

**LEGISLATIVE DRAFTING:**

**PRINCIPLES**

**AND**

**MATERIALS**

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# **LEGISLATIVE DRAFTING**

## **PRINCIPLES AND MATERIALS**

### **PROLOGUE:**

These principles and materials cover three distinct yet closely inter-related characteristics of sound legislation.

Principles I – III address Substantive Soundness. This refers to the legal content of legislation, and how well it meets its objectives (solving or preventing problems).

Principles IV – XVI address Technical Soundness. This refers to organization, structure/format, and drafting issues relating to grammar and linguistics.

Principles XVII – XVIII address Procedural Soundness. This refers to the manner in which legislation is drafted, and how different parties contribute to the process.

Clearly, these three requirements are intricately linked. Legislative drafting is the process whereby legislators try to get both the substance and the format right. Substantive and policy-making errors lead to legislation that is not Practical, Effective, or Efficient, and turn legislative drafting into an exercise in frustration. Technical errors compromise substantive work, and lead to complications in implementing legislative solutions. Inefficient and closed procedures undermine the quality of legislation and turn law-making into a top-down process that lacks legitimacy.

Just as a chain is only as strong as its weakest link, legislation must meet the requirements of Substantive Soundness, Technical Soundness, and Procedural Soundness in order to be Practical, Effective, and Efficient.

### **ABOUT THE AUTHOR**

Mark Segal is a lawyer originally from Philadelphia, Pennsylvania, who has been an international legal consultant since 1994. During this time, he has worked and lived in Central and Eastern Europe, the Baltic States, the Balkans, the Caucasuses, Ukraine, the Russian Federation, Central Asia, Asia, the Middle East, Africa, and Latin America. He has been involved in a large number of legal, judicial, and legislative reform projects, including senior positions, on behalf of different international organizations and donors. He works with parliaments, ministries, courts, non-governmental organizations, and professional training institutions. This work covers rule of law issues, legal reform, judicial reform, court administration, legislative drafting, institution building, capacity development, monitoring and evaluation, and raising professional qualifications. It includes training of thousands of legal professionals in dozens of countries.

# **LEGISLATIVE DRAFTING - PRINCIPLES AND MATERIALS**

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# INTRODUCTION TO LEGISLATIVE DRAFTING

## Words of Wisdom Concerning Clear Writing

Before looking at specific principles concerning legislative drafting, it is helpful to take a look at some comments from prominent personalities concerning laws, writing, and clarity.

- 1) "A law should be clear, precise, and unambiguous – interpreting it means allowing distortions".  
Napoleon Bonaparte
- 2) "A man who uses a great many words to express his meaning is like a bad marksman who, instead of aiming a single stone at an object, takes up a handful and throws, hoping he may hit." Samuel Johnson
- 3) "Whenever we can make 25 words do the work of 50, we halve the area in which looseness and disorganization can flourish." Wilson Follett
- 4) "The most valuable of all talents is that of never using two words when one will do." Thomas Jefferson
- 5) "A sentence should contain no unnecessary words, and a paragraph no unnecessary sentences, for the same reason that a machine should have no unnecessary parts." William Strunk
- 6) "My aim is to make things as simple as possible, but not simpler than that." Albert Einstein
- 7) "Easy reading is damned hard writing." Nathaniel Hawthorne
- 8) "I am sorry this is such a long letter, but I didn't have time to write a short one." Mark Twain
- 9) "Simplicity is the ultimate sophistication." Leonardo da Vinci
- 10) "If you can't explain something simply, you don't understand it well." Albert Einstein
- 11) "Genius is the ability to reduce the complicated to the simple." C. W. Ceram
- 12) "The ability to simplify means to eliminate the unnecessary so that the necessary may speak."  
Hans Hofman
- 13) "The chief virtue that language can have is clearness, and nothing detracts from it so much as the use of unfamiliar words." Hippocrates
- 14) "The language of law must not be foreign to the ears of those who are to obey it." Learned Hand
- 15) "Broadly speaking, the short words are the best, and the old words when short are best of all."  
Winston Churchill
- 16) "The shorter and the plainer the better." Beatrix Potter
- 17) "The best sentence? The shortest." Anatole France

- 18) "Use the smallest word that does the job." E. B. White
- 19) "Do not accustom yourself to use big words for little matters." Samuel Johnson
- 20) "Never use a foreign phrase, a scientific term or a jargon word if you can think of an everyday English equivalent." George Orwell
- 21) "Think like a wise man but express yourself like the common people." William Butler Yeats
- 22) An intellectual is a man who takes more words than necessary to tell more than he knows.  
Dwight D. Eisenhower
- 23) "I believe more in the scissors than I do in the pencil." Truman Capote
- 24) "Writing improves in direct ratio to the things we can keep out of it that shouldn't be there."  
William Zinsser
- 25) "Stick to the point, and cut whenever you can." W. Somerset Maugham
- 26) "Words, like glasses, obscure everything they do not make clear." Joseph Joubert
- 27) "The great enemy of clear language is insincerity. When there is a gap between one's real and one's declared aims, one turns, as it were, instinctively to long words and exhausted idioms, like a cuttlefish squirting out ink." George Orwell
- 28) "Writing is largely a matter of application and hard work, or writing and rewriting endlessly until you are satisfied that you have said what you want to say as clearly and simply as possible."  
Rachel Carson
- 29) "Poorly drafted statutes are a burden upon the entire state. Judges struggle to interpret and apply them, attorneys find it difficult to base any sure advice upon them, and the citizen with an earnest desire to conform is confused. Often, lack of artful drafting results in failure of the statute to achieve its desired result. At times, totally unforeseen results follow. On other occasions, defects lead directly to litigation." Albert R. Menard
- 30) "Law books are the largest body of poorly written literature ever created by the human race." John Lindsey
- 31) "There are two things wrong with legal writing. One is style. The other is content". Fred Rodell
- 32) "Brevity is the soul of wit". William Shakespeare
- 33) "I'm the Parliamentary Draftsman, I compose the county's laws, and of half the litigation, I'm undoubtedly the cause. I employ a kind of English, which is hard to understand, though the purists do not like it, all the lawyers think it's grand." J. Bridge
- 34) "The length of your answer should correspond to how much you know about the subject".  
Professor handing out examination to students

# PRINCIPLE I

## The Legislative Drafting Process Should Start With Setting Objectives and Establishing Policy

**EFFECTIVELY**

**IMPLEMENTING**

**POLICY**

**THROUGH**

**LAW**

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## **I. Introduction**

Laws are tools for ordering economic and social activities in a country. They are designed to solve or prevent problems, or to promote welfare. Policy making or formulation is the process whereby the objectives of governmental action and laws are established. It involves selecting and prioritizing the issues to be addressed and deciding how to handle them. Thus, the first step in the legislative drafting process is identifying the objectives to be achieved and the policies to be implemented.

Once it has been decided *what* needs to be done, it is possible to determine *how* to most effectively do it. This could involve legislation or another form of governmental initiative. Thus, the first question to ask is whether a law is necessary, or whether an alternative measure (or a combination) would work best. If a legal instrument is warranted, the correct form must be selected (treaty, law, regulation, decree, administrative order, etc.). It must then be determined whether new legislation is required, or if it is sufficient and possible to amend existing legislation.

If a legal instrument is not necessary, then alternatives such as manuals, circulars, opinion letters, guidelines, voluntary agreements, codes of conduct, self-regulation, performance-based initiatives, informational campaigns, etc. can be considered. These mechanisms can be very cost-effective, and they establish a more cooperative relationship between the government and the governed.

But the traditional approach is to pass “**Command and Control**” legislation, which creates legal obligations and imposes sanctions for violations. This approach is believed to a) provide standardized solutions to problems, b) be relatively easy to enforce, c) establish clarity for target groups, and d) enable legislators/regulators to express their intent. However, legislation can be rigid (difficult to amend and adapt to changing circumstances), costly for the government and governed, adversarial with respect to target groups, overly complicated and detailed, and ineffective at the end of the day. Setting objectives and defining policy must be practical exercises, directed towards successful implementation and actually solving problems. Sometimes legal instruments are not required, and sometimes they work best when accompanied by other kinds of measures.

Laws solve or prevent problems by implementing policies in the form of norms. Norms are rules concerning what specific target groups must not do, must do, or may do, under carefully defined circumstances. Thus, laws contain prohibitions, obligations, and rights (authorizations). In order to be effective, laws and the policies which they implement must define the relevant target group(s), and carefully specify what their behavior should be (or how it should change). Remedial or preventive measures must be based on a sound understanding of the targeted behavior and the circumstances under which it occurs, realistic planning concerning how to make changes, and an understanding that laws are not the only source of influence upon behavior. In other words, policies must be based on accurate information, a sound understanding of the real situation, and clear planning concerning what authorities can and should do.

The initiators or proponents of laws have a crucial role to play in developing policy and laying the foundation for its proper implementation. They are responsible for 1) determining what the new law should do, 2) demonstrating that this is necessary and appropriate, 3) building consensus, and 4) ensuring that the final version of the new law and the implementing mechanisms are sound, practical, and viable. Once the initiators or proponents determine that a new law is indeed required, they should guide the legislative drafting process, collaborating with legislative drafters and parties who will mark up the law. This requires effective communication, meaningful consultation, sound information management, and constant attention to the structure and content of the law. The goal is to combine sound policies, accurate drafting, and productive review, to produce a good law.

However, policy making is not a neutral or objective exercise. Electoral and political processes determine who will lead a country, and establish the ideology and methodology for identifying and formulating legislative solutions. Rules of procedure and the institutional structure of the government create a framework (processes and mechanisms) for identifying and codifying legislative solutions. Nonetheless, policies must be professionally designed, through problem solving exercises, and seek practical solutions. Further, they must be subjected to informed debate. Policies which are excessively influenced by political/ideological objectives or parochial interests are less likely to meet their objectives, and more likely to undermine governance.

## **II. Where Do Policies Originate?**

Objectives for major legislative initiatives usually originate in a Government Programme. This is customarily developed and elaborated through electoral and political processes. Thus, it reflects the positions and interests of the governing party (or parties if there is a coalition), and starts with party platforms. In many countries, the Government also formulates and issues a legislative agenda, which identifies and prioritizes the subject matters to be addressed, and indicates the timing for doing so. This agenda may be prepared annually, or correspond to the legislative session. In Commonwealth countries, the Head of State usually opens the first session of Parliament by reading the annual legislative programme. It serves as a reference point and calendaring mechanism for institutions and parties which prepare and review draft laws.



The Government Programme should be based on a meaningful assessment of the long-term and general needs of the society. It should not focus on special interests or parochial positions of powerful or narrow sectors of society. Unfortunately, in many countries policy making (and legislative drafting and review) are greatly affected by interest groups, powerful parties, and lobbyists. It is important to set limits on this, and ensure transparency. There must be a distinction between the provision of information and the exercise of undue influence.

Nonetheless, the Government Programme is not and can never be “neutral”. It is developed through political and ideological processes, and it is elaborated by executive and legislative institutions managed by individuals with defined interests. And the line between facts and values is not always crystal clear. Still, the Government Programme has to be professional, and not excessively based on ideology or partisan interests. After all, it will eventually be judged, through electoral and political processes (at the times and under the circumstances established in each country). In fact, overly ideological/partisan approaches and haphazard legislative prioritization are major causes of poor governance and governmental inefficiency.

Ministries have a key role to play in formulating and implementing the Government Programme. They should contribute to policy development on the basis of circumstances in their areas of competence, and to resolve problems relating to existing policies and their implementation. They should contribute to policy implementation through design of legislative solutions and participation in the legislative drafting process. Sound lines of communication with constituents, experts, and other ministries are crucial for this work.



Even if the governing party/parties have the political strength to impose policies, legislative solutions are more likely to be sound when subjected to honest and transparent debate. Public discourse in a pluralist setting is one of the best ways to test legislative solutions. For this purpose, there must be adequate access to information concerning the Government Programme and what is being proposed, and how it will be implemented. Institutions which play a key role in this process include the media, trade unions, think tanks, professional associations, the legal profession, the academic community, and civil society (Non-Governmental Organizations).

Outside of the Government Programme, new laws may respond to circumstances which arise, or be based on the priorities of specific parties. In some countries, individual legislators, a minimum number of legislators, specific institutions (such as Ombudsmen), or even the general public have the right of legislative initiative. Policy formulation under these circumstances is oriented towards the specific issue being addressed. It also depends greatly upon the capacity and positions of the parties most directly involved.

### **III. How Should Policies Be Made, and What Are the Key Steps?**

The degree of separation between policy making and legislative drafting varies between countries. In some countries there is excessive demarcation. This can turn policy making into an extremely theoretical exercise. In other countries the tasks are merged, and drafters have too much discretion concerning policy. This makes legislative drafting unfocused and variable, and is counterproductive. It is clearly best practice to take fundamental decisions regarding policy before a law is drafted. Ministries, Ministerial Committees, and the Government Office can be responsible for this process, based upon the Government Programme. However, as discussed below, it is natural and indeed necessary to engage legislative drafters in *refining* policy, and determining the most effective ways to achieve policy objectives. Parties which draft and mark up legislation, from Working Groups to Parliamentary Committees, are invariably engaged in this process.

**There are four key steps in the policy making process:**

<b>FOUR STEPS FOR DEVELOPING POLICY</b>	
<b>1</b>	<b>Identifying the problem</b>
<b>2</b>	<b>Analyzing and explaining the causes of the problem</b>
<b>3</b>	<b>Proposing multiple solutions to the problem</b>
<b>4</b>	<b>Selecting the best solution(s) to the problem</b>

Making policy through this four-step process treats legislation as a means to designated ends. It does not make value judgments about those ends, but seeks to test their likely success through rational analysis. Each of these four steps needs to be carefully considered, in turn.

#### **STEP ONE: Identifying the problem**

It is necessary to precisely identify a problem in order to find ways to solve it. When a problem is defined and stated accurately and concretely, it is much easier to find a coherent solution. Far too often, causes and symptoms are confused, and the core nature of the problem is not identified. In

order to avoid this problem, it is important to ask a number of poignant questions, and assess how well the answers lay the groundwork for designing solutions.

The following questions exemplify this approach:

1. What kinds of conditions/circumstances are causing this problem?
2. What types of behavior (action or inaction) are causing the problem?
3. Who (which target groups, individuals, legal persons, institutions) is responsible for the problem, or is engaged in problematic behavior?
4. Where, when, how, and under what circumstances is this behavior taking place?
5. What parties or institutions are contributing to the problematic behavior?
6. Who is affected by this problem or problematic behavior, and in what ways?

The last question is crucial. Often there are complex inter-relationships between the parties who are responsible for problems and the parties who are affected by them. These inter-relationships need to be explored in order to design targeted and lasting solutions.

One way to get to the heart of a problem is by identifying the conditions that must be changed, and then assessing their causes. In other words, state what is happening that should not be, or what is not happening that should be, and then consider possible explanations. The explanations should fully account for cause and affect relationships.

It is important to remember that distinct problems can be combined or intertwined to create a new and larger problem. Thus, several of the above formulations could be applicable simultaneously.

## **STEP TWO: Analyzing and explaining the causes of the problem**

Once we have clearly identified the problem, we need to determine why it exists. Clear formulations of a problem can illuminate intermediate causes. But solutions can only be developed by carefully identifying the ultimate or root causes.

Different circumstances cause socio-economic problems. Seven major categories can be identified:

1. The legal framework. Laws and regulations may be poorly drafted, ambiguous, outdated, impractical, counterproductive, or even contradictory. Many socio-economic problems have their origins in laws or regulations which lack cogently formulated objectives, or which are not soundly designed to meet their objectives.
2. Implementation of the law. Laws and regulations may be difficult to implement. Juridical or administrative institutions may not be able to fulfil designated roles, due to management difficulties or lack of resources (financial, capital, technical, human, or informational). Capacity constraints may be compounded by the absence of a clear mandate, or excessive administrative discretion. Corruption may be an issue.
3. Capacity of Target Groups. Target groups may lack the necessary skills, resources, and technical capacity to take appropriate actions or comply with legal requirements. There are both individual and institutional aspects to capacity requirements.
4. Information management. Parties may be unable to effectively access, analyse, organize, utilize, and/or share information. Indeed, information management problems often contribute to or compound socio-economic problems.
5. Communication issues. Lack of communication between parties who need to work together often causes socio-economic problems. Technology limitations, obstacles to

mobility and transportation, and geographical distance create communication problems. This can cause target groups to be unaware of their legal obligations, or applicable working procedures. There may be barriers between official institutions and target groups, particularly those which are marginalized or disadvantaged.

6. Procedural obstacles. Ineffective procedures for making decisions, performing and documenting work, or engaging in collective action can cause socio-economic problems. Bureaucratic procedures often create obstacles, alone or in combination with the circumstances identified above.
7. Incentives and ideologies. It is extremely important to understand the motivation and ideology of target groups, in order to solve socio-economic problems. What are their goals? How do they perceive and rationalize their behavior? How do they evaluate costs and benefits? Sometimes target groups do not actually know what is in their own interests, due to disincentives, inconsistent reward structures, or confusion between material and non-material rewards. There may be special motivational factors (like protecting cultural heritage, natural resources, or group interests).

These factors are often inter-related, and mutually reinforcing. For example, there can be a clash between legal norms and cultural interests, exacerbated by bureaucratic procedures and geographic distance. Or communications difficulties can affect institutional performance and the implementation of laws. Under such circumstances, there are multiple levels of interconnected explanations, involving legal, institutional, and human factors.

Finally, it is necessary to evaluate any institutions which are charged with handling, controlling, or solving the problem or problematic behavior. What are they doing? Why can't they solve the problem? What can be done to help them work better? Official institutions are often part of the problem, or part of the reason the problem is not being solved. Understanding why this is the case can help identify solutions to socio-economic problems.

### **STEP THREE: Proposing multiple solutions to the problem**

Once the problem is fully analyzed and the causes are understood, it is time to identify potential solutions. They should be carefully directed towards root causes (not symptoms), and be based on the latest and most accurate information possible.

The first step in designing solutions is establishing the rationale and mechanism for governmental action. The following questions need to be addressed:

- Why should the government solve this problem?
- What level of government should address the problem? National, regional, or municipal?
- What is the optimal form of governmental action? Is a legal instrument necessary, or will some other mechanism, such as an informational campaign, suffice?
- If a legal instrument is necessary, what kind is most appropriate? Is a law necessary, or can the problem be addressed through secondary legislation (such as an administrative regulation), or by some other kind of normative act (such as a decree or by-law)?
- How can the policy making and legislative drafting processes establish the *legitimacy* of the governmental action?

This analysis is important, because a new law is not always the answer, or the best answer.



To design sound solutions for socio-economic problems, it is necessary to a) identify the most appropriate actions and mechanisms, b) determine who should carry them out, and c) specify when and where and how. In other words, we should determine *what* should be done, *who* should do it, and under *which* circumstances.

The chart below identifies possible actions/mechanisms, depending on the nature of the problem:

LEGISLATIVE PROBLEM SOLVING	
ORIGIN OF THE PROBLEM	TYPES OF SOLUTIONS
<b>Legal Framework</b>	Laws and regulations can be amended or revised, to change normative requirements or remove ambiguity. This should be done through consultative processes which fully identify what is wrong with the law or regulation, and generate feedback to determine how to improve it.
<b>Implementation of Law or Regulation</b>	Technical assistance can be provided to juridical or administrative institutions responsible for implementation or enforcement, so they can better fulfil designated roles. This support can help management, rationalize the use of resources (financial, capital, human, and information), or focus on mission development and strategic planning.
<b>Capacity of Target Groups</b>	Technical capacity of target groups can be enhanced through advice, training, or the provision of resources which enable them to develop knowledge, skills, and the ability to better perform their functions in accordance with normative requirements and social responsibilities.
<b>Information Management</b>	Key institutions and target groups can receive support for accessing, analyzing, organizing, utilizing, sharing, and disseminating information. Technology solutions can facilitate this process.
<b>Communication Issues</b>	Communication can be improved through networking, establishing linkages, and better transportation. Target groups can be informed about their legal obligations and optimal working procedures. Barriers between official institutions and target groups can be surmounted through improved service delivery.
<b>Procedural Obstacles</b>	Procedures can be improved through revised organic documents, protocols, new working procedures, and more effective collective action. Bureaucracy can be streamlined and improved. Business re-engineering and change management principles can be applied.
<b>Incentives and Ideologies</b>	New incentive structures (punishments and rewards) can be created, to motivate different approaches by target groups. Capacity for compliance can be increased. Educational measures can help target groups better understand the choices they are making and the likely (preferable) results. Disincentives and inconsistent reward structures can be eliminated.

The specific actions and mechanisms which are utilized for solving socio-economic problems can be categorized as follows:

<b>PROBLEM SOLVING MECHANISMS</b>	
<b>Direct Measures</b>	Direct Measures are usually punishments and rewards. They are designed to have an immediate and express effect on targeted behavior. Punishments, such as incarceration, fines, and taxes, are disincentives for targeted behavior. Rewards, such as in-kind benefits or tax advantages, are incentives for targeted behavior. Direct Measures are at the heart of the Command and Control approach to problem solving.
<b>Indirect Measures</b>	Indirect Measures affect the status and circumstances of target groups. They include steps to enhance capacity, improve communications, develop access to information and information management, and modernize overall management.
<b>Motivational Measures</b>	Motivational Measures are directed towards interests of the target group. They can affect ideology, belief structures, and approaches to issues. They utilize advocacy, outreach, and dialogue.
<b>Educational Measures</b>	Educational Measures are closely related to motivational measures, but emphasize raising the level of knowledge of target groups, and helping them utilize relevant information. Many different delivery mechanisms can be utilized to teach and inform.

To a certain extent these categories overlap, and therefore precise definition is not required. In addition, it is sometimes advisable to employ a combination of actions and mechanisms.

Once potentially useful actions and mechanisms are identified, the next step is to determine who should carry them out. This process can be called “**designating the catalyst**”. As in chemistry, the catalyst is an agent which initiates or triggers a chain reaction. When solving socio-economic problems, the catalyst can come from either the public sector or the private sector. It could be a governmental or official body, or a Non-Governmental Organization (such as an educational institution or professional association). The choice of catalyst follows from the way the problem is formulated, and the characteristics of the target group(s) which must be influenced. The choice of catalyst (and in particular whether it is official or from the free market) also depends upon the ideological predisposition of the policy makers.

If the catalyst is a legal person, it is necessary to determine whether an existing institution will suffice, or whether a new one needs to be established. The creation of a new catalyst inevitably runs into obstacles related to institution building and cost. Difficulties may arise between the new institution and existing institutions, as their relationships are established. On the other hand, if an existing institution is chosen, it is important to a) assess its current performance, b) determine how well it will be able to handle a new mandate and additional responsibilities, and c) determine what additional resources and operational capacity will be required. Finally, it is necessary to determine if the institution already has a relationship to the problem. In spite of this, it is generally advisable to use what is already available, if possible, before dedicating resources to creating something new.

The customary mechanism for solving problems is by assigning tasks to an administrative or executive agency. It is also possible to rely on autonomous agencies, public corporations, courts, or private institutions, or a combination thereof. Sometimes there are multiple candidates, and it is necessary to perform comparative analysis. When an existing institution is assigned new tasks, the issues raised above and the following questions need to be addressed:

- What is the current mandate of the institution?
- How well is the mandate being fulfilled? Is there sufficient capacity? If not, what is lacking?
- How will the new tasks relate to the existing tasks?
- How will the new tasks be assigned? Will organic documents need to be changed?
- How will the new tasks be integrated into the work of the institution? Will organizational restructuring, business re-engineering, and/or change management be required? How will managerial difficulties be overcome? Will strategic planning be required?
- How will management (leadership) respond to new tasks? How will decisions be made? What will be the incentive structure for the new tasks?
- How will existing employees respond to the new tasks? What will be the relationship between existing and new employees?
- What should be done to enhance capacity, and perform new tasks? What additional resources (financial, capital, technical, human, or informational) are required?
- How will other institutions respond to the changes?
- How will the relationship with other institutions be affected?

These questions constitute a “mini-functional review”. Clearly, careful analysis of institutional functions is pre-requisite to the design of viable legislative solutions. Further, if there is more than one candidate institution, comparative functional review is in order. Comparative assessment of existing and required capacity is necessary in order to identify the best candidate.



*It is important to understand that one of the most common causes of poorly executed policy is selection of a catalyst lacking institutional capacity and/or incentive to implement the legislative solution. In addition, this situation is usually foreseeable at the time of policy design and legislative drafting! In other words, measures which are required to secure implementation of the legislative solution are not put in place when they can and should be. This makes the resulting law or regulation less sound, and less likely to achieve its designated objectives.*

Specific ideas concerning how to achieve legislative objectives can be generated from a number of sources. Previous experience addressing related problems is the best place to start. Information from other jurisdictions which have faced similar problems can prove extremely valuable. Legal databases can provide a wealth of information. And consultations with interested and knowledgeable parties are indispensable. Non-Governmental Organizations and independent experts can offer highly practical expertise and guidance. Indeed, target groups are often the best source of guidance concerning what will work most effectively.

Utilizing the techniques outlined above, it should be possible to identify a number of potential solutions to the socio-economic problems being addressed. At this stage, the idea is to assemble several potential solutions, and categorize them on the basis of approach, without ranking them or determining which is best. Having done this, we are ready to move on to the fourth and final stage of the problem-solving process, and select the optimal approach.



#### **STEP FOUR: Selecting the best solution(s) to the problem**

Once a selection of sound and viable solutions has been assembled, it is time to assess them and rank them, and thereby decide which is most efficient and effective. The question is which potential solution (or combination of solutions) will work best. This may sound easy to figure out, but it is not. Many variables affect results during policy implementation. Results are always time-bound, and it is not always possible to reach consensus concerning the optimal timeframe. Political considerations often mitigate in favor of shorter-term perspectives, with rapid benefits and displaced or delayed costs. Finally, and perhaps most importantly, ideological predispositions color the analytical process, and impede objectivity. As a result, it is not always possible to precisely determine the most likely results of policies in advance.

Nonetheless, there are a number of valuable and viable techniques for determining whether proposed solutions are likely to be effective, and for selecting the best alternatives.

The following questions can help prepare a checklist which ranks potential solutions:

- Which policy approach is most likely to lead to required behavioral changes on the part of the target group(s)? Behavior is influenced by the letter of the law, expectations concerning enforcement, and subjective socio-cultural factors.
- During which time frames will different policy approaches yield results?
- During which timeframes will the costs of different policy approaches be incurred?
- Which policy approach addresses all (or the most important) causes of the problem?
- Which policy approach can be most effectively implemented by existing institutions?
- What needs to be done to make sure that each policy approach is implementable?
- Which policy approach is least likely to face political or administrative opposition?
- Which policy approach is most likely to be accepted by the target groups?
- How will different policy approaches be viewed by the international community?

It is advisable to perform a simplified Cost-Benefit Analysis for each of the proposed solutions. This is the only way to identify which solution is most “efficient”. Efficiency is a function of effectiveness and cost. The question to ask is which solution provides the most advantageous ratio between effectiveness and cost. It is not always advisable to select the most effective solution. Another solution may be only slightly less effective, but significantly less expensive.



It is also important to take a look at the likely results of the proposed solutions. Regulatory Impact Analysis can be utilized to identify political, economic, social, humanitarian, and environmental consequences, and to minimize the chances of unintended results.

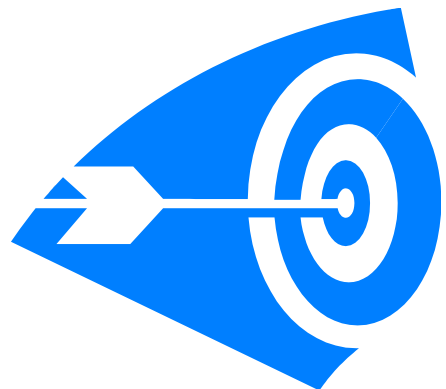
Although it may be difficult to come up with precise numbers, there are definite advantages to a quantitative approach. Market values can be used to aggregate different costs and benefits, and compare them. Sample budgets can be used to monetize costs (give them an actual or estimated financial value). Time factors can be factored into the equation by discounting costs (calculating their current value). This will indicate whether it is better to incur costs over longer periods of time. It will also reveal the true costs of securing immediate benefits by borrowing from future tax revenues (which is politically expedient but not fiscally responsible).

Even if it is not possible to conduct a quantitative analysis, a qualitative approach can still be useful. Qualitative approaches are based on comparisons between factors, and assessments of relative costs and benefits. The following examples illustrate a qualitative approach:

- Since it is usually more expensive to establish a new institution than to expand an existing one, the former can only be more efficient if it is considerably more effective.
- Even without exact figures concerning salaries for new employees, it may be possible to determine the least costly legislative solution by comparing the numbers and types of employees which will be required for each.
- Informational campaigns are generally less costly than enforcement campaigns.
- Incarceration is a very expensive solution, especially compared to fines. Fines are less expensive to administer when procedures are streamlined, and courts are not involved.
- Technological solutions utilizing existing facilities are less expensive than additional human resources (even though all technological solutions require some human support).

When performing Cost-Benefit Analysis, it is always necessary to consider the cost of doing nothing. Sometimes it is more efficient to let a problem be, or solve only part of it. For example, it would not be efficient to impose rigorous safety measures with major costs on businesses if they only marginally enhance public welfare. Solutions should never be more expensive than the problems they address.

When finalizing legislative solutions, it is very important to remember that the best approach may combine elements of several solutions. In other words, different tactics may be combined into a single solution. Or multiple solutions may be combined into an overall policy. Thus, the best way to hit the target may be to combine prohibitions and incentives, or conduct an informational campaign prior to an enforcement campaign, or improve both information management and bureaucratic procedures at the same time. In addition, it may be best to combine approaches to achieve incremental improvements over time, rather than tackling every aspect of a problem at once.



Creativity and flexible thinking are in order, when combining the best elements of different legislative solutions to design an optimal approach.



*NB: Policy makers and legislative drafters do not always engage in the rigorous and complex process outlined above. This may be due to objective factors, such as time pressure, an aggressive legislative agenda, limited human resources, lack of information, or bureaucratic impediments. It may also be due to inattentiveness, lack of discipline, political expediency, or the desire to take shortcuts that reach ideologically acceptable proposals (without honest analysis or debate). There may also be uncertainty regarding the relative roles of policy makers and legislative drafters during the design of legislative solutions.*



*Under these circumstances, policy makers and legislative drafters may go directly to step three, by developing a limited range of potential solutions, and conducting a rapid pro forma analysis to reach a preferred approach. For subjective purposes or political expediency, this may be effective. But Stage Four is eliminated, since there is no chance to select the optimal solution or combination of solutions from a carefully developed set of practical and effective options. In other words, by not fully and honestly carrying out the process described above, policy makers and legislators reduce the chances of truly solving important socio-economic problems.*

#### **IV. How Can Laws Be Drafted to Implement Policy Objectives and Legislative Solutions?**

Once policy objectives and legislative solutions are identified, the next step is to make sure that they are codified into implementable laws. Two key factors must be managed:

1. The structure and content of the draft law. This is a *substantive and technical* exercise, and initially the responsibility of legislative drafters.
2. Review and approval of the law. This is a *procedural* matter, involving all of the parties who consider, amend, and finally enact the draft law.

Both aspects are closely related, and significantly affect each other. However, for analytical purposes, this Section deals with codification, and Section V below deals with procedures.

Codification of policy objectives and legislative solutions is the responsibility of legislative drafters. They ensure that the content of laws (legal provisions) achieve intended results. In other words, legislative drafters make sure that the law, as written, will solve the problem(s), as identified. Further, this should be done according to the models and through the mechanisms selected during the policy making process.

In order to convert policy goals into legal reality, legislative drafters must create optimal text and wording. This is an art and a science, requiring highly specialized skills.

In order to perform their tasks, legislative drafters require:

- A sound understanding of policy objectives, and access to policy makers if clarifications are required
- Accurate information about the problem and actual socio-economic conditions

- Knowledge concerning different approaches to the problem which have already been attempted, particularly in other jurisdictions
- Access to outside and independent parties who can provide information, assist in the drafting process, and analyse possible consequences of selected approaches and legal text
- Sufficient time and resources to perform their work

Unfortunately, legislative drafters regularly face significant obstacles to meeting their requirements. Depending upon the institutional framework and political realities, they may not have full information concerning policy objectives, may not be given sufficient opportunities to obtain clarifications, may not have up-to-date information concerning socio-economic conditions, and may not be able to meaningfully communicate with outside parties who can offer crucial guidance. Perhaps most seriously, legislative drafters usually have limited resources, and face tight and unrealistic deadlines from strict and ambitious legislative calendars.



