons whereby tax systems become complex.[33] Although they reduced unnecessary complexity in terms of their legislation's language, they did not identify and address the existence of unnecessary complexity of tax policy and administrative systems. Sawyer, Bornman and Smith recommend that distinguishing necessary and unnecessary complexity is a step forward in simplifying the New Zealand tax system[34]

The following two subsections determine the type of complexity that has led South Africa and India to rewrite their income tax legislation.

2.2 South Africa

It will be recalled from the first article in this series that, in 1997, the South African Treasury indicated that the structure and language of the Income Tax Act 1962 were complex. It announced that the government intended to simplify and make the legislation accessible to taxpayers.[35] It could be inferred that, in 1997, the South African government intended to address legal complexities.

In 2009, the Treasury announced the revision to the employment income tax base. It explained that the objective of the project was to reduce compliance costs for employers, and to support efforts by SARS to modernise taxation of salaried taxpayers.[36] Compliance cost is a measure of effective complexity. Thus in 2009, the South African government intended to reduce effective complexity through tax reform.

In 2012, South Africa enacted the Tax Administration Act. The memorandum of the objectives of the Tax Administration Bill 2011 suggests that, essentially, the government had two main goals. First, to improve the effectiveness and efficiency of collection of taxes that the Commissioner of SARS administered.

29 Simon James, and Ian Wallschutzky "Tax Law Improvement in Australia and the UK: The Need for a Strategy for Simplification" (1997) 18 *Fiscal Studies* 445.
30 Budak, James and Sawyer, above n 26, at 343.
31 Simon James and Alison Edwards "A Strategic Approach to Personal Income Tax Reform" (2007) 22 *Australian Tax Forum* 105.
32 At 118. James and Wallschutzky, above n 29, at 453
33 Simon James "The Complexity of Tax Simplification: the UK Experience" in Simon James, Adrian Sawyer and Tamer Budak (eds) *The Complexities of Tax Simplification: Experiences from Around the World* (Palgrave Macmillan, New York, 2016) p 236.
34 Sawyer, Bornman and Smith, above n 24, at 136.
35 Budget Review 1997, above n 9, at [7.5.2].
36 Budget Review 2009, above n 9, at 69; Trevor A Manuel, Minister of Finance "Budget Speech (2009)" (11 February 2009) at 18.

Secondly, to simplify the interpretation of rights and obligations of taxpayers and powers, and duties of tax administrators, by clarifying these aspects.[37] The goals relate to the compliance and administration of tax law. That is, in 2012, the South African government intended to address challenges related to effective complexity.

Since 2014, in multiple reports, the Davis Tax Committee indicated that the corporate tax regime in the Income Tax Act 1962 is complex and its simplification should be a priority.[38] When explaining reasons for the complexity, the committee noted that inconsistencies related to layout, ordering, style and language exist in the legislation. Tax law and amendments are often convoluted and complex.[39] Since 1962, the Act evolved as a patchwork of provisions that addressed specific technicalities and transactional developments.[40] These provisions were inserted with insufficient consideration of overall policy and structure objectives, or the desire to retain simplicity.[41] The factors that the committee highlighted come under legal complexity.

When discussing ways of simplifying the corporate tax regime, the committee noted that a comprehensive rewrite of the Act may be a solution; however, considering the amount of resources, time, planning and public consultation involved, the committee decided that the project was extremely difficult to carry out. Therefore, a rewrite cannot be considered to be a short-term solution.[42]

The committee also discussed the increase in the cost of administration and compliance.[43] In its closing report of March 2018, it noted that tax legislation has become onerous and complicated making associated tax compliance and reporting requirements burdensome and expensive. For this reason, simplicity and certainty in order to encourage local and foreign direct investment is needed.[44] However, the committee considered the rewrite as a solution only in the context of reducing legal complexity.[45] When suggesting a solution to reduce compliance and administration costs, the committee observed that in general, income taxes are complex, and minimising administrative and compliance costs require sophisticated taxpayers and tax administrators.[46]

Scholarly writings have shown the presence of legal and effective complexity in the Income Tax Act 1962.[47] However, none of the studies address the issue of tax complexity in the context of rewriting legislation.

37 South African Revenue Services, *Memorandum on the Objects of the Tax Administration Bill, 2011* (2011) <www.sars.gov.za> at 178.

38 Davis Tax Committee *Macro Analysis First Report* (December 2014) at 95; Davis Tax Committee *The Efficiency of South Africa's Corporate Income Tax System* (March 2018) at 88; Davis Committee Secretariat *Closing Report on the Work Done by the Davis Tax Committee* (March 2018) at 15.

39 *The Efficiency of South Africa's Corporate Income Tax System*, above n 38, at 90.

40 At 89.

41 At 91.

42 At 89.

43 *Closing Report on the Work Done by the Davis Tax Committee*, above n 38, at 15. *The Efficiency of South Africa's Corporate Income Tax System*, above n38, at 57.

44 *Closing Report on the Work Done by the Davis Tax Committee*, above n 38, at 15.

45 *Closing Report on the Work Done by the Davis Tax Committee*, above n 38, at 15. *The Efficiency of South Africa's Corporate Income Tax System,* above n 38, at 91.

46 Davis Tax Committee *Final Report on Micro Analysis of the Tax System and Inclusive Growth in South Africa* (April 2016) at 83.

47 Sawyer, Bornman and Smith, above n 24; Li and Pidduck, above n 23; Smulders, Stark and Tickle, above n 23.

When examining indicators of legal complexity, scholars listed the following problems: length,[48] unreadability,[49] illogical structure,[50] confused numbering system,[51] and inelegant drafting style.[52] When investigating indicators of effective complexity, they listed the extent of tax disputes,[53] high administrative cost to SARS[54] and high compliance cost to individuals.[55] A prominent issue is that the Income Tax Act – assented to and commenced in 1962 – has been regularly amended by more than 100 Acts of Parliament and Government Notices. The original Act exists alongside the amending Acts. Although various publishers have, occasionally, published a consolidated version of what the Act could look like if it were officially consolidated, no single, official, correct version of the Income Tax Act can be found in an easily accessible volume.[56] Each amending instrument adopts its own style and conventions. Policy objectives for enacting each amending instrument are different. Since 1962, the government has made little systematic and coordinated attempts to consolidate the legislation and ensure uniformity.[57] If a taxpayer were to attempt to ensure accuracy and was relying on the official "correct" version of the Income Tax Act such a taxpayer would need to access the original 1962 Act as well as all the Acts (Parliament and Government Notices) that amend the original 1962 Act. The effort that a taxpayer would need to manage over 100 separate Acts to ensure he or she is reading the official version of a particular provision would be considerable, time consuming and full of opportunities for error.[58]

The point that emerges is that legal complexity and effective complexity exist in the Income Tax Act 1962. In 2012, the South African government indicated that it intended to address challenges related to effective complexity, when rewriting the Act. Since the government has taken no further measure to advance the rewrite of the legislation, it could be implied that its position remains unchanged.

As far as unnecessary complexity is concerned, by enacting the Tax Administration Act 2012, South Africa certainly attended to complexity with respect to the administration of the income tax legislation aspect of the income tax legislation; however, South Africa still needs to deal with the unnecessary substantive complexity. Li and Pidduck highlight the presence of unnecessary complexity in the context of laws concerning taxation of cross-border transactions. They acknowledge that such laws deal with complex transactions, and therefore, the presence of complexity is unavoidable. However, they also note that these rules are excessively detailed, and tend to create unnecessary complexity in compliance and introduce uncertainty to the tax system. Further, they point at the presence of large number of specific anti-avoidance rules. They recommend that the Income Tax Act can use fewer specific anti-avoidance rules or can simply some of them, so that general anti-avoidance rule can be invoked to deal with tax avoidance arrangements. Such a strategy would also allow courts to develop adequate jurisprudence on the general anti-avoidance rule, rendering it an effective shield for the tax system.[59]

48 Smulders, Stark and Tickle, above n 23, at 204.
49 Smulders, Stark and Tickle, above n 23, at 205.
50 Sawyer, Bornman and Smith, above n 24, at 146.
51 Li and Pidduck, above n 23, at 312.
52 Li and Pidduck, above n 23, at 308.
53 Smulders, Stark and Tickle, above n 23, at 209.
54 Smulders, Stark and Tickle, above n 23, at 211.
55 Smulders, Stark and Tickle, above n 23, at 212.
56 Sawyer, Bornman and Smith, above n 24, at 144.
57 Sawyer, Bornman and Smith, above n 24, at 145.
58 Sawyer, Bornman and Smith, above n 24, at 144.
59 Li and Pidduck, above n 23, at 313.