The exact role of legislative drafters and their level of involvement in policy making vary between different legislative systems. There are two major approaches:

1. Legislative drafting is primarily a *technical exercise*, which involves converting established policies and legislative objectives into a legal document.
2. Legislative drafters play an *active role* in establishing legally binding norms/instructions that effectuate policy objectives and create implementable legislative solutions.

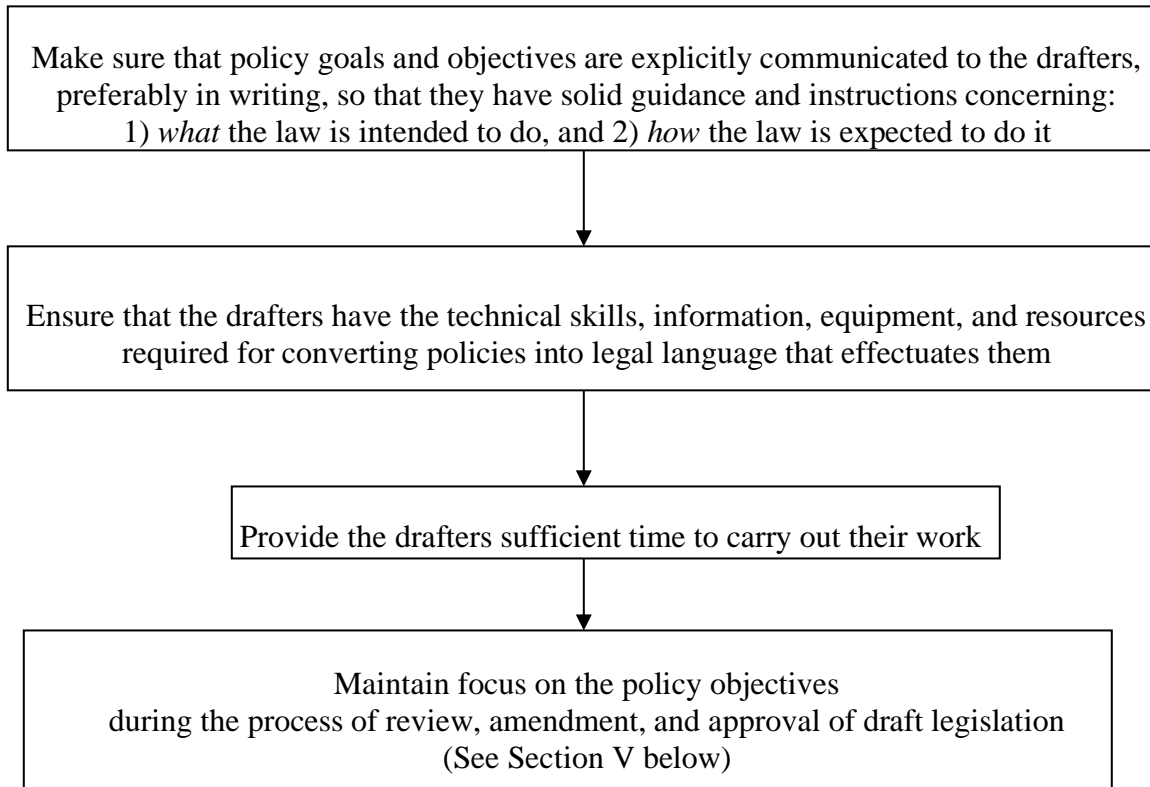
The first approach is more likely to be applied in systems where policy making and legislative drafting are somewhat separated. Countries of the Commonwealth, with parliamentary systems based on British Common Law, often have specialized institutions (such as a Parliamentary Council Office) tasked with drafting laws covering a wide range of subjects. This is done at the request of and under the guidance of initiators or proponents, from the Government or Parliament. Due to the division of labor between policy making and legislative drafting, it is of paramount importance to clearly set forth the policy objectives and support inter-institutional communication.

The second approach is more likely to be applied in systems where policy making and legislative drafting are combined. In Continental legal systems, and countries following Civil Law traditions, ministries and other governmental bodies often carry out these two functions more or less simultaneously. Officials having both substantive expertise and drafting skills combine their efforts, often in Working Groups, which may include representatives of different institutions having jurisdiction over the subject matter. Under these circumstances, the final result is highly dependent upon the specific institutions and individuals engaged in the drafting process.

Despite the formal differences between these two systems and approaches, legislative drafters always have a crucial role in problem solving. They are responsible for formulating written norms which set the parameters for permissible and/or prohibited behavior on the part of the governed, and create incentives and disincentives for target groups. They also make sure that these norms are in compliance with legal traditions and existing law, and are practical and implementable. Therefore, legislative drafters have a crucial role in converting policy into law, and making sure that legislative objectives will in fact be met.

Under these circumstances, accurate and effective drafting must be based on clear instructions concerning policy goals and legislative objectives. It is ineffective and potentially inappropriate to give legislative drafters excessive discretion. They can refine policy and search for creative mechanisms to implement it, but they should not make it.

Therefore, initiators or proponents of legislation play a major role in the articulation and communication of their policies and objectives. To convert their policies into law, it is incumbent upon the initiators or proponents to:



It is important to determine the most advantageous *timing* for starting the drafting work. In some countries, drafters are involved from the start of the legislative process. They provide advice to initiators or proponents about how to best formulate the law to meet policy objectives, and what to include in a Statement of Legislative Intent or the Explanatory Memorandum or Note which will accompany the law (see Section V below). In other countries, drafters wait for instructions before starting their work. While the early involvement of drafters is advantageous, it is most important to provide clear guidance for their work. This is the only way to ensure that drafters effectively convey the correct message to those who must obey, administer, interpret, enforce, or adjudicate laws.

Information concerning legislative intent is sometimes included in the preliminary provisions of laws. In some jurisdictions, Preambles provide background information or explain objectives. Citations (“Having regard to...”) and Recitals (“Whereas...”) may be used to explain the legal basis, rationale, and goals, but they are more commonly found in treaties and conventions. In any event, preliminary provisions are not part of a law, and cannot create enforceable norms. The body of the law must contain all of the required normative provisions.

It is important to note that all laws have policy objectives, whether they are stated or not. Policy objectives are the substance/content of the law, which is actually a vehicle for implementation.

Legislative drafting is also a linguistic exercise. In some countries, linguistic issues (multiple official or working languages) complicate legislative drafting and the conversion of policy into law. One language may be more suitable for legal purposes and terminology, or have longer legal traditions, making it favored by legal professionals. This creates challenges during the drafting process, and may necessitate translation services. Questions may arise regarding the accuracy of the translation, and there may be delays in preparing official versions. Accordingly, linguistic issues should be carefully considered during the drafting process, and be settled as soon as possible. In this regard, Canadian practice is exceptional. In Canada, the entire legislative drafting process proceeds simultaneously in both official languages, English and French. Skilled experts knowing each language conduct drafting activities virtually side by side.

One of the key issues which legislative drafters regularly face is the degree of specificity required in primary legislation, and the extent to which technical and administrative issues can be left to secondary legislation (regulations, by-laws, and decrees). In some jurisdictions, particularly under a Civil Law approach, laws can serve as statements of policy, with details provided in regulations prepared and implemented by administrative agencies. This has been denominated “General Principles Drafting”. It is distinguished from the more detailed and prescriptive “Traditional Approach”, customarily followed in Common Law jurisdictions.

However, in modern practice, the two approaches often converge, particularly in certain areas of law. Secondary legislation is almost always required, and plays an important role. Therefore, legislative drafters must determine the respective roles of their law and subsequent secondary legislation, and the appropriate degree to which regulatory authority should be delegated.

Generally speaking, laws should set forth the main norms, cover key legal issues, and specify penalties. They should also define the parameters for handling subsidiary issues and details in secondary legislation. This will ensure that secondary legislation does not supersede the law or exceed its mandate (which would constitute usurpation of Parliamentary powers). Naturally, the exact balance depends upon specific circumstances, including the nature of the subject matter and the level of administrative capacity. Details concerning highly technical subjects are probably best left to experts who have knowledge, capacity, and time to regulate.

However, regulatory discretion is less advisable when administrative institutions lack the capacity, resources, or staff to properly prepare and efficiently administer regulations. If administrative machinery is less developed, laws which are aspirational or declarative are less likely to effectuate policy and be effectively implemented. They are also more likely to end up in court, which is not the optimal place for defining legislative intent and administrative authority.

Therefore, in countries where the legal system is in transition, or where administrative institutions are still developing and building capacity, it is counterproductive to delegate significant regulatory discretion. Implementing regulations may be deficient, and administrative machinery may not be up to the task. The policies and objectives of the drafters are less likely to be realized. Further, disproportionate discretion gives administrative agencies and personnel more power than they can responsibly manage. This can set the stage for manipulation, inconsistent/selective enforcement, and corruption. Accordingly, the best practice in countries that are reforming their legal system is to very precisely define the relative roles of laws and regulations, and make sure that laws contain sufficient detail concerning rules and norms, and how they should be applied.

It is best practice to address as many of the issues raised above as possible in organic documents which regulate 1) the structure and content of different kinds of legislative acts, and 2) the procedures for drafting/approving them. Examples include Parliamentary Rules of Procedure, Protocols, Executive Decrees, or a Law on Normative Acts. These organic documents can also establish principles for normative legislative drafting, to make sure that laws clearly specify what target groups must do, must not do, or may do, under carefully defined circumstances. Finally, they can specify how to make laws practical and effective, by requiring Regulatory Impact Analysis and related *ex ante* analytical exercises.

Whether they are attached to a Ministry, the Parliament, a Governmental institution, a Working Group, or an independent body, legislative drafters are the focal point for successfully codifying policy into law. It is extremely important to recognize their role and provide them with all required information, resources, and support. This will enable them to create a legal document with enforceable norms and clear guidance for all parties who will be responsible for administration, interpretation, compliance, enforcement, and adjudication.

## **V. How Can Policy Objectives Be Secured During the Legislative Process?**

Sound legislative solutions start with setting appropriate policy objectives and enabling legislative drafters to create practical and implementable normative legal documents. But this is not enough. Laws are the final result of the legislative *process*. Unfortunately, laws can start well but end up otherwise, after being marked up by different parties in various institutions.

The procedures for reviewing and approving draft laws are established in the constitution, legal acts, and rules of procedure. Naturally, the Government (or Council of Ministers), Parliament (starting with Committees), their Legal Departments, other specialized institutions, and Non-Governmental Organizations should exercise their functions according to law. However, the process must be well managed and coordinated. Otherwise, ad hoc changes to a draft law can alter or compromise its policy objectives, make it less practical and more difficult to implement, reduce its internal consistency, or adversely affect its legal sufficiency and quality.

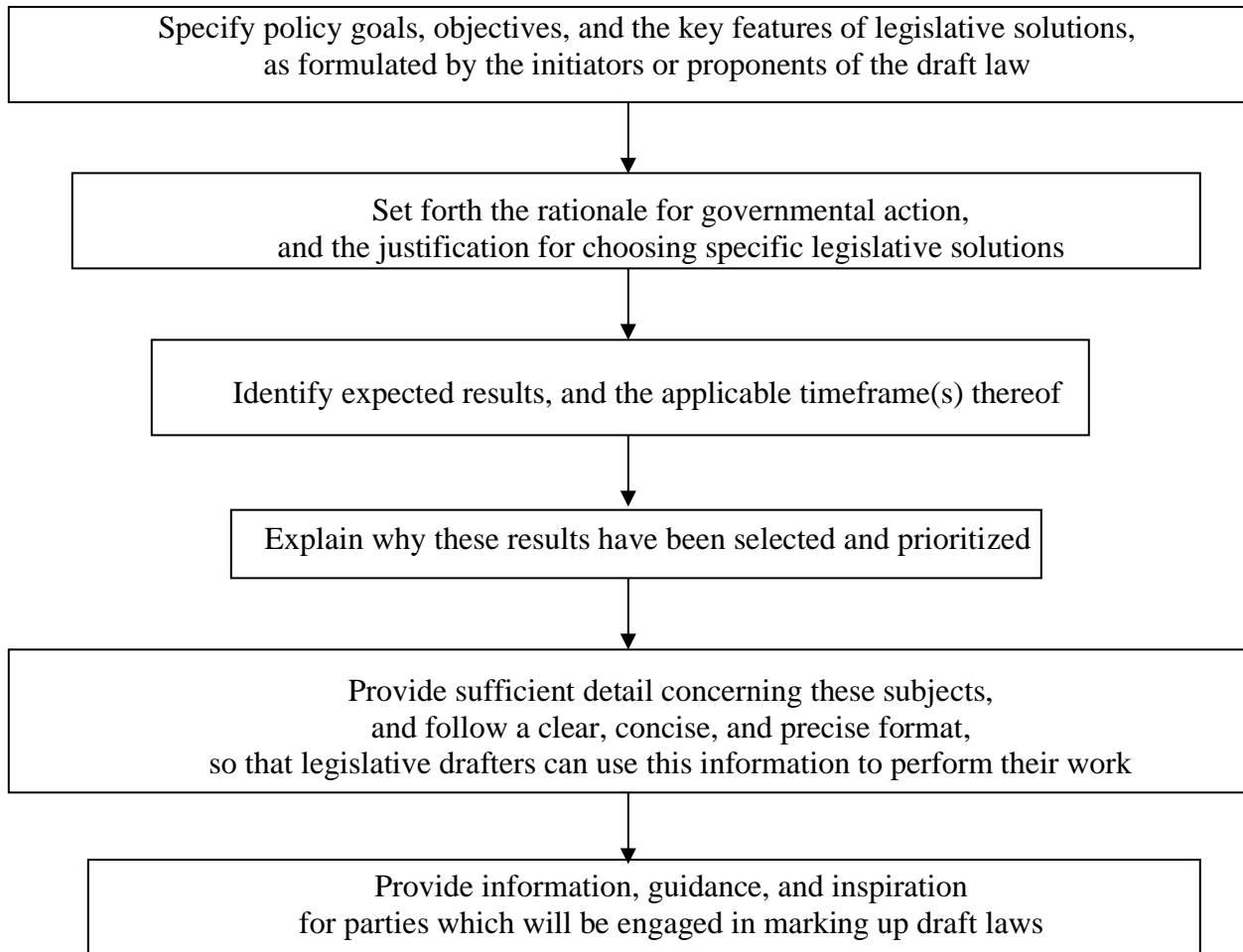
To prevent this from happening, the initiators or proponents of draft laws should:

- Document and communicate their policy objectives and proposed legislative solutions
- Utilize technological and IT solutions to facilitate rational marking up of draft laws
- Help provide required information to parties engaged in marking up draft laws
- Facilitate legal scrutiny and expertise for amendments to draft laws

In jurisdictions which separate policy making and legislative drafting, the initiators or proponents of draft laws usually prepare a Statement of Legislative Intent. This provides policy instructions for legislative drafters, and guides their work.

In many jurisdictions, an Explanatory Memorandum or Explanatory Note accompanies draft laws, and is circulated widely. Its contents and use are usually specified in organic documents, such as Parliamentary Rules of Procedure, Protocols, Executive Decrees, or a Law on Normative Acts. Typically, the Explanatory Memorandum provides background information concerning the draft law, statements of policy objectives, information concerning legal conformity, lists of related laws or those being amended, analysis concerning expected consequences (including Cost-Benefit Analysis and Regulatory Impact Analysis), and other relevant details.

In the current context, the Explanatory Memorandum should:



Sometimes the Explanatory Memorandum is treated as a *pro forma* exercise, or only used to provide perfunctory details, without really explaining the rationale for legislative action. In such cases, it is up to the parties who review and amend laws to demand a more serious approach. There is really no excuse for failing to justify legislative action. As Albert Einstein said, "If you can't explain something simply, you don't understand it well."

It is important to understand that the Explanatory Memorandum is not an end in and of itself. Rather, it is a tool that serves as a guide and reference point during the drafting process. Accordingly, it is advisable to create mechanisms and communication channels for addressing questions about the Explanatory Memorandum that may arise during drafting and review. These could take the form of meetings or briefings, or written requests for clarification or additional information. This makes the Explanatory Memorandum into a "living document" which can be expanded or amended to meet on-going requirements.

One of the best ways of testing the soundness of policy decisions and draft texts is by submitting them to outside expert review. Non-governmental parties, and in particular the target groups which will be affected by a draft law, are in an excellent position to provide guidance concerning the likely effects (and while there is still time to make improvements). Open legislative drafting processes are challenging to manage, but they are an investment which pays off very well for initiators or proponents of draft laws. An ounce of prevention is worth a pound of cure.



By utilizing these practices and mechanisms during the legislative process, and promoting sound communication and legal review of amendments, initiators or proponents of laws can increase the chances of agreement, and ensure that the final product retains its integrity, is of the highest quality, and implements designated policies.

## **VI. How Can Policy Making Be Evaluated?**

Legislators and government officials typically spend far more time making policy and converting it into law than reviewing and assessing the results of their previous work. In some ways this is to be expected, given the extent of their obligations, and the number of laws and subjects which require their attention. However, in another sense this is unfortunate. Only through the review of results and consideration of feedback can the policy-making process be improved. And in the absence of monitoring and evaluation, mistakes and inefficient practices are much more likely to be perpetuated. The inevitable result is an increasing quantity of laws which do not solve socio-economic problems or achieve their objectives, and disillusionment on the part of the populace.



The success of policy making is best judged by evaluating the results of laws, and whether problems have been prevented or resolved. But this is a difficult and amorphous process. Results only become clear over time, and vary with time. Extraneous factors and circumstances, and the absence of direct cause and effect relationships, make it difficult to precisely determine what a specific law has changed or accomplished. There are obstacles to exact measurement. Indeed, defining a baseline for what the situation would have been without a law is conjecture.

For these reasons, political leaders often neglect post-implementation (ex post) Regulatory Impact Analysis, and avoid quantitative methodologies. It is much more expedient to employ “subjective” descriptions and “politicized” conclusions. Nonetheless, the results of laws are always assessed by affected target groups. And, eventually, the entire country will present a verdict, through the electoral process or other means. If policy making is inaccurate or inadequate, laws are more likely to be wasteful and ineffective, and the populace is more likely to conclude that its representatives and legislators have squandered their chance to make positive socio-economic changes.

“Sunset Clauses” are an extremely effective technique for obliging policy makers and legislators to take a careful look at the results of their work. Sunset Clauses give a law fixed or limited duration. Thus, on a certain date or after a set period of time, the law will automatically expire. At that time, in order to remain in effect, the law must be extended or re-authorized. This technique necessitates periodic assessment and analysis of the actual results of laws. Furthermore, any extensions or amendments must take full account of what has been achieved, and what is working best. Therefore, Sunset Clauses are an excellent mechanism for overcoming reluctance to meaningfully assess the results of previous laws. But they are not frequently utilized.

The optimal way to approach this issue is to have Government officials establish quantitative indicators to determine if policy goals are being met, and identify the most appropriate measurement tools, as part of the policy making process. Parameters for monitoring and evaluating results of



policies can be adopted, to see how well solutions are achieved. Timing issues should also be addressed. But this is a time-consuming process, which opens the door to critical review.

The second-best solution is a qualitative review. Although not as rigorous, it can still be useful. And it is less threatening. Parties involved in policy making and drafting can answer these questions:

- Has the policy making stage received sufficient attention?
- Was there enough time for policy making?
- Was a serious effort made to perform all of the steps required for identifying the most effective legislative solutions? Or were there too many assumptions and shortcuts?
- Which institutions most effectively carried out their obligations for policy making?
- Did key individuals have the required technical skills? Or is further training required?
- Were policy objectives adequately documented and communicated?
- Was modern computer technology utilized to promote communication and information sharing, and avoid complications during the process of marking up the draft law?

The answers to these generic questions can be used to identify strengths and weaknesses related to institutional capacity, human resources, communication mechanisms, information management, technology utilization, and the correct application of different kinds of problem-solving procedures.

## **VII. Conclusion**

Policy making is the first step in the legislative drafting process, and one of the most important. Laws must be designed from the start to solve or prevent problems, by implementing policies in the form of norms (concerning what target groups must do, must not do, or may do, under carefully defined circumstances). While policies originate in the Government Programme, they must be refined in the context of specific laws. This is a complex process, with four stages: identifying the problem, analyzing and explaining its causes, proposing alternative solutions, and selecting the optimal one(s). The initiators or proponents of legislation have a crucial role to play in the process, in close cooperation with legislative drafters, who are responsible for converting policy into law.

Policy making does not always receive the attention it deserves, and is not sufficiently monitored and evaluated. This is unfortunate, since insufficient attention to policy making is short-sighted, counterproductive, and likely to have negative consequences both during and after the drafting process. If policies are not fully developed or consistent with the best interests of the society, or if legislative solutions are not well-founded, then it is not possible to draft sound legislation that can be properly implemented. If policy makers do the right things, then policy implementers can do things right.

Thus, taking extra time and devoting sufficient resources to develop and communicate policies and objectives before laws are drafted is actually a very sound investment, which pays off greatly in the long run. This significantly increases the chances that laws will accomplish what they are supposed to, and yield positive results for the populace. Also, laws that effectuate sound policies are easier to enforce, and do not require frequent amendment. Therefore, sound policy making results in considerable *savings* of time and resources, as it helps laws to efficiently and effectively do what they are supposed to, from the start.





## **PRINCIPLE II**

### **Legislation Should Be Harmonized With National and International Legal Requirements**

**HARMONIZING**

**LAW**

**WITH**

**NATIONAL**

**AND**

**INTERNATIONAL**

**LEGAL**

**STANDARDS**

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## **I. Introduction**

Laws do not exist in isolation. They are part of a legal system and legal framework, and they are applied and adjudicated through administrative procedures. Therefore, laws must properly “relate” to each other, taking account of applicable legal requirements and institutional arrangements. Harmonization refers to the inter-relationship between different laws. (Throughout Principle II, the term “law” is used expansively to include regulations and other kinds of legal acts).

Laws can be considered harmonized with each other when they 1) meet all requirements for legality, 2) do not contradict each other in any way, and 3) are sufficiently complementary. Legality means that a law complies with all substantive legal requirements (including formatting rules and the typology of legal acts) and has been enacted according to the rules of procedure. The absence of contradiction means that the law does not violate constitutional rights or international law, and does not prohibit or authorize behavior which is elsewhere permitted or not authorized. Complementarity goes to the next level, referring to reasonable coordination of policy objectives and normative requirements, so that laws achieve their objectives.

There are two fundamental conditions for establishing and maintaining a harmonized and coherent legal system and legal framework:

1. *New laws* must be harmonized with those which already exist
2. *Existing laws* must be harmonized with subsequent enactments having superior force

The first condition is far more common, since most countries produce a large volume of new laws and legal acts every year. However, the second condition should not be overlooked. It arises every time an international treaty is ratified or the constitution is amended. Both conditions must be met, because the Rule of Law starts with an internally consistent body of laws fulfilling all legal requirements, which can then be applied and adjudicated in an objective and timely fashion.

Broadly speaking, there are two categories of standards that apply to both new and existing laws:

1. *National legal instruments and obligations.* These include the constitution, codes, laws, regulations, administrative orders, decrees, by-laws, and court rulings which change law.
2. *International legal instruments and obligations.* These include treaties, conventions, multilateral agreements, rules of trans-national organizations, and applicable decisions of international tribunals and commissions.

Both sources must be reviewed. Generally speaking, the supreme source of law comes first. This could be international law, if the hierarchy of legal acts under national law gives it supremacy. Or, it could be national law, if the subject matter is not covered by international obligations.

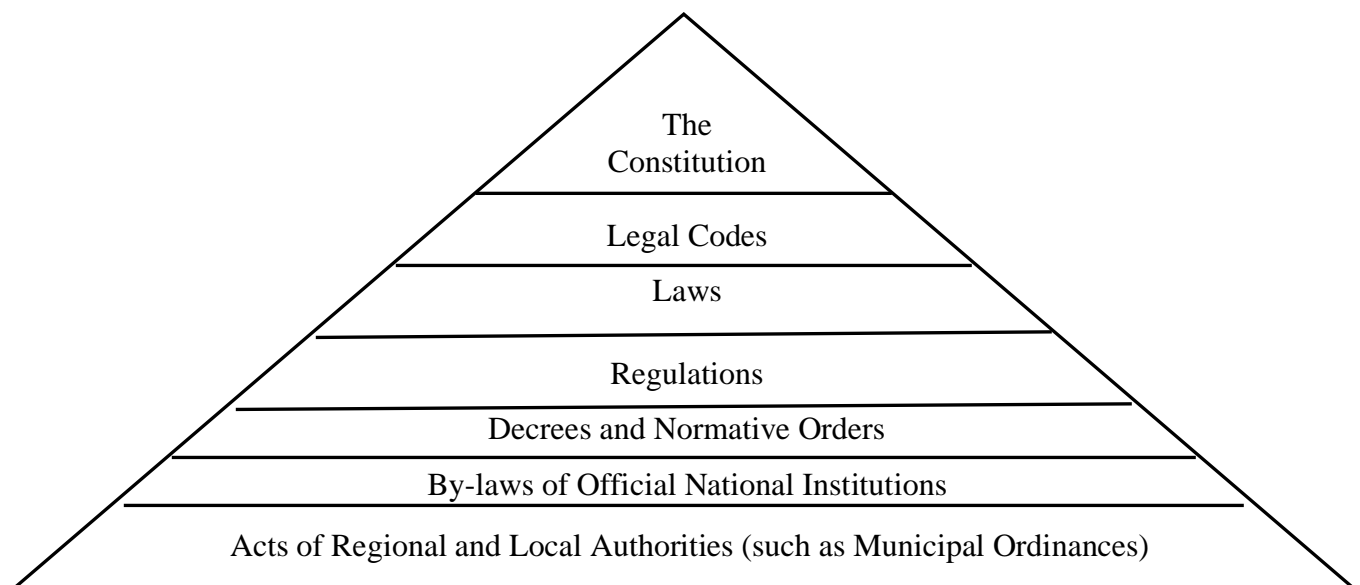
It is important to understand that harmonization is much more than an intellectual exercise. Contradictions between normative requirements create predicaments for the target groups of laws, complicate enforcement, and compromise adjudication. Insufficient coordination between normative requirements undermines implementation and makes laws less sound and effective. Thus, shortcomings in harmonization a) create confusion and uncertainty in the legal system, b) make laws less effective and prevent them from achieving their objectives, c) cause socio-economic harm, d) reduce confidence in the legal system, and e) undermine the Rule of Law.

## II. What Is Harmonization With National Standards?

Harmonization on the national level starts with the **principle of supremacy (hierarchy of law)**. This is usually set forth in the constitution (organic law). Additional requirements and details concerning the “categories of laws”, in the form of a typology, are often found in special legal acts. It could be in a Law on Normative Acts, or Parliamentary Rules. The basic principle of supremacy is that each and every different kind of law must be in conformity with other laws which are equal to or above it in the hierarchy.

Thus, if a contradiction between laws arises, it must be resolved by rescinding or amending the law of inferior status in the hierarchy. In this context, it could be a law, regulation, administrative order, decree, by-law, or any other normative act authorized under the legal system. In addition, court decisions have to be taken into account, to the extent that they modify law.

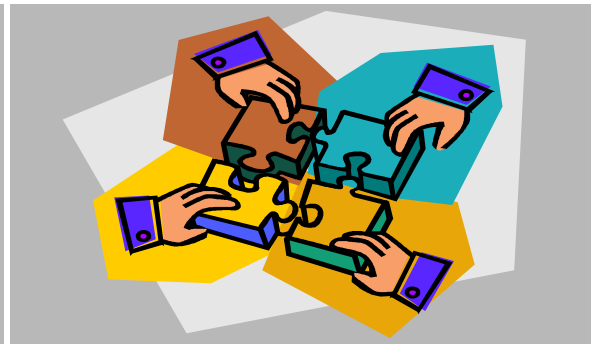
The following chart demonstrates a sample hierarchy of laws, on the national level (not indicating the position of international law):



There are three requirements for harmonization in the national context:

- 1) New laws must comply with pre-existing laws of superior status. Therefore, laws must be constitutional, regulations must comply with laws, etc. Any non-compliant provisions of new laws of inferior status are void *ab initio*, and should not exist.
- 2) New laws should not contradict pre-existing laws of equal status. While the most recent law is given priority, as a principle of legislative interpretation, the best practice is to avoid contradictions or discrepancies in the first place.
- 3) New laws should rescind or amend any non-compliant pre-existing laws of inferior status. If this requirement is not met, for any reason, then the non-compliant provisions of pre-existing laws must be eliminated or modified directly.

**The first requirement ensures that new laws respect the principle of supremacy with regard to existing laws. The second requirement ensures that laws of equal status respect each other. The third requirement ensures that existing laws respect the principle of supremacy with regard to new laws having superior status.**



1) Accordingly, first and foremost, new and existing laws must comply with the constitution (supreme organic law). This includes both the text of the constitution and all decisions which interpret it. In some jurisdictions, there are mechanisms for securing advisory opinions or expedited decisions from the Supreme Court or Constitutional Court. The parties which can exercise this right are specified. However, in the overwhelming majority of cases, decisions regarding constitutionality are made by legal experts involved in the legislative drafting process. These experts have a more difficult task in countries which are in “transition”, or in the process of establishing democratic and representative institutions. This is because the constitutions are new, have not been interpreted often, and may be subject to frequent amendment.

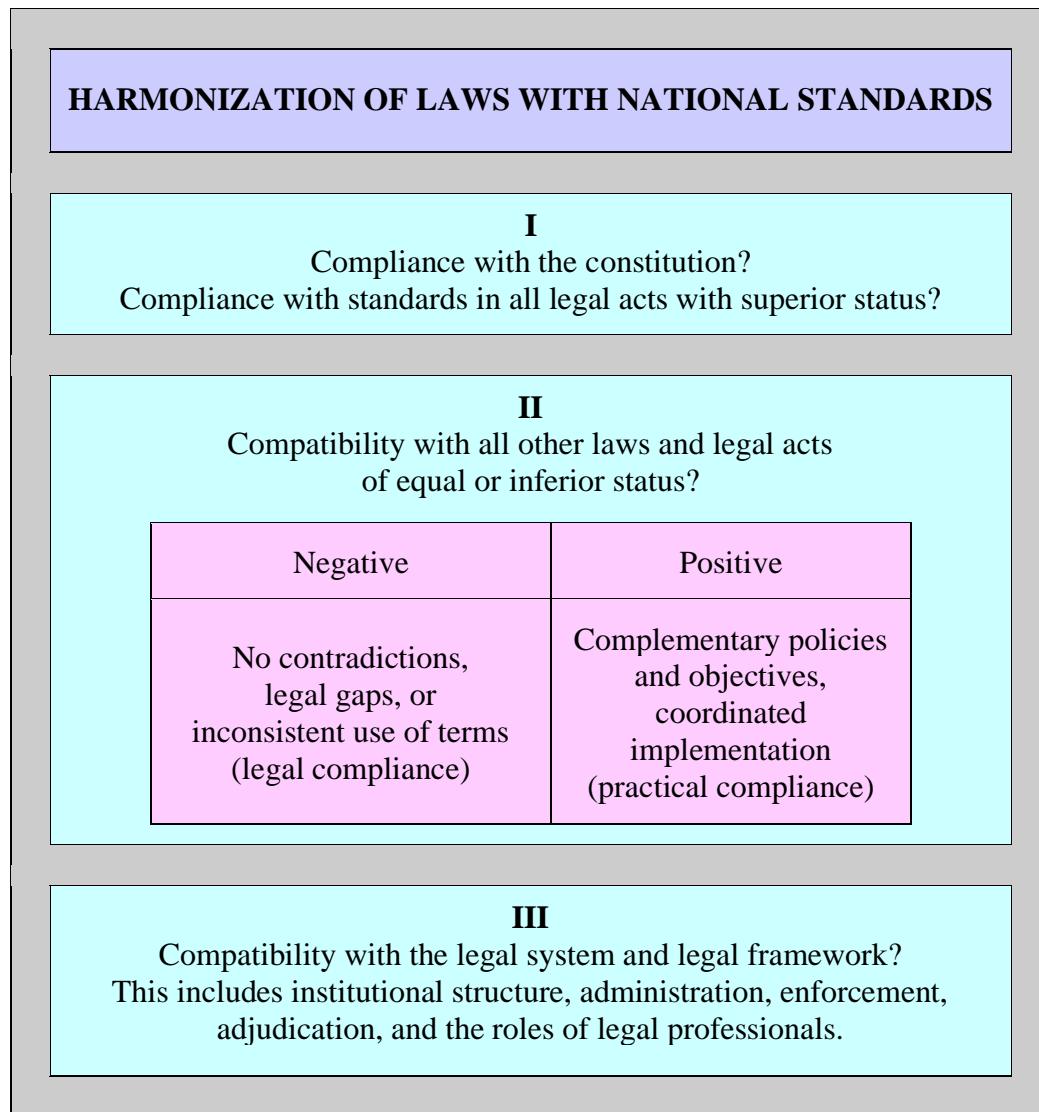
2) Second, new laws must properly relate to existing laws. This starts with “procedural” requirements concerning the structure and format of laws, and their normative typology. It then includes “substantive” requirements found in specific laws that deal with the same subject matter(s). In this regard, many different aspects of laws need to be harmonized. This includes specific legal provisions, definitions and the usage of terms, and transitional provisions (covering jurisdictional issues and entry into effect).

In a practical sense, harmonization between laws includes “negative” and “positive” aspects. The former refers to the absence of contradictions, which in a purely legal sense is the most important requirement. The latter refers to the existence of actual harmony between laws. It includes commonality of purpose, based upon compatible policy objectives and practical goals. Laws which meet only the first aspect of harmonization will not be legally incompatible, but may still fail to effectively serve socio-economic interests. In other words, they may pass the legal test for harmonization, but fall short of the practical requirements.

One exception to the above requirements should be mentioned. Under the hierarchy of laws, there can be legal acts with limited scope or application. For example, certain institutions may be empowered to adopt acts which apply only to their own operations, or self-governance. These include Parliamentary Rules of Procedure, Ministerial By-laws, Resolutions, etc.

3) Third, although not strictly required under the principle of supremacy, new laws should comply with and fit into the legal system and legal framework. This is a broader question than constitutionality or the relationship between specific laws, since there are numerous requirements with diverse origins. For example, the structure and roles of governmental and juridical institutions must be respected, key characteristics of the administration and enforcement of justice must be accounted for, and the functions/competencies of different legal professionals must be respected. These issues can only be addressed through respect for the “big picture”.

The following chart summarizes the requirements for harmonizing national legal standards:



Finally, it should be understood that the above principles do not in any way limit or restrict the power of the legislature to rescind or amend existing laws. Rather, they require that rescission and amendment be carried out in a deliberate and thorough manner. Provisions which rescind or amend existing laws should be express, complete, and legally precise. The provisions being altered must be explicitly identified. And the changes must be very clearly set forth. There should never be any inconsistencies or legal gaps. Legal certainty must be ensured.

### **III. What Is Harmonization With *International* Standards?**

Harmonization of law with international standards is conceptually similar to harmonization on the national level. However, the analysis and application of international standards takes on an entirely new dimension. Harmonization with national standards involves the internal consistency of a unitary legal system. Further, there are limited and defined sources of law, and a finite number of juridical institutions. Harmonization with international standards involves the relationship between two entirely different systems. Further, the international arena presents multiple sources of diverse kinds of laws, creating dynamic and developing standards of constantly increasing complexity. As a result, harmonization with international standards has become a multi-faceted challenge, which affects many different interests and requires the evaluation of many different factors.

While there must be complete compatibility between laws on the national level, there are different “degrees” of harmonization between national law and international standards. “Transposition of law” or “legal surgery” refers to complete and full introduction of international standards in the national legal system. In contrast, “legal approximation” or “convergence” is the process of gradually bringing legislative solutions closer to certain defined external standards, without immediate need to make them identical. It is also helpful to distinguish “hard law” (such as treaties and conventions) from “soft law” (such as model laws and restatements). Both of these distinctions concern the degree of compliance required and the applicable timeframe.

In the current format, international legal harmonization has its origins at the end of the nineteenth century, when the nation-state system began to take shape, and the first truly international institutions were created. International harmonization accelerated significantly after the Second World War, with the creation of the United Nations system and the first global financial institutions (such as the World Bank and International Monetary Fund). The Information Revolution and the fall of the Berlin Wall served as major catalysts. The result is a truly global economy and international legal system.

**But international legal harmonization is not a new process!** In fact, *sharing law is a recurrent and inherent feature of human development.* Most legal systems throughout human history have borrowed, copied, ratified, or been forced to accept codes of law or individual laws originating elsewhere. Most great civilizations expanded the jurisdiction of their legal systems, through force or persuasion. Many “Law-Givers” created and influenced legal systems and institutions. Prominent examples include Moses, Hammurabi, Solon, Justinian, Mohammed, Confucius, and Napoleon.



This process is called “**Legal Borrowing**”. Here are a few of the many historical examples:

- The Ten Commandments are perhaps the most concise and disseminated of all legal texts
- Roman law extended throughout the empire, and served as a major unifying force
- Islamic Sharia law spread rapidly in the seventh century, and after that throughout the world
- The re-introduction of Roman law (as codified by Justinian in the sixth century) was at the heart of the European Renaissance
- *After* independence, the American colonies followed British law and procedure (as codified in Blackstone’s “Commentaries”, a handy two-volume compilation owned and regularly consulted by most lawyers)
- Modern maritime law can be traced back to ancient Greece, particularly Rhodes
- The French *Code Civil* has been applied or utilized in dozens of countries, in Europe and throughout the world

Legal Borrowing is often carried out by prominent or charismatic leaders. Examples include the post-independence leaders in Latin America, the Meiji in Japan, and Mustapha Kemal Ataturk in Turkey (who chose the Swiss Civil Code as a model). Legal professionals can be a major force behind legal borrowing. They are naturally motivated by the desire to introduce prestigious, coherent, and accessible laws that have proven effective in other jurisdictions.

These examples show that while cultural factors impose some limits on Legal Borrowing, the most important factors are the quality and consistency of the laws being borrowed, and the strength and motivation of the catalysts for their introduction.

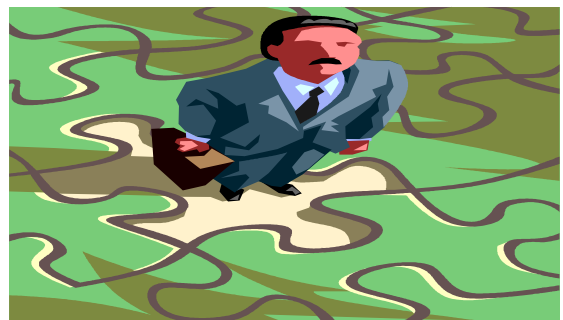
But despite these historical antecedents, the twenty-first century is fundamentally different. Now, every country in the world faces a multi-dimensional international system with a virtually endless array of mutual and shared obligations not under the control of any single party. Requirements are found in a vast number of international, multilateral, and bilateral conventions, treaties, and agreements. They are formulated and applied by international institutions (such as the United Nations and its numerous agencies and bodies, the International Court of Justice, the International Criminal Court, the World Trade Organization, the World Bank, and the International Monetary Fund), regional bodies (such as the European Union, the Council of Europe, the Organization of American States, the Association of South-East Asian Nations, the African Union, the North American Free Trade Association, and Mercosur), and multi-lateral institutions dedicated to legal standardization (such as the United Nations Commission on International Trade Law).

In certain instances, international obligations established by supra-national institutions are *self-executing*. This means that they apply automatically on the national level, without ratification or other formal action. This is the case with much of European Union law. Other international obligations, while not mandatory, are still a precondition for important economic or political benefits. In such cases, countries have the right to opt out, but do so to their own detriment.

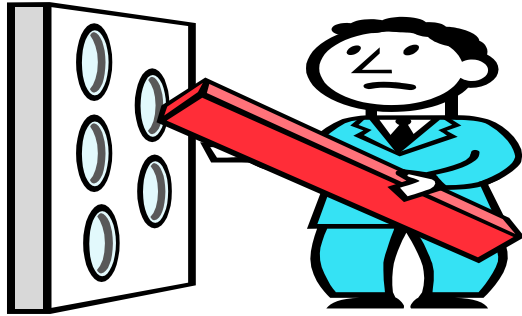
As the current international system becomes fully “globalized”, many countries are in the process of bringing their laws into compliance with international principles concerning democracy, a free market economy, and human rights. The parameters of this process depend greatly upon whether the objective is harmonization or legal approximation.

Full harmonization is challenging. A country which joins the Council of Europe and ratifies the European Convention for the Protection of Human Rights and Fundamental Freedoms must import and extend to its citizens a complete regime of legal rights, developed over decades. These rights can be enforced through national courts, which must modify their practices, or at the European Court of Human Rights in Strasbourg, which has appellate jurisdiction. Membership in the European Union entails transposition of the entire *Acquis Communautaire*. The historic accession of ten new countries in May 2004 showed how difficult this process can be. Membership in the World Trade Organization requires the application of many principles (such as Most Favored Nation and National Treatment), and the expeditious compliance of national law with the Agreements on Technical Barriers to Trade (TBT) and Sanitary and Phytosanitary Measures (SPS). This requires amending existing laws, establishing new institutions with cross-border functions, creating a new regulatory regime for accreditation and conformity assessment, and modifying commercial practices to promote product standardization and safety.

The process of full harmonization places significant demands and pressure upon the legislature, administrative and juridical institutions, government officials, and members of the legal profession. Timeframes are usually extremely short, while expectations are great. There may be pressure to simply import and apply international standards wholesale, without full consideration of the actual and likely effects.



Legal approximation, on the other hand, is a longer and more variable process. It depends upon the specific sphere of activity in question, and the objectives which are being established. When the process and timing for harmonization are more flexible, it is possible to identify and prioritize essential areas for approximation, take different models into account, consider local conditions, and design a more tailored approach. In short, the process can be customized to meet specific needs in context.



At first glance, greater flexibility and a longer time-frame appear to be advantageous. However, this prolongs the decision-making process, complicates the prioritization of standards, and enables interest groups who will be affected by the outcome (both positively and negatively) to exert influence. The process takes on new parameters and dynamism. It may even become politicized.

Thus, ironically, harmonization is in many respects more straightforward. It is clear what has to be done, and the only variables concern how and when. Under such circumstances, the key to ultimate success is identifying mechanisms for securing compliance, setting a proper foundation for the work, establishing a sound pace for reform, and maintaining commitment over time.

Unfortunately, Legal Borrowing is not a purely scientific process. Laws exist as part of a system. Their success in a particular jurisdiction can depend upon “subjective” factors, such as special institutions, legal traditions, social values, and even natural resources and the environment. A law, provision, or practice which is effective and perhaps even essential under certain socio-economic conditions and administrative structures may be less productive or even counterproductive in a different context. It is important to determine whether this will be the case *in advance*, if possible. This can be achieved by assessing the relationship between the law to be transplanted and the socio-legal context of the recipient, and by comparing the socio-legal context of the donor and recipient countries.

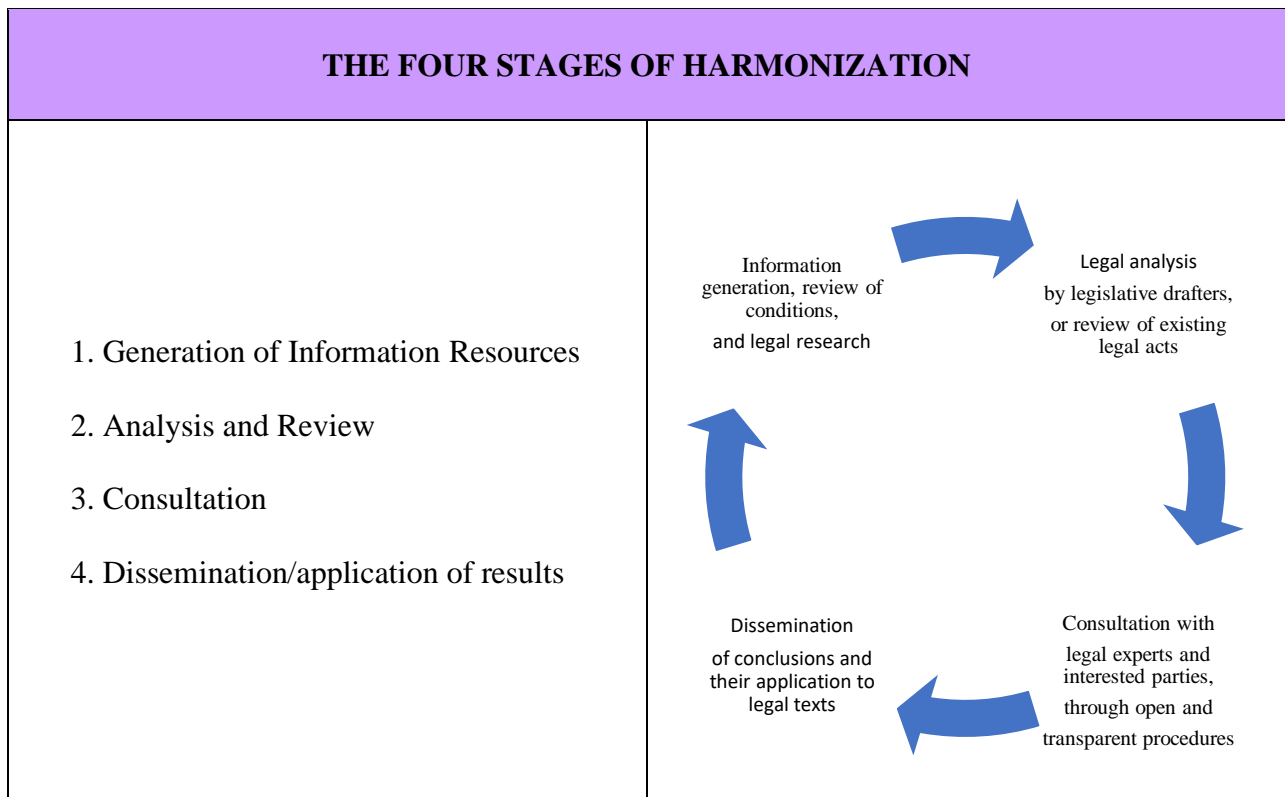
In spite of limitations in the process of Legal Borrowing, the current trend is to require full harmonization with all directly applicable international standards. Many principles of international law are now considered universal and binding upon the family of nations. While many conventions do need to be ratified, such as the Universal Declaration of Human Rights and the International Covenant for Civil and Political Rights, there is a tendency to make key obligations *self-executing*. This includes prohibitions against genocide, war crimes, and crimes against humanity. While there is no such moral imperative when it comes to international commercial law, it is clear that failure to ratify and apply standard practices jeopardizes the right of countries to participate in the trading system, and thereby obtain important benefits.

#### **IV. How Is Harmonization Performed?**

With an understanding of the nature of harmonization and its historical antecedents, we can now look into how it is performed.

Conceptually speaking, the methodology for harmonizing laws can be divided into four distinct stages:





### 1) Generation of Information Resources

Several different kinds of information are required for carrying out the analytical work which forms the backbone of legal harmonization. First of all, it is necessary to have copies of all relevant legal texts, and in the appropriate language(s). Next, it is necessary to have first hand information concerning actual conditions, including the application of laws in practice and the functions of institutions which are responsible for administration and adjudication. Finally, it is helpful to have access to juridical materials such as expert analysis, explanatory articles, assessment reports, and model laws. All of this information should be organized in a user-friendly manner, preferably in electronic databases that facilitate rapid and comprehensive research.

### 2) Analysis and Review

Legal experts who review and analyse draft or existing laws need to start out with solid knowledge of and experience with the subject matter. This can be acquired through legislative drafting, scholastic work (teaching and research), the practice of law, and business or social activities. In addition, strong analytical skills are required, in order to assess whether there are actual or potential inconsistencies between different laws. Practical experience is very important, since it is necessary to consider how laws actually function in the real world.

In order to properly and systematically conduct legal analysis and review, it is a best practice to have checklists to fill in and questionnaires to answer.

The following chart presents eight questions which can be used to guide the process of harmonizing legislation with **national** standards:

### **EIGHT QUESTIONS TO ANSWER DURING THE ANALYSIS OF DRAFT LAWS TO ENSURE HARMONIZATION WITH NATIONAL STANDARDS**

1. Is a new law necessary at all, in light of existing laws and conditions? Or is a different type of normative act or official initiative more appropriate?
2. Will policies, goals, or provisions of the new law be affected by existing law?
3. Does the new law replace, amend, or affect existing law?
4. Are the definitions and usage of legal terms in the new law consistent with existing law and administrative practice?
5. Will any new terms conflict with those in existing law or cause confusion?
6. Are all provisions in the new law that repeal or amend existing law carefully drafted and technically correct?
7. Are all provisions concerning the timing and effective dates of the new law correct, or will there be contradictions or gaps that create uncertainty?
8. Will complications arise concerning interpretation, implementation, or adjudication of the new law, in conjunction with existing law and institutional practice?

International standards present particular challenges, particularly when they automatically have superior status under the hierarchy of laws. Both draft and existing laws must comply with actual requirements.

The following chart presents four questions which can be used to guide the process of harmonising legislation with **international** standards:

### **FOUR QUESTIONS TO ANSWER DURING THE ANALYSIS OF DRAFT LAWS TO ENSURE HARMONIZATION WITH INTERNATIONAL STANDARDS**

1. Does the draft law comply with the text of ratified international agreements?
2. Does the draft law comply with the standards established by tribunals in applicable cases, decisions, or rulings?
3. Does the draft law comply with the prevailing approach to implementing international standards, as elaborated by scholars and legal experts?
4. Does the draft law comply with the rules of any international institutions that have jurisdiction over the subject matter?

There are many different ways to perform the analysis. The best choice depends upon the subject matter, context for the work, and situation on the ground. It can be extremely helpful to prepare lists and charts which specify the statutory provisions applicable to different subject matters. For example, rights relating to employment can be found in a number of different international legal instruments. Listing them in charts with excerpts of the applicable provisions facilitates comparison, and makes it easier to contrast and evaluate. Computerized databases can help.

Legal analysis is time consuming work. It requires focus and attention to detail. Unfortunately, legal experts usually have an excessive amount of work to perform, while facing very strict deadlines. For this reason, it is extremely important that they have good working conditions. This includes modern information and communication technology, access to sound information resources, and opportunities to communicate with colleagues.

Finally, it is important to emphasize that assessments of legal compliance must go beyond the text of laws. There can be significant divergence between legal texts and implementation/ practice. This is because the implementation of laws is a process which involves institutions and individuals. It is possible for the text to be compliant with applicable standards, while those standards are not in fact realized in practice. This is why practical knowledge and experience on the part of legal experts is so important. Particularly with respect to international standards, and even more so in the field of human rights, compliance issues are ultimately determined by what is happening in courtrooms, police stations, correctional facilities, and on the streets.

### 3) Consultation

Legal analysis is not generally considered to be a collective activity. However, harmonization is more complete and more accurate when legal experts with different backgrounds share their opinions and experience. Specific expertise which should be brought into the process can be solicited from legal experts who work with:

- Governmental institutions
- Social services providers
- Private companies
- Non-Governmental Organizations
- Professional associations
- Trade Unions
- Think tanks
- Law faculties and universities
- Institutions which train judges, prosecutors, and lawyers
- The media



It should be remembered that it is precisely these legal experts who are most likely to challenge a non-compliant law after it is approved or when it is being implemented. Therefore, it is both logical and expeditious to **secure** their legal expertise *before* the law is final, instead of **combating** their legal expertise *after* the law is passed.

Suitable techniques for consultation include:

- The circulation of legal texts for written comments
- Conferences, seminars, and workshops
- Informal meetings
- Communication through the media
- Open hearings

Information and communications technology can make a significant contribution to these consultations. For example, legal texts can be placed on websites for open comment, and Voice Over

Internet Protocol (VOIP) can be used to enable parties who are far away from each other to talk and exchange opinions for free.

The value of sharing opinions and engaging in interactive discussions in order to reach sound conclusions regarding the compliance of draft legal texts should not be underestimated. Good results are much more likely when legal experts work together. This is especially the case when they have complementary knowledge concerning different aspects of an issue, or experience in diverse geographic locations.

#### **4) Dissemination and Application of Results**

The results of legal analysis must be disseminated and brought to the attention of all interested parties, and then be put to good use.

This can be done through reports, informational presentations, electronic communication, and effective use of various media. During the legislative drafting process, the key parties who should be fully informed include Government officials, members of legislative Working Groups, Members of Parliament, and representatives of legal departments. When the legislative drafting process is open and consultative, it is much more likely that sound legal analysis will reach the attention of parties who can influence the structure and content of laws.



#### **V. How Are Laws Harmonized During the Drafting Process?**

The harmonization of draft laws takes place within the specific context of the legislative drafting process. Therefore, the role of different parties depends upon the nature of the system, including the institutional structure and the procedural rules. Still, there are a number of general principles and best practices which are universally applicable, in order to enhance the quality of draft laws.

##### **SEVEN GENERAL PRINCIPLES FOR PROMOTING HARMONIZATION AND COMPLIANCE DURING THE LEGISLATIVE DRAFTING PROCESS**

1. Harmonization and compliance issues should be fully dealt with before laws are passed
2. Harmonization should be carried out from the start of the legislative drafting process
3. Harmonization should be carried out systematically, and at all appropriate stages of the legislative drafting process
4. Legal expertise should be secured from all knowledgeable and involved parties
5. Analysis and conclusions concerning compliance issues should be fully documented
6. Analysis and conclusions concerning compliance issues should be disseminated and applied
7. There should be sufficient time for legal analysis

Each of these seven principles will be considered in turn:

1) The first guiding principle is that harmonization and compliance issues should be fully dealt with before laws are passed. This sounds elementary, but the fact of the matter is that mistakes do occur. And there is no such thing as a small mistake during the legislative drafting process. As a consequence, amendments and revisions are required. Legal certainty is sacrificed, target groups become confused, time and money are lost, and the Rule of Law is undermined.

2) The second guiding principle is that harmonization should be carried out from the start of the legislative drafting process. Indeed, it is important to secure preliminary advice concerning compliance issues during the policy-making phase, when the law is designed. Sound elaboration of the objectives of a law sets the stage for accurate drafting of provisions. Further, proponents and drafters of new laws have initial and primary responsibility for ensuring that they comply with legal requirements, from the start of the drafting process until approval by the Parliament.

3) The third guiding principle is that harmonization should be carried out systematically, and at all appropriate stages of the legislative process. Expertise is regularly required by all parties who draft, assess, and approve laws, whether they work in specialized institutions, the Government, Line Ministries, or Parliament. Further, laws are often changed during the process which creates them. All amendments must be evaluated, to assess their relationship to the rest of the draft, existing laws, and international standards. It does not make sense for legal experts to perfect for an early version of a draft law, only to have an amended/legally incorrect version passed by Parliament. The legislative process must be structured and timed to facilitate legal review of increasingly finalized versions of draft laws, and to take account of supplemental legal expertise.

4) The fourth guiding principle is that legal expertise should be secured from all knowledgeable and involved parties. Consultation is crucial for ensuring compliance (justifying its place as the third step in the harmonization process, discussed in Section IV above).



Full opportunities to provide legal expertise should be extended to Members of Working Groups, specialists at Ministries, legislative drafters, and staff in Legal Departments (attached to the Government, Ministries, Parliament, and/or Office of the President, depending on the legal system). Legal experts outside governmental institutions should also be fully included in this work.

5) The fifth guiding principle is that analysis and conclusions concerning compliance issues should be fully documented. The most appropriate place to do this is in the Explanatory Memorandum which accompanies draft laws.

Information which should be documented includes how the new law interacts with existing laws, whether existing laws need to be amended or revoked, how the new law fits into the existing legal framework, and how implementation will be secured.



Unfortunately, even when it is mandatory to place this kind of information and analysis in the Explanatory Memorandum, the task is often handled in a perfunctory or *pro forma* manner.

It is important to emphasize that the special legal expertise described above is not required by all parties engaged in drafting or approving laws.

It is sufficient if non-experts:

- Fully respect constitutional requirements and coherence of the legal framework
- Understand the principle of supremacy, and the need to coordinate new and existing laws
- Obtain, share, and accept legal expertise regarding compliance issues

6) The sixth guiding principle is that analysis and conclusions concerning compliance issues should be disseminated and applied. This corresponds to the fourth step in the harmonization process (described in Section IV above). Unfortunately, it is not sufficient for the work to be inclusive and documented. Analysis/results must be shared with all interested parties, considered, and utilized, in an atmosphere of cooperation and transparency. Modern information and communication technology can play a key role, at minimal cost, and should be put to full use.

7) The seventh and final guiding principle is that there should be sufficient time for legal analysis. The pace of the legislative drafting process can significantly affect compliance. Many countries produce numerous laws on a strict and aggressive timetable, set to serve political objectives. But accelerated legislative calendars place excessive pressure on legal experts, and cut the consultation process short. They fail to acknowledge the fact that correctly performed compliance checks take time. Countries in transition are notorious for expediting the legislative drafting process, and producing too many new laws in too little time.

Under such circumstances, there is a much greater chance that new laws will not be properly harmonized, or be fully consistent with existing laws and international standards. Further, these problems may be exacerbated by uncertainty concerning the role and function of different kinds of laws (primary vs. secondary) and the operations of different legal institutions.



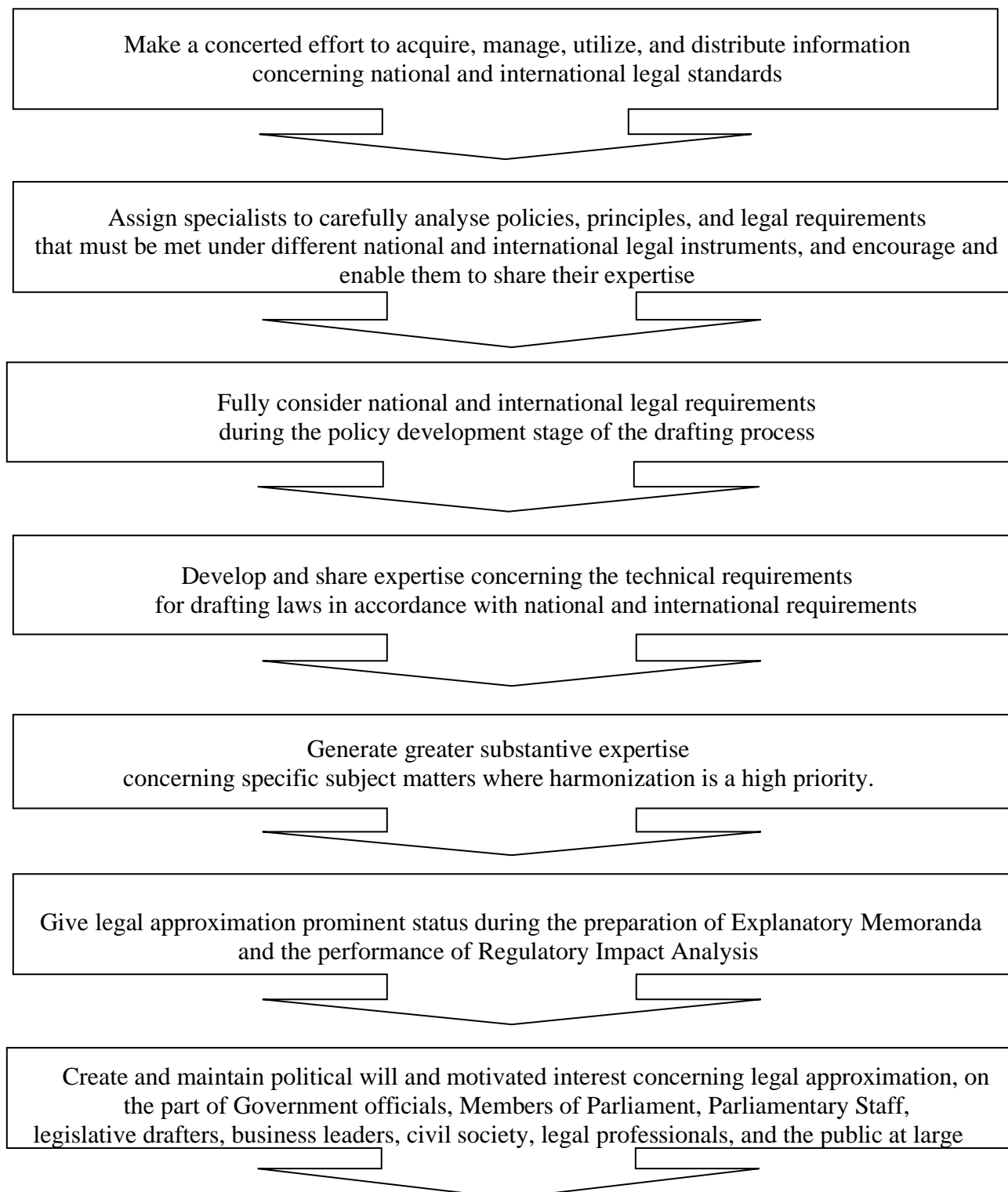
Clearly, compliance with these seven principles will greatly enhance the quality of laws under any legal system, by promoting harmonization and quality control.

Finally, it is very important to note that full legal harmonization involves much more than simply drafting laws that contain provisions required by the national legal framework or international conventions. Harmonization also depends upon implementation. Therefore:

- There must be political and administrative support at all levels of government for ensuring that laws are implemented in accordance with applicable standards.
- There must be sound implementing regulations, whenever required.
- Administrative institutions need commitment and capacity to carry out their mandates and supervise compliance. This includes a) an effective, professional, and well-trained civil service, b) necessary facilities, equipment, and resources, c) sufficient inter-institutional linkages, and d) sound communication and information-sharing practices.
- Courts must adjudicate and facilitate the enforcement of all applicable legal standards. This requires good facilities/equipment, qualified personnel, and sound procedures.
- There must be awareness and acceptance of the importance of harmonization and compliance by businesses, legal professionals, civil society, and the general public.

In other words, legal harmonization is more than a criterion for legislative drafting. It is part of a complicated and extended process that only begins with passing a law. Indeed, the realization of national and international legal standards is ultimately a question of implementation. Therefore, making laws practical and effective is a key component of harmonization.

The following diagram summarizes key principles for harmonization during legislative drafting:





## **VI. Conclusion**

For laws to be harmonized with each other, and meet national and international legal requirements and standards, all provisions must fulfil the conditions for legality, and be free from contradiction. In addition, all provisions should be compatible, to promote the objectives of laws. The two fundamental conditions for establishing and maintaining a harmonized and coherent legal system and legal framework are 1) that new laws be harmonized with those which already exist, and 2) that existing laws be harmonized with any subsequently enactments which have superior force.

For laws to be fully sound, all provisions must be both necessary and correct. Legal provisions which require harmonization are amongst the most important to get right, the first time. This is because any error will inevitably affect other laws, and conflict with national requirements and international obligations. In addition, failure to harmonize creates confusion on the part of parties charged with administering, enforcing, adjudicating, and complying with laws. This results in legal uncertainty, and undermines the Rule of Law.

Therefore, it is necessary for all parties involved in the legislative drafting process to seek legal expertise. In addition, legal experts should have every possible opportunity to ensure that the typology of laws is followed, the principle of supremacy is respected, the provisions of draft laws are compared to existing laws, and all relevant international standards and obligations are fulfilled. In addition, when a legal act of superior force affects pre-existing laws, all aspects of this relationship should be addressed. Otherwise, pre-existing laws have to be thoroughly reviewed, to determine the need for and draft any required amendments.

In order to achieve harmonization, institutions and legal experts both inside and outside of government must generate all required information resources, conduct full analysis and review of draft and existing laws, consult with each other, and disseminate and apply the results of their work. Then, the requirements for harmonization must be taken into account during the application of laws. After all, results in practice are what counts, not just the accurate wording of legal texts.

It is very important to appreciate that harmonization is a process, as well as a result for specific laws. It needs to be built into the legal system and legislative drafting process, carried out systematically over time, and respected by all involved parties. There must be sufficient resources, including information, information and communications technology, human expertise, and time. This is the only way to ensure positive results, and thereby protect legal interests, human rights, and the Rule of Law.



## **PRINCIPLE III**

### **Legislation Should Be Practical and Effective**

**MAKING**

**LEGISLATION**

**PRACTICAL**

**AND**

**EFFECTIVE**

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## **I. Introduction**

Good governance depends upon sound legislation. When laws are practical and effective, the administrative machinery of the State and the legal system can function properly, and help meet societal needs. This indicates that leaders, government officials, and legislators are performing their jobs well, and that the legislative drafting process is working.