2.3 India

Arbind Modi highlights certain fundamental tax complexities in the Income-tax Act 1961.[60] He explains that, in India, in some situations, certain provisions of the Income-tax Act 1961 overlap and contradict each other.[61] The legislation is replete with "administrative discretion",[62] which invariably leads tax officials to apply provisions inconsistently and provides opportunities for corruption. Modi notes further that complexity of the Act leads to increases in the costs of compliance and administration. Compliance costs are essentially regressive, and implicitly undermine the equity of tax system.[63] Complications listed by Modi indicate the presence of effective complexity.[64]

It is also worthwhile to consider the recommendations of the Standing Committee on Finance, to which the Direct Taxes Code Bill was referred during the legislative process. The committee's recommendations concerned complications with the structure and content of the Bill. They focussed on the issues of complexity that the Members of the Parliament have emphasised.

The Standing Committee on Finance recommended that the government review the structure of the proposed Direct Taxes Code and ensure that chapters and clauses were self-contained and easy to understand. The committee was of the view that the structure and content of the Code could be more user-friendly.[65] Reducing complications in the compliance and administration of tax law was another aspect of the committee's recommendations with an emphasis on "taxpayer-friendly" measures such as faster refunds and swifter assessment and redressing of grievances.[66] The committee also recommended that the Code avoid open ended and generic definitions of terms, especially when dealing with provisions of a stringent nature.[67] It encouraged draftsmen to use precise and clear terms, which would reduce the scope of litigation by providing stability and certainty to the applicability of provisions.[68]

The committee's recommendations were not only related to making the tax law easy to understand but were also concerned with reducing the cost of compliance and administration. When the committee's recommendations are considered as a whole, it could be inferred that it intended to address issues of effective complexity.

The BJP-led Indian government established the Income Tax Simplification Committee in 2015. Its terms of reference included studying and identifying provisions or phrases in the Income-tax Act, which were open to interpretation, and as a consequence, gave rise to litigation. Another objective of establishing the committee was to study and identify provisions that affect the ease of doing business. Further, the government required the committee to study and identify which provisions of the Act, could be simplified in the light of existing jurisprudence. Moreover, the committee was responsible for suggesting alternatives or modifications with a view to ensuring certainty and predictability in tax laws without substantially impacting the tax base or revenue collection.[69]

60 See Modi, above n 10. Compare Task Force for Drafting the New Income Tax Law *Report on Income Tax Reforms for Building a New India* (September 2018) at 10.
61 Modi, above n 10.
62 Modi, above n 10; *Report on Income Tax Reforms for Building a New India*, above n 60, at 11.
63 Modi, above n 10; *Report on Income Tax Reforms for Building a New India*, above n 60, at 11.
64 Saurabh Jain "Review and Rewrite of the Income Tax Act 1961" (2018) 24 *Asia-Pacific Tax Bulletin* <www.ibfd.org>.
65 Standing Committee on Finance *The Direct Taxes Code Bill Forty-Ninth Report 2010 Lok Sabha Secretariat* (March 2012) at 32.
66 At 60.
67 At 61.
68 At 61.
69 Income Tax Simplification Committee *Report (Containing First Batch of Recommendations to be put up in Public Domain)* (2016) at 3.

The objectives for establishing the committee suggest that the government intended to bring certainty and predictability to income tax legislation, which in turn would increase the ease of doing business and reduce the burden of compliance. Assuring certainty and predictability would also decrease litigation, which in turn would reduce the administrative burden. The objectives indicate that the Indian government intended to address challenges that fall into the category of effective complexity.

After the Task Force submitted its report, Akhilesh Ranjan essentially maintained that the Task Force considered compliance to be the cornerstone of any tax policy. For this reason, it focussed on improving compliance when drafting the new tax legislation. Ranjan stated that compliance has different aspects. Improving compliance not only involves reducing tax rates and making filing procedures easy; it also entails modernising the tax system, improving the litigation management system and improving the comprehensibility and coherency of the law. In order to improve compliance, the Task Force recommended simplification to existing provisions and revision to their structure.[70] Ranjan's statement shows that the Task Force was concerned with improving compliance within income tax law. This included simplifying the law to make it more easily understood. That is, the Task Force addressed issues concerning effective complexity.

When considering statements made by policy makers, recommendations of the Standing Committee and objectives of the Simplification Committee, it could be inferred that India intends to reduce effective complexity or enhance effective simplicity. As far as unnecessary complexity is concerned, it is clear that existing laws create unnecessary complexity for taxpayer compliance which has been the focus of all policy makers. For instance, provisions related to capital gains tax are generally lengthy. The structure of the capital gains regime is incoherent. An example of this incoherency is that the Income-tax Act 1961 deals with calculating capital gains under s 48. The provision uses terms such as "cost of acquisition", "cost of improvement" and "adjusted" yet these terms are defined under s 55. Several provisions using these terms exist in both ss 48 and 55. Thus, it is difficult for taxpayers – who are not tax professionals – to understand the law. Difficulty in understanding the law increases compliance costs. Complexity, to some extent, is a consequence of complex transactions, and is understandably unavoidable. With regular additions, however, the capital gains tax regime – as with other regimes in the Income-tax Act 1961 – has become increasingly complex.[71] The Task Force has therefore simplified the overall structure of the capital tax regime and its provisions. Existing laws also create both administrative complexity and uncertainty, which has increased litigation. Policy makers[72] and committees[73] seem to suggest that this complexity can be avoided by improving comprehensibility and coherency which would require redrafting the laws.

2.4 Comparison

South Africa and India intend to reduce compliance and administration costs. However, a major factor, which contributes to the increase of compliance and administration cost in South Africa, is absent in India. Unlike South Africa, Indian income tax legislation has a single official consolidated version. Most amendments brought by Finance Acts are incorporated in the original income tax legislation. Thus, when compared with South Africa, India has fewer amending Acts not consolidated within the original legislation.

70 "Corporate tax system complex, need to make it more streamlined, says CBDT's Akhilesh Ranjan" *The Economic Times* (online ed, Mumbai, 19 September 2019); Shreya Nandi "Compliance key focus in new Direct Tax Code report: Ranjan" *Livemint* (online ed, New Delhi, 20 September 2019); "Equity taxes need serious simplification, says former CBDT member Akhilesh Ranjan" *CNBC TV18* (10 December 2019).

71 "Equity taxes need serious simplification, says former CBDT member Akhilesh Ranjan", above n 70.

72 "Equity taxes need serious simplification, says former CBDT member Akhilesh Ranjan", above n 70.

73 *The Direct Taxes Code Bill Forty-Ninth Report*, above n 65, at 61; Income Tax Simplification Committee, above n 69.

In South Africa as well as India, incoherent structure and a complicated drafting style of provisions of the legislation contribute to legal complexity. However, both countries intend to improve the underlying policy that is the cause of the legal complexity. They both appear to have learned from the experiences of New Zealand, the United Kingdom and Australia. Unlike those countries, South Africa and India have adopted the effective approach to enhance tax simplicity.

The Indian government focused on addressing effective complexity since it began rewriting the Income-tax Act 1961 in 2005. Unlike India, however, South Africa's approach has been inconsistent. In 1997, when the South African government first considered rewriting the Income Tax Act 1962, it intended to address legal complexity but in 2009, its focus shifted to enhancing effective simplicity. Currently, both South Africa and India expect to address effective complexity through the rewrite of their legislation.

The answer to the issue of unnecessary complexity emerges almost as a corollary of the aforementioned point. For South Africa and India, the major area of unnecessary complexity is the content of the income tax law. Both countries appear to acknowledge that the cause of the unnecessary complications of content is ill-conceived and results in poorly devised policy. Their steps so far show that they intend to deal with related major policy issues simultaneously while simplifying complicated language.

Unlike New Zealand, the United Kingdom and Australia, South Africa and India intend to address effective simplicity. Consequently, functions of their institutional structures to manage the reform process are different from those in New Zealand, the United Kingdom and Australia. The following section deals with the institutional structures managing the tax reform process in South Africa and India.

3.0 FORMULATION OF TAX POLICIES: INSTITUTIONALISATION

It will be recalled from Section 2 of this article that another approach to policy formulation is to focus on how issues are approached.[74] That is, how to create institutions to manage the tax reform process.

McIntyre and Oldman use the term "institutionalisation" to mean the imposition of a management system on the process of reform.[75] Such a system analyses tasks to be performed and assigns them to departments capable of accomplishing them. Another attribute is that it plans for short term as well as long term, and coordinates departments concerned with specific tasks. Without a management system, reforms occur ad hoc, with unreliable unstructured support for reform efforts.[76]

McIntyre and Oldman argue that improved institutional arrangements for changing a country's tax system can enhance the quality of reform. Careful and comprehensive attention when establishing appropriate institutional arrangements for tax reform also increases the likelihood of their enactment.[77] They acknowledge that major reform is inherently political by nature and eventually decided on political grounds. They argue, however, that good institutional arrangements can be critical in preventing reform being defeated for the wrong reasons.[78]

74 Bird, above n 4, at 44.
75 McIntyre and Oldman, above n 1, at 406.
76 At 406.
77 McIntyre and Oldman, above n 1, at 401; Bird, above n 4, at 44.
78 McIntyre and Oldman, above n 1, at 401. See also Bird, above n 4, at 44.

McIntyre and Oldman note that the institutional arrangements required to organise successful tax reform vary considerably from country to country.[79] However, they recommend that certain features should *generally* be included in all organisational structures.

First, most countries need to establish separate permanent departments,[80] each with one of the following responsibilities: (1) drafting tax legislation;[81] (2) gathering and analysing data relevant to tax matters;[82] and (3) tax reform planning.[83] Certain countries might consolidate these departments into a single unit; however, all functions must exist to develop sound policy.[84] For instance, in New Zealand,[85] the United Kingdom[86] and Australia,[87] these responsibilities were vested in project teams in the offices of their countries' tax authorities.

Secondly, when considering undertaking major tax reform, most countries need to expand their normal tax reform machinery. This is often achieved by an ad hoc committee of external experts. The advantage of such a committee is that it may consist of persons of high academic and political regard who can help sell reform proposals to the legislature and the public. For an ad hoc committee to work fast and competently, however, it should be adequately staffed and supported by appropriate machinery.[88] The United Kingdom established two ad hoc committees: a Steering Committee and a Consultative Committee. The Steering Committee supervised the rewrite and provided strategic guidance to the project. It also ensured that the simplification of the language of the statute did not unintentionally lead to other than minor changes in tax policy and the law. The Consultative Committee provided a principal forum to ensure consultation on proposed rewritten legislation.[89] In New Zealand[90] and Australia,[91] the supervisory and consultative functions were vested in a single ad hoc committee. In all three countries, the committees collaborated with and were supported by the project team. In addition to members of parliament, judiciary, and tax authority, these committees consisted of lawyers, accountants and academics.

The third feature concerns the optimum location of these units in the bureaucracy. When deciding which department should be assigned various tax planning functions, the government should consider the effect of placement with reference to the decision-making process. Two competing theories exist regarding decision making theory. The traditional decision-making theory is that these units should be located where

79 McIntyre and Oldman, n 1, at 401. See also, Martin Grote *How to Establish a Tax Policy Unit* (IMF, Washington DC, 2017) at 2.

80 Simon James, Adrian Sawyer and Ian Wallschutzky "Tax Simplification: A Review of Initiatives in Australia, New Zealand and the United Kingdom" (2015) 13 *eJournal of Tax Research* 280 at 300.

81 McIntyre and Oldman, above n 1, at 429.

82 At 430.

83 At 430.

84 At 431.

85 The Policy Advice Division (now Inland Revenue's Policy and Strategy group) of the Inland Revenue Department. See *Income Tax Act 2007 – Introduction and summary of the Act*; available at https://www.taxtechnical.ird.govt.nz [Access 27 August 2021]; Adrian Sawyer "New Zealand's Tax Rewrite Program-in Pursuit of the (Elusive) Goal of Simplicity" [2007] 4 *British Tax Review* 405; Sir Ivor Richardson "Simplicity in Legislative Drafting and Rewriting Tax Legislation" (2012) 43 *Victoria University of Wellington Law Review* 517.

86 See David Salter "Towards a Parliamentary Procedure for the Tax Law Rewrite" (1998) 19 *Statute Law Review* 65 at 67. Inland Revenue, which was merged with Her Majesty's (HM) Customs and Excise to form HM Revenue and Customs (HMRC) in 2005.

87 Australian Tax Office. See, Simon James and Ian Wallschutzky "Tax Law Improvement in Australia and the UK: The Need for a Strategy for Simplification" (1997) 18 *Fiscal Studies* 445 at 452. In 2002, the functions were transferred to Treasury; see Brian Nolan and Tom Reid "Re-writing the Tax Act" (1994) 22 *Federal Law Review* 448.

88 McIntyre and Oldman, above n 1, at 432.

89 See Salter, above n 86, at 68.

90 In 1995, the New Zealand government established the Rewrite Advisory Panel. See Adrian Sawyer "RAP(ping) in Taxation: A Review of New Zealand's Rewrite Advisory Panel and its Potential for Adaptation to Other Jurisdictions" (2008) 37 *Australian Tax Review* 148 at 152; Richardson, above n 85, at 526.

91 In 1994, the Assistant Treasurer appointed a Consultative Committee. See Nolan and Reid, above n 87, at 452.

their placement promotes top level policy makers' most rational decisions. According to the contemporary decision-making theories, however, formulating complex policy involves an exploration of a range of issues and values which should be analysed within a multiplicity of perspectives, not necessarily achieved by a single individual or groups of individuals. For this reason, the contemporary decision-making theory argues that an adversary process, with various societal groups and government agencies pressing their own interests, results in better decision making.[92] As noted earlier, in New Zealand,[93] the United Kingdom[94] and Australia[95] the units were in their tax departments. Their arrangements show the presence of both decision-making theories. They assigned a central role to tax authorities in the rewrite project to ensure that top officials were integrated into broader processes of making and changing tax law and policy. At the same time, the consultative process was accorded significance. The third article in this series deals in detail with the consultative process.

McIntyre and Oldman also note that a system for managing reform should plan for short- and long-term objectives and coordinate various departments.[96] The experience of the United Kingdom, provides an important lesson in achieving long term tax simplification. A highlight of the Tax Law Rewrite Project (TLRP) was the Office of Tax Simplification (OTS). The United Kingdom established OTS in 2010 as an independent office of HM Treasury and was elevated to a statutory body in 2016. Its role is to provide independent advice on simplification of the tax system to the government of the day. Thus, it helps maintain simplicity in the tax system. Zu and Oats suggest that although the actual work program of the OTS cannot be transposed from the United Kingdom to another jurisdictions, they consider assigning a statutory body the role of providing independent advice on simplification to the government of the day.[97] Such a body should be independent so that the proposals and recommendations are not formed under political pressure. Second, it should also be sufficiently independent from the business community to avoid becoming a lobby group by another name.[98]

The following few subsections examine the institutional arrangements in South Africa and India for the rewrite process.

3.1 South Africa

Initially, in South Africa, the role of tax policy design was centralised in the Tax Policy Unit in the National Treasury. The unit advised the Minister of Finance on policy measures to meet annual revenue targets. This function is now split between the Economic Tax Analysis and the Legal Tax Design units in the Tax and Financial Sector Policy division.[99] The Minister of Finance, backed by cabinet, advances tax policy choices. The Minister also requests advice from external committees or commissions.

92 Alexander L George "The Case of Multiple Advocacy in Making Foreign Policy" (1972) 66 *The American Political Science Review* 751 at 756; McIntyre and Oldman, above n 1, at 434.

93 Consistent with New Zealand's Generic Tax Policy Process, the rewrite drafters proceeded on the basis of full consultation at every stage. When drafts of segments were completed, they were referred to RAP for comments. Also, in the lead-up to public consultation, the drafting team subjected the drafts to quality assurance by seeking feedback from specialists both within and outside the Inland Revenue Department. See Richardson, above n 85, at 525.

94 The Consultative Committee provided a principal forum for ensuring consultation on proposed rewritten legislation, especially its details, with interested groups in the private sector. Inland Revenue Consultative Document *The Tax Law Rewrite – The Way Forward* (July 1996) at 49.

95 In addition to full-time staff of the ATO, the project team engaged two tax experts form the private sector as its senior members. The objective for their appointment was to ensure direct private sector participation so that community views were considered. Further, the government established a Consultation Committee acted as a sounding board to the project. See Nolan and Reid, above n 87, at 452. James and Wallschutzky, above n 87, at 452.

96 McIntyre and Oldman, above n 1, at 406.

97 Zu and Oats, above n 13, at 65.

98 Zu and Oats, above n 13, at 65.

99 National Treasury Organogram <www.treasury.gov.za>.

The directorates within the Economic Tax Analysis unit are "General Tax Analysis and Design", and "Revenue and Economic Impact Analyses and Forecasting". The Legal Tax Design unit focuses on legal drafting and international tax treaty negotiations. Tax laws are drafted in-house by the National Treasury in collaboration with SARS. Outside experts such as academic legal drafters, tax practitioners and international tax experts may contribute.[100]

Several points emerge. First, the names of the directorates in the Economic Tax Analysis unit imply that they gather and analyse relevant tax data. Secondly, the Legal Tax Design unit drafts tax law. Thirdly, tax reform planning is performed by senior officials. Fourthly, these functions have been collapsed into the National Treasury. That is, the South African institutional structure conforms to the first feature for successful tax reform as suggested by McIntyre and Oldman.