Practical and effective legislation is also a key requirement for the Rule of Law. To support the Rule of Law, legislation must be:

- Accessible, intelligible, and reasonably acceptable to the governed
- Straightforwardly and impartially administered
- Objectively, fairly, and properly adjudicated
- Impartially, uniformly, and correctly enforced
- Compatible with the knowledge, skills, and experience of the legal profession

When these conditions are met, legislation (a term which includes primary laws, secondary regulations, by-laws, decrees, ordinances, and any other kind of legal act) is more likely to serve the interests of society, promote development and economic growth, and protect human rights. Further, it can play an active and positive role in daily life.

However, even in the most developed countries, with longstanding legislative drafting traditions supported by expertise and information resources, legislation can be of questionable quality, and not work well in practice. This raises a number of crucial questions:

- Why is it so difficult to produce practical and effective legislation?
- Why is there often disagreement concerning the best ways to achieve policy objectives?
- How does legislation become politicized, or based on ideological or pecuniary interests?
- Why does impractical/ineffective legislation remain in force, long after results are clear?
- What can be done to improve the quality of legislation and the drafting process?

These questions demonstrate that there are many challenges and obstacles to setting up a good legislative drafting process. Nonetheless, *it is important for all countries, and especially those which are in transition or reforming their legal systems, to identify and put in place measures which make legislation practical and effective.*

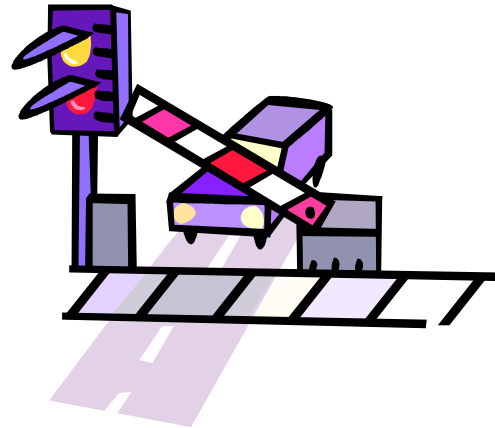
## **II. What Is Practical and Effective Legislation?**

Legislation is practical and effective when it successfully implements policy, and meets its intended goals in the most viable and cost-effective manner.

Practicality is a measure of how well legislation takes account of and corresponds to the actual situation in the “real world”. When legislation is practical, it can be implemented without interference from foreseeable obstacles. Obstacles to be avoided include lack of funding or capacity for implementation or enforcement, constraints in human resources or information resources, natural and environmental conditions, resistance from target groups, etc. These factors are discussed in detail in Section III below.

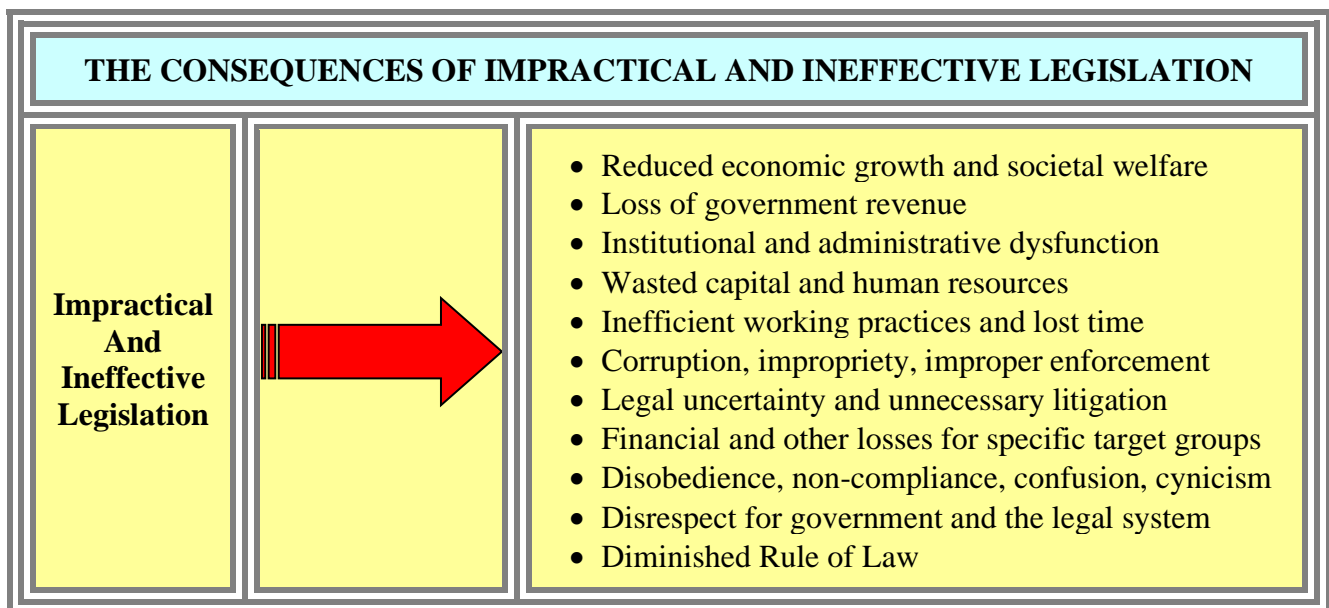
Effectiveness is a measure of how well and how promptly legislation meets its goals, and how efficiently resources are targeted towards achieving results. Resources are always required for achieving policy objectives through legislation. Legislation must be published/publicized, administered, adjudicated, and enforced. Numerous institutions (from ministries to courts) and individuals (from bureaucrats to policemen to judges) are exclusively dedicated to effectuating legislation. In addition, target groups must spend their time and money to comply. Even penal laws which impose fines may end up costing more money than they bring in. Clearly, there has to be a balance between what is achieved, what is spent, and how much time is required.

Legislation which is practical, effective, aligned with societal interests, and seen to be legitimate is also more likely to be obeyed. Legislation is always more successful and less costly when target groups exercise *self-compliance*, and minimize the need for supervision and enforcement. It is cumbersome and expensive for the State to enforce legislation which is unsound, unlikely to achieve its intended results, or contrary to the interests/practices of target groups. Further, such legislation undermines confidence in governance and the legal system, and compromises the Rule of Law.



Practicality and effectiveness are somewhat independent of policy. Of course, it is harder to draft implementing legislation for a policy which is counterproductive, serves narrow interests, or lacks legitimacy. Still, *regardless of the policy selected, legislation must be sound to be implemented.* Legislative drafters are responsible for finding the best way to implement policy.

What are the consequences of unsound legislation? When legislation is not practical and effective, it can not meet its goals, and is difficult to administer, adjudicate, and enforce.



This chart shows that impractical and ineffective legislation has a ripple effect throughout the economy, society, and legal system, causing harm to the governors and governed alike.

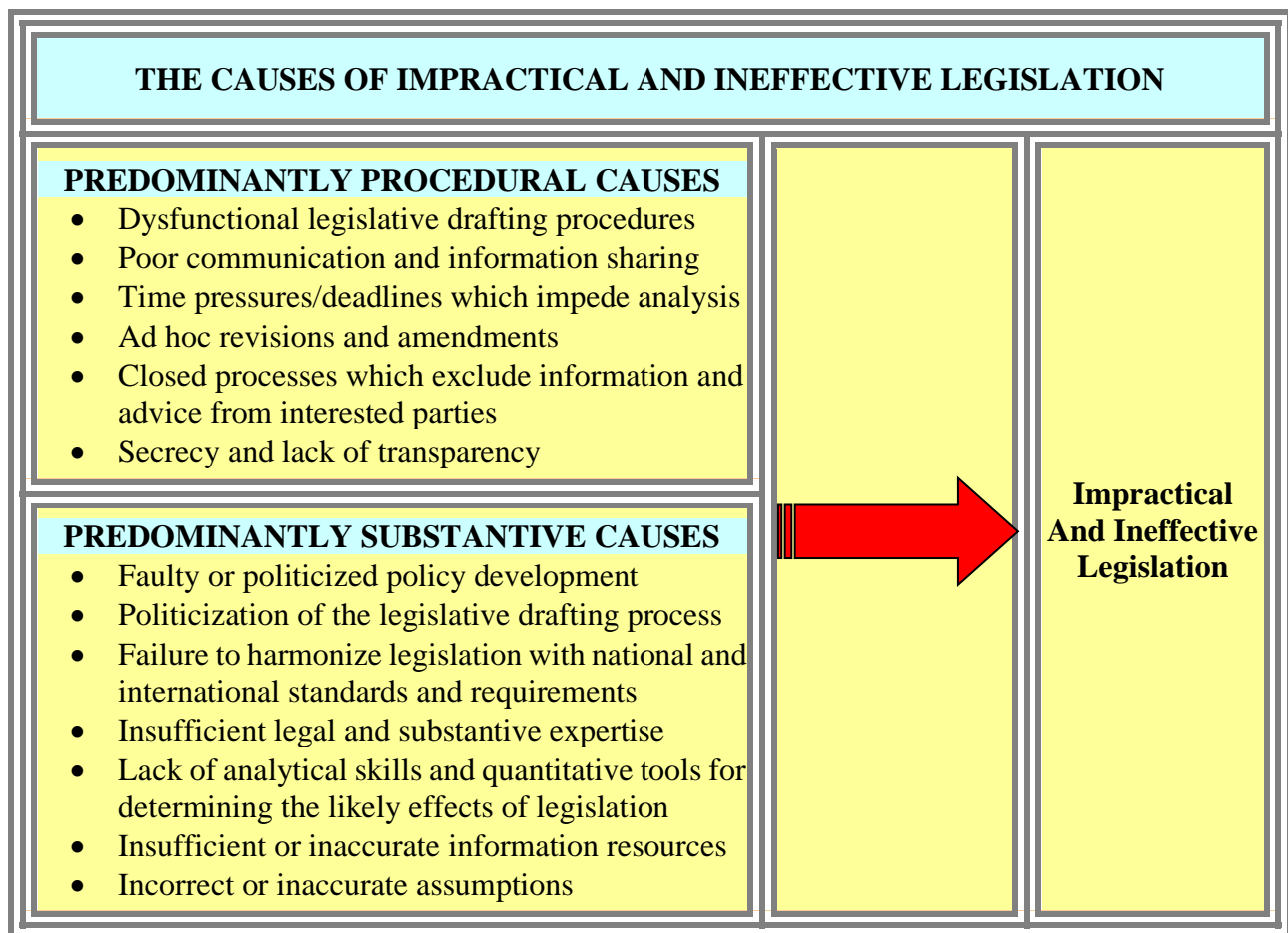
### **III. How Can Legislation Be Made Practical and Effective?**

Legislative drafting is not pure science. Nonetheless, government officials, Members of Parliament, and legislative drafters have many procedures, mechanisms, and tools at their disposal to improve the quality of draft legislation, and make it more practical and effective.

What are the key factors which enhance the quality of legislation?

- a) Professional and de-politicized policy making
- b) A well-structured drafting process
- c) Juridical institutions and individuals fulfilling properly defined roles
- d) Legal and substantive expertise
- e) Accurate, comprehensive, and accessible information resources
- f) Open and participatory mechanisms which facilitate input from all interested parties
- g) Transparency and accountability

When legislation falls short of requirements and expectations after it is on the books, it is usually a consequence of the drafting procedures and substantive skills applied. Major causes of impractical and ineffective legislation are summarized in the following chart:

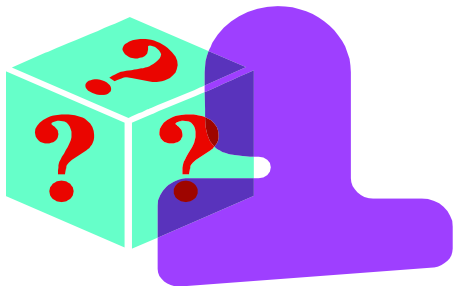


This chart shows that many causes of impractical and ineffective legislation are largely within the control of government officials, Members of Parliament, and legislative drafters. Therefore, it is at least partially within their power to correct them.

It should be noted that the distinction between procedural and substantive causes is not precise. All of the causes listed above result from a combination of inadequate processes and insufficient skills. Indeed, processes can be improved by developing skills and changing behavior, and substantive work can be improved by changing processes which impede collaboration and information sharing. It is a question of degree. But the distinction is still helpful, since it indicates the *extent* to which both procedural changes and skills development are required.

What can be done to counteract the causes of impractical and ineffective legislation? Other chapters address the effective development and implementation of legislation, harmonization of law with national and international standards, utilizing legal expertise, and making the legislative drafting process open and consultative. This chapter looks at the analytical skills and drafting techniques which are required for improving the substantive quality of legislation.

**Optimal analytical approaches and decision-making techniques for drafting practical and effective legislation must answer two key questions:**



1. Which pre-existing conditions and circumstances will affect the success of draft legislation? This question needs to be answered through substantive knowledge and accurate empirical information.
2. What impact/effect will the draft legislation actually have, in light of these conditions and circumstances? This question is best answered through Regulatory Impact Analysis (RIA).

The following chart summarizes some of the key existing conditions/circumstances for which knowledge and information are required:

EXISTING CONDITIONS TO ASSESS WHEN DRAFTING LEGISLATION
<ul style="list-style-type: none"><li>• The structures and roles of governmental and juridical institutions</li><li>• Institutional and administrative capacity</li><li>• Roles and procedures of governmental officials and legal professionals</li><li>• Resources (financial, material, capital, and human)</li><li>• Information management (including access, utilization, and dissemination)</li><li>• Law enforcement capacity and practices</li><li>• Legal jurisprudence (the state of the law and existing legislation)</li><li>• Adjudication, the work of the judiciary/courts, and enforcement of judgments</li><li>• Environmental factors and natural resources</li><li>• Communications and transportation</li><li>• Cultural and linguistic issues</li></ul>

*Any one of these conditions and circumstances can dramatically affect and alter the degree of practicality and efficiency of legislation, and thereby its ultimate success. For this reason, accurate information, substantive knowledge, and practical expertise are required.*

Armed with knowledge and information concerning actual conditions and circumstances, and taking account of the policy objectives of the draft legislation, it is possible to move on to the second question, and analyse the likely results of draft legislation. This is best accomplished through RIA

Before discussing what RIA is (Section IV), and how it can be best utilized (Section V), it is useful to consider in greater depth the last cause of impractical and ineffective legislation listed in the chart on Page 4 above: *incorrect or inaccurate assumptions*.

Policy making and legislative drafting are invariably based on a wide range of assumptions, concerning a) actual conditions and circumstances, b) how they will change over time, and c) how they will be affected by new legislation. These assumptions concern economic cycles, technological development, government resources, international affairs, natural phenomena, human behavior, etc. However, legislation (and RIA) are only as good as these assumptions.

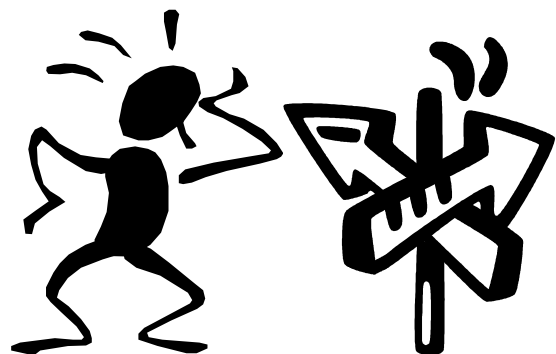
*If correct information is available, there are two main causes of incorrect assumptions:*

1. Faulty analysis, probably due to inadequate skills and techniques or wishful thinking
2. An erroneous presumption that the world is static rather than dynamic



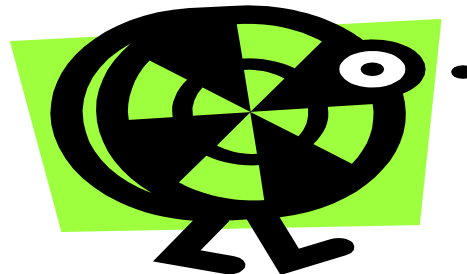
To avoid the first cause of incorrect assumptions, it is necessary to a) develop analytical skills, b) put them to optimal use through collaborative working practices, c) challenge them through consultation with a wide range of interested parties, and d) professionalize (de-politicize) the legislative drafting process. Transparency and open processes are the best means for addressing the wishful thinking which too often undermines the preparation of legislation.

To avoid the second cause of incorrect assumptions, it is necessary to understand that conditions are always changing. Taking the examples of assumptions listed above: economic trends are unpredictable, technological development alters our lives in unforeseen ways, government resources are rarely in line with predictions, international relations are affected by a multitude of changing variables, and nature always surprises us (variable rainfall, heat/ cold, earthquakes, agricultural pests, epidemics, etc.).



In addition, assumptions about the behavior of target groups and how they will respond to new legislation are often inaccurate. Target groups are dynamic actors who adjust their behavior according to incentives and penalties (and their probability). They routinely utilize services of a wide range of professionals and experts (from lawyers to accountants to tax planners), who instruct them on how to maximize results by changing behavior in response to new legislation. This makes predicting the future behavior of target groups a difficult exercise. And when those predictions are incorrect, the results of the legislation will be different from what is expected.

In this context, drafting legislation for an ever-changing world is like trying to hit a living and moving target. Indeed, *circumstances may change while legislation is being drafted.* Therefore, government officials, Members of Parliament, and legislative drafters must obtain the latest and most accurate information, and make full use of all of the analytical skills and tools available to them, especially RIA.



**Legislation based on an inaccurate assessment of conditions/circumstances or faulty assumptions is likely to miss its mark and have unintended consequences. And RIA based on the same information and assumptions cannot serve as a useful tool for making corrections or improvements. Therefore, access to and full utilization of accurate empirical information, and the development of sound assumptions, are indispensable pre-requisites for drafting practical and effective legislation, and for properly performing RIA.**

#### **IV. What Is Regulatory Impact Analysis?**

**Regulatory Impact Analysis can be defined as a systematic effort to determine the probable consequences of legislation *ex ante* (in advance), and thereby improve decision-making.** Thus, RIA is a valuable and dynamic tool for guiding policy makers, drafters, and legislators towards the most effective means and mechanisms for achieving their policies and objectives, and making legislation practical and effective. In other words, RIA is a decision-making tool which helps identify the most appropriate way to achieve socio-economic goals.

What are the potential effects of legislation?

FACTORS IMPACTED BY LEGISLATION
<ul style="list-style-type: none"> <li>• The economy (economic growth, productivity, investment, labour conditions)</li> <li>• State and local budgets</li> <li>• State machinery (administration, law enforcement, and court operations)</li> <li>• The legal system and other legislative acts</li> <li>• The environment and natural resources</li> <li>• International relations and legal obligations</li> <li>• Human rights and freedoms</li> <li>• Specific institutions, organizations, and types of businesses</li> <li>• Specific sectors of society and target groups</li> <li>• Society at large</li> </ul>

Regulatory Impact Analysis started modestly in the United States in the 1970's. It was based on econometric forecasting, looking at economic benefits and costs of legislation. The approach was predominantly *quantitative*. RIA was gradually expanded to cover more of the factors listed in the chart above, and to include the *qualitative* effects of draft legislation.

One of the first and foremost efforts to systematically employ RIA to promote social welfare was the 1969 National Environmental Policy Act in the USA. This law requires federal agencies to prepare an Environmental Impact Statement for any regulations or actions affecting the environment. Adverse results, side effects, reasonable alternatives, opportunity costs, and required resources have to be considered. Environmental Impact Statements are now commonplace in many countries, and a pre-requisite for official and private initiatives.

RIA was adopted in several developed countries in the 1980's and 1990's. In 1995, the Organization for Economic Cooperation and Development (OECD) introduced a Checklist for assessing legislation. It was included in "Recommendations on Improving the Quality of Government Regulation". The Checklist covers key issues regarding substantive soundness (legal sufficiency and effectiveness), technical soundness (format and quality of drafting), and procedural soundness (consultation). Many of these issues are properly included in RIA. The Checklist has ten questions:

THE OECD CHECKLIST FOR ASSESSING LEGISLATION	
1	Is the problem correctly defined?
2	Is government action justified?
3	Is regulation the best form of government action?
4	Is there a legal basis for the regulation?
5	What is the appropriate level (or levels) of government for this action?
6	Do the benefits of the regulation justify the costs?
7	Is the distribution of effects across society transparent?
8	Is the regulation clear, consistent, comprehensive, and accessible to users?
9	Have all interested parties had the opportunity to present their views?
10	How will compliance be achieved?

These ten questions are an excellent starting point for policy makers and legislative drafters.

**Question One** asks whether the problem is correctly identified. This is the first step in the drafting process, and it must be taken during policy design. Socio-economic problems can often be traced to the behavior of specific (responsible) target groups. Reasons for their behavior, motivating factors, surrounding circumstances, and the official response should be assessed. *Without a sound understanding of the nature and causes of a problem, it is impossible to devise a legislative solution.*





**Question Two** enquires into whether government is responsible for addressing the problem. This is also a threshold issue, which should be addressed during policy design. Government should not become involved in problems which are better handled through markets or non-governmental action. Many rules and standards are applied and enforced by non-official parties (self-regulation), or through co-regulation in cooperation with government. If a market or private system breaks down, government intervention and oversight are warranted. Otherwise, government exceeds its mandate, rules ineffectively, and jeopardizes public support.



Once it is determined that government should get involved, Question Three asks how. Far too often, legislation is seen as the preferred or only means for addressing a problem. But governments have other (more flexible, more creative, and less costly) ways to implement policy. These include market-based measures, educational and informational campaigns, and public pressure. Sometimes a *combination* works best. For example, after the United States passed legislation requiring seat belts, compliance was minimal and enforcement was ineffective. The situation changed dramatically after a major televised educational campaign showing what happens to dummies inside a crashing car, both with and without seatbelts.

It should be noted that many socio-economic problems are not new or unique. Therefore, prior efforts to address them and the experience of other countries can offer valuable guidance.

The first three questions are based on the principle that *only when a problem is clearly understood, and the role of government in solving it is carefully defined, is it possible to devise suitable legislative solutions, and select the optimal one.* Even though these issues have to be addressed during policy development, they should still be revisited during RIA. Any rush to legislate when the situation and role of government are poorly understood is doomed to failure.

**Question Four** concerns the legal sufficiency of draft legislation. Is it authorized by and harmonized with national standards (the constitution and existing legislation) and international obligations (treaties and conventions)? Is it legally correct, certain, proportional, and internally consistent? Have proper procedures been followed? Answers to these questions must come from legal experts. Their input needs to be incorporated into the drafting process at all appropriate stages, including initial design, drafting, RIA, and marking up (finalization and amendments).

**Question Five** addresses the geographical scope of legislation (centralization, federalism, and regionalism). Some issues must or can be addressed nationally, while others are best handled closer to home. Often jurisdiction is shared, with certain aspects of a problem handled nationally and others locally. This issue has to be included in RIA. Answers are country-specific, depending on the structure and respective functions of different levels of government, and socio-cultural values. But the basic principle is universal: *if the wrong level of government takes charge, or when responsibility for a shared issue is not allocated correctly between different levels of government, legislation is unlikely to be practical and effective.*



**Question Six** focuses on **Cost-Benefit Analysis (CBA)**. In many respects, this is the heart of RIA. CBA is a utilitarian concept based on neo-classical/welfare economics and Pareto Optimization. The idea is that legislation should promote overall/aggregate societal welfare by a) maximizing benefits, b) minimizing costs, and c) ensuring that benefits exceed costs. Therefore, legislation is not appropriate if it delivers limited benefits at great cost. For example, a regulation which prevents a few injuries a year, but which is expensive to enforce and requires significant investment from businesses, can be considered unjustified, and thus impractical and ineffective.

What are some of the potential costs and benefits associated with legislation?

POTENTIAL BENEFITS AND COSTS OF LEGISLATION		
SECTOR	BENEFITS	COSTS
<b>Government</b>	<ul style="list-style-type: none"> <li>• Increased power</li> <li>• Increased revenue</li> <li>• Stronger institutions</li> <li>• Better conditions for officials and civil servants</li> </ul>	<ul style="list-style-type: none"> <li>• Administration and supervision</li> <li>• Enforcement and adjudication</li> <li>• Infrastructure, buildings, equipment, human resources, IT, information management</li> <li>• Reduced revenues or taxes</li> </ul>
<b>Business</b>	<ul style="list-style-type: none"> <li>• Better economic conditions</li> <li>• New investment possibilities</li> <li>• Greater revenues and profits</li> <li>• Less regulatory burden</li> <li>• Lower taxes</li> </ul>	<ul style="list-style-type: none"> <li>• Compliance costs (including capital expenditures and reporting)</li> <li>• Information management</li> <li>• More expensive human resources</li> <li>• Higher taxes</li> </ul>
<b>Special Target Groups</b>	<ul style="list-style-type: none"> <li>• Improved conditions of special interest</li> <li>• Lower compliance costs</li> <li>• Reduced taxes</li> </ul>	<ul style="list-style-type: none"> <li>• Obstacles to carrying out activities</li> <li>• Higher compliance costs</li> <li>• Reporting obligations</li> <li>• Increased taxes</li> </ul>
<b>Society</b>	<ul style="list-style-type: none"> <li>• Economic development</li> <li>• Better health, education, welfare</li> <li>• Environmental protection</li> <li>• Consumer protection</li> <li>• Access to information</li> <li>• Greater liberty and human rights</li> </ul>	<ul style="list-style-type: none"> <li>• Reduced economic growth and employment</li> <li>• Diminished health, education, welfare</li> <li>• Social dislocation and emigration</li> <li>• Environmental degradation</li> <li>• Restrictions on liberty and human rights</li> <li>• “Externalities” not paid by responsible parties</li> </ul>

Unfortunately, Cost-Benefit Analysis is not a totally precise science. While direct costs can usually be budgeted, indirect costs and compliance costs are more amorphous. When costs and benefits cannot be entered or found on balance sheets, how are they calculated? Without quantifiable data, does CBA turn into a conceptual debate? The following questions illustrate this dilemma:

- What is the benefit of a regulation which saves one life (the monetary value of a life)?
- What is the monetary benefit of a new school, hospital, or municipal park?
- What are the benefits from reducing obesity? How much is saved through better health, lower medical costs, reduced absenteeism from work, or lower fuel usage by airlines?
- How much are human rights (such as freedom of speech or assembly) worth?
- How much is saved by consumer protection measures which improve product quality?

- What is the monetary benefit from strengthened requirements for professional licenses?
- What is the additional cost to a ministry/department for enforcing a new regulation?
- What is the overall effect on government revenue from a tax incentive for business?  
Will increased business generate more tax revenues, offsetting initial expenditures?
- What is the true cost of time spent by target groups complying with a regulation?
- What is the cost of a polluted river? What if the river flows into another country?

Clearly, it is challenging to quantify and monetize the costs and benefits of legislation. Indeed, some of the above questions seem “heartless”. But without some form of answer, it is not possible to determine if legislation is economically justified and cost effective. In other words, *it is necessary to predict the results of legislation (financial and otherwise) in order to a) determine whether it should be passed in the first place and b) make it as practical and effective as possible.*



Proponents of RIA have developed a number of valuation techniques. For benefits, they include:

- Market Analysis of “willingness to pay for and willingness to accept” additional costs
- “Revealed Preferences”, determined through analysis of the behavior of social actors
- “Stated Preferences”, determined through interviews and responses to questionnaires
- “Estimates of Alternative Values” (such as the cost of replacing resources or the funds that are saved through improved health and well-being)

It is helpful to adopt a common sense and flexible approach. If precise figures are difficult to develop, then estimates or ranges (with explanations concerning the factors that will affect them) are perfectly acceptable. As an alternative, qualitative assessment can be utilized. Indeed, *numerical precision may not be as important as careful identification of overall consequences and alternative mechanisms for implementation.*

It is also important to identify and evaluate both short-term and long-term consequences. What if benefits or costs increase or decrease over time? What if there are short-term costs but long-term benefits, or short-term benefits but long-term costs? Or a combination of both?

To facilitate comparisons, long-term effects should be discounted to their **current value**. This is the actual value today of an anticipated benefit or cost tomorrow (or over time). For example, the current value of an amount of money at a future date is equal to the amount of money which invested at a standard rate of return today would yield that amount at the designated time. So, if interest rates are five percent per annum, all other factors being equal, it would be acceptable to have either 100 units today or 105 units in one year.

#### Computing Compounded Amounts

To compute the current value of compounded amounts, use the “Rule of 72”. This Rule applies to compounded interest (when there is interest on interest, not simply cumulative). Thus, any sum earning compound interest will double in value according to the formula of 72 divided by the interest rate. Thus, at six percent annual interest a sum would double in twelve years (72/6), while at four percent interest it would double in eighteen years (72/4).

**Question Seven** concerns the distribution of effects across society. Legislation frequently benefits certain target groups, while imposing costs on others. In fact, Cost-Benefit Analysis almost always ends up identifying multiple transfers of benefits or wealth. Very rarely are both costs and benefits borne by the exact same target group(s). Thus, even when legislation brings an overall benefit to society, there are always **transfer effects** and **transfer costs**.

For example, legislation which limits pollutants benefits society by cleaning the environment and reducing disease, but imposes costs on economic operators. Tax legislation always grants special benefits or imposes direct costs on specific and well-defined target groups, while affecting overall government revenues (and thus, eventually, the tax burden on other target groups). Indeed, *tax breaks should be viewed as subsidies to specific target groups (which are usually poorly monitored)*. They have the same net effect on government revenue as any other unfunded expenditure, and will eventually have to be offset by higher taxes elsewhere.



The distribution of benefits and costs can be contentious, because it concerns who wins and who loses. This issue is generally decided in the political arena, on the basis of which parties favoring which interest groups have power. Thus, a law which benefits a small target group that actively supports the government, while dispersing greater overall costs across society, may be unfair and inefficient, but make perfect political sense. Especially if it escapes scrutiny. The average citizen is unlikely to notice a small loss, but the target group will know, and reward its patrons.

Another problem with distribution analysis is that target groups can be difficult to define. Indeed, they may be numerous and overlap, complicating the assessment of relative impact. For example, Small and Medium-Size Enterprises are very diverse. Should gender impact be included in target group analysis? How about the poor, marginal social groups, rural citizens, farmers, or people in defined regions? What about impact on innovation (are inventors a target group)? It is difficult to quantify the effect of legislation on multiple, diverse, and overlapping target groups.

Perhaps for these reasons, Question Seven does not address the *nature* of the distribution of costs and benefits, but only the *level of transparency*. The idea is to ensure that policy decisions concerning the distribution of costs and benefits are visible and seen, and thoroughly considered as part of RIA. Although final decisions regarding distribution remain largely within the realm of politics, transparency makes it possible to hold decision-makers accountable in the court of public opinion, and at the subsequent election.

**Question Eight** concerns the quality and accessibility of legislation. To be practical and effective, legislation must be clear, precise, intelligible, and available to all parties expected to comply. This is the rationale for using more “plain language”. Naturally, parties responsible for administration, enforcement, and adjudication also benefit from quality legislation. In addition, there must be a proper balance between primary legislation (laws) and secondary legislation (regulations). Delegation of regulatory power to executive agencies can enhance flexibility and recruit specialized expertise for handling difficult and multi-faceted problems. Indeed, laws are a cumbersome tool for addressing complicated situations that change rapidly. However, this can distort the balance of governmental powers, undermine the authority of the legislature, reduce oversight, hinder quality control, and lead to arbitrary or inconsistent application.

**Question Nine** concerns consultation with the governed. In a sense this question is different from all of the others, because it is purely procedural. However, *consultation is indispensable for ensuring that all of the other questions are answered correctly*. Indeed, open legislative drafting processes, information sharing, and feedback from the governed are the best ways to exercise quality control, and make legislation practical and effective. Simply stated, in the absence of transparency and consultation, legislation is unlikely to be practical and effective.



**Question Ten** addresses how to achieve compliance. Legislators must carefully consider a) what must be done to make sure legislation is successfully implemented and obeyed, b) which institutions and parties must do it, c) what resources are required (costs), and d) how target groups will react. Far too often, obstacles to implementation are overlooked or underestimated. Legislation becomes *aspirational* (and impractical) when it sets requirements which are difficult to enforce, because target groups are reluctant or unable to modify their behavior, because official institutions can not do their part, or because resources for implementation are inadequate.



While Question Six focuses on the financial costs of securing compliance, Question Ten concerns broader issues of capacity, feasibility, and motivation/incentives. Thus, Question Ten includes the status, operations, decision making procedures, and resource requirements of institutions charged with implementation, the capabilities and interests of government officials, the adequacy and distribution of information, the efficacy of judicial processes, the potential impact of different incentives and sanctions, and the motivations of target groups.

In addition to the above issues, RIA should assess procedures and mechanisms for monitoring and evaluation. Legislation requires oversight to correct deficiencies in implementation. This has to be based upon viable feedback and accurate information. The most common example is regular reporting (often accompanied by live testimony) from senior officials charged with implementation. This promotes accountability, and strengthens oversight by the legislature. Quality control measures are an excellent way to ensure implementation and compliance, and thereby make legislation more practical and effective.

After the OECD Checklist came out, more and more countries began using RIA, and expanding its application. It is now required in most developed, European Union, and OECD countries. RIA is also standard for international organizations, such as the World Bank, and mandatory for the European Commission (since 2005). At this time, RIA is generally recognized to be an essential element of good governance, sound public management, effective legislative problem solving, and smart regulation.

The latest trend is towards specialized forms of Regulatory Impact Analysis. These include:

- Soft Cost-Benefit Analysis, which integrates multiple legislative objectives
- Sustainability Impact Analysis, which is particularly useful for long-term investments such as roads, airports, and dams



- Cost Effectiveness Analysis, which imposes discipline on expenses and performance, by comparing the costs of different options with comparable results (relative costs)
- Administrative Burden Estimates, Business Impact Tests, Small Firm Impact Tests, Paperwork Reduction Acts (USA), and Standard Cost Models (Netherlands), which address overall costs or compliance costs for target groups such as economic operators
- Distributional Analysis, which addresses the relative effects upon different target groups
- Uncertainty Analysis, which creates a range of possible outcomes, taking account of potential difficulties in estimating costs and benefits

These tools can be extremely helpful for clarifying key aspects of RIA, and assessing important issues in greater detail. In fact, it is best practice to have a wide array of tools available, so that the most appropriate one(s) can be selected and employed. However, care is required. Excessive use of specialized RIA techniques can “fragmentize” the process. Legislators may become distracted from the big picture by excessive focus on peripheral issues. Indeed, benefits from special forms of analysis may be outweighed by their costs.



## **V. How Should Regulatory Impact Analysis Be Utilized?**

Regulatory Impact Analysis is best viewed in context, as a crucial component of the larger process of quality control for legislation. Therefore, RIA works best when different parties use multiple mechanisms at all appropriate stages of the legislative drafting process. This requires a concerted and constant effort to answer and re-answer the questions in the OECD Checklist.

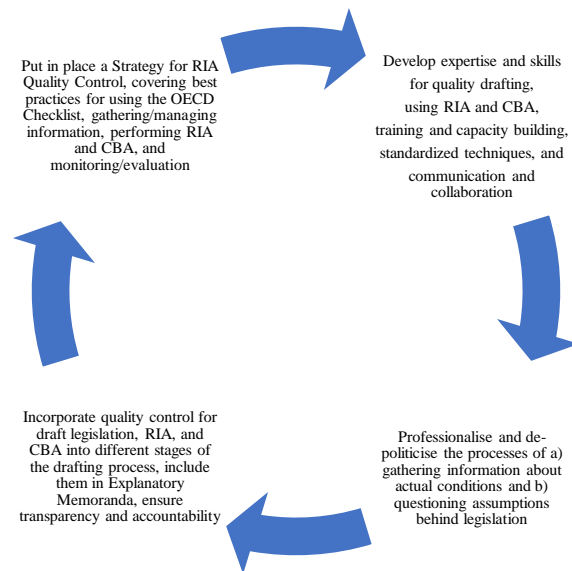
RIA should be strategically and systematically employed. Best practices/methodologies include:

- Determining which types of legislation require RIA. Ideally, existing legislation should be included. But overuse of RIA diminishes quality, by over-stretching limited resources.
- Specifying which kinds of RIA are appropriate for different types of legislation
- Determining the appropriate level of RIA. In-depth RIA is only justified for major legislation with significant impact. RIA should be proportionate to the interests at stake.
- Specifying who is responsible for RIA. This ensures cooperation and reduces duplication. Line ministries and specialists with expertise should have a major role.
- Designating which parties should supervise, review, and participate in RIA
- Setting the timing for RIA, so it is integrated into policy design and legislative drafting
- Making RIA as accurate and standardized as possible, through sound analytical approaches, quantitative measures of valuation, checklists, and user-friendly techniques
- Allocating sufficient resources for RIA (human, material, and financial)
- Determining optimal means for obtaining sound information. Best practices include multiple sources, alternative means for collection, advance planning, mapping of needs, public-private partnerships, sharing/publicizing data, and openly addressing uncertainty.
- Ensuring transparency, sound communication, and information sharing, so that results of RIA are disseminated and available to all interested parties, for feedback and comment
- Making RIA a mandatory part of the Explanatory Memorandum which accompanies draft legislation. This ensures timely completion and dissemination of RIA.

Finally, it is necessary to establish supervisory and quality control mechanisms for the RIA process. (Note that this is distinct from quality control for specific legislation, to secure compliance, under Question Ten of the OECD Checklist, discussed in Section IV above). Supervision of the RIA process should ensure fulfilment of all requirements, and promote the highest standards. Quality control and monitoring and evaluation procedures should determine how well RIA is meeting its objectives, and identify ways to streamline and improve the process. Many countries have established ministerial departments or independent bodies to exercise these functions. They are often supplemented by peer review procedures, private sector working groups, and watchdogs. The idea is to ensure accountability, and obtain input from the governed.

Ideally, there should be an official and documented Quality Control Strategy for Regulatory Impact Analysis, which addresses all of the requirements discussed above. Strategies serve as a reference point, ensuring that all parties are aware of the correct procedures and techniques. They also discourage deviation from best practices. In addition, requirements for using RIA should also be included in Rules of Parliamentary Procedure, and Administrative Procedure Acts which apply to executive agencies.

The following flow chart summarizes four major steps for making legislation practical and effective through quality control measures focusing on Regulatory Impact Analysis:



## **VI. What Are Sunset Provisions, and How Should They Be Utilized?**

“Sunset Provisions” are one of the best mechanisms for ensuring the continuing viability of legislation, and preventing it from outliving its usefulness. Sunset Provisions, as introduced on Page 22 in the context of policy development, can either limit the amount of time which legislation remains in force, or set a specific expiration date. In either case, the legislation has a limited lifespan, after which it automatically expires. In order to re-authorize the legislation or extend its validity, positive action must be taken, through the regular legislative drafting process.

Thus, Sunset Provisions make it mandatory to assess and analyse the actual results of legislation. Extensions or amendments must take full account of what has been achieved, what has worked best, and any shortcomings.

Obviously, Sunset Provisions only have an *ex post facto* effect. They cannot directly guarantee that specific legislation is practical and effective *before* it is passed. Still, Sunset Provisions help improve the quality of legislation in two ways:

1. When legislators know that the results of their work will be evaluated, and that they will be held responsible, they are much more likely to meaningfully perform and document quality control measures such as RIA and CBA. This *accountability effect* motivates greater attention to specific legislation containing Sunset Provisions.
2. When the results of legislation are regularly assessed pursuant to Sunset Provisions, this builds capacity and skills for conducting RIA and CBA, in part by mandating critical review of prior work. It also strengthens communication and collaborative procedures which promote quality control. This *capacity development effect* helps improve the overall quality of legislation.

Unfortunately, while government officials, Members of Parliament, and legislative drafters devote considerable time to preparing and passing new legislation, they are much less engaged in assessing the results of previous work. New problems are pressing. Time is short. Mechanisms for obtaining accurate and unbiased feedback are underdeveloped. Reviews of the results of prior legislation tend to be general or political, rather than technical and professional. Finally, due to turnover, the parties responsible for previous legislation may not be around.

**The fact that legislation is usually approached in a *prospective* manner, and rarely analyzed in a *retrospective* manner, is one of the greatest obstacles to quality control.**

Sunset Provisions can automatically alter this dynamic, by mandating *subsequent* review of *specific* legislation. And they are not difficult or complicated to put in place.

Nonetheless, Sunset Provisions are rarely utilized. Substitutes are sometimes employed. They include requirements to assess a certain number of legislative acts per year, or to conduct an assessment before legislation is amended. Some countries have temporary legislation. Some legislation, particularly involving taxes, is given limited duration (but usually without any requirement to assess the results). Sometimes governmental bodies are tasked with submitting interim reports on the results of legislation, particularly to Parliaments.

Unfortunately, these alternative measures are usually inadequate substitutes for *mandatory comprehensive analysis as a condition precedent* for extending the validity of legislation. Therefore, Sunset Provisions should be more regularly employed, according to established procedures and criteria. Further, they should be included in the Quality Control Strategy for Regulatory Impact Analysis.



## **VII. Conclusion**

Good governance and the Rule of Law require practical and effective legislation, which can be implemented, enforced, adjudicated, and obeyed. But it is not easy to draft and pass legislation which takes account of and corresponds to the actual situation in the real world, and which meets its goals in an efficient, cost effective, and timely manner. Far too often, impractical and ineffective legislation fails to meet its own objectives, and undermines the legal system, while imposing un-necessary costs for implementation and compliance.



General measures to correct this situation, by improving the legislative drafting system, include professionalizing and de-politicizing policy making and legislative drafting, rationalizing the drafting process, ensuring that juridical institutions and officials are able to fulfil properly defined roles, effectively incorporating legal and substantive expertise into the drafting process, ensuring the availability of comprehensive and accurate information resources, and putting in place open and participatory mechanisms which ensure transparency and communication, and facilitate input from all interested parties.

Specific measures to correct this situation, by improving the quality of draft legislation, start with access to solid empirical information concerning pre-existing conditions and circumstances, and careful analysis of the likely impact of draft legislation, based on sound assumptions. Regulatory Impact Analysis can play a major role in this process, and help legislators make decisions and act on the basis of reason and knowledge. Regulatory Impact Analysis, as set forth in the OECD Checklist, and in conjunction with quantitative tools such as Cost-Benefit Analysis, can enable legislators to fine tune draft legislation so that it achieves its goals in an effective manner. It can also help make legislation “normative”, so that it precisely specifies which target groups must not, must, or can take which actions, under which circumstances.

However, Regulatory Impact Analysis is only as good as the procedures in place and the personnel involved. Therefore, it is necessary to define who does what, when, and how, and build skills and capacity. This is best done through a comprehensive Strategy for Quality Control and Regulatory Impact Analysis.

Finally, it is necessary to highlight the crucial and cross-cutting role played by transparency and open/consultative legislative drafting processes. When legislative drafting is left to officials and insiders, there are severe limits on information resources, expertise, analytical skills, and practical experience. Open processes direct legislative drafting towards the big picture and the long run, challenge assumptions, point out obstacles, place limits on political influence, and promote accountability. Public participation significantly enhances the overall quality of legislation, and makes it much more practical and effective.

## **PRINCIPLE IV**

### **Legislation Should Be Normative, Not Aspirational**

**NORMATIVE**

**LEGISLATIVE**

**DRAFTING**

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## **I. Introduction**

The main function of legislation is to achieve policy goals by controlling the behavior of target groups. In this context, legislation can be defined as “a legal act which establishes prohibitions, obligations, and/or rights for defined target groups under specified conditions within a jurisdiction”.

It is helpful and illustrative to separate this formula into five distinct and concrete components. For legislation to establish prohibitions, obligations, and rights it must indicate:

1. *Who* (the target group or subject)
2. *Must Not, Must, and/or May* (the prohibitions, obligations, and/or rights)
3. *Do What* (targeted behavior)
4. *When and How* (under what conditions and circumstances, with what exceptions)
5. *Where* (the jurisdiction)

Note that it is not always necessary to specify *where*, since jurisdiction may be clear from the context. For example, national legislation normally applies throughout the territory of the country, while provincial/state/municipal legislation has defined territorial application. However, exceptions to this general principle of jurisdiction must always be specified (for example, if national legislation applies to conduct performed abroad or only within a certain part of the territory).

According to the above schema, legislation must coherently forbid, require, or authorize something in order to be substantively sound, implementable, and effective. This approach can be called normative legislative drafting, because it focuses on the creation and enforcement of defined norms.

When drafting diverges from a normative approach, the resulting legislation is more difficult to implement, obey, enforce, and adjudicate. This is because legal professionals, legal institutions, and citizens can only work with well-defined norms concerning their behavior. When legislation contains goals that are general, indefinite, ill-defined, ambitious, political, unrealistic, or unachievable, it is the result of what can be denominated aspirational legislative drafting.

Legislation that proclaims goals rather than establishing norms is actually less likely to achieve those goals. Further, such legislation compromises and “dilutes” the value of all legislation. This is because parties which implement, enforce, adjudicate, and obey legislation cannot act accordingly, and end up losing respect for the legal system. Legislation is not the place for policy pronouncements or aspirations, no matter how positive, beneficial, or laudatory they might be.

## **II. Drafting Normative Provisions**

Sound normative legislation starts with clear policy objectives. The initiators or proponents of legislation must set forth exactly what they hope to achieve, and then communicate that information to the legislative drafters. It is then up to the legislative drafters (whether part of a formal institution/department or an informal working group) to formulate the appropriate language for creating enforceable/applicable norms which achieve the objectives. The final stage of the legislative process is the approval/ratification of these norms by the appropriate legislative and executive bodies.

Legislative drafters sometimes utilize Preliminary Provisions to set the context for legislation, identify its policy objectives, state its legal basis, and/or explain its rationale. The Preamble, Citations, or Recitals at the beginning of legislation are most appropriate for this purpose. This practice is more common in international and multilateral legal instruments, which require a demonstration of

consensus concerning legal approach. In any event, Preliminary Provisions are purely for explanatory purposes, and do not have legal effect. The body of legislation, the only component with legal effect, must contain all required normative provisions.

Legislative drafters need to carefully analyse the essential characteristics of the three kinds of normative provisions.

### **A. Provisions Which Create Prohibitions**

Provisions which create prohibitions prevent target groups from taking actions which they might otherwise take. Provisions which create prohibitions are properly considered first. This is because prohibitions are usually the most serious type of rule to break. Criminal or at the very least administrative sanctions are likely to be imposed for failure to heed a prohibition.



Here is a sample prohibition:

“Companies registered in the State are prohibited from dismissing any employee without three weeks advance notice in writing stating the reasons for dismissal, unless the presence of the employee at the workplace constitutes an actual danger to company operations.”

Let’s break this down into the component parts:

1. Companies registered in the State (who, the target group or subject)
2. Are prohibited from (prohibition)
3. Dismissing any employee (doing what)
4. Without three weeks advance notice in writing stating the reasons for dismissal (under which circumstances/conditions)
5. Unless the presence of the employee at the workplace constitutes an actual danger to company operations (subject to this exception)

This provision clearly identifies the target group, states what this target group cannot do, and specifies an exception to the prohibition. Note that it may be necessary to define the term “actual danger”, and specify who takes this decision, in order to make this provision legally certain.

The following three formulations are optimal for prohibitions:

- Must not
- Shall not
- Is/are prohibited from

While “shall not” is regularly employed by drafters, and treated as an historical tradition, the fact of the matter is that the word “shall” is a) used in many different contexts, b) used inconsistently, and c) sometimes subject to divergent interpretations. In addition, it cannot really be considered part of standard English. For this reason, it is disfavored and even avoided in certain jurisdictions, where “must not” is deemed to be the most appropriate formulation.

It is recommended that prohibitions employ strong formulations, such as those identified above. Weaker formulations make prohibitions aspirational, or unenforceable. Consider the following:

- Should not
- Cannot
- Is/are not authorized to
- Is/are not permitted to
- Is/are not allowed to
- Is/are not to

What does it mean when target groups are “not authorized” to perform an act? Is there a difference between a prohibition and a lack of authorization? It clearly sounds as though the target groups are not encouraged to take some positive action, but this is not the same as a categorical prohibition against that action.

Certain formulations turn provisions into suggestions, lacking legal force, and are not recommended:

- Should avoid
- Should try not to
- Are advised against
- Must be discouraged from
- Will not

With prohibitions, it is superfluous and potentially counterproductive to add qualifiers like:

- Strictly
- Absolutely
- Expressly
- Under any circumstances

What is the difference between actions which are “prohibited” and actions which are “strictly prohibited”? What is the difference between actions which “must not be performed” and actions which “must not be performed under any circumstances”? Drafter(s) may be trying to make a point, that certain conduct is *more* serious. But this actually makes the *opposite* point, that other conduct is *less* serious. Any prohibited conduct is (by definition) serious! Prohibitions, *as a class of normative provision*, are undermined by the use of qualifiers indicating degrees/levels of seriousness.

The better approach is to a) prohibit that which is prohibited, and b) indicate seriousness exclusively through the degree of sanction or penalty that is applied.

Exceptions to prohibitions can employ the following formulations:

- Unless
- Provided that
- If
- Except

Exceptions, particularly if they are formulated using any word other than “unless”, are best placed in a separate sentence.

Properly drafting prohibitions according to the principles outlined above increases the chances of affecting the behavior of target groups to realize the objectives of the legislation.

## **B. Provisions Which Create Obligations**

Provisions which create obligations require target groups to take actions which they might not otherwise take. This category of normative provision is considered second, after prohibitions. There may be very important reasons for requiring target groups to take actions, for example to protect national security or save lives. However, the majority of obligations relate to administrative requirements, which are technical or financial in nature.



Here is a sample obligation:

“Every citizen must file an annual tax declaration in the prescribed format with the Department of Revenue by the fifteenth day of the fourth month of the subsequent calendar year.”

Let’s break this down into the component parts:

1. Every citizen (who, the target group or subject)
2. Must (obligation)
3. File an annual tax declaration in the prescribed format with the Department of Revenue (do what)
4. By the fifteenth day of the fourth month of the subsequent calendar year (when)

This provision clearly identifies the target group, states what this target group must do, and specifies one circumstance (timing).

The following two formulations are most frequently used and considered optimal for obligations:

- Must
- Shall

However, it is important to be aware of potential difficulties with the word “shall”, discussed above with respect to prohibitions.

The following formulations are generally acceptable and often utilized, but not optimal:

- Is/are required to
- Has/have to

Certain formulations turn obligations into suggestions that lack legal force, and are not recommended:

- Should
- Need(s) to
- Ought to
- Is obliged to
- Is/are requested to
- Is/are to

What does it mean to say that target groups “should perform an act”? It has the connotation that it would be better if they do, and that they are requested to do so. But this is not the same as saying that they absolutely must.

When drafting obligations, it is superfluous and potentially counterproductive to add qualifiers like:

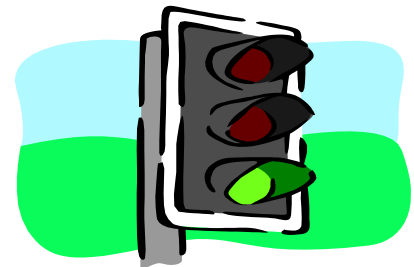
- Definitely
- Absolutely
- Positively
- Certainly
- Under all circumstances

What is the difference between actions which “must” be taken and actions which “absolutely must” be taken? What is the difference between actions which “shall be taken” and actions which “shall be taken under all circumstances”? As with prohibitions, when drafters qualify obligations they undermine obligations as a *class of normative provision*. Once again, it is preferable to treat all obligations as obligations, and distinguish their importance through the application of different degrees of penalty or sanction in the case of violations.

Properly drafting obligations according to the principles outlined above increases the chances of affecting the behavior of target groups to realize the objectives of the legislation.

### **C. Provisions Which Authorize and Create Rights**

Provisions which create rights present options to target groups, authorizing and enabling them to take actions which they might not otherwise be allowed to take. It is important to emphasize that the exercise of rights is discretionary. Target groups can elect to exercise the rights or forego them. Thus, only normative provisions which create rights contain an element of choice.



Thus, normative provisions which create rights may not actually change anything. There are many reasons that target groups might choose to forego rights. In fact, provisions which create rights are sometimes drafted cynically, without adequate provisions or mechanisms for facilitating their exercise. For example, legislation might grant citizens the right to peacefully protest in public places, provided that they obtain a permit in advance from local authorities. If local authorities do not in fact grant such permits, then the right cannot be exercised in practice, and no target groups will actually try to do so.

Here is a sample right:

“Companies registered as State Enterprises under Section 301 of the State Enterprise Act are entitled to relocate to another location within the State without payment of the Business Relocation Tax specified in Section 223 above, provided that they advise the Department of Revenue in writing at least six months in advance.”

Let’s break this down into the component parts:

1. Companies registered as State Enterprises under Section 301 of the State Enterprise Act (who, the subject)
2. Are entitled and authorized to (right)
3. Relocate to another location within the State without payment of the Business Relocation Tax specified in Section 223 above (do what)
4. Provided that they advise the Department of Revenue in writing at least six months in advance (condition precedent)

This provision clearly identifies the target group, states what this target group is entitled to do, and specifies the conditions required for exercising this right.

The following formulations are optimal for rights:

- Is/are authorized to
- Is/are entitled to
- Is/are permitted to
- Is/are allowed to
- May
- Can

It is preferable not to use the conditional formulations or qualifiers for rights:

- Might
- Would be allowed to
- Could be authorized to
- Can be permitted to

What does it mean to say that target groups “might be permitted” to perform an act? Does this mean that they can act, or that another party must take prior action to permit them to act?

Exceptions to rights can employ the following formulations:

- Unless
- Provided that
- If

Note that provisions creating rights can also be structured as obligations for parties that must accommodate those rights. Thus, a provision granting citizens the right to assemble in public could be drafted as an obligation on the part of municipal authorities to permit citizens to exercise their right to assemble in public. The sample right analyzed above could be drafted as an obligation on the part



of the Department of Revenue: “The Department of Revenue shall exempt all companies registered as State Enterprises under Section 301 of the State Enterprise Act from the Business Relocation Tax specified in Section 223 above when they relocate to another location within the State, if [provided that] they have advised the Department of Revenue in writing at least six months in advance.”

Properly drafting rights according to the principles outlined above increases the chances of affecting the behavior of target groups to realize the objectives of the legislation.

#### **D. Exceptions To Normative Drafting**

In order to be enforceable, legislation should always provide sufficient information to target groups so that they can 1) identify who they are, and 2) determine what they must not, must, or may do 3) under which circumstances. However, it is not necessary for every single provision or article to contain all of these elements. Consider the following circumstances:

- In complex legislation, required information concerning scope, applicability, and/or exceptions can be placed in a separate section.
- Definitions can be used to provide information of general applicability, so that it does not need to be repeated.
- Amendments to existing legislation can address only the changes in normative rules, relying upon the main legislation to cover the remaining provisions which are unchanged.

Take a look at the following articles:

Article 1: Passive income from the rental of real estate is subject to taxation at the rate of 20%.

Article 2: Passive income from the sale of real estate owned for at least five years is subject to taxation at the rate of 15%.

Such provisions are not in and of themselves defective, *provided that* the required additional information is supplied. Additional required information in this case includes *who* must pay this tax, how it must be paid, when it must be paid, how it is calculated, what deductions are allowed, what is meant by “passive”, etc. This information could be provided in another section of the legislation. Or, if these articles are only amendments (changing the *rate* of taxation), then this information can be found in the main legislation. However, except in the case of amendments to existing legislation, it should not be necessary to refer to other legislation for necessary details.

One common technique for avoiding the stringent requirements of normative drafting is use of the passive voice. The passive voice results from the designation of something other than the target group as the subject of a sentence. Usually this is an inanimate object, an action (verb), or a circumstance (if). The active voice can be identified by a designation of the subject at the start of the sentence. The subject is often designated later when the passive voice is used. Look at the following examples:

“*Applications for an extension* must be filed at least thirty days in advance.”

“*Homeowners* must file applications for an extension at least thirty days in advance.”

“*License taxes* are due and payable before the first day of the following fiscal year.”

“*Owners of retail establishments*, as defined in Article 312, must pay all license taxes before the first day of the following fiscal year.”

*“Entry into restricted areas by unauthorized personnel is prohibited, and can result in a fine equal to twenty times the standard minimum wage.”*

*“Unauthorized personnel are prohibited from entering into restricted areas. Violators are subject to a fine equal to twenty times the standard minimum wage.”*

In the first sentences, the subjects are “applications for extensions”, “license taxes”, and “entry into restricted areas”. In the second sentences, the subjects are “homeowners”, “owners of retail establishments”, and “unauthorized personnel”. While it can be argued that the overall meaning is clear in either event, the preferred approach is to make legislation as precise as possible. Legislation is less precise when it is drafted to apply to inanimate objects or actions that are actually part of the “what” that animate target groups must or must not do.

In other words, laws should not address objects or actions when they really apply norms to people. Exceptions should be carefully screened. Thus, for example, laws can use the passive voice when they actually apply to inanimate objects (if they specify product standards or the contents of documents). In addition, laws can apply to actions if they are universally applicable, and there is no doubt concerning this point. For example:

*“Smoking in public places is prohibited.”*

*“Fishing in national parks without a license is prohibited.”*

In these cases, the normative provisions clearly apply to everyone, so it is acceptable to start by identifying the action that is prohibited, thereby making the action into the subject.

Therefore, the passive voice should not be used in legislation. It should be restricted to informational documents, announcements, or public signs. Laws should present norms that facilitate enforcement.

### **III. Conclusion**

Failure to comply with the principles of normative legislative drafting is one of the most common mistakes in the drafting process. This is unfortunate, since the consequences can be extremely significant. Legal professionals and target groups are unable to apply, enforce, adjudicate, or obey legislation which does not clearly formulate normative obligations.

This is also an entirely avoidable problem. Normative legislative drafting is a relatively straightforward technique, based on the consistent application of clear linguistic formulations in the language of the legislation.

Further, normative legislative drafting is a good investment. A limited amount of extra effort devoted to normative legislative drafting can yield big dividends with respect to the time and money spent by legal professionals and target groups once legislation is passed. By reducing litigation and obtaining compliance without enforcement, normative drafting makes legislation much more effective, and increases the chances of achieving its objectives.

## PRINCIPLE V

### **Legislation Should Establish Appropriate Sanctions**

To properly impose sanctions, legislation must clearly:

- 1) Identify who is responsible or liable for taking an action or failing to take an action,
- 2) Indicate what behavior is subject to sanction
- 3) Directly connect behavior of target group to specific and clear sanctions or penalties.

In addition, sanctions should be cogently structured and explained. They should clearly indicate the conditions and circumstances under which they will be applied.

There are three principal categories of sanctions:

1. Criminal (fine or imprisonment or both)
2. Civil (civil penalty, civil liability, injunctive relief, presumption of negligence)
3. Administrative (revocation of license or permit, adverse publicity)

However, these categories tend to overlap in current practice. For example, in some countries payment may be imposed for a violation of penal laws, civil laws, or administrative regulations. In addition, administrative detention may be applied to individuals who are not charged with any crime (such as immigrants or migrant workers). It is important to exercise caution, however, since legal soundness may be compromised when the category of sanction does not match the category of legislation.

It is important to make sure that sanctions are appropriate for the objectives of the legislation. The type of sanction that will prove most effective and implementable depends upon:

- The type of legislative act
- The authorities responsible for implementation and enforcement
- The kind and degree of harm caused
- The resources that are available
- The capacity for administration and surveillance
- The capacity for enforcement and prosecution
- Public policy and public values
- Technology

In order for legislation to meet its objectives, sanctions must be implementable, cost-effective, proportionate, flexible, aligned with public interests, and have a dissuasive/deterrent effect.

#### **A. Implementable**

To be implementable, sanctions have to be within the capacity of the institutions which apply them or carry them out. These include administrative bodies, the court system, and law enforcement and penitentiary services. Capacity involves practical and logistical issues, which relate to institutional mandates, human resources, information resources, physical facilities, space, equipment, etc.

## **B. Cost Effective**

Cost effectiveness involves the relationship between the objectives which are served and the expenses which are incurred. For example, civil and administrative sanctions are sometimes used to raise revenue. If they cost more to implement than they bring in, then they are not cost-effective. Cost should be calculated in a comprehensive fashion, to include intangible items such as time spent and opportunity costs.

Penal sanctions are always costly to apply, but they are usually considered warranted for other purposes. For example, cost may be deemed less important than protecting society, punishing offenders, or discouraging conduct. But if the costs of incarceration vastly exceed the harm being done by perpetrators, then the sanctions may be excessively cost-ineffective. An example of this would be incarceration for victimless crimes.

Legislative drafters should also consider the cost relationship between harm and enforcement. In other words, the amount of resources devoted to prevention, prosecution, adjudication, and castigation should correspond to the level of harm and danger to society. This may not be the case when significant resources are devoted to enforcing “morality”. If too many resources are devoted to preventing and prosecuting action which causes relatively little damage, sanctions are not cost effective, and there may be a case for using those administrative resources in a different fashion. In addition, such circumstances can lead to selective prosecution and corruption.

## **C. Proportionate**

Proportionality involves the relationship between the offense and the sanction. Clearly, the seriousness of the sanction should reflect the nature of the offense. In other words, the punishment should fit the crime. Factors to be considered include the intent of the perpetrator, the harm caused, the nature of the issues involved, the conditions of the target groups, and public interest/welfare.

When considering harm, it is important to identify:

1. Who/what is harmed,
2. The nature of the harm (seriousness and duration), and
3. Reparability (potential for restitution)

In an effort to respond aggressively to particular situations, legislative drafters often establish unduly severe or inappropriate sanctions. This is particularly associated with the “Command and Control” approach to legislation. Of course, common sense establishes limits. It would hardly seem appropriate to impose incarceration for a parking offense. But sanctions are often not proportional.

Consider the following actual provision:

“In the event that an Association or Foundation fails to file an Annual Report in the format required by this Law and according to the timing required by this Law, its Registration and Certificate of Operation can be revoked”.

The dissolution of a juridical person is an extremely harsh penalty for failure to comply with an administrative obligation. While some authorities would like to have such means at their disposal, it may prevent them from responding in a manner which reflects the actual nature and seriousness of the issue being addressed. Will judges apply the sanction? How will the public and media react?

In addition, for sanctions to be proportional:

1. Offenses of comparable seriousness should not receive different penalties.
2. Offenses of different seriousness should not receive comparable penalties.

It is important to note that the requirement for proportionality applies to individual legislative acts and to the entire body of laws, which is to say the legal system as a whole.

#### **D. Flexible**

In many instances, a range of sanctions is available. This makes it possible to take specific circumstances into account, such as intention (*mens rea*), previous conduct, extenuating circumstances, etc. To limit the discretion of judges, mechanisms such as Sentencing Guidelines are sometimes applied. Very often, legislators carelessly neglect to establish an appropriate range of sanctions. This can be counterproductive.

Let's take the example of the NGO reporting requirement above. This type of provision is designed to demonstrate a serious official attitude. However, in addition to being disproportionate, it is inflexible. Instead of establishing a range of viable sanctions, it provides for only one, namely dissolution, which is the ultimate sanction. Instead of empowering authorities, it actually limits their range of action. Seeking dissolution of an NGO is likely to be a relatively complicated procedure, especially compared to other sanctions (such as administrative fines).

In addition, this type of sanction may be unattainable or difficult to impose. If cases are tried, judges may be reluctant to apply a serious sanction like dissolution for what amounts to an administrative infraction. Therefore, while the provision may cause fear, it may not actually encourage compliance, if target groups doubt that the sanction can/will be imposed.

Clearly, disproportionate and inflexible sanctions can be inflexible and potentially unenforceable. In addition, they often deny parties their rights to procedural due process, including proper notification and a reasonable chance to correct deficiencies.

It would be more effective and appropriate to provide procedural safeguards and establish a range of sanctions:

If an Association or Foundation fails to file an Annual Report in the format required by this Law and according to the timing required by this Law, and does not meet these requirements within thirty days of written notice by the Registering Authority, the Registering Authority may issue a fine of up to 500 Euro. If the required action is not taken within thirty days following the imposition of this fine, the Registering Authority is authorized to issue an additional fine of up to 2,500 Euro, and initiate proceedings in a court of first instance to revoke the Registration and Certificate of Operation.

#### **E. Aligned with Public Interests**

Sanctions should reflect and be in accordance with public values and mores. This does not imply that they should be dictated by the whims of public opinion or manipulated by media. Instead, it highlights the importance of not offending or contravening important norms. Further, if sanctions become controversial, this distracts attention from their functionality and important role.