The National Treasury implements discussions on tax proposals for the annual budget with SARS. Generally, legal drafting is executed in committee format with specialist teams from the National Treasury and SARS. It holds regular consultations on tax avoidance and structural tax adjustments with producers of excisable products, accounting firms, corporate tax law practitioners, business community, labour unions and other ministries.[101]

As indicated, the tax policy design function is in the National Treasury. Its placement seems to promote rational decision-making by top level policy makers, and to encourage them to explore the perspectives of multiple stakeholders. That is, the South African institutional structure contains elements of both theories of decision-making process, which can affect the optimum location of units developing tax policy.

After the government began to rewrite the income tax statute, it established the Katz Commission (1994–99) and the Davis Committee (2014–17). Their terms of reference were limited to conducting a tax review. The government did not establish an ad hoc committee to contribute to redrafting legislation. Thus, the South African government did not expand its normal machinery to oversee the rewrite. This is not necessarily a shortcoming. An arrangement that works well for a particular country may not readily be transposed elsewhere.[102] For example, governments of New Zealand, the United Kingdom and Australia were clear that income tax statute was simply to be rewritten and underlying policy remain. In other words, they addressed legal complexity. They assigned to their ad hoc committee the task of identifying unintended changes in interpretation of the law that arose from the difference in language between the old and the new statute. In contrast, South Africa addressed effective complexity, an approach that potentially involved changing policy. Thus, South Africa did not need a committee to identify unintended policy changes.

3.2 India

Until February 2016, the "Tax Policy and Legislation" wing of the Central Board of Direct Taxes, and the "Tax Research Unit of the Central Board of Excise and Customs" undertook research and provide proposals in relation to tax policies.[103] They were located within the Ministry of Finance, worked separately for their boards and were independent.

100 Grote, above n 79, at 35.
101 Grote, above n 79, at 35.
102 Sawyer, above n 90, at 159.
103 The "Central Board of Excise and Customs" (CBEC) has been renamed as the "Central Board of Indirect Taxes and Customs" (CBIC).

In February 2016, the government established the Tax Policy Research Unit and the Tax Policy Council and assigned most of the functions of the Tax Policy and Legislation wing, and the Tax Research Unit to the Tax Policy Research Unit and Tax Policy Council. It did this on the recommendation of the Tax Administration Reform Commission.[104] The new units are in the Ministry of Finance. They work independently of the Central Board of Direct Taxes and the Central Board of Indirect Taxes and Customs.

The Tax Policy Research Unit analyses various fiscal and tax policies referred to it by the Central Board of Direct Taxes, and the Central Board of Indirect Taxes and Customs, and provides independent advice. It is responsible for preparing and disseminating policy and background papers on tax policy issues. It assists the Tax Policy Council in making appropriate tax policy decisions. It prepares analyses for tax proposals which cover legislative intent, the expected effect on tax collection, and their impact on the economy.[105] The Tax Policy Council examines the findings of the Tax Policy Research Unit and suggests broad policy measures. It helps the government identify key policy decisions for taxation.[106]

The Tax Policy and Legislation section of the Central Board of Direct Taxes drafts legislation.[107] It is unclear whether the Tax Research Unit of the Central Board of Indirect Taxes and Customs still drafts legislation. Since the Tax Policy Research Unit and the Tax Policy Council do not expressly state that they draft legislation,[108] it could be implied that the Tax Research Unit still holds responsibility for drafting legislation for the Central Board of Indirect Taxes and Customs.

Several points emerge. First, the Tax Policy Research Unit collects and analyses data relevant to tax matters. Secondly, the Tax Policy and Legislation section and the Tax Research Unit are responsible for drafting tax law. Thirdly, the role of tax reform planning is performed by senior Ministry of Finance officials. Fourthly, although all these units fall within the Ministry of Finance, they are separate and work independently.

It could be inferred that the organisational structure for managing tax reform assigns the functions of gathering and analysing data, drafting tax law and tax reform planning to separate permanent departments which are all consolidated in the Ministry of Finance. Thus, the structure complies with the first requirement recommended by McIntyre and Oldman.

The membership of the Tax Policy Council consists of the Finance Minister, and top officials of Finance and other ministries. The Tax Policy Research Unit is a multi-disciplinary body. Its membership includes officers from the Central Board of Direct Taxes and Central Board of Indirect Taxes, as well as statisticians, economists, legal experts and operational researchers. When required, it may interact with various research institutions. The functions and composition of the Tax Policy Council and the Tax Policy Research Unit suggest responsibilities concerning tax reform policy promotes rational decision-making and allows policy makers to consider the perspectives of multiple stakeholders.[109] Thus, the Indian organisational structure for managing tax reform contains elements of two competing theories concerning optimum location.

The Indian government established a Task Force, which drafted a new income tax legislation. Members of the Task Force consisted of accountants, an economist, lawyers, and former and current officers of the Central Board of Direct Taxes, who were supported by officers of the Tax Planning and Legislation wing

104 "Government Sets-up a Committee to Simplify the Provisions of the Income Tax Act, 1961" (Press Information Bureau, New Delhi, 2015).
105 Above n 104.
106 Above n 104.
107 Functions of the Tax Policy and Legislation Unit are listed at the website of the Income Tax Department of India.
108 "Government Sets-up a Committee to Simplify the Provisions of the Income Tax Act, 1961", above n 104.
109 "Government Sets-up a Committee to Simplify the Provisions of the Income Tax Act, 1961", above n 104.

of the Central Board of Direct Taxes and the Tax Policy Research Unit.[110] When undertaking a major reform such as the rewrite, the Indian government, therefore, expanded normal tax reform machinery by establishing ad hoc committees of external experts, supported by normal machinery. The structure for managing Indian tax reform conforms to the third requirement suggested by McIntyre and Oldman. Unlike the relevant ad hoc bodies in New Zealand, the United Kingdom and Australia, the Task Force did not have the responsibility to identify policy changes because India adopted an effective approach to enhance simplicity, which potentially involves changing underlying policy for certain taxes.

3.3 Comparison

In India, institutional arrangements for organising successful tax reform contain all three features whereas similar arrangements in South Africa, contain two. Both countries have established separate units, which draft tax law, gather and analyse data, and plan tax reform. Considering the availability of policy making and administrative resources, they seem to have the necessary components for developing sound tax policy. They appear to provide top level officers with opportunities for rational decision-making and ensure that policy makers explore perspectives of interested groups. However, unlike the current Indian government, the South African government did not expand its normal tax reform machinery for redrafting tax legislation. While India established a Task Force, South Africa delegated the responsibility for drafting new legislation to the National Treasury and SARS.

While the South African and Indian systems for managing reform are capable of simplifying tax law in the short term, unlike the United Kingdom, they do not include a permanent independent body that can maintain the simplification of tax law by providing independent advice to the government of the day. Constrained policy making and administrative resources in the two countries may prevent the creation of a permanent body solely to advise government on simplification.[111] It is also unclear whether providing the government with such advice is a role assigned to the relevant tax authorities in South Africa and India. To be fair, policy makers are required to strike a balance between simplifying a law or administrative policy, and meeting objectives such as efficiency and equity.

If South Africa and India were to create a permanent body to advise on simplification, it is doubtful whether it would maintain its independence successfully, especially for India. As discussed in the first article, the Indian rewrite process was executed as initiatives of finance ministers of different political parties. In such a political environment it is hard not assume influence by political pressure of the government of the day.

Nevertheless, considering that the complexity of tax law and administrative procedures has been an ongoing and significant problem in both countries, it is hoped that, when creating such units, both governments considered providing advice on simplification to be a function.

110 *Report on Income Tax Reforms for Building a New India*, above n 60, at (iv).

111 See James, Sawyer and Wallschutzky, above n 80, at 300. Zu and Oats, above n 13. These scholars are of the view that the establishment of a permanent department for simplification is useful in the long run. Compare Judith Freedman "Creating New UK Institution for Tax Governance and Policy Making: Progress or Confusion?" [2013] *British Tax Review* 2 and Judith Freedman "Managing Tax Complexity: The Institutional Framework for Tax Policy-Making and Oversight" in Chris Evans, Richard Krever and Peter Mellor (eds) *Tax Simplification* (Kluwer Law International, Alphen aan den Rijn, 2015) p 259.

4.0 LEGAL AUTHORISATION: PRE-PARLIAMENTARY CONSULTATION AND PARLIAMENTARY PROCESS

The second stage in the process of tax reform is adoption by the legislature. An effective tax legislative process is essential for implementing reform proposals: the third stage of the tax reform process.[112]

Tax reform in general, and rewritten draft tax legislation in particular, are different from other law reforms. While rewritten draft legislation is primarily aimed at improving the clarity and simplicity of the existing statutes, it goes beyond consolidation, and attempts to recast rules governing discrete areas of law. Its nature may require a government to change certain operating procedures. In most countries, the political structure of the legislative process cannot be modified to accommodate special needs of tax reform. McIntyre and Oldman suggest two modifications to make the process more efficient and effective.[113]

First, countries can improve information flow, so that legislators and the taxpaying public understand the implications of bills under consideration.[114] This is pre-parliamentary consultation. Rigorous consultation enhances transparency and shows that a government is serious about communicating with stakeholders.[115]

The Generic Tax Policy Process (GTPP) used by New Zealand stands out. Although the government implemented GTPP at the beginning of its rewrite project, it still followed the model for tax policy development including thorough consultation. It provided a clear strategic focus through a structured five-phased process: strategic, tactical, operational, legislative and implementation. The first three relate to pre-parliamentary reform. The strategic phase did not involve formal consultation but entailed broad proposals such as budget documentation. In the tactical phase, targeted consultation with the private sector identified significant policy issues. The operational phase involved consultation and the release of a government consultation document.[116]

The United Kingdom and Australia adopted a different approach. In New Zealand, the pre-parliamentary consultative process involved the release for comment to interested parties of draft legislation, while in United Kingdom and Australia, the process involved consultation with experts. In the United Kingdom, with regard to draft legislation, the government created a Consultative Committee which consulted relevant private sector interests, tax professionals and business users.[117] The Committee scrutinised drafts and other material produced by the drafting team. The Australian government established a Consultation Committee to represent interests of stakeholders.[118] Scholars regard the United Kingdom's and Australia's approach as less than fully transparent, and for this they have been criticised.[119]

McIntyre and Oldman's second suggestion to make the process efficient and effective is that, considering the special nature of draft rewritten legislation, parliamentary decision-making procedures could be altered slightly.[120]

112 McIntyre and Oldman, above n 1, at 408.
113 At 424.
114 At 424.
115 See Ruth Sullivan "Some Implications of Plain Language Drafting" (2001) 22 *Statute Law Review* 145 at 162; Sawyer, above n 85, at 411.
116 Tax Working Group *The Generic Tax Policy Process: Background Paper for Session 14 of the Tax Working Group* (September 2018) at 5.
117 See Salter, above n 86, at 67.
118 James and Wallschutzky, above n 29, at 452.
119 Sawyer, above n 23, at 8.
120 McIntyre and Oldman, above n 1, at 425.

The United Kingdom devised a discrete and tailor-made parliamentary procedure for processing Rewrite Bills in TLRP.[121] The logic behind this approach was twofold. First, because the rewrite focused on enhancing legal simplicity, a customised procedure enabled the parliament to scrutinise rewritten legislation without debating fiscal policy. Secondly, the legislature was expected to deal with substantive reform regularly during the rewrite process, which was expedited by a tailor-made process.[122] However, when the House of Commons established this particular procedure, it was aware of existing pre-parliamentary consultative processes. The Howe Report observed that the legislature must be confident that the Bills had been through thorough and objective pre-parliamentary scrutiny.[123] New Zealand and Australia did not adopt tailor-made parliamentary procedures.

Experiences in New Zealand, the United Kingdom and Australia offer two lessons. First, pre-parliamentary consultations play an important role in fundamental tax reforms such as a rewrite; and the quality of the consultative process is measured by the degree of transparency. Secondly, expediency of the parliamentary process helps to complete the rewrite within a reasonable timeframe.

South Africa and India devised no discrete or tailor-made procedure – neither pre-parliamentary nor parliamentary consultation – for the rewrite process. Instead, they relied on pre-existing procedures. Their pre-parliamentary consultative processes apply to legislative proposals in general. However, they have a separate procedure for scrutinising money Bills,[124] by which a money Bill may be introduced only to the Lower House of the Parliament. The following subsections examine the pre-parliamentary consultation and legislative process of money Bills in South Africa and India.

4.1 South Africa

The process for legally adopting a tax reform requires the Parliament to invite public comment and that the government conduct pre-parliamentary consultation. The process begins with a Green Paper, which is published in the *Government Gazette* for public comment. It is followed by a more refined discussion document, or White Paper also published in the *Government Gazette* for public comment. Subsequently, a Bill is introduced by the Minister of Finance to the National Assembly[125] also published in the *Government Gazette*. At the same time, SARS publishes an Explanatory Memorandum describing the planned changes.

The Bill is then referred to the Standing Portfolio Committee on Finance which examines it and requests responses.[126] The committee may invite outside stakeholders to comment if major policy changes are envisaged. The committee submits a report to the National Assembly.[127] The Bill is again tabled in the National Assembly for a second reading. Once the Bill is passed by the National Assembly, it is sent to the National Council of Provinces. After the Bill is passed in both Houses, it is presented to the President for assent. When the Bill is signed by the President, it becomes a Statute.[128]

121 House of Commons *Standing Order of the House of Commons – Public Business 1998*, Standing order No 60 (March 1997).
122 Tax Law Review Committee *Parliamentary Procedures for the Enactment of Rewritten Tax Law* (IFS, London, 1996) at 7.
123 The Tax Law Review Committee, above n 122, at 19.
124 A money Bill is defined under the Constitution of the Republic of South Africa 1996, s 77; and, the Constitution of India, Art 110.
125 The Constitution of the Republic of South Africa, s 75.
126 The Standing Portfolio Committee on Finance is constituted under the s 4(1) of the Money Bills Amendment Procedure and Related Matters Act 2009. It considers and reports on the national macro-economic and fiscal policy, the National Budget, revenue proposals and money Bills.
127 South Africa has a bicameral Parliament. The National Assembly is the House directly elected by the voters.
128 The National Council of Provinces is the House of the South African Parliament, which is elected by the provinces and represents them.

The only statute enacted in the process of rewriting tax legislation has been the Tax Administration Act (28 of 2011). This operating procedure was also followed after the National Treasury announced that it was drafting the Tax Administration Bill with SARS.[129]

Unlike New Zealand, South Africa did not establish a separate tax policy development process. South Africa held no consultations – either targeted or detailed – while rewriting legislation or drafting the Tax Administration Bill. Public consultation began only after the National Treasury and SARS drafted the Bill, and before the Ministry of Finance introduced it to the National Assembly. In this regard, the South African pre-parliamentary procedure corresponds to procedures in the United Kingdom and Australia. Unlike the United Kingdom and Australia, South Africa released the Bill for public comment, rather than for scrutiny by a separate committee composed of private sector stakeholders. Thus, as with the United Kingdom and Australia, South Africa's pre-parliamentary consultation procedure was less than transparent.

Unlike the United Kingdom, South Africa did not follow a discrete parliamentary procedure. The only element that helped expedite the processing of the Tax Administration Bill was that the Tax Administration Bill was a money Bill, and the Constitution requires that money Bills be introduced only to the National Assembly for approval. The Bill did not need the approval of the National Council of Provinces.

4.2 India

Once the Ministry of Finance drafts a Bill for a new tax proposal, it must publish the draft and an explanatory note on the internet and other media. The Ministry may also consult stakeholders. However, it has discretion to decide the degree and mode of consultation, which may vary according to the nature of the subject and potential impact on stakeholders. The Ministry may also submit the stakeholders' feedback summary when the draft bill is referred to the Ministry of Law and Justice, Cabinet and the Standing Committee on Finance. In cases in which the Ministry decides not to hold consultations, it may record its reasons in a note to Cabinet.[130]

Subsequently, the Minister of Finance introduces the Bill to the Lower House of the Parliament for the first reading.[131] After he has introduced the Bill, it is published in the *Gazette of India*. Also, at this stage, the Speaker can refer the Bill to the Parliamentary Standing Committee on Finance. The Committee examines the Bill and prepares a report. It may seek expert opinion or opinions of interested groups.[132] After it submits its report, the Ministry of Finance considers the Committee's recommendations and incorporates them in the Bill.

The Bill is then again tabled in the Lower House for the second stage of the reading. The House refers the Bill to a Select Committee of the House or a Joint Committee of the Two Houses of the Parliament. These committees may take evidence from associations, public bodies or experts who may be affected by the prospective law. After each committee submits its report, the Ministry of Finance considers them.

129 See Kyle Mandy "Rewriting SA Tax Law", FA News (6 February 2013) FA News <www.fanews.co.za>; South African Revenue Services *Memorandum on the Objects of the Tax Administration Bill, 2011* (2011) <www.sars.gov.za>; Theuns Steyn and Madeleine Stiglingh "The Complexity of Tax Simplification: Experiences from South Africa" in Simon James, Adrian Sawyer and Tamer Budak (eds) *The Complexity of Tax Simplification: Experiences from Around the World* (Palgrave Macmillan, London, 2016) p 164.