## **F. Deterrent**

The deterrent value of sanctions is hotly debated by experts. Some parties maintain that punishments set an example, and that target groups (whether regular citizens or criminals) are attuned to the potential repercussions of their actions. Other parties argue that criminals or individuals with little to lose have different decision-making processes, and that potential punishment (particularly if it is in the distant future and only follows lengthy court proceedings) does not have any major impact. Regardless of how this debate is resolved, the fact remains that the *potential* deterrent effect of sanctions should be considered. Many target groups *will* be concerned about sanctions, particularly if they are carefully selected to reflect their interests, vulnerabilities, and fears.

It is important to address all of these issues in a rational and practical manner. Legislative drafters should have a good understanding of the administrative, adjudicative, and penal systems, and how target groups are likely to respond to legislation and different sanctions.

## PRINCIPLE VI

### **Legislation Should be Technically Sound and Correctly Structured**

To achieve its objectives, legislation must be technically sound. Technical soundness refers to the way legislation is written; its structure, content, and the way that words are formulated.

There are two aspects of technical soundness:

- 1) Structural, organizational, and formatting requirements for the specific kind of legislation.
- 2) Drafting techniques and accurate linguistics.

This section addresses the first aspect of technical soundness. Subsequent sections address the second aspect.

Laws, manuals, or guidelines in most countries address the technical requirements for legislation. They usually contain criteria pertaining to different types of legislation (which helps to select the correct and most appropriate legal instrument), address structural issues, and provide instructions concerning content. Basic guidelines may be found in the constitution. But details are usually contained in a Law on Normative Acts, similar framework law, or Parliamentary Statutes. Every State in the United States has a Manual on Legislative Drafting, generally available for download on the Internet.

#### **A. Why Are the Structure and Format of Legislation Important?**

In order to be technically sound, legislation must be correctly and accurately organized, structured, and formatted. This should be considered a primary objective of the legislative drafting process. In addition, it is a major responsibility of all parties engaged in preparing legislation.

There are four basic principles/requirements concerning the organization, structure, and format of legislation. Simply stated, legislation must:

- 1. Include all required components**
- 2. Place all components in the correct (established) order**
- 3. Distinguish different components and separate them completely**
- 4. Exclude extraneous material**

To summarize: “Put the right things in the right place and the right order”.

Any violation of these principles/requirements renders legislation more difficult to interpret and apply, and will complicate efforts to adjudicate legal disputes and protect legal rights. Indeed, it is counterproductive and potentially dangerous to produce legislation that is not soundly structured, since it is unlikely to achieve its designated goals, and may even end up standing in their way.

It is up to the parties that draft legislation to work together to develop standards concerning sound structure and ensure that they are implemented. The legal profession is responsible for overseeing this process, and promoting quality control.

## **B. What Are the Key Components of Legislation?**

Legislation customarily has the following basic components, in approximately this order:

- 1) Title.
- 2) Table of Contents (to set forth the structure, and make it easy to locate subjects of interest).
- 3) Preliminary provisions. Typical examples include Preambles, Enacting Clauses, Statements of Purpose, Citations, Recitals, Summaries, or Statements of Scope.
- 4) Delineation of subject matter and scope
- 5) Definitions
- 6) Substantive and normative provisions. These can set forth a) prohibitions, b) obligations, and/or c) rights. They can be formulated as major rules, secondary rules, and exceptions.
- 7) Procedural and administrative requirements, generally relating to implementation.
- 8) Sanctions or penalties.
- 9) Appropriations and financial requirements.
- 10) Transitional and final provisions. Typical examples include Transitional Clauses, Effective Dates, Applicability Clauses, Publication Provisions, Savings Provisions, and Technical Provisions (such as the repeal or amendment of existing legislation).
- 11) Annexes (only if extremely important and absolutely required).

Not all of these components are found in every legislative act. The inclusion of specific components depends upon the rules in the jurisdiction, the applicable jurisprudence, and the type of legislation. For example, certain jurisdictions require an “Enacting Clause” (“Be it enacted by the Parliament that...”), while others do not. A “Statement of Purpose” may be helpful and explanatory, or it may cause confusion and compromise the normative provisions, depending upon the type of type of legislation and the drafting techniques employed. Citations and Recitals, while common in international treaties and proclamations of international organizations, are not usually placed in standard legislation unless there are special reasons. As discussed below, there are numerous categories of special clauses that may be required.

While different options are available concerning certain components, legislation must contain:

- A Title.
- Normative provisions (prohibitions, obligations, and/or rights).
- Sanctions or penalties (if the normative provisions establish prohibitions or obligations, but not if they only create rights/entitlements that do not have to be exercised).

There are limited exceptions to this rule:

- Legislation may omit normative provisions if it only changes the sanctions for normative provisions which are pre-existing or specified elsewhere.
- Legislation may omit sanctions if it only changes the normative provisions for sanctions which are pre-existing or specified elsewhere.

In other words, it is possible for legislation to change only normative provisions or sanctions, by making reference to other legislation. However, this is actually a special circumstance more than an exception to the rule. Legislative drafters should normally consider normative provisions and sanctions to be indispensable components of legislation, and indeed partners whose relationship needs to be carefully settled.



As indicated above, each component of legislation should be handled completely in one location. Thus, for example:

- Normative obligations and rights should not be established in the preliminary provisions or the transitional provisions.
- Sanctions should not be included in the preliminary provisions or definitions.
- Definitions should not be placed amongst the normative provisions (unless their application is extremely limited, say to a single article or paragraph).
- Terms should not be defined in the transitional provisions.

One of the most common mistakes concerning the intermingling of components involves norms and sanctions. Look at the following example:

“Natural persons must consent to investigative actions even when this results in the disclosure of personal or private information. If the natural person does not consent, an investigative action may be carried out pursuant to judicial order, and administrative sanctions may be imposed for non-compliance”.

The first sentence creates a norm/rule with respect to privacy rights during investigative actions. The second sentence addresses procedures and sanctions in the event of non-compliance. These are two separate issues, which should be addressed in their own right. Therefore, this provision should be divided into three separately numbered Articles. Further, the first provision might preferably be placed in a different component or section from the second and third provisions, which more naturally belong together. The revised version is as follows:

- 1) Natural persons must consent to investigative actions even when this results in the disclosure of personal or private information.
- 2) If the natural person does not consent, an investigative action may be carried out pursuant to judicial order.
- 3) Non-compliance with a judicial order can result in the imposition of administrative sanctions.

Here is another example, from European Union legislation:

“If products do not satisfy the requirements laid down in Article 5, the Member States shall take all necessary measures to restrict or prohibit the marketing of those products or to ensure they are withdrawn from the market, subject to penalties for the other eventuality decided on by the Member States.”

This text should be divided into two Articles. Again, they might preferably be placed in different components or sections of the legislation. The revised version is as follows:

- 1) If products do not satisfy the requirements laid down in Article 5, Member States shall take all necessary measures to restrict or prohibit their marketing or ensure that they are withdrawn from the market.
- 2) Member States shall determine the penalties to be applied in the event of failure to comply with these restrictions and prohibitions.

Unfortunately, legislation does not always follow a correct and logical order, and components are not always compartmentalized and treated in only one location. This is because:

- Many different parties are engaged in the legislative drafting process, and legal professionals can differ concerning the format as well as the substance of legislation.
- Non-legal professionals are involved in legislative drafting, and they do not always yield to or fully respect legal expertise.
- Different institutions can establish their own approaches, and there can be rivalries between institutions as they try to exert influence.
- The legislative drafting process includes many different stages and institutions. As legislation passes from one institution to another (Ministry to Government to Parliament, for example) it is amended. The process of adding and removing provisions from different components changes the structure and format, sometimes without full regard for internal and legal consistency. Indeed, sometimes amendments are simply added to the wrong component.
- Standardized formats and principles for structuring legislation may not be well-known, well-understood, or adequately shared amongst legal professionals and institutions.
- Parties providing technical expertise to legislative drafters may take divergent approaches, thereby hindering standardization. This issue can be particularly salient when a number of different donors and international organizations are providing legal assistance to different national institutions and legal professionals.

Steps to address these issues are discussed in Section “J” below.

### **C. What Is the Optimal Order for Components of Legislation?**

The list of eleven components presented in Section “B” above is in a typical and customary order for certain jurisdictions. However, the exact order of components is subject to some variability, and depends upon the specific practice in each jurisdiction. The exact order of components depends upon drafting rules and customs, the applicable jurisprudence, the type of legislation, and the subject matter being addressed.

In spite of differences between legal systems, the order of components in legislation must follow certain basic rules dictated by internal logic, consistency, the basic principles of legal reasoning, and usefulness for target groups and interested parties. Therefore,

- Preliminary or introductory provisions should be placed at the beginning of legislation.
- Definitions with general application to terms in normative provisions should precede those normative provisions, in order to make them more intelligible.
- Sanctions should follow normative provisions.

These principles should be considered mandatory, and part of sound practice. Of course, it could be argued that order is not as important as including all of the necessary components, since interested parties can always read sections in the order they choose. Nonetheless, for reference purposes, to create a uniform approach to legislation, and to assist legal professionals and target groups alike, following a logical and appropriate order is important. In addition, since almost everyone starts reading laws at the beginning, putting components in the wrong order is practically guaranteed to generate confusion.

On the other hand, certain components of legislation may be covered in different places without compromising internal consistency or enforceability. For example, it would be possible to:

- Reference the laws being amended or repealed at the start of legislation, instead of at the end (as long as the information is accurate).
- Discuss financing arrangements before normative sanctions, instead of afterwards.

Principles concerning the ordering of these components should be considered voluntary, and therefore be subject to customary practice in the jurisdiction. No problems should arise (as long as these customs are consistently followed).

#### **D. What Is the Optimal Internal Structure of Components or Provisions?**

Components and provisions of legislation (as well as Chapters and Parts) normally have subdivisions. They may include sections/subsections, articles/subarticles, paragraphs/ subparagraphs, and clauses/sub-clauses. The total number is not usually specified or limited. Subdivisions of legislation must be properly denominated, consistently organized, and correctly numbered, according to standard practice. In any event, the Article is the main structural element of a legislative act.

The particular requirements for different jurisdictions are often set forth in laws (such as a Law on Normative Acts), rules (such as Parliamentary Rules), and manuals or guidelines (often issued by institutions or departments dedicated to legislative drafting). The basic premise is that categories and their order and numbers should be logical, sequential, and not unduly complicated. If paragraphing, numbering, indenting, and other formatting practices are confusing, the validity and application of substantive legal provisions may be compromised. Every effort should be made to prevent formatting issues from interfering with legislative intent and reducing legal certainty.

The following sample schema shows how components or provisions of legislation can be efficiently organized:

##### Section 101

- (a) Subsection (lower case letters in parentheses)
  - (1) Paragraph (Arabic numerals in parentheses)
    - (A) Subparagraph (upper case letters in parentheses)
      - (i) Clause (lower case Roman numerals in parentheses)
      - (ii) Clause (lower case Roman numerals in parentheses)
    - (B) Subparagraph (upper case letters in parentheses)
  - (2) Paragraph (Arabic numerals in parentheses)
    - (A) Subparagraph (upper case letters in parentheses)
    - (B) Subparagraph (upper case letters in parentheses)
- (b) Subsection (lower case letters in parentheses)
  - (1) Paragraph (Arabic numerals in parentheses)
  - (2) Paragraph (Arabic numerals in parentheses)
- (c) Subsection (lower case letters in parentheses)
  - (1) Paragraph (Arabic numerals in parentheses)
  - (2) Paragraph (Arabic numerals in parentheses)

It would be possible to extend this schema to include subclauses, denominated by upper case Roman numerals in parentheses: Section 101(a)(1)(A)(i)(I). However, this is likely to lead to confusion, and is not recommended.

Another alternative, utilized in some jurisdictions, involves the following sequence:

Chapter I  
    Article  
        Paragraph  
        Paragraph  
    Article  
        Paragraph  
            Subparagraph  
                Clause  
                Clause  
            Subparagraph  
        Paragraph

Normally, the sequence alternates between numbers and letters (starting with small case).

European Union legislation is generally composed of Parts, Titles, Chapters, Sections, Articles, Paragraphs, Subparagraphs, Points, and Sentences. Articles are considered the “basic unit”. Parts and Titles are designated by Cardinal or Roman numerals, chapters are designated by Roman or Arabic numerals, articles utilize Arabic numerals, paragraphs utilize lowercase letters in parentheses, and points are preceded by a dash. Articles must address only one subject, and must be sequentially numbered throughout the legislation, even if located in separate Sections.

Laws should follow an “outline” format, and apply the following principles:

- Numbering should be consecutive.
- Proper paragraphing and indenting should be used to make laws readable and intelligible, and enable users to identify provisions that interest/affect them.
- Subdivisions at the same level should have the same indentation.
- Subdivisions on a lesser level should have greater indentation.
- Parentheses should be used consistently (Not 2a in some places and 2(a) in others).

Headings can be used to describe major components (such as Chapters, Parts, and Sections/ Articles). They should provide guidance concerning the subject matter of the component. They can also highlight the logical sequence of the legislation, and help readers to locate subjects of interest. Headings should not be utilized with subdivisions. It is important to remember that headings are not part of substantive law. They should not establish normative requirements, and they should be disregarded for purposes of interpreting legislative provisions. Headings are only for purposes of identification and categorization.

Subdivisions with dubious legal status, or which complicate the format of legislation, should be strictly avoided. For these reasons, Footnotes should not be utilized in legislation.

The inefficient or inaccurate enumeration of paragraphs can cause significant difficulties. Take a look at the following regulation, issued by the Department for the Environment, Transport, and Regions in England:

“In the application by virtue of this paragraph of subparagraphs (4) and (6) to (10) of paragraph 3 to an application or proposed variation: (a) the notice served under sub-paragraph (6) of this paragraph shall be treated as the notification required by sub-paragraph (4) (1) of paragraph 3; the reference in sub-paragraph (6) of paragraph 3 to the day on which the notification under sub-paragraph (4) (a) of paragraph 3 is made shall be treated as reference to the day on which the notice served under sub-paragraph (2) of this paragraph is given.”

This demonstrates how complicated legislation becomes when there are confusing references to different sequences of paragraphs. This provision would probably be much clearer, at least to non-lawyers, if the objective were stated in regular words, with only minimal reference to the numbers of paragraphs.

The proper formatting of subdivisions and reference to them goes a long way towards making complicated legislation more intelligible to the parties who implement, enforce, interpret, and must comply with it. Accordingly, all possible measures should be taken to simplify subdivisions and make them internally consistent whenever possible.

#### **E. How Should Legislative Provisions Be Prioritized?**

Proper order and sequencing should be applied within each component, provision, or subdivision of legislation. Naturally, the specific principles may vary according to the nature of the component. For example, while definitions are placed in alphabetical order, substantive provisions are grouped on the basis of priority and logic. For transitional provisions and technical provisions, it is most appropriate to mention legislation which is repealed before legislation which is amended.

With regard to substantive provisions, the following principles apply:

- Primary (major) provisions should precede subsidiary (explanatory/less important) provisions.
- Provisions concerning scope and application (to target groups) should precede details concerning specific cases.
- Universal and general provisions should precede specific provisions.
- Universal and general provisions should precede exceptions and special cases.
- Permanent provisions should precede temporary provisions.
- Normative/substantive provisions (Rules of Essence) should precede administrative, procedural, and technical provisions.
- Provisions creating bodies should precede provisions covering their activities and functions.
- Provisions that will be subject to frequent reference should precede those having less salience.
- Provisions concerning issues having stages should be placed in chronological order.
- Substantive provisions should precede the delegation of powers to make secondary legislation.

These principles are not merely stylistic. They are logical, and can also affect the substance and application of legislation.

## **F. How Should Legislation Be Titled?**

Legislation should be correctly and succinctly titled. Generally speaking, titles should be concise, grammatically correct, and no longer than necessary for purposes of identification and categorization. While using words efficiently, titles should also be sufficiently descriptive to comply with requirements for adequately identifying their subject matter. Some jurisdictions impose limitations on the scope of legislation, and thus the titles. For example, it may not be permitted for one legislative act to deal with two distinct subjects. However, in many cases it is not as easy as it sounds to determine what constitutes multiple subjects. In some jurisdictions, legislation has both a long and formal “Descriptive Title” and an informal “Short Title”. The Short Title, which is set forth in the legislation itself, facilitates and is commonly used for identification and reference.

What is wrong with the following titles?

1. “Concerning the responsibility of insurers and self-ensured employers to pay the total cost of independent medical examinations in worker’s compensation permanent disability cases to resolve issues related to the determination of maximum medical improvement or the impairment rating of the claimant upon request of the claimant subject to reimbursement through an offset against the permanent disability award or upon a determination of the indigency of the claimant based upon adjusted gross family income of one hundred twenty-five percent or less of the federal poverty level pursuant to the income criteria for the Colorado medically indigent programme”. [This is an actual title from a 1993 law in the State of Colorado]
2. “A Bill to Repeal Article 23 of Law 345 of 9 November 2005”.
3. “New Provisions Concerning Personal Income Tax Rates, Corporate Income Tax Rates, and Value Added Tax Rates”.
4. “Improvements in Procedures for Conducting Municipal Elections”.
5. “An Act to Establish Uniform Procedures for the Adoption of Children in Accordance with the International Convention on the Rights of the Child”.

These examples demonstrate the importance of correctly titling legislation, and indicate that this topic does not always receive sufficient attention.

## **G. What Are the Basic Principles for Preliminary Provisions?**

Preliminary provisions may include Preambles, Citations, and Recitals.

- Preambles are the optimal place for introductory, preliminary, and background information.
- Citations (“Having regard to...”) set forth the legal basis for legislation and identify important procedural issues.
- Recitals (“Whereas...”) explain the background, rationale, and goals, and send messages regarding administration and adjudication.

These components of legislation are most common in treaties and conventions. They are also found in European Union Directives. Their most common purpose is to demonstrate consensus amongst different parties for the rationale and purpose behind legislation. In other words, they set the stage for a multilateral approach.

In light of the above, preliminary provisions are usually considered unnecessary or even unhelpful in the context of national legislation. Since they are not part of legislation, and do not create enforceable norms, they cannot contribute to the legal impact. On the other hand, they might detract from the normative provisions, or even create confusion. Therefore, national legislation usually focuses on the body (enacting terms), which alone can achieve objectives and implement policy.

## **H. What Are the Basic Principles for Definitions?**

Definitions should be grouped together in one section. This facilitates reference and is convenient for parties who utilize the legislation. The only exceptions are: a) when there are very few definitions, or b) when a term has extremely limited application (is used infrequently or in only one place). In such cases, it makes sense to use and define the term(s) in the same place. When definitions are grouped together, they should be placed in alphabetical order according to the first letter of each term, regardless of their relative importance or the number of times they are referred to. Definitions are discussed further in Principle XII.

## **I. What Are the Basic Principles for Special Clauses?**

Certain special clauses are routinely included in legislation, in accordance with national requirements. They address issues relating to scope, application, adjudication, and entry into effect. These clauses are sometimes denominated “Enacting Terms”. The principal categories are as follows:

- Applicability Clauses specify who and what is covered by legislation. They may be accompanied by Exclusions and Exemptions. Applicability can refer to categories of target groups, specific geographic locations, certain events or occurrences, particular dates, etc. For example: “This Act applies only to naturalized citizens who are not born within the State.” Or: “This law takes effect on July 1, 2006, and applies to all offences committed on or after that date.” Sometimes application (scope) is addressed in Preliminary Provisions. However, it is best to avoid general statements of principle, in favour of concrete and specific provisions.
- Saving Clauses ensure that new provisions apply only after a certain point in time or under certain circumstances, thereby partially preserving select provisions of existing legislation. In other words, previously existing legislation continues to have limited application to prior events/transactions. For example: “Nothing in this Article affects any right, duty, or liability arising under the law in effect prior to 1 January 2006”. Sometimes it is helpful to explicitly clarify the relationship between new and existing provisions. For example: “The administrative sanctions established in this Act are cumulative and supplementary to those previously in effect, and are not to be construed to alter or repeal those existing administrative sanctions.”
- General Saving Clauses are applicable to all laws in a legal system, and reduce the instances where such clauses are required in specific legislation. They might be specified in Codes or even in constitutional provisions. For example: “The repeal or amendment of a law does not alter or eliminate any penalty, liability, or right under that law, unless the repealing or amending act expressly so provides. The previous law shall remain in force for purposes of any proper action or prosecution for enforcement of the penalty, liability, or right.”
- Grandfather Clauses are a type of Saving Clause that excludes certain pre-existing circumstances or specific target groups from coverage. They are generally used to protect the status of existing members of target groups having long-standing legal rights, while changing the status for new members. In other words, they prevent legislation from having retroactive effect. For example: “The additional licensing requirements for attorneys required under this

Act do not apply to individuals licensed to practice law prior to 1 January 2005. Nothing in this Act shall be construed to affect the licensure of such attorneys.” Or: “Businesses registered with the appropriate authority prior to the date upon which this law enters into effect are not required to submit the certification specified in Section 213 above”.

- Severability Clauses ensure that even if one portion of legislation is invalidated, the remainder is not affected. They can be general (affecting the entire legal system) or specific (applying only when included in legislation, and only for that legislation).
- General Severability Clauses are often part of the legal system, or included in a Law on Normative Acts. For example: “If any provision of a Statute is found by a court of competent jurisdiction to be unconstitutional or unenforceable, the remaining provisions of the Statute are valid, unless 1) it appears to the court that the valid provisions of the Statute are so essentially and inseparably connected with and dependent upon the void provision that it cannot be presumed the legislature would have enacted the valid provisions without the void one, or 2) the court determines that the valid provisions, standing alone, are incomplete and incapable of being executed in accordance with the legislative intent.”
- Specific Severability Clauses may be justified in particular legislation, even if there is a General Severability Clause. For example: “If any provision of this Act or the application thereof is held unconstitutional or invalid, this shall not affect other provisions or applications of this Act that can still be given effect without the invalid provision or application. For this purpose, the provisions of this Act are declared to be severable.”
- Non-Severability Clauses are utilized when all parts of legislation are considered indispensable and mutually interdependent, and it is deemed necessary to prevent the validity of remaining provisions in isolation. For example: “If any provision of this Act is held invalid, this will invalidate the Act in its entirety. For this purpose, the provisions of this Act are declared to be non-severable.”
- Effective Date Clauses specify when legislation takes effect. Normally there are fixed principles for when legislation takes effect, in the absence of a specific provision in legislation. For example, legislation may automatically take effect upon passage, or a set period of time after official publication. Most European Union legislation takes effect twenty days after publication. Under certain circumstances, fixing a future effective date is good practice, since it gives interested parties time to learn about the legislation and make appropriate arrangements. Fiscal and tax measures often come into effect at the start of a new fiscal or calendar year. Sometimes different sections of legislation become effective at different times. If this is the case, details must be explicitly stated. The effective date should not normally depend upon the occurrence of a contingency, or condition precedent, since this makes it variable, and impossible to ascertain from the legislation itself. If there must be a condition precedent for entry into effect, it should be clearly and objectively described, to avoid uncertainty. Finally, the entry into effect of legislation or part thereof may depend upon subsequent legislation.
- Expiry Date Clauses specify the duration of legislation. They are also called “Sunset Clauses” or “Drop-Dead Provisions” in different jurisdictions. Expiry Date Clauses can establish a limited period of application (“This Act will remain in effect for five years”) or set a specific termination date (“This Act will expire on 1 January 2013”). These clauses are particularly useful for requiring legislators to evaluate and re-authorize legislation, or in cases where legislation is expected to achieve its objectives within a set time frame. For example: “This Act will expire five years after it enters into effect. At that time, the Minister of Labor must evaluate its effectiveness, and the results achieved by the Workplace Safety Division, and submit a report to the Parliament”.



- Termination of Authority Provisions withdraw a grant of authority at a specific time. For example, “The authority granted to the Minister of Justice under Section 302 of this Law will expire on 1 January 2013”. This has the same value as a Sunset Clause, but it applies to the powers of a specific institution.
- Reporting Provisions require an individual or institution to submit a report concerning specified subjects at an indicated time. For example: “The Minister of Justice must submit an annual report concerning compliance with the provisions of Section 302 of this Law”. Reporting Provisions should indicate who submits the report, to whom it is submitted, when and how often it is prepared, and what the contents should be.

Transitional provisions regulating the changeover from existing to new rules, the repeal or amendment of other legislative acts, and entry into effect are usually placed at the end of legislation. This simplifies numbering and references, and facilitates future amendments.

## **J. How Can the Structure of Laws Facilitate Secondary Legislation?**

Laws (primary legislation) must set the framework and establish the authority for regulations (secondary legislation). It is important that the respective roles of primary and secondary legislation be clear, and respected in practice. Laws must provide appropriate guidance concerning normative requirements and their implementation, to prevent excessive regulatory discretion and the infringement of legislative power by executive institutions. Therefore, legislative drafters must pay attention to substantive provisions, procedural provisions, financial provisions, and structure/format, to set the stage for subsequent regulations.

The organization and format of laws can greatly affect regulations. When laws are properly and clearly organized and formatted, it is easier to draft and implement effective regulations. Legislative intent can be correctly determined, and cross-referencing can be accurately carried out. A well-organized law creates a good framework for regulations, and facilitates coordination between the two. When a law is poorly organized, the chances of difficulties with regulations increase significantly.

The use of special clauses in laws can also greatly affect regulations. Confusion regarding the scope of legislation, the “grandfathering” of specific target groups, and entry into effect, for example, will significantly complicate implementing regulations. This issue highlights the close relationship between substantive and technical requirements for sound laws. While the inclusion and proper placement of clauses that provide regulatory guidance can be considered technical requirements, the content of these clauses is a crucial aspect of substantive soundness. For this reason, the quality of legislation is enhanced when technical expertise concerning structure and format is combined with substantive expertise concerning the specific area of law being addressed. Indeed, these two kinds of expertise need to be integrated at several key stages of the legislative drafting process.

## **K. What Are the Best Ways to Improve Structure and Format?**

There are four main factors that affect the structure and format of legislation:

1. The legal framework
2. Institutions engaged in the legislative drafting process
3. Human Resources and expertise (particularly involving the legal profession)
4. The legislative drafting process

The legal framework sets the stage for the structure and format of legislation. It is extremely important to have principles, guidelines, and materials concerning how legislation should be structured and formatted. They should be in accordance with legal requirements, coherently formulated, well drafted, comprehensive, distributed, accessible, and utilized. The source of this guidance is not determinative. While a law on legislation is most authoritative, and has the widest scope/application, it is not indispensable. Rules and manuals can serve well. The key issues are whether the source is authoritative, and whether the guidance is applied in practice. This depends upon institutions and individuals.

Legal institutions are responsible for implementing guidance concerning the structure and format of legislation. This should be done as a matter of policy. The main institutions engaged in drafting legislation are in a unique position to standardize the technical aspects of legislation, and ensure that sound principles are followed. When institutions such as ministries, executive bodies, departments for legislative drafting, and legislatures diverge in their approaches, fail to follow them consistently, or jockey for advantage, the legal certainty of legislation is compromised.

Legal professionals and legislative drafting experts are the parties who can most directly affect the structure and format of legislation. Legal professionals should know the principles and rules pertaining to the structure and format of legislation. They should consistently apply these rules, and work with each other to promote compliance. Legal professionals must also try to encourage non-legal professionals who are involved in the drafting process to support their goals. Finally, legal professionals should work closely with parties providing technical assistance, such as international organizations and donors, to promote consistent approaches and standardization. Expertise should effectively combine substantive law and technical aspects of legislation, since both are required for legal certainty.

The structure and format of legislation need to be addressed throughout the legislative drafting process. This is particularly challenging as different parties and institutions draft and amend legislation. Generally speaking, the structure and requirements should be settled early in the process, by the working group or initial drafters, and in accordance with the type of legislation and its objectives. Care needs to be exercised as the legislation is worked up, and for this purpose it is important for expertise to be applied regularly. This includes both substantive and technical issues.

If all of these factors are addressed in a focused and consistent manner, it is possible to improve the structure and format of legislation in any jurisdiction.

In conclusion, it should be stated that correctly structured and formatted legislation is easier to interpret, apply, enforce, and adjudicate, and therefore directly promotes legal certainty. It is the responsibility of legal professionals and parties engaged in the legislative drafting process to pay attention to this subject, and ensure that appropriate mechanisms are put in place. Otherwise, the structure and format of legislation varies according to the identity of the drafters and circumstances of the drafting process. Therefore, it is important to develop consensus concerning principles, standards, and guidelines for the structure and format of legislation, and ensure that they are consistently applied in practice.

## PRINCIPLE VII

### **Legislation Should be Technically Sound/Well Drafted**

Accurate drafting is the second requirement for making legislation technically sound. If legislation is not well drafted, then constructive objectives, excellent policy analysis, legal expertise to ensure compliance with national and international legal requirements, legal expertise concerning the subject matter, Regulatory Impact Analysis to ensure effectiveness and practicality, and attention to organizational and formatting requirements serve no purpose. In other words, substantive expertise enables legislative drafters to know *what* must be accomplished, but technically sound drafting is the key to *how* they do it.

Legislative drafting is both an art and a science. It is defined by Reed Dickerson, as “the crystallization and expression in definitive form of a legal right, privilege, function, duty, or status”. Successful legislative drafting is the final result of a constant process of thinking, composing, consulting, and reviewing, with persistent focus on the objectives to be achieved.

It is no coincidence that numerous legislative drafting manuals start with requirements concerning clarity. For example, Selected Rules for Drafting European Union Legislation start with a requirement that wording should be “clear, concise, and unambiguous” Also, the Joint Practical Guide for the European Union starts by requiring that legislative acts be drafted “clearly, simply, and precisely”. Legislation must clearly explain exactly what the target groups need to know.

While clarity is a universal goal, legislative drafting techniques are also related to the kind of legal system, the relative roles of the legislature and the judiciary, and the traditions of the legal profession. In civil law jurisdictions, where codification in the Roman tradition is admired, the *tendency* is for the legislature to provide guidance, for governmental institutions to provide instructions, and for the judiciary to implement. In common law jurisdictions, where the courts developed as a counterbalance to royal and legislative power, the *tendency* is for the legislature to provide instructions while the judiciary interprets. Some parties claim that there is an inherent dichotomy between clarity and certainty.

However, these differences are overstated. A number of basic principles apply to well-drafted legislation in any jurisdiction. The handling of many subjects is becoming increasingly standardized in our modern and inter-connected world. International laws, treaties, conventions, trading rules, and commercial practices increasingly set limits on national jurisdiction. Finally, while some Acts in civil law jurisdictions apply “General Principles Drafting”, specificity and detail must be and are eventually supplied through implementing secondary legislation or regulations. This secondary legislation is often just as detailed as its common law counterparts.

The following principles are fundamental to sound legislative drafting. Some have been addressed in previous sections, and the remainder will be discussed in greater detail in subsequent sections.

- Legislative provisions must be drafted in normative fashion, clearly identifying prohibitions, obligations, and rights that apply to specific parties under defined circumstances.
- Norms and rules should be directly and explicitly stated. All required information should be presented. Special knowledge on the part of target groups should not be presumed or assumed. Recourse to supplemental sources of information should be avoided.

- Normative provisions should always complement each other. There should never be contradictions, gaps, or unanswered questions. This applies both within a legislative act and between different legislative acts.
- Legislation should clearly specify its scope, applicability, and timing. It should be possible to quickly and accurately determine to whom and under what circumstances it applies.
- Legislative drafting style should reflect the type of legislation and intended audience.
- Language should be clear, precise, and coherent.
- Linguistic consistency should be ensured. This means that 1) different words should not be used to convey the same meaning, and 2) the same word should not be used to convey different meanings.
- Grammar, punctuation, and syntax should be standard and correct. Grammatical rules apply to paragraphs, sentences, phrases, and individual words.
- Sentences should be short and to the point, and express a single idea. Separate sentences should be utilized whenever possible. Sentence structure should be straightforward, without subordinate clauses, extraneous phrases, extra punctuation, or excessive parentheses.
- Long sentences that include a series of items should be restructured into numbered or lettered lists.
- There should not be redundancies, repetitive statements, or unnecessary phrases or words.
- Imperative and permissive words such as “must”, “shall”, and “may” have to be accurately used.
- Legislation should not have slang, vernacular, archaic words, trite comments, colloquial phrases, or idiomatic expressions.
- Abbreviations and acronyms should be used sparingly, and defined or written out when first used.
- Key terms should be defined, when necessary, and consistently used in accordance with a single definition. Definitions should not deviate from standard meanings or usage in prior legislation. Definitions should be placed in a single convenient location, preferably at the beginning of legislation, in alphabetical order.
- Transitional clauses and final provisions concerning issues such as timing, entry into force, and duration should be clear and correct.
- Negative formulations should be avoided, in favor of positive statements, which are less confusing.
- Legislation should be gender neutral whenever possible.
- Amendments or revocations of existing legislation should be accurately written, follow the correct format, and explicitly state their legal implications.
- References to other legislation or different sections of the same legislation should be clear, accurate, and correctly structured.
- Annexes and supplemental materials should be correctly and sparingly used.
- Linguistic differences should be respected. Multilingual laws should not contain any terms or legal concepts specific to only one language.