130 Ministry of Law and Justice Government of India "Pre-legislative Consultation Policy" DO No 11(35)/2013-LI (New Delhi, 5 February 2014).

131 Rules of Procedure and Conduct of Business in Lok Sabha, Ch X deals with the legislative procedure.

132 Rules of Procedure and Conduct of Business in Lok Sabha, r 331H.

Subsequently, each clause of the Bill may be debated. In the third stage, the Lower House debates and votes on the Bill. If the Bill is passed, it is then tabled in the Upper House. Once the Bill is passed in both Houses, it goes to the President for assent and becomes an Act.

On 5 February 2014, the Indian government enforced a mandatory Pre-legislative Consultation Policy before which no existing procedure scrutinised tax reform. Nonetheless, the Ministry of Finance in the Indian government led by the United Progressive Alliance (UPA) followed a pre-legislative consultation approach, when, in August 2009, it prepared the first draft of the Direct Taxes Code Bill. After drafting the Bill, but before introducing it to the Lower House, the Ministry of Finance published it and a discussion paper for public comment. At the end of both rounds of consultation, the Ministry incorporated inputs provided by interested groups. Moreover, when the government placed the Bill before the Lower House, it referred the Bill to the Parliamentary Standing Committee on Finance. The committee again invited public comment.

The Task Force established by the government led by the Bharatiya Janta Party, or BJP, submitted a draft of the new Income Tax Act to the Finance Minister. The Ministry of Finance has not yet published the draft. It has, however, implemented certain recommendations of the Task Force in the Budget 2020–21. It is hoped that the Ministry of Finance will soon publish the draft.

4.3 Comparison

Altered procedures – whether pre-parliamentary consultations or parliamentary process – depend on a country's unique political situation.[133] Unlike New Zealand, neither South Africa nor India established separate policy development processes. They did not consult – either targeted or detailed stakeholders – while rewriting tax legislation or drafting the Tax Administration Bill. Public consultation began only after their authorities drafted the Bill. In this sense, the pre-parliamentary procedure in South Africa and India corresponds to that in the United Kingdom and Australia. Unlike them, however, the South African government and the UPA-led Indian government released their Bills for public comment, rather than having them scrutinised by separate committees representing interested parties. As with the United Kingdom and Australia, the pre-parliamentary consultation procedures in South Africa and India were not as transparent as New Zealand's GTPP.

Further, unlike New Zealand, the United Kingdom and Australia, South Africa and India did not use ad hoc bodies for pre-parliamentary consultations. In South Africa and India, these functions were performed by tax authorities in collaboration with their Ministries of Finance. Moreover, the Indian pre-legislative consultation policy empowers the Ministry of Finance and Department of Income Tax to mould the structure of the consultation process according to their needs.

Unlike the United Kingdom, South Africa and India did not formulate new parliamentary procedures for processing rewritten Bills. Instead, they relied on a pre-existing process devised exclusively to process money Bills. To be fair, unlike the United Kingdom, South Africa and India focused on reducing effective simplicity, intending not only to improve the language of the law, but also to work on underlying policy. Parliamentary scrutiny of policy change should be accompanied by debate – especially when tax reform is as fundamental as a rewrite process. Setting realistic timeframes is essential for the successful completion of process, something both countries failed to achieve.

133 McIntyre and Oldman, above n 1, at 425.

The South African National Treasury, in collaboration with SARS, conducted a pre-parliamentary consultation when it drafted the Tax Administration Bill. As with the South African government, the UPA-led government in India invited public comment on the draft of the Direct Taxes Code Bill before it put the Bill forward for the consideration of the Parliament.

Unlike the South African government and the UPA-led Indian government, the BJP-led Indian government did not release a draft of prospective income tax legislation. It has, however, begun to implement the recommendations of the Task Force. A possible explanation to the BJP-led approach may be found in how it has implemented new tax reform.

A well-designed legislative process is the key to enacting serious reform. The BJP-led government indicated that it found recommendations of the Task Force too radical and seemed to introduce the new law in parts and in a certain sequence. Because of these decisions, it may have not published the draft of the new income tax legislation. By contrast, the UPA-led government intended to implement provisions in the rewritten legislation simultaneously, and therefore, published the complete draft of the new legislation.

This point is related to the implementation of tax reform. Section 5 of this article analyses different approaches adopted by the South African government and governments led by different parties in India for implementing the rewrite of their tax legislation.

5.0 IMPLEMENTING TAX REFORM: "BIG BANG" OR GRADUALISM

The third stage of the tax reform process is implementation. When implementing reform, governments can adopt either the "big bang" or the "gradualism" approach. If a government uses the former, it simultaneously and quickly introduces all reforms.[134] The big bang approach is also referred to as the "bundling" approach. Gradualism, also referred to as the "sequencing" or "incremental" approach, involves implementing reforms sequentially rather than simultaneously.[135] While the big bang approach refers to the speed of implementation, gradualism is sequences or orders.[136] New Zealand, the United Kingdom and Australia used gradualism to implement their rewrite projects.

Any significant tax reform is inherently political.[137] However, when choosing how to implement reform, governments not only consider the institutional and political context, but also consider goals and obstacles.[138] In New Zealand, the institutional and political context favoured gradualism. Successive National and Labour-led governments backed the project. The support of successive Ministers of Finance and Revenue arranged necessary funding and facilitated consideration of Bills through the parliamentary processes. The private sector also supported the project and worked in partnership with the government.[139] The government used gradualism to reduce costs incurred by taxpayers and society. It reasoned that a rewrite in stages

134 Gérard Roland *Transition and Economics: Politics, Markets, and Firms* (MIT Press, Massachusetts, 2000) p 1; Bert Brys, "Making Fundamental Tax Reform Happen" (2011) *OECD Taxation Working Papers* at 18.

135 Roland, above n 134, at 1; and Brys, above n 134, at 18.

136 Anders Olofsgard, "The Political Economy of Reform: Institutional Change as a Tool for Political Credibility" (2003) *World Development Report Background Papers* at 17. See also, Jorge Martinez-Vazquez and Robert M McNab "The Tax Reform Experiment in Transitional Countries" (2000) 53 *National Tax Journal* 273 at 276; Gérard Roland "The Political Economy of Transition" (2002) 16 *Journal of Economic Perspectives* 29.

137 Bird, above n 4, at 42.

138 Brys, above n 134, at 18; and Olofsgard, above n 136, at 17.

139 Richardson, above n 85, at 528.

would make the task more manageable, allow taxpayers time to absorb the changes gradually, permit the development of guidelines for the drafting of legislation, and allow for consultation with the private sector at each stage of the rewrite. It concluded that gradualism minimised educational costs incurred by taxpayers, and improved draft legislation at an early stage which reduced compliance cost.[140]

Scholars have written widely on the advantages and disadvantages of these two approaches. However, it is not in the scope of this article to review the literature. Rather, the objective of the discussion that follows is to examine the approach South Africa and India adopted when rewriting their tax legislation, and to assess the reasons for their particular approach.

5.1 South Africa

In 1997, the South African Government announced its intention to simplify the Income Tax Act 1962;[141] and between 1997 and 2000, it reorganised, reordered and restructured the Act.

In 2009, the government announced the project of revising the employment income tax base, which it called "the *first step towards rewriting* the Income Tax Act (1962)".[142] In 2011, it announced that it had extended the scope of the project of drafting the Tax Administration Act, which could "now be seen as *a preliminary step towards the re-write [sic]* of the Income Tax Act".[143] Both chronology of events and language indicated that the government intended to adopt gradualism for introducing the rewritten legislation.

Further, in 2009, the then SARS Spokesman, Adrian Lackay, explained that the government had plans in place to ultimately rewrite the Income Tax Act, but that "there would be *a phased approach to rewriting the legislation*".[144] It could be implied that by "a phased approach", Lackay meant gradualism. His statement confirmed that both government and policy makers favoured gradualism for implementation. The following two reasons explain why.