In many jurisdictions, legal professionals who must understand and apply legislation have developed “Rules of Construction”. Rules of Construction are principles, techniques, and practices used for determining the meaning and legal effect of legislation and other legal documents. For instances when the provisions of legislation are ambiguous or uncertain, or lead to unacceptable results, the Rules of Construction cover “legislative intent”. The idea is for judges and lawyers to look into what the Parliament or Legislature “intended” to do, through recourse to sources other than the legislation itself. Reference can be made to preliminary or supplemental materials, including initial legislative

drafts, parliamentary reports, Explanatory Memoranda, records/transcripts of legislative proceedings, etc. While legislation cannot be expected to address all possible circumstances that might subsequently arise in a changing world, frequent need to evaluate legislative intent is indicative of incomplete, unclear, or possibly even unsound drafting. In addition, determining legislative intent is an inexact endeavor, which some critics consider speculative. If legislation is well crafted and drafted, legal professionals will be able to understand and apply it, and judges will be able to find and apply the law without interpreting and making it.

## PRINCIPLE VIII

### **Legislative Drafting Should Reflect the Type of Act and Intended Audience**

Legislative drafting must take account of 1) the type of act, 2) who it is written for, and 3) how it will be enforced and adjudicated. The traditional approach was for legislative drafters to target officials who implement laws, and judges, prosecutors, and lawyers who interpret and apply them. However, the current trend is towards the “plain use” of language whenever appropriate, so that laws can be understood by all interested parties, including the general public. This reflects the complexity of modern life, where a large body of law affects almost every sphere of human activity, and where people enter into numerous legal relationships with a variety of parties on a daily basis.

Questions concerning drafting approach need to be resolved at the start of the legislative process. They are part of the preliminary analysis concerning the most appropriate form of legislative act and the intended target groups. Further, drafting approach greatly affects the application of legislation. Implementation and enforcement depend upon legal certainty, which requires drafting in a manner that balances precision and simplicity, determining the appropriate level of regulatory discretion, identifying the role of key parties, etc.

The following key principles apply to drafting style:

- Drafting style should take account of the category of legal act, in accordance with the established typology and respective standards and requirements.
- Drafting style should take account of the level of sophistication of the intended target groups. In addition, the target groups should be explicitly identified, in a manner that enables them to determine who they are.
- Drafting style should take account of the nature of the subject, and whether it is highly technical/archaic, of greater interest to specialists, or more applicable to the daily life of citizens.
- Legislation requires less specificity when it is designed to establish guidelines and delegate regulatory authority. However, regulations always require sufficient detail.
- The level of discretion granted to administration and enforcement should be carefully controlled, particularly when institutions are in transition or there is a danger of arbitrary conduct on the part of officials.

In any event, when it is possible, and when it does not compromise legal precision and certainty, the objective should be to draft legislation in plain, non-technical language, and in a clear and coherent manner, using words with standard meanings, which are understandable to important target groups. To those who argue that legislation is most important for and usually read by legal specialists, it is necessary to point out that more people would read legislation if it were more widely accessible and intelligible. Particularly when it deals with topics of everyday and general interest.

This is the approach taken by the European Union in its Joint Practical Guide for legislative drafting in Community institutions. Its objectives are to make Community legislation ‘better understood’ and ensure that it is drafted: “... in an intelligible and consistent manner ... so that citizens and economic operators can identify their rights and obligations and the courts can enforce them.” Further, legislation should be: “precise, leaving no uncertainty in the mind of the reader”.

What kind of drafting style should be adopted for the following kinds of laws/regulations?

- 1) A regulation altering the computation of capital gain taxes for businesses which invest in oil drilling equipment.

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- 2) A regulation describing what items passengers can hand-carry onto airplanes.

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- 3) A law changing the method for electing Members of Parliament, from representatives selected in single districts to proportional representation using party lists.

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- 4) A law establishing fuel efficiency requirements for motor vehicles.

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- 5) A law setting standards for containers used to transport chemical substances.

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## PRINCIPLE IX

### **Legal Clarity Should Be Promoted Through Sound Sentence Structure**

Legislation should be clear, concise, and straightforward in order to promote legal certainty. The following principles are designed to make phrases used in legislative drafting more accurate, straightforward, and intelligible, and thereby enhance legal certainty. Of course, sentence syntax is to a certain degree language specific. In other words, while there are general principles that should be observed, certain issues that arise in one language may not necessarily arise in others, or may need to be addressed in a different manner.

1) Sentences should be correctly structured and as short, concise, and precise as possible. The meaning is often lost when too many ideas or points are covered in a single sentence. Complicated sentences are more likely to confuse than impress. Simple sentence structure is an effective means for communicating ideas. Compound sentences, with subordinate clauses and parentheses, are particularly confusing and difficult to apply. It is best practice to divide complicated sentences into two or more simple and clear sentences, or utilize a list.

- “Vehicles will only qualify for tax exemption if their purchase price is under 50,000 Euro, and they are not used as demonstration vehicles by an authorized dealer in the business of selling that vehicle, and they are not used primarily for farming purposes.” This provision is clearer when structured as a tabulation or list:

“Vehicles will qualify for tax exemption if they meet the following three conditions:

- a) The purchase price is under 50,000 Euro
- b) They are not used as a demonstration vehicle by an authorized dealer in the business of selling that vehicle
- c) They are not used primarily for farming purposes.”

When using a tabulation or list, it is preferable to indicate whether it is disjunctive (“or”) or conjunctive (“and”) in the introductory clause. In other words, the list should be prefaced with “any of the following”, “one of the following”, “one or more of the following”, or “all of the following”, instead of placing either “and” or “or” towards the end of the list. In addition, any terms or conditions that apply to each item in a list should be presented in the introductory clause, not in the body of the list.

- “All parties to the agreement must have access to the results of the work, subject to the understanding that research institutes have the possibility to reserve use of the results for subsequent research projects.” This should be: “All parties to the agreement must have access to the results of the work. However, research institutes may reserve use of results for subsequent research projects.”

One of the most effective methods for making long provisions more straightforward is placing clauses containing exceptions or conditions in separate sentences. Key words to look out for include “unless”, “if”, “provided that”, “however”, etc.



2) Rules of grammar should be respected, in order to make sentences more clear. Compound sentences, dependent clauses, and parentheses should be avoided. The correct use of punctuation is particularly important.

In the following Indemnity Clause actually used by the National Westminster Bank, notice the complete absence of punctuation marks:

“The Bank may without any consent from the Indemnifier and without affecting the Indemnifier's liability hereunder renew vary or determine any accommodation given to the Debtor hold over renew modify or release any security of guarantee now or hereafter held from the Debtor or any other person including any signatory of this Guarantee and Indemnity in respect of the liabilities hereby secured and grant time or indulgence to or compound with the Debtor or any such person and this Guarantee and Indemnity shall not be discharged nor shall the Indemnifier's liability under it be affected by anything which would not have discharged or affected the Indemnifier's liability if the Indemnifier had been a principal debtor to the Bank.”

Does the following actual provision from the Employment Relations Act of the Department for Trade and Industry in England clearly specify *who* should not do *what* under *which* circumstances? If not, can this be clarified?

“A person carrying on an employment business shall not request or directly or indirectly receive any fee from a second person for providing services (whether by the provision of information or otherwise) for the purposes of finding or seeking to find a third person, with a view to the second person becoming employed by the first person and acting for and under the control of the third person.”

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3) Verb forms (modals) should not be split. Conditions should be stated separately, in a fashion that minimizes the need for commas.

- “The employer must, within two weeks of a written demand by the employee, state the reasons for denial of the application.” This should be: “The employer must state the reasons for denial of the application within two weeks of a written demand by the employee”.

4) Modifiers should be used correctly. Modifiers that limit or qualify a statement need to be accurately placed, so that it is clear what they apply to. Look at the modifier “only” in the following provision, and notice how its placement changes the meaning:

- “The Chief Financial Officer *only* is authorized to certify the annual financial statement.”
- “The Chief Financial Officer is *only* authorized to certify the annual financial statement.”
- “*Only* the Chief Financial Officer is authorized to certify the annual financial statement.”

## PRINCIPLE X

### Legal Clarity Should be Promoted Through Sound Word Choice

Legislation often contains words that are incorrectly used or simply not necessary. This makes it difficult to understand, and creates legal uncertainty. Legal drafters should carefully consider the meaning, need for, and importance of every single word. For legislative drafting, correct word choice, simplicity, and clarity are the signs of genius. The following principles can help drafters achieve more accurate and intelligent wording, and thereby promote legal clarity.

1) Terminology in legislative acts should be consistently utilized. The inconsistent use of terminology is one of the most common mistakes in legislative drafting. It sometimes results when different sections are assigned to different parties, or when Working Groups distribute tasks. There are two general categories of mistakes:

1. Different words are used to convey the same meaning, or
2. The same word is used in a different manner with different intended meanings.

Often, this is simply a matter of carelessness, or inconsistent proof-reading. For example, different sections of a law might refer to “contracts” and “agreements”, or “deliver” and “supply”, or “child” and “minor”, without intending to make a distinction. If there is no distinction, then the same terminology should be used. The use of different terminology raises legal doubts concerning whether in fact there is a distinction, and whether a distinction is intended.

2) Legislation should not contain superfluous words. Brevity is achieved by omitting needless words and using a word instead of a phrase whenever possible. Clarity is enhanced when all words are necessary, and there are no repetitive or unwieldy word combinations. Look at the unnecessary words (*in Italics*) in the following examples:

- Any contract that violates this law is *completely and utterly null and void*.
- The Agency has *full* authority to issue administrative orders requiring *complete* compliance with this Regulation, and these orders are final *and conclusive*.
- The authorized time period for filing an appeal is fourteen days from the date of the decision, *and no longer*.
- This Regulation can be amended *or modified* only in accordance with *the provisions of* Paragraph 3, which have full force *and effect*.
- If required, an action may be brought in a Court of First Instance with jurisdiction *over the subject matter and parties*.
- This sanction can be applied *inter alia*, to parties who support or facilitate illegal *criminal* activity on the part of others.
- In the absence of the owner, the Designated Agent is the *sole and* exclusive representative.
- Under no circumstances *whatsoever* can the deadline be extended.
- This contract is made *and entered into* on the first day of September, 2007, *pursuant to and* under the *power and* authority of the Commissioner.
- Payment can be made by the Chief Accountant or, *in the alternative*, the Chief Book-keeper.
- The importation of un-labeled packages is *strictly* prohibited.

3) Complicated or archaic phrases reduce clarity, and should be replaced by fewer or even single words. Look at the following examples:

- “In the event that” can be replaced by “if”.
- “In close proximity” can be replaced by “near”.
- “At the time of” can be replaced by “when”.
- “Is entitled to” can be replaced by “may”.
- “Be deemed to be” can be replaced by “is”.
- “Due to the fact that” can be replaced by “because”.
- “Notwithstanding” or “anything to the contrary notwithstanding” can be replaced by “despite” or “although”.
- “Constitutes” can be replaced by “is”.
- “Full and complete” or “true and correct” can be replaced by “full”, “true”, or “exact”.
- “Provided that” or “provided, further, that” can be replaced by “if”.
- “Shall enter into force and effect” can be replaced by “shall take effect” or “enters into effect”.
- “Shall be construed to mean” or “shall mean” can be replaced by “means”.
- “Null and void” can be replaced by “void”.
- “Hereunder” can be replaced by “under this section”.
- “In those cases which” can be replaced by “when”.
- “Is hereby authorized to” or “is hereby empowered to” can be replaced by “may”.
- “A person who has attained the age of 18 years” can be replaced by “a person who is 18 or over”.
- “Member of a partnership” can be replaced by “partner”.
- “Cease and desist” can be replaced by “Stop”.
- “Until such time as” can be replaced by “until”.
- “During such time as” can be replaced by “while”.
- “Each and every” can be replaced by “each”.
- “A corporation organised and existing under the Laws of England” can be replaced by “An English corporation”.
- “Includes but is not limited to” can be replaced by “includes”.
- “Is defined as and shall be construed to mean” can be replaced by “means”.
- “Not later than” can be replaced by “by”.
- “A period of time not less than” can be replaced by “for at least”.

4) Certain confusing and archaic words should not be utilized at all. Examples include:

- Hereby
- Henceforth
- Herein, hereinabove, heretofore, hereafter, hereinafter, hereunder
- Whatsoever, whosoever, wheresoever, whensoever
- Aforementioned, aforesaid, afore-indicated, afore-specified
- Irrespective of whether, irregardless
- Forthwith
- Thereof, therewith, thereto

5) Common words should be utilized whenever possible and appropriate. Legal terms are useful, and may be necessary to accurately convey a legal concept. However, it is often possible to more clearly convey a concept or instruction using basic vocabulary. This is especially true when there is too much legal terminology in a single sentence or paragraph. The use of basic language is particularly

important when legislation is directed towards and must be understood by non-professionals. In such cases, terms in foreign languages (such as Latin) are particularly unhelpful. Finally, slang, vernacular, and idiomatic expressions should be avoided.

6) Prohibitions need to be clearly stated. They should be authoritative and imperative. The most appropriate terms for prohibitions are “must not”, “shall not”, and “is prohibited from”. “May not” and “is not authorized to” are less authoritative. “Must not” is generally utilized with the active voice, whereas “may not” is generally used with the passive voice. Terms such as “should not”, “will not”, or “can not” are not sufficiently authoritative. Compare the following acceptable choices:

- “Manufacturers shall not distribute merchandise that lacks the required safety warnings.” This provision is extremely authoritative.
- “Manufacturers are prohibited from distributing merchandise that lacks the required safety warnings.” This provision is extremely authoritative.
- “Merchandise without the required safety warnings may not be distributed.” This provision is acceptable, but not preferable, since merchandise is the subject, and it is less authoritative.

The following are not recommended:

- “Manufacturers will not be allowed to distribute merchandise that lacks the required safety warnings.” This provision incorrectly utilizes the future tense (see below).
- “Manufacturers should not distribute merchandise that lacks the required safety warnings.” This provision is not sufficiently imperative.

Prohibitions should leave no doubt as to their intended effect.

7) Imperative words are applicable to absolute duties and obligations. The terms “must” and “shall” are most commonly used and preferable, and clearly apply to the active voice and animate subjects. Animate subjects are distinguished by their ability to comply with a command. For example:

- “Individuals earning any income within the State *shall* file the appropriate tax forms.” This provision contains a normative instruction for a concrete target group, indicating an obligation that absolutely has to be fulfilled. The use of “shall” is appropriate.
- “The Advisory Committee *shall* include the Directors of Departments and Financial Officers.” This provision simply defines the members of a committee, and is therefore a “false imperative”. Use of the word “shall” is not appropriate. It should be drafted as follows: “The Advisory Committee consists of ...” or “Members of the Advisory Committee include...”
- “Each member of the regional council *shall* be entitled to nominate a representative.” This provision concerns a right that *can* be exercised. Therefore, the imperative “shall” is inappropriate. It should be redrafted as follows: “Each member of the regional council *is* entitled to nominate a representative”.
- “The court *shall* consider the following factors when determining which conditions of release *shall* reasonably ensure the appearance of the defendant in court.” This provision correctly uses “shall” the first time, referring to an obligation of the court. However, the second use is inappropriate, since it refers to a circumstance. It should be drafted as follows: “The court shall consider the following factors to determine which conditions of release reasonably ensure the appearance of the defendant in court.”

- “Whoever *shall* violate this Act is subject to administrative sanction.” In this provision, the word “shall” is simply unnecessary. It should be drafted as follows: “Parties that violate this Act [Violators of this Act] are subject to administrative sanction”.

Imperative terms are also useful for denoting a condition precedent. For example: “To be eligible for this programme, individuals must have a permanent residence in the State”.

However, note that imperative words are most applicable to legislation. Contracts, for example, indicate what parties “agree to”. Therefore, the terms “shall” and “must” are less appropriate in contracts, and are sometimes not used at all.

7) The term “may” is applicable when conferring a power, authorization, entitlement, privilege, discretionary power, or possibility, that *does not have to be exercised*. While “may” is preferable, it is also possible to use the formulation “is entitled to” or “is authorized to”. Look at the following three examples:

- “The Executive Director *may* call an additional Meeting of the Board between the regular scheduled meetings if the Executive Director deems this appropriate.”
- “The Executive Director *is authorized to* request additional information from the Chief Financial Officer.”
- “The Executive Director *shall* be authorized to issue invitations to the Meeting of the Board.”

The first example correctly uses the term “may”, and the second example correctly uses the term “is authorized to”. The third example incorrectly uses the imperative “shall” instead of may, and is best written as follows: “The Executive Director may issue invitations to the Meeting of the Board”.

9) The future tense, including the term “will”, should only be utilized for future contingencies.

Choice of verb and tense can vary between different types of acts, and even between different sections of the same act (for example between Recitals and normative provisions). However, the general rule is that the present tense should be used, unless there is a specific reason for using the past or future tense.

Great care should be taken in using the term “will”, which either denotes a definitive consequence or a future contingency. In normative provisions, the term “will” should never be used in place of “shall” or “must”. In addition, it should never be used to denote present obligations. “Will” should be reserved for definitive results or circumstances that arise in the future.

- “Employees must notify their employer if they reasonably believe that a working condition *will* cause serious damage to health.” This provision correctly uses “will” to denote a circumstance that has to be certain and can only occur in the future. However, it restricts the notification provision to conditions that are going to prove harmful in future. It is probably better to focus on working conditions that *cause* harm, rather than ones that *will cause* harm.
- “The penalty for any violation of this Section *will be* three times the minimum monthly wage.” Legislative provisions have to describe what the penalty is, not what it will be. Indeed, if “is” can be used, “will be” should not be used. This should be: “The penalty for any violation of this Section *is* three times the minimum monthly wage”.
- “Parties that violate the provisions of this Article *will be* subject to administrative sanction.” The use of the future tense here is not appropriate. This should be: “Parties that violate this

Article *are* subject to administrative sanction (the words “the provisions of” are not necessary).

- “The duties of the Chief Financial Officer *will* include...” There is no reason to use the future tense here, because the provision actually describes what some of the duties of the Chief Financial Officer *are*. This should be: “The duties of the Chief Financial Officer include...”

10) The active voice is more authoritative and clearer than the passive voice. As discussed in Principle IV, legislation should use the active voice whenever possible. The active voice clearly identifies the subject matter, and more accurately indicates who, what, when, and where. The passive voice is more descriptive and literal, and provides more flavor. Thus, provisions using the passive voice tend to present a scenario, instead of issuing instructions. To use the active voice, make the party having the obligation or right the subject matter, and identify this party at the very start of the sentence.

- “A notice *shall be sent by the Commission* via first class mail to all concerned parties within fifteen days of the issuance of an Administrative Order”. This formulation makes the notice the subject of the provision, and describes what happens to it. Normative provisions should make the target group the subject. This should be: “*The Commission shall send notice by first class mail* to all concerned parties within fifteen days of the issuance of an Administrative Order.”
- “Financial statements must be sent by all corporations to the Commissioner of Revenue.” Again, the use of the passive voice makes the financial statements the subject matter, and describes procedures affecting them. The target group here is corporations, and it is preferable to identify them first and clearly state what they must do. This should be: All corporations must send a financial statement to the Commissioner of Revenue.”
- “Receipts for business expenses should be kept for a period of five years by taxpayers.” Again, the target group is taxpayers, not their receipts, and the objective is to tell taxpayers how to handle their receipts. This should be: “Taxpayers must keep all receipts for business expenses for at least five years” (the word “should” is not correctly used, and the words “a period of” are unnecessary).

In addition, provisions drafted in an “if...then” fashion are literal and less authoritative.

- “If a taxpayer claims business expenses, then receipts shall be retained for five years”. While not legally incorrect, this provision should be: “Taxpayers who claim business expenses shall retain receipts for five years.”
- “If notice is provided in written form, then the licensee shall reply within five business days of receipt”. While not legally incorrect, this provision should be: “Licensees shall reply to written notice within five business days of receipt”.

11) Action (base) verbs should be used instead of auxiliary verbs. Legislative drafters sometimes change the format of an action verb and precede it with an auxiliary verb. The result is still legally correct, but it complicates sentence structure, dilutes the impact of the provision, and involves additional/unnecessary words.

- “The Commission shall *make a determination* whether the Applicant is qualified within thirty days of receipt of the Petition.” “Determine” is an action verb, and it is sufficient for the target group to determine, rather than make a determination. This should be: “The Commission shall *determine* whether the Applicant is qualified within thirty days of receipt of the Petition.”

- “The Committee shall *give consideration to* the qualifications of the Applicant.” “Consider” is already an action verb, and it is sufficient for the target group to consider something, rather than to give consideration to something. This should be: “The Committee shall *consider* the qualifications of the Applicant.”
- “This Article *is applicable* to all individuals physically present within the State for 180 days during any calendar year.” “Apply” is already an action verb, and does not need to be preceded by another verb. This should be: “This Article *applies* to all individuals physically present within the State for 180 days during any calendar year.”

12) Pronouns should clearly indicate to whom they refer. When two or more parties are mentioned in a provision, the use of one pronoun can create confusion. Consider the following example:

- “After the Chief Executive Officer appoints an Arbitrator, he or she must file the required documents with the Arbitration Committee.” It is not clear in this example which party is responsible for filing the documents. This provision should be redrafted to clarify this point: “After the Chief Executive Officer appoints an Arbitrator, [the Arbitrator] or [the Chief Executive Officer] must file the required documents with the Arbitration Committee”. If the Arbitrator is responsible, the provision could be drafted as follows: “Following appointment by the Chief Executive Officer, the Arbitrator must file the required documents with the Arbitration Committee”.

13) Care should be taken when using “that” and “which”. “That” qualifies or limits the word it modifies, and distinguishes it from other categories. “Which” provides a supplemental description of the word it modifies. Notice the difference between the following:

- This Act does not apply to any business that has less than ten employees.
- The mediation procedure, which is carried out by the Department of Immigration, must be completed within ninety calendar days from filing of the notice.

14) It is best not to use the term “and/or”, but rather “A, or B, or both”. For example:

- “The penalty for violating this Article is two years imprisonment and/or a Twenty Thousand Dollar fine. This should be: “The penalty for violating this Article is two years imprisonment, or a Twenty Thousand Dollar fine, or both.”

15) Clarity is imperative when specifying numbers, dates, times, and ages.

- Numbers should be written out, and may also include numerical forms: “Ten Thousand Five Hundred (10,500) Euro”. Carefully consider whether it is necessary to place numerals in parenthesis after the number is written out in words. This practice was designed to prevent forgery, and traditionally applied to financial instruments. It may not be necessary or appropriate for legislation.
- Dates should present the day/month/year, or month/day/year in the clearest form. Commas are traditionally used. However, the clearest way to write dates without any commas is by separating the day and year with the written word for the month: “25 October 2006”.
- Times should indicate am or pm: “9:00 am, 12:00 noon, 1:00 pm, or 12:00 midnight”.
- Ages should be stated succinctly: “A person who is twenty-one years of age or older”.

16) Names of institutions and job titles should be used consistently throughout legislation. Different formulations should never be utilized when referring to the same institution or functionary. If an abbreviated formulation is used, it should be clearly spelled out when presented the first time.

- “The Department of Natural Resources, referred to in this Article as the “Department”, shall...”
- “Chief Financial Officers registered with the Department of State, further referred to as “Registered Officers”, are entitled to...”

17) Acronyms and abbreviations should be used sparingly, and only when readily understood. The excessive use of acronyms and abbreviations destroys the flow of legislative provisions, and obfuscates important points. Provisions with several acronyms and abbreviations are extremely confusing. Acronyms and abbreviations should always be written or defined when first used. A table of acronyms and abbreviations can be presented if this is helpful or required.

18) Use of the singular form of nouns promotes clarity. Legislation should apply to each and every member of the target group. Use of the plural form can cause confusion, because it might make the provision appear applicable only to two or more members of the target group.

For example:

“Employees may apply for coverage under the Wage and Hours Act by submitting the appropriate forms to their supervisor”.

Does this provision apply to every employee, or only to groups of employees?

In addition, the singular form should always be used when connecting nouns with “and”. Note the following examples:

- “This Act applies to charitable and educational institutions”. Does this mean institutions that are *both* charitable *and* educational, or institutions that are *either* charitable *or* educational? Drafting in the singular form would require a choice between: “This Act applies to any charitable and educational institution” or “This Act applies to any charitable or educational institution”. If using the plural, it would be necessary to state: “This Act applies to charitable institutions and educational institutions”.
- “Pension benefits are provided to persons who have attained the age of sixty-five years and who are disabled.” Does this mean a person who has attained the age of sixty-five years *and* is disabled or a person who has attained the age of sixty-five years *or* is disabled. Drafting in the singular form would require a clear choice between these two formulations. If using the plural, it would be necessary to state: “Pension benefits are provided to persons who have attained the age of sixty-five years and persons who are disabled.”

19) Formulas and calculations need to be simplified. This can be accomplished through the use of examples, explanatory notations, and words instead of symbols.

Careful diction and word choice, in accordance with the standards specified above, makes a major contribution to the quality of legislation.



## PRINCIPLE XI

### **The Repeal or Amendment of Existing Legislation must be Precise**

Mistakes regarding the repeal or amendment of prior legislation can have very serious consequences. Such mistakes can be substantive, relating to the subject of the legislation and the legal issues involved, or technical, relating to the procedures and formulas required for making the changes.

Complete repeal of legislation refers to its total revocation or abrogation, meaning that no part of it has any further legal validity. Partial repeal of legislation involves the deletion of specific sections, without affecting the remainder, which continues to be valid. To amend legislation is to alter parts of it (while preserving the validity of the remainder) or to add new parts. Amendments can also have an overall effect (for example by changing only the scope or applicability of legislation).

Provisions that repeal or amend legislation must be extremely precisely designed and formulated, to ensure legal certainty. The provisions being altered must be explicitly identified, and the changes must be very clearly set forth. Legislation may serve the single purpose of repealing or amending previous legislation.

More often, repeal or amendment is necessary in the course of making new law. Provisions covering repeal or amendment are often placed in a single section or article towards the end of the new legislation, after normative provisions but before transitional provisions. In some jurisdictions and types of legislation, the grounds for repeal or amendment are specified in Recitals.

When repealing or amending legislation, significant attention must be paid to the transitional provisions. What consequences are there for judicial/administrative rulings and the behavior of target groups which are based on prior law? Will certain categories of target groups continue to enjoy their existing rights under “grandfather clauses”? How can the legitimate expectations of target groups be protected? Circumstances regarding the “entry into effect” of new provisions must be carefully analyzed and explicitly pronounced.

The following principles and practices should be observed when repealing or amending legislation:

- Legislation should be repealed or amended by a superior or similar category/type of legislation. It is not legally correct to repeal legislation through a subordinate category. Thus, for example, a regulation cannot repeal or amend a law.
- Legislation that completely replaces previous legislation should explicitly repeal it, and not be denominated or structured as an amendment.
- It is not legally correct to repeal “all of a previous legislative act with the exception of enumerated provisions”.
- When legislation is repealed, this automatically repeals all subordinate legislative acts which depend upon it. Thus, when a law is repealed, this usually terminates the implementing regulations.
- Amended provisions should fit perfectly into the previous legislation, with complementary objectives and application, consistent structure and terminology, etc.
- General Clauses should not be used to repeal or amend legislation (for example: “All acts or provisions of acts that are in conflict with this section are hereby repealed or amended”). Provisions being repealed or amended must be precisely identified and expressly changed. Repeal or amendment cannot be performed “by implication”.

- When legislation is amended several times, it should be re-codified or consolidated. Having a single complete and authoritative text including/incorporating all amendments minimizes confusion. It also facilitates access by interested parties. Codification also refers to combining and replacing several separate legislative acts.
- When legislation is amended, the affect upon any legislation that relies upon or refers to the amended legislation must be taken into account.
- Legislation intended solely to amend previous legislation should not contain new provisions.
- Supplementary provisions may be utilized for temporary amendments or short-term derogations, but permanent amendments require the replacement of existing provisions.
- When legislation is amended, it may be necessary to change the title. However, this should be done sparingly and carefully, since complications can arise.
- Amendments should not be utilized simply to renumber or reorganize existing legislation.
- Provisions that are expired, no longer in effect, or irrelevant may be excluded from amended legislation. This promotes clarity and simplicity. However, such provisions still probably apply to circumstances that existed while they were in effect.
- Where a large number of provisions or articles are being amended, it is appropriate to number the amendments separately.

Formatting and procedures for replacing, adding, and inserting text should be carried out according to the rules and practice in the jurisdiction.

For example, it may be preferable to show the exact changes to existing law, as follows:

- Indicate deleted material by ~~striking it out~~ or by [placing it in brackets].
- Indicate inserted material by underlining or by *using italics*.

Thus: “This law takes effect ~~on 1 January 2010~~ sixty days after passage of the new Criminal Code”

Or, it may be preferable to amend by way of restatement, as follows:

- When an entire provision or article is repealed and amended, using the formula: “Paragraph 13 of Regulation ABC is hereby repealed and replaced by the following...”
- When specific terms in a provision are amended, using the formula: “In Paragraph 13 of Regulation ABC, the date of X is replaced by the date of Y”.
- When adding new provisions, using the formula: “Paragraph 13 of Regulation ABC is amended by adding, after the last sentence, the following: \_\_\_\_\_”.

In addition, attention should be paid to:

- Whether it is acceptable to “repeal and re-enact”, by merging existing law and new law, or amended law and new law.
- Procedures for numbering and re-numbering.
- How distinguishing formatting, numbering, or lettering can be used to indicate amended provisions.

Issues faced by the European Union with respect to the consolidation of different provisions in the various treaties are noteworthy. A great deal of time and attention are being devoted to references, consolidation, formatting, and numbering issues. This highlights the importance of creating authoritative, comprehensive, and accessible legal texts that provide interested parties with all required information, including the status of repealed and amended provisions.

## PRINCIPLE XII

### **Definitions Should be Correctly Used**

Terms that are not commonly used or that have a special meaning in a legislative context should be defined. Definitions are especially necessary when particular meanings of terms are required for correct application of the legislation, when terms are not employed according to common usage, and when terms are subject to differing interpretations.

Terms should not be defined or used in a manner that is contrary to their general or ordinary meaning. In such cases, a different term should be used, to avoid confusion. Terms that have an established usage, legal basis, or body of jurisprudence should not be defined, unless it is necessary to alter this established definition.

Definitions may be exhaustive/complete or partial. “Means” is used for exhaustive/complete definitions (X means...). “Includes” is used for partial definitions, illustrative purposes, and for the provision of certain examples (X includes...). Partial definitions are particularly important when a term applies or does not apply to categories that would not normally be included or excluded. “Excludes” or “does not include” is used to remove certain specific categories or examples.

Definitions are generally grouped together in a specific location towards the beginning of legislation, after the preliminary provisions but before the substantive/normative provisions. This draws attention to them and makes them easy to find. In certain jurisdictions, and when definitions are very limited in number and apply only to terms in one section, they can be placed in that section. For example, definitions of terms located only in Sections 204 through 208 of Chapter II of an act could be placed in Section 201. It is appropriate to place the definition of a term used in only one section of legislation in that section. The best practice is to group definitions in one location, before the normative provisions. It is better not to place definitions at the end of legislation, although this can be done.

There are three basic practices concerning the order of definitions:

1. Alphabetical Order. The best practice is to list defined terms in alphabetical order, based upon the first letter. This is straightforward, and it makes all terms easy to locate.
2. Order of Importance. Sometimes terms are listed in order of “importance”. But importance is difficult to assess, and subject to different interpretations. Therefore, this makes the terms harder to locate, as the reader tries to decide on how the drafter ranks importance. If there are certain terms that must be defined first because they are very special (such as references to royalty), the best practice is to list those terms first, separately, and then list the remainder of the terms in alphabetical order.
3. Order of Usage. Sometimes terms are listed in the order that they arise in the legislation. This is confusing if they appear in different sections, even if their location in the law is indicated. It also causes difficulties for those who are consulting only certain sections of a law.