First, South Africa is a developing economy with limited policy making and administrative resources. Introducing the new law sequentially is less demanding on such resources. Goode's findings support this argument.[145] Essentially, he determined that, although adopting gradualism to advance reform may lead a government to miss certain necessary changes, it puts less demand on constrained policy, administrative and compliance resources and is, therefore, more likely to succeed.[146]

Secondly, gradualism suits South Africa's political scenario. Since the end of apartheid in 1994, the African National Congress, or ANC, has held the majority in the National Assembly, and eight of nine provincial legislatures. Simplifying the legislation would certainly make administration and compliance more efficient. In such a situation, the government would find support for reform, and, if needed, for using the current majority against future ones. Roland's theory clarifies this point. He argues that, although

140 Sawyer, above n 85.

141 National Treasury *Budget Review 1997* (1997) <www.treasury.gov.za> at [7.5] (emphasis added).

142 National Treasury *Budget Review 2009* (2009) <www.treasury.gov.za> at 69 (emphasis added).

143 South African Revenue Services *Memorandum on the Objects of the Tax Administration Bill, 2011* (2011) <www.sars.gov.za> at 178 (emphasis added).

144 Mandy, above n 129 (emphasis added); and Sanchia Temkin "Income Tax Act to be Rewritten", *Phatshoane Henney Inc Knowledge Centre* (17 February 2009) <www.dupwest.co.za>.

145 Richard B Goode, *Government Finance in Developing Countries* (Brookings Institution, Washington, DC, 1984).

146 Goode, above n 145, at 299. See also Bird, above n 4, at 53; Brys, above n 134, at 21.

gradualism suits situations in which the benefits of reform are uncertain, other conditions optimise gradualism, such as when efficiency gains from reform are certain: for example, when majority support is sufficient. In such a scenario, unbundling can pitch current majorities against future ones.[147]

Although gradualism suits South Africa, using it to introduce a full tax law rewrite is a challenge. As noted, an officially correct version of the consolidated Act does not exist. That is, a taxpayer must refer to original legislation as well as all amending Acts. In July 2012, the government's final measure related to the rewrite was the enactment of the Tax Administrative Act. After almost eight years, South Africa has still to publish a draft of income tax legislation. Yet the original Act, as it operates now, along with amendment Acts, was reorganised, reordered and restructured between 1997 and 2000. The rewrite, which will proceed sequentially, may further require reordering of the entire Act. At some point, later stages will require reordering of earlier stages. It is highly likely, therefore, that all legislation will be in transition for the next few years; this state overlaying the normal uncertainties of tax legislation proceeding from further amendments.

Prebble suggested an alternative for such a situation. Although his suggestion is intended for the rewriting project of tax legislation of New Zealand, his suggestion can be applied to South Africa. He proposed that the rewriting process should run parallel to the ordinary Act and its regular amendments. The existing statute should be supplemented by the new statute only when the new statute is complete. Meanwhile, drafts of the new legislation can be published in stages for public comment. The rewriting process should be allowed to inform ongoing amendments to the existing Act.[148]

5.2 India

It has been noted that, in February 2005, the then Finance Minister of the UPA government initiated the project to replace the Income-tax Act 1961 by a Direct Taxes Code. The government intended to replace the Act by April 2008. Between 2009 and March 2013, it released multiple revised drafts of the Direct Taxes Code and placed the Direct Taxes Code Bill before the parliament for approval.

The point is that each time the UPA government released the draft of the Direct Taxes Code, it did so with the intention of enforcing the new legislation at once. It could be inferred that the government opted for the big bang approach for adopting and implementing the Direct Taxes Code. The political scenario that existed when it was in power may clarify why it preferred the big bang approach.

The UPA was a coalition of the Indian National Congress, the pro-left front and multiple regional parties. It did not, therefore, enjoy a majority in the Lower House of the Indian Parliament. In 2008, it narrowly survived a vote of no confidence, when the pro-left front withdrew its support. In such a scenario, it is hardly surprising that the government preferred the big bang approach to prevent the formation of lobby groups strong enough to stop the tax reform from advancing.

147 Roland, above n 134, at 69.

148 John Prebble "Evaluation of the New Zealand Income Tax Law Rewrite Project from a Compliance Cost Perspective" (2000) 54 *Bulletin for International Taxation* 290 at 298. Contrast, Sawyer, above n 85, at 411. Sawyer cautioned that the approach suggested by Prebble has its danger if the rewrite process is not completed. He cites the example of the Australian approach of running two acts in parallel and leaving the process in uncertainty.

Olofsgard's argument confirms this reasoning. He believes that there are many reasons for using the big bang approach for implementing comprehensive reform. One reason relevant to the present context is that people take time to consider whether they will benefit or gain from a particular reform and will form a powerful opposition if they expect to lose. Adopting the big bang approach to advance reform, therefore, prevents an opposition from emerging powerful enough to stop or reverse reform.[149]

Arbind Modi expressly stated his preference for the big bang approach over the sequencing approach.[150] However, he was motivated by economic rather than political considerations. According to Modi, prima facie evidence existed to suggest that figures for annual inflation, Gross Domestic Product (GDP) growth, and foreign direct investment as percentage of GDP for countries, which have adopted the big bang approach for implementing tax reforms, on an average, were better than that for other countries.[151]

In 2014, the current BJP government replaced the UPA government. The BJP government started afresh the process of redrafting new income tax legislation. In August 2019, it established a Task Force that submitted a report and draft of new tax legislation. The Convenor of the Task Force, Akhilesh Ranjan, indicated that the Task Force recommended more than just a reduction in tax rates for corporations and individuals. In order to improve tax collection, it also recommended a new structure for compliance and broadening the tax base, and an appropriate rate structure. He suggested that government should consider the recommendations as a whole and adopt the report in full. [152]

Two points emerge from Ranjan's statement. First, the proposed reforms are compatible and are meant to work in combination. Secondly, because of their compatibility, Ranjan preferred the big bang approach to implement the new legislation although unlike Modi, he did not assign a reason for his preference. In the light of his statement, two reasons emerge.

First, the Task Force intended its recommendations to work as a whole and to reap their benefits, they should be implemented as a reform package. Olofsgard's argument supports this point. According to him, the big bang approach suits a situation in which implementing the full tax reform package is necessary to realise the long-term benefits of a reform-thrust.[153]

Secondly, the Task Force seems to have designed the package so that its effect on a particular group is simultaneously mitigated by corresponding benefits. For example, the reform disallows certain deductions and exemptions to individual taxpayers and simultaneously, their personal income tax rates are also reduced. Another example is that, although the prospective law is expected to improve scrutiny, it should also make compliance easier. In the Indian political environment, it can be difficult to find support for implementing such fundamental reform as tax legislation. Policy makers seem to have bundled smaller tax reforms in order to increase the chances of greater political support to implement reform. However, this approach needs the big bang approach.

Brys states that implementing multiple changes simultaneously using the big bang approach provides a government with an opportunity to mitigate costs for interest groups that might otherwise be disadvantaged if the government were to implement individual measures. By selecting details of a tax-reform package, a government increases the probability of finding sufficient support. He emphasises that the potential to

149 Olofsgard, above n 136, at 17; Brys, above n 134, at 20.
150 Modi, above n 10.
151 Modi, above n 10.
152 "Equity taxes need serious simplification, says former CBDT member Akhilesh Ranjan", above n 70.
153 Olofsgard, above n 136, at 17.

advance combined reform highlights the significance of considering the tax system as a whole, rather than individual taxes in isolation. To successfully implement fundamental reform governments may need to combine smaller reforms to achieve a balance among broader objectives of efficiency, growth, equity and revenue.[154]

Contrary to Task Force's advice to adopt the report in full, the BJP government implemented recommendations separately. This suggests that it chose gradualism to introduce new law. Two related reasons emerge for its choice.

First, a single statute has governed the Indian income tax system for the last 59 years, and tax administrators, tax professionals and taxpayers are accustomed to it. In such a situation, it is hard to predict the outcome of introducing a new Income Tax Act. In the case of a negative outcome, affected groups may want to reverse reform. Costs of reversal increase with the magnitude of the reforms that have already been implemented.[155] Thus, reversal costs would be high, if the government used a big-bang approach. Hence, the government has preferred to apply gradualism and introduced smaller reforms first. Once the outcome is clear, the government can decide whether to implement further reforms or return to the status quo. Moreover, when implementing reforms concerning personal and corporate tax, the government has allowed taxpayers to opt for the old law. This strategy suggests that the government has kept the old law operative, so that if needed, it can return to the status quo immediately. This point is based on the model proposed by Dewartripont and Roland.[156]

Dewartripont and Roland show that complementarity of reform packages does not by itself imply that a big bang approach is desirable. On the contrary, applying gradualism may give governments an additional advantage by building constituencies for further reforms. If uncertainty surrounds the outcome of partial reforms, governments can choose between accepting next reforms and reversing the previous ones. If initial reforms yield positive results, people accept less popular reforms to save on reversal costs and not lose gains from reforms already implemented. Thus, correct sequencing can create momentum by strengthening the support for reforms during the transition process. By contrast, incorrect sequencing undermines popular support and may unnecessarily lead to reform reversal.[157]

Secondly, the current Indian government is forward-looking, rational, and reform minded. The Task Force's recommendations focused on improving tax compliance by making compliance easy, helped by digital technology. However, because India exhibits low compliance,[158] its population may not have supported comprehensive reform if the government had suddenly introduced compliance measures. By first announcing the reduction of income tax rates for individuals and companies, the government tried to proceed positively and gather support for future compliance.

154 Brys, above n 134, at 19.

155 Mathias Dewatripont and Gérard Roland "The Design of Reform Package under Uncertainty" (1995) 85 *American Economic Review* 1207 at 1208.

156 At 1207.

157 At 1209.

158 Central Board of Direct Taxes *Income Tax Department Time Series Data Financial Year 2000–01 to 2018–19* <https://www.incometaxindia.gov.in>. The compliance the rate of compliance in the financial year 2018–19 was 11.6 per cent. Anirudh Tagat "The Taxman Cometh: Behavioural Approaches to Improving Tax Compliance in India" (2019) 3 *Journal of Behavioural Economics for Policy* 12.

Olofsgard states that using gradualism to advance comprehensive tax reform may be beneficial because a reform-minded government may achieve a good reputation and establish support for more controversial measures by first introducing relatively popular reforms.[159] However, the BJP government may consider Stiglitz's advice. Stiglitz argues against reducing tax rates before more complex issues are introduced. He suggests that tax reform would generally be accepted if a prospect of some kind of tax reduction exists.[160]

Nevertheless, it is hoped that the government consider the Task Force's advice to adopt the big bang approach. The Task Force intended its recommendations to be implemented together, so that benefits would be fully realised. Advancing recommendations in batches may reduce the intended impact. Scholars have suggested that if a reform package can be accomplished by adopting the big bang approach, it is better to employ it. In their opinion, gradualism runs the risk of losing focus and degenerating into ad hoc measures that do not lead to necessary fundamental change.[161]

5.3 Comparison

The South African government has consistently used gradualism for advancing the rewrite process of tax legislation. In India, governments led by different parties have adopted different approaches. The UPA-led government adopted the big bang approach in contrast with the current the BJP-led government's use of gradualism.

Even though the current governments in both countries are using gradualism to advance their processes, their reasons for doing so are different. South African policy makers have not completed drafting a new Income Tax Act. They are still in the process of introducing small reforms sequentially to create the structure of the new legislation. At present, the ANC government has sufficient majority support for advancing small tax reforms. It does not appear to be losing this support. For these reasons, the South African government has chosen gradualism for their rewrite.

Unlike the South African government, the Indian government has the draft of the new Income Tax Act ready. Nevertheless, the government is introducing the legislation sequentially. Unlike the ANC, a political party in India, even if in power, may struggle to find sufficient majority support for fundamental tax reform. Revenue measures are a matter of confidence: their defeat would defeat the government. For this reason, the current Indian government is introducing small reforms strategically and sequentially to gather and maintain majority support and prevent tax reform from being blocked.

The Coronavirus disease has adversely impacted the South African and Indian economies. Understandably, at present, the governments of both countries may consider short-term tax policies for reviving their economies. In such circumstances, it would be unsurprising if both governments delay the rewrite process for some time.

159 Olofsgard, above n 136, at 17.

160 Joseph E Stiglitz, "New Perspectives on Public Finance: Recent Achievements and Future Challenges" (2002) 86 *Journal of Public Economics* 341 at 348.

161 Brys, above n 134, at 20; Bird, above n 4, at 52; David Lipton and Jeffrey Sachs "Creating a Market Economy in Eastern Europe: The Case of Poland" (1990) 1 *Brookings Papers on Economic Activity* 75 at 139; Kevin Murphy, Andrei Shleifer and Robert Vishny "The Transition to a Market Economy: Pitfalls of Partial Reform" (1992) 107 *Quarterly Journal of Economics* 889 at 905; Susan Gates, Paul Milgrom and John Roberts "Complementarities in the Transition from Socialism: A Firm-Level Analysis" (1994) *Institute for Policy Reform Working paper no IPR75*.

6.0 CONCLUSION

Eagleson notes that the cause of much complicated language is frequently ill-conceived and poorly devised policy. No amount of simplification of language can remove unnecessary complications of content.[162] Experiences from New Zealand, the United Kingdom and Australia confirm this statement. South Africa and India appear to have taken this lesson into account. Measures adopted so far in the rewrite process by the two countries suggest that their objective to redraft income tax legislation is to reduce administrative and compliance cost. They intend to improve the language of their income tax legislation in the light of this goal. In other words, their latest efforts suggest that they intend to enhance effective simplicity.

South African and Indian income tax Acts deal with complex transactions. Thus, the laws concerning such transactions are unavoidably complex. However, complexity has also arisen because policies are not given proper thought or meet amendments with changes in economic transactions. Such policies have affected the drafting style of several provisions and their structure. A complicated drafting style and an incoherent structure make provisions hard to understand and increase compliance costs.[163] The task force in India has suggested measures to reduce unnecessary complexity in its draft of new income tax legislation. South Africa, on the other, hand has dealt with unnecessary complexity with the Tax Administration Act 2012. However, it needs to still deal with unnecessary substantive complexity.

As far as institutional machinery is concerned, South Africa and India possess it, if they decide to pursue the rewrite process further. Unlike New Zealand, the United Kingdom and Australia, neither country has created individual bodies to manage the process. Instead, they have established units within the offices of their tax authorities and assigned them various responsibilities. Their actions are reasonable, considering that both countries are developing economies with limited policy making and administrative resources. It is hard to transpose structures from one jurisdiction to another. Redrafting tax legislation is a resource-intensive exercise, and resources differ from country to country.

While the existing institutional machinery in South Africa and India is capable of planning for short term tax simplification, it does not show the ability to plan and maintain the tax simplicity in the long term. The United Kingdom created OTS to advise the government of the day on tax simplification. A lesson from the United Kingdom is that such a body should be independent of government and private sector. If South Africa and India create such a body, maintaining independence will be a major challenge. It is hard to imagine that such a body could work independent of political pressure, considering that South Africa has not changed its government since independence, and that in India, the redrafting process initiated by a political party in power has never been supported by its successor.

South Africa and India did not modify their legislative processes to undertake their rewrite. Their arrangements suited the adoption of tax reform in the two countries in terms of their objective to enhance effective simplicity given their limited resources. Nevertheless, regardless of the aims of the rewrite and the availability of resources, both countries may consider adopting certain practices from the experiences of New Zealand and the United Kingdom.

162 Robert Eagleson "Plain English in the Statutes" (1985) 59 *Law Institute Journal* 673.

163 See, Joel Slemrod "Complexity, Compliance Costs and Tax Evasion" in Jeffrey A Roth and John T Scholz (eds) *Taxpayer Compliance (Vol 2)* (University of Pennsylvania Press, Philadelphia, 1989).

Unlike New Zealand, South Africa and India did not hold public consultation when formulating policy. Lack of transparency raises doubts over the seriousness of the governments of involve stakeholders in the process, although in India, the membership of the Task Force included tax professionals. However, these tax professionals were policy makers rather than representatives of the interests of different professional bodies.

Unlike the United Kingdom, South Africa and India did not devise a tailor-made process for parliamentary scrutiny of rewritten legislation. This cannot be regarded as a shortcoming as such. The United Kingdom's objective was to improve legal simplicity. This meant that scrutiny of rewritten drafts by a steering committee was essential to ensure that policy was not changed with changes in language. It, however, did not mean that the drafts were necessarily debated in parliament. Consequently, parliament could reasonably be expected to expedite its procedure. South Africa's and India's intention was to enhance effective simplicity. Their focus meant that the underlying policy of certain laws was changed. While such a situation requires detailed consultation at policy formulation stage, it also requires rigorous parliamentary debate. Debate about policy, however, should not overlook the importance of setting a reasonable time frame.

South Africa and India have adopted gradualism for implementing comprehensive reform. Each country's decisions, however, are influenced by its unique political and institutional environment. Two relevant differences are: first, the South African government – led by the ANC – currently commands a majority, which will probably prevail for a considerable time. In the Indian political environment, however, even a party in power may struggle to generate and maintain support, especially for major reforms. Secondly, South Africa has not yet drafted new tax legislation, whereas the Indian government has prepared a draft of the rewritten Income Tax Act. The Indian government considers that these proposed changes are radical and prefers to pause before publishing the draft for public comment.

The limitation of this article is a comparison of two jurisdictions which have not yet completed the rewrite of their income tax legislation. Thus, reasons for approaching certain issues arising from the adoption and implementation stages can only be conjectured. The author recommends undertaking a further review when South Africa and India have completed the rewrite process. Only then may a comprehensive evidence-based comparative analysis will be possible.

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