Definitions should be phrased in a manner which makes it possible for them to be substituted for the term itself in the text of legislation. Indeed, one of the most effective means for testing the accuracy and sufficiency of definitions during the drafting process is to actually place them in the text and evaluate the result.

Definitions do not always receive the attention that they deserve. This is unfortunate, since inaccurate or poorly drafted definitions can significantly affect the meaning of legislation, and become a source of confusion and legal uncertainty.

The following additional key principles apply to the definition of terms:

- Terms should be defined only when necessary, to promote clarity, consistency, and precision.
- Definitions should provide information and clarification, not merely restate the obvious.
- Unnecessary definitions should be avoided. Terms that do not need definition should not be defined!
- Terms which are not used should not be defined.
- Terms which are used only once should be defined in the same location they are used.
- The absence of a definition of a term should not be given legal significance.
- Terms and definitions should be used consistently throughout a legislative act.
- Terms and definitions should be used consistently with other legislative acts.
- Definitions in other legislative acts should be incorporated by reference, not restated.
- Definitions should not include the term itself, or rely upon circuitous or faulty logic.
- Definitions should never include normative provisions or rules.

Particular care should be given to using definitions from another existing law. The general principle is that it is preferable to refer to the other law if the definition should change in the event of a change in that other law. Conversely, it is preferable to copy the definition from the other law and insert it into the new law if the definition in the new law should remain fixed, regardless of what happens to the other law.

## PRINCIPLE XIII

### **Negative Formulations Should be Avoided**

Provisions that use the negative form are often confusing and difficult to apply. Look out for the word “not” or the prefixes “in” or “un”. It is generally preferable to use positive or affirmative statements.

Look at the following examples:

- 1) Public announcement of the disposal of property cannot be omitted, unless the property has potential military use. This should be: Public announcement of the disposal of property is mandatory, unless the property has potential military use.
- 2) Manufacturers, other than those who do not have mortgages on their factory, are eligible for benefits under this Section. This should be: All manufacturers who have mortgages on their factory are eligible for benefits under this Section.
- 3) Vehicles will not qualify for tax exemption as business expenses unless their purchase price is not over 50,000 Euro or if they are not used as demonstration vehicles by an authorized dealer in the business of selling that vehicle. This should be: Vehicles will not qualify for tax exemption if their purchase price is over 50,000 Euro. This rule does not apply to demonstration vehicles used by an authorized dealer in the business of selling that vehicle.

Negative formulations constitute a significant violation of the principles of plain legislative drafting. In addition, they are regularly cited as a cause of confusion on the part of target groups.

## PRINCIPLE XIV

### **Legislation Should be Gender Neutral**

Legislation should be drafted in a gender-neutral fashion, to the greatest extent possible. It should not use gender references in a discriminatory or offensive manner. Legal terminology, phrases, and definitions should not make unnecessary or unintended distinctions between men and women.

Of course, there men and women are different. Thus, there may be legitimate policy and legal justifications for differential treating under certain circumstances. Indeed, certain kinds of legislation can only achieve their objectives by acknowledging differences. However, such circumstances should be reflected in the *substance* of legislation, not in terminology that is needlessly gender oriented.

In many countries, the traditional practice has been to use male-oriented terminology in legal texts. This may derive from traditional views concerning legal personality. In addition, gender bias is sometimes reflected in language structure. For example, in certain languages the masculine plural form is applied to groups containing both genders. And in some languages, nouns in the masculine form are applied to both genders. Curiously, in English the third person singular is gender oriented (“he” and “she”, “his” and “her”), while the third person plural is gender neutral (“they” and “their”). In addition, many professions, positions, and practices are traditionally gender oriented (“businessman”, “chairman”, “fireman”, “policeman”, “bell-boy”, “fellowship”, “husbandry”, etc.).

To correct gender specificity, some jurisdictions are redrafting antiquated legislation. Other jurisdictions are empowering legislative institutions to carry out technical revisions. Legislation may contain a “disclaimer” concerning gender neutrality, or addresses the issue in definitions.

The key principles for gender neutrality are:

- 1) There should not be any substantive changes to legislation. Technical revisions can not be used to modify substantive rights or legal effects, even if there is real or perceived bias.
- 2) The least intrusive method to correct gender specificity should be utilized.
- 3) Historic usages should be respected if this is necessary to preserve legal meaning. For example, it is acceptable to use established terms such as “Landlord” or “Manslaughter” or “Ombudsman”.
- 4) New or revised terminology should not be created simply to achieve gender neutrality.
- 5) Awkward phrases and word patterns should not be utilized simply to achieve gender neutrality.

Here is a list of gender-specific terms and their gender-neutral equivalent:

• Brother, Sister:	Sibling
• Chairman	Chairperson
• Congresswomen, Congressman	Member of Congress
• Crewman	Crew member
• Son, daughter	Child, children, offspring
• Draftsman	Drafter
• Father, mother	Parent, parents
• Female, male	Person, individual
• Fireman	Fire fighter

• Foreman	Supervisor
• Grandfather, grandmother	Grandparent
• Lawman	Law enforcement officer
• Maid	Domestic worker
• Maiden name	Birth name
• Mailman	Mail Carrier or postal worker
• Man-hours	Hours worked
• Mankind	Humanity, human beings, people
• Manmade	Artificial, synthetic, manufactured
• Manpower	Personnel, workers, human resources
• Middleman	Intermediary
• Policeman, policewomen	Police Officer
• Salesman or tradesman	Salesperson or merchant
• Seaman	Sailor, crew member
• Spokeswomen, spokesman	Spokesperson
• Statesman	Diplomat
• Stepdaughter, stepson	Stepchild
• Wife, husband, or widow, widower	Spouse or surviving spouse
• Workmanlike	Skillful, efficient

In addition, terms with the special endings “ess” or “trix” should be avoided, in favor of the standard form. These include “administratrix”, “executrix”, “heiress”, “stewardess”, “testatrix” “waitress”, etc.

Look at the following formulas for correcting gender-specific terminology:

- Removing the possessive.

“The Director shall hold *his* office until a successor is appointed.”

This should be “The Director shall hold office [holds office] until a successor is appointed.”

- Changing the possessive to an article.

“The designated individual shall submit *his* application.”

This should be: “The designated individual shall submit *an* application.”

- Changing a nominal to an active verb form.

“A person who imports or *has in his possession* an unlicensed chemical product”

This should be: “A person who imports or *possesses* an unlicensed chemical product”

- Using the plural form.

“If an applicant is licensed in another country, *he shall submit* evidence of licensure.”

This should be: “Applicants licensed in another country *shall submit* evidence of licensure.”

Or: “Any applicant licensed in another country *shall submit* evidence of that licensure.”

However, it is generally preferable to draft legislation using the singular form, since the singular form always includes the plural.

- Using “who”, “which”, or “that”.

“If an employee is eligible, *he must submit* the required application in writing.”  
This should be: “An eligible employee *must submit* the required application in writing”.

- Changing “if” or “when” to “on” or “upon”.

“If the Inspector finds evidence of intoxication, *he must notify* the Committee.”  
This should be: “The Inspector *must notify* the Committee upon finding evidence of intoxication”.

- Using the gerundial form.

“An employer must provide three weeks advance notice before *he fires* an employee.”  
This should be “An employer [Employers] must provide three weeks advance notice before *firing* an employee.”

Formulations that respect both genders include:

- his or her
- his/her
- he/she
- s/he

While preferable to gender bias, these formulations should be avoided if possible.

It can be argued that failure to respect gender neutrality does not undermine the clarity or intention of legislation, since the meaning is still clear. However, if certain parties or genders are offended or distracted by practice in this regard, then the quality of the legislation is indeed undermined. Further, as a matter of principle, due process is gender neutral and justice is supposed to be blind. So, laws should not raise even the slightest suspicion when it comes to neutrality and objectivity.



## PRINCIPLE XV

### **References Should be Accurately Drafted**

Cross-references between legislative provisions must be meticulously and correctly structured. In addition, they should be used sparingly and only when required.

Cross-references can be used:

- 1) Within a single legislative act (internal references) or
- 2) Between different legislative acts (external references)

Two categories of cross-references can be identified:

- 1) Orienting references are commentary and explanatory in nature. They do not have any normative meaning, and are designed to inform and orient the target group(s).
- 2) Regulatory references have a normative and legally binding effect. For example, they can be used to incorporate by reference applicable sections of another legislative act.

Unfortunately, there is a tendency to use cross-references excessively, incorrectly, and/or in association with archaic language. This can severely undermine the clarity, soundness, and effectiveness of legislation, and confuse the target group(s). This problem arises when laws are drafted quickly, perhaps by different parties, with insufficient harmonization and technical compliance checks.

The following key principles apply to references:

- References should be used sparingly, since it is preferable to make legislative provisions intelligible without them.
- References should be used to enhance legal clarity, and should never make legislation more difficult to read or understand.
- If possible, references should be structured so that the provision to which reference is made does not need to be consulted (see example below).
- If it is necessary to consult the provision to which reference is made, the reference should be precise enough for it to be easily identified and consulted.
- References should only be made to sources that are published and accessible.
- References should follow the formulas set forth in drafting guidelines and principles.
- Sections from other legislative acts should not be repeated unless absolutely necessary, since this can result in error or confusion.
- References to the title of previous legislation should state the full title, at least the first time.
- Previous legislation to which reference is made can be listed or summarized in the Recitals of new legislation.
- References should not be used to make non-binding provisions enforceable.
- Cross-references should avoid unnecessary and archaic words and phrases, such as “heretofore”, “aforementioned”, “henceforth”, etc.
- Cross-references should avoid vague formulations such as “above”, “below”, “foregoing”, “previous”, “subsequent”, etc.
- Circular references (to an act or article which refers back to the initial provision) should be strictly avoided.

- Serial references (to a provision which refers to another provision) should be strictly avoided.
- It should be understood that consequences can arise from the subsequent amendment of legislation to which reference is made.
- Care should be taken when making dynamic references, which automatically include revisions of the provision to which reference is made.
- References to clauses concerning dates, times, extensions, exceptions, derogations, applicability, and entry into effect should be carefully reviewed.

Look at the following examples:

- 1) Instead of: “Article 12 applies to all exported products...”  
It is preferable: “The safety provisions in Article 12 apply to all exported products”.
- 2) Instead of: “The aforementioned Articles 10 through 14 of Act 234 are hereby repealed”.  
It is preferable: “Articles 10 through 14 of Act 234 are repealed”.
- 3) Instead of: “Paragraph 3 of Article 10 of Act ABC amending Paragraph 4 of Article 12 of Act BCD is hereby further amended”.  
It is preferable: “Article 10 of Act ABC and Article 12 of Act BCD are hereby amended”.

Legislative drafters should take account of the fact that laws are also written for target groups which are supposed to comply with them. References may be easily handled by lawyers who are trained to compare and contrast laws, and who have access to a law library or computerized database. But they can cause confusion on the part of citizens who are unaccustomed to obtaining and juggling different texts. In this regard, the use of references can depend on who legislation is written for. For example, accountants can be expected to determine the relationship between different tax provisions. Nonetheless, even lawyers can become confused by complicated provisions with excessive references.

## PRINCIPLE XVI

### **Legal Drafting and Terminology Should Respect Linguistic Differences**

Legislative provisions and legal terminology are not always directly translatable or transposable from one language to another. Particular care must be taken when legislation is drafted in more than one language, or translated into other languages. Many countries have more than one national or official language. Many international treaties and conventions (such as the European Convention on Human Rights and Fundamental Freedoms) are translated and then given legal effect in numerous jurisdictions. The provisions of the World Trade Organization are applied in one-hundred and fifty countries. European Union legislation must be equally authoritative in all of the official languages, which have very distinct philological and jurisprudential bases.

Legal expressions that are valid in one language, and useful to convey concepts and practices that are well understood as a matter of law, may have a different meaning or no meaning at all in another language. When a law needs to be translated, such terms are likely to create legal uncertainty. Classic examples of French legal terminology that are difficult to translate include “*sans prejudice*” and “*faute*”. Common Law jurisdictions often make reference to the concept of “*reasonableness*”, which is familiar to all judges and lawyers. It is best practice to avoid concepts and expressions that are too specific to one language.

These considerations also apply to drafting style and rules of grammar. For example, English and French may use different verbs and tenses. Where English uses the auxiliary “shall”, French uses the present tense. In addition, plural adjectives in Romance languages indicate the gender, which may make it possible to determine to which nouns an adjective applies, while additional explanation may be required in the English version, where plural forms do not indicate gender.

In Canada, legislative drafting takes place simultaneously in both official languages, French and English. This requires the drafters to overcome linguistic differences from the start, and obliges all parties engaged in drafting to critically appraise their work. It also avoids difficulties that arise when legislation is finished in one language and only subsequently translated into another. Typical problems which are encountered include procedural drafting issues, timing (particularly delays caused by backlogs), substantive differences between languages, and undue reliance upon unofficial translations.

The greatest difficulty is posed when official translations create legal uncertainty. Here is an actual example of the official translation of a Law on Normative Acts concerning the retro-active application of new laws:

“The effect of a normative legal act does not spread on the relations which were aroused before its introduction into effect.”

This example highlights the importance of involving native speakers in the translation of legislation.

Please identify examples of legal concepts or terms that are specific to a single language:

- 1)
- 2)
- 3)

What practices and procedures can be established to prevent linguistic differences from causing legal uncertainty in multi-lingual jurisdictions?

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## **PRINCIPLE XVII**

### **The Legal Profession Should be Fully Engaged in Legislative Drafting**

**LEGISLATIVE**

**DRAFTING**

**AND**

**THE**

**LEGAL**

**PROFESSION**

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## **I. Introduction**

The legal profession plays a major role in drafting sound legislation. The quality of legislation is greatly improved when different kinds of legal practitioners with a wide range of knowledge, skills, and experience, and who understand the methodology of law, are meaningfully involved in all stages of the drafting process. Therefore, institutions and individuals involved in drafting legislation (whether primary laws, secondary regulations, or any other kind of legal act) need to secure the participation of the legal profession, and take full advantage of the diverse expertise and input which is available.

At the same time, in order to prepare sound laws, there must be a balance between legal and non-legal expertise. Lawyers are indispensable for legislative drafting, and non-lawyers cannot draft legally correct legislation on their own. However, legislation is not the exclusive province of lawyers. A wide variety of input is important for making laws practical and effective. Substantive expertise regarding specific subjects is crucial. Further, elected leaders and government officials are responsible for carrying out legislative and administrative programmes which further the interests of the country and populace, and fulfil mandates arising from the electoral process.

In order to produce sound legislation, each country must take a deliberate and strategic approach to defining the role of the legal profession. This includes a) the identity of the individuals or groups who can provide expertise, b) the types of expertise which need to be provided, c) the timing for this expertise, d) the mechanisms and format for providing this expertise, e) the institutional framework and procedures which will structure the work, and f) the means for putting expertise to best use. By analyzing best practices and different models, each country can make the best possible use of legal expertise during the legislative drafting process.

## **II. What Is the Role of the Legal Profession in the Legislative Drafting Process?**

The relative influence of legal and non-legal expertise in drafting legislation varies between countries. Naturally, there is no “perfect” model. Factors which influence the balance include:

- The system of government
- Political and electoral processes
- Federalism, regionalism, and the degree of local autonomy
- The structures/functions of different executive, legislative, and juridical institutions, and their specific roles in the legislative drafting process
- Procedures and stages for preparing and approving legislation
- The nature and history of the legal system
- The importance of different sources and kinds of law (religious, customary, judge-made)
- The level of self-governance/independence of the legal profession
- The roles and influence of different categories of legal practitioners
- The state of information and communications technology
- The category of legislation and the specific subject matter

However, despite the differences between countries, there are many best practices which deserve attention and replication. Both established legal systems with centuries of experience and developing democracies building/rebuilding their legal systems can and should find ways to make improvements. For this reason, each country must carefully consider how, when, and where to utilize legal expertise in order to improve the quality of legislation.

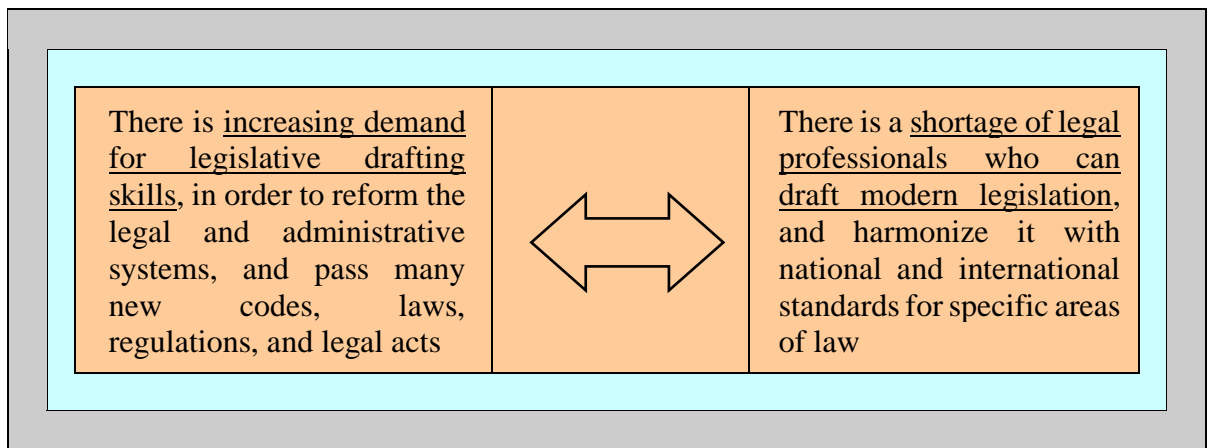
The first question to ask is *what* kind(s) of legal expertise contribute optimally to the quality of legislation, on the basis of *when* (stage of the drafting process) it is required. It is then possible to determine *who* should provide it and *how*. The following chart summarizes the possibilities:

LEGAL EXPERTISE AT DIFFERENT STAGES OF THE LEGISLATIVE DRAFTING PROCESS	
STAGE	LEGAL EXPERTISE (INPUTS)
Policy Development	<ol style="list-style-type: none"> <li>1) Advice concerning policy options</li> <li>2) Assistance determining legislative objectives</li> <li>3) Counsel regarding practical and achievable approaches for achieving goals</li> </ol>
Design of Legislation	<ol style="list-style-type: none"> <li>1) Planning and outlining of draft legislation</li> <li>2) Preparation of instructions and provision of guidance for legislative drafters or Working Groups</li> </ol>
Legislative Drafting	<ol style="list-style-type: none"> <li>1) Technical expertise concerning the structure and format of legislation, proper use of special and transitional clauses, and correct terminology and definitions</li> <li>2) Substantive expertise concerning how to use legislation to achieve goals and solve problems, and the soundness of specific measures and provisions</li> <li>3) Substantive expertise relating to harmonization and compliance issues (such as the relationship with and effect upon existing legislation, and how to meet national and international requirements/standards)</li> </ol>
Assessment of Legislation	<ol style="list-style-type: none"> <li>1) Regulatory Impact Analysis and Cost-Benefit Analysis</li> <li>2) Advice concerning the likely effects of legal provisions</li> <li>3) Review of draft legislation to ensure that it is practical, effective, and likely to achieve its intended goals</li> </ol>
Finalization	<ol style="list-style-type: none"> <li>1) Final review to ensure that all amendments and revisions are consistent and legally correct</li> <li>2) Final compliance checks to ensure that draft legislation meets all requirements for harmonization</li> </ol>

Once the relationship between the stages of the legislative drafting process and the potential contributions from legal expertise is understood, it is appropriate to determine how to manage and utilize available legal expertise.

In “developed” legal systems, there is usually a great deal of legal expertise. However, most of it serves clients in the private sector. The main challenge is setting up systems and procedures which secure this expertise for legislative drafting, and integrate it into the process at optimal times.

On the other hand, countries which are in transition, or reforming their legal system, face a double challenge, relating to both supply and demand:



This creates a dilemma. The supply of legal expertise is insufficient to meet actual demand. Meanwhile, the level of demand is increasing rapidly (mainly from officials and the business community, but also from the general public). This dilemma is exacerbated by the fact that it takes many years to increase the supply of legal expertise. Legal professionals must attend a qualified law faculty, have initial practical experience (through apprenticeships or internships), and then obtain working experience in the real world. This process can take up to ten years.

Therefore, it is necessary to rationalize the use of legal expertise, and in some cases ration it. To perform this task, it is useful to distinguish between two specific skill sets:



**Active Legislative Drafting Skills** are required for *creating* new legislation. This means sitting down with instructions from a ministry, a Statement of Legislative Intent from policy makers, an international treaty requiring domestic application, or a European Union Directive, and turning a blank computer screen into new legislation. Active skills are required for a) converting policy into law, b) drafting sound/accurate provisions that achieve objectives, and c) making laws technically sound.

**Legislative Interpretation Skills** (or **passive drafting skills**) are required for *reviewing, analyzing, assessing, and applying* legislation prepared by others. They are crucial for a) oversight of the drafting process, b) ensuring that legislation is legally correct, practical, and effective, and c) implementing and enforcing legislation after passage. Many legal practitioners require interpretation skills. Judges and prosecutors often handle cases involving statutory interpretation, and private lawyers must assess legal texts in order to effectively represent their clients (businesses, individuals, and civil society organizations).



It is important to understand that active drafting skills are rarer and harder to develop. They require specialized training and experience, and significant time and commitment. Generally speaking, professionals with active drafting skills are concentrated in specific institutions dedicated to



producing legislation, such as Legal Departments of Governments, Ministries, or Parliaments, and sometimes prominent business associations or “think tanks”. Interpretation skills, on the other hand, are more easily developed via a combination of substantive knowledge, practical experience, and analytical exercises. Thus, they are more widely dispersed amongst governmental institutions, economic operators, civil society organizations, and private law firms.

The following chart presents the most effective means for utilizing the two kinds of skill sets, in order to enhance the quality of legislation:

OPTIMAL USE OF LEGAL SKILLS IN THE LEGISLATIVE DRAFTING PROCESS	
Active Legislative Drafting Skills	Legislative Interpretation Skills
Enough legal experts with active legislative drafting skills should be available for and engaged by the key institutions and parties charged with preparing legislation	Enough legal experts with legislative interpretation skills should be actively engaged in assessing and improving legislation on behalf of a wide range of governmental and non-governmental parties
Active legislative drafting skills should be <b><i>concentrated</i></b> in select institutions with a mandate to design and draft new legislation	Legislative interpretation skills should be <b><i>dispersed</i></b> amongst an array of institutions, to bring diverse perspectives to the review and approval process, and promote informed debate on draft legislation and its possible consequences

In order to effectively utilize legal expertise, it is necessary to carefully consider the needs of both the public (governmental) and private sectors:

There must be sufficient legal expertise to meet the drafting and interpretation needs of all **governmental institutions** which prepare, review, and approve legislation. These institutions must effectively *utilize* this expertise, by efficiently organizing their departments, establishing sound communication channels, selecting experts on the basis of merit, and ensuring that experts have all the tools required for their work (including information technology and databases). Also, remuneration must be sufficient to overcome disparities between the public and private sectors.





There must be sufficient legal expertise to meet the legislative interpretation needs of non-governmental parties. This includes businesses, professional and trade associations, unions, think tanks, civil society organizations, and private citizens interested in legal issues. Skilled lawyers can engage in advocacy through written comments and testimony concerning draft laws, and by carrying out Regulatory Impact Analysis and Cost-Benefit Analysis. They can also represent the interests of different parties in administrative and enforcement actions, and court proceedings.

*With an understanding of the role of legal expertise in the legislative drafting process, the kinds of legal expertise available, and how this expertise can be effectively utilized, we can now look at practical ways to enable and require the legal profession to make a greater contribution.*

### **III. How Can the Legal Profession Contribute More to the Quality of Legislation?**

To secure more legal expertise and enhance the role of the legal profession in the preparation of legislation, it is necessary to adopt a two-prong approach:

1. Improve the utilization of existing legal expertise. This can be accomplished by opening the legislative drafting process to outside expertise, establishing sound communication and information sharing mechanisms, and increasing transparency and accountability.
2. Build the capacity of the legal profession to provide more and better drafting expertise. This can be accomplished by improving the legal education system, developing internship programmes, providing more opportunities for legal professionals to improve their drafting skills, and offering greater incentives (financial and non-financial) for participating.

Both of these approaches will be considered in turn.

#### **A. What Can Be Done to Improve the Utilization of Existing Legal Expertise?**

Open legislative drafting and parliamentary procedures are the *sine quo non* for passing sound legislation which incorporates legal expertise and input from a wide range of social actors.

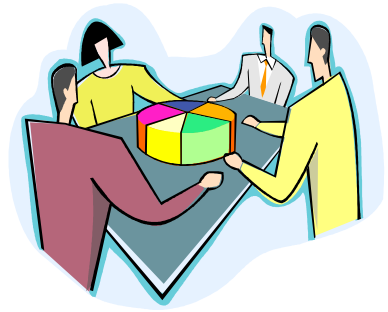
When legislation is drafted behind closed doors, and without input from diverse legal experts and social actors, it is less likely to be legally and substantively sound, and less likely to achieve its objectives in the real world. Leaders and officials need to work diligently to open the doors of government and Parliament to the people, especially those who are able to make a meaningful contribution to the quality of legislation.



Indeed, when the legislative drafting process is open, participatory, inclusive, and transparent, legal expertise will naturally gravitate towards draft legislation. Given the means and opportunity, social actors will always try to provide input concerning legislation that will affect their lives, interests, and economic status. The three key requirements are a) institutional structures and procedural mechanisms that facilitate input, b) freedom of information, and c) willingness on the part of government officials to listen.

To facilitate input into the legislative drafting process:

- Procedures should be settled, documented, and known
- Information about the legislative programme and status of drafts should be fully available, preferably via the Internet
- There should be user-friendly mechanisms for providing input (such as electronic communication and open hearings) at key/suitable stages of the drafting process
- All interested parties should have sufficient time to prepare and submit their input
- Input should be documented, acknowledged, and retained
- The media should play an informative and supportive role



Generally speaking, the legislative drafting process should be user-friendly for legal expertise.

In addition, government officials and parties engaged in drafting legislation can establish direct links with individual legal experts and different institutions which are in a position to provide regular input concerning specific areas of law. Naturally, care must be taken to prevent undue influence or improper conduct. This requires ethical rules and enforcement mechanisms. However, it should be recognized that *information* from legal experts, even those who are representing defined interests, is *always* useful to legislative drafters. Problems only arise from misconduct on the part of specific individuals who confuse their personal interests and professional obligations.

Finally, it is important to point out that the above requirements and conditions apply to all kinds of expertise. Sound legislation requires an optimal combination of legal expertise, drafting expertise, substantive expertise, and political guidance. The exact proportions depend upon the type of legislation, subject matter, and conditions in the country (see Section II). Balance can only be achieved through open and participatory processes.

## **B. What Can Be Done to Build Capacity of the Legal Profession?**

For the legal profession to contribute maximally to the legislative drafting process, efforts to efficiently utilize existing capacity should be combined with efforts to increase capacity.

When countries embark on major legal reforms, or enter a transition phase, the demand for legislative drafting skills expands greatly, and the supply is often insufficient. Law faculties need to play a major role in meeting new requirements, and there must be more opportunities for legal professionals to develop legislative drafting and interpretation skills. However, as mentioned in Section II, changes in the composition and skills of the legal profession take time. Further, there must be strict quality control measures. There is no “margin for error” when it comes to drafting legislation!

Many parties can help the legal profession build capacity to improve the quality of laws. They include government and ministry officials, legislative drafters, legal professionals (judges, prosecutors, and lawyers), leaders and members of associations of legal professionals (such as Associations of Judges and Bar Associations), administrators of law faculties, law professors, think tanks, civil society organizations, the media, etc. Each of these groups can contribute to each of the four mechanisms for building legal capacity which are discussed below.

## **1. Improve law faculties and the legal education system**

It is important to generate drafting and interpretation skills amongst the next generation of legal professionals. To play a positive and long-term role, law faculties should:

- Generate greater awareness and understanding of legislative drafting through introductory presentations and the provision of informational materials to all law students
- Provide mini-courses and specialized educational opportunities on legislative drafting, in cooperation with legal experts and experienced drafters
- Set up internship programmes which offer practical experience in legislative drafting and interpretation, in partnership with governmental institutions, legal clinics, civil society organizations, donors, and international organizations
- Provide information concerning draft laws, planned legal reforms, and legislative drafting issues



In addition to these direct educational measures, law faculties must also improve and expand facilities and recruit and hire highly qualified professors with specialized skills. This requires a serious financial commitment to both infrastructure and human resources. It also requires quality control measures, so that the legal education system maintains high standards and meets all of its obligations.

## **2. Expand access to information concerning legislative drafting**

Governmental institutions and officials should do more to generate and disseminate information about a) legislative drafting in general, and b) work on specific drafts. This is not an esoteric exercise. It is key governmental business that has a profound effect on the lives of all citizens. Therefore, time pressure and desire to avoid oversight cannot stand in the way of communication between governors and governed. Information and communication technology and different media can provide information that informs, encourages, and inspires more parties to participate in the legislative drafting process, and develop and contribute legal expertise.

## **3. Expand access to specialized training on legislative drafting**

Legal professionals who are interested in legislative drafting should have every possible opportunity to expand their skills. The most valuable mechanisms include:

- Continuing legal education courses, or in-service training
- Conferences, seminars, workshops, and self-study courses
- Participation in specialized committees of professional associations
- Research, writing/publishing articles, preparing “white papers”
- Apprenticeships with institutions which draft legislation, and work with drafters
- Contacts with international organizations, donors, and technical assistance projects

Professional associations of judges, prosecutors, and lawyers can play a pivotal role in providing training and information, organizing initiatives, and setting up professional development opportunities. Official support for these activities is extremely valuable.

#### **4. Provide recognition for contributions to the quality of legislation**

Remuneration is not the only way to recognize contributions to legislative drafting.



In addition to gaining personal satisfaction for making a meaningful contribution to good causes, legal professionals may be motivated by professional recognition, prestige, publicity, or honorary awards. By achieving greater status and enhancing their reputation, legal professionals open doors, strengthen their career prospects, and generate future business.

Finally, measures which enhance the utilization of existing capacity also increase capacity. By participating in the legislative drafting process, legal professionals gain experience, develop skills, and become able to make a greater contribution the next time. In other words, by making better use of existing expertise, governmental institutions and officials develop partnerships and build capacity to provide even more assistance.

#### **IV. Conclusion**

When countries reform their legal systems, they are in an excellent position to put in place measures which optimally incorporate both legal and non-legal expertise in the legislative drafting process. As the legislative drafting process is formalized and strengthened, different kinds of legal expertise from different sources can be obtained at the most useful times, and utilized to improve the quality of legislation.

It is important to manage both the demand and supply of legal expertise. Demand is managed by making sure that expertise is put to best use, and making the processes open and participatory. Supply is managed by enhancing capacity, through a long-term approach. The most important measures include strengthening law faculties, promoting freedom of information concerning legislative drafting, expanding opportunities for specialized training, and offering different kinds of recognition to legal experts who contribute. Taking these measures improves the quality of legislation and governance, promotes socio-economic development, and protects human rights.



## **PRINCIPLE XVIII**

### **The Legislative Drafting Process Should be Open and Participatory**

**OPEN**

**PARLIAMENTARY**

**AND**

**LEGISLATIVE**

**DRAFTING**

**PROCESSES**

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## **I. Introduction**

Open and participatory parliamentary procedures are a key feature of representative democracy. Parliaments are a natural focal point for communication and interaction between non-governmental parties and representatives and leaders. Indeed, this has been their role for centuries, in many different countries and societies throughout the world. The key lesson to be learned from this experience is that after the elections, a meaningful ongoing relationship between the governors and the governed is required to make democracy work in practice.

Many different non-governmental parties have an important role in democratizing and supporting the work of Parliament. They include citizen groups, businesses representatives, Non-Governmental Organizations, professional bodies, and independent experts. It does not matter whether Members of Parliament carry out their work through political parties or blocs, or are elected by constituents (defined geographically or by characteristics/interests). In any case, Members of Parliament have concrete obligations to promote the interests of their constituents and the general welfare, and in a transparent manner. This means working closely with non-governmental parties.

This chapter discusses the rationale and means for establishing open and participatory parliamentary procedures, with special focus on the legislative drafting process and the formulation of laws. There are also references to the Executive Branch of Government. The Executive should also govern in a transparent and representative manner, as it collaborates with Parliament during the legislative drafting process (and carries out its own institutional role). But the main issue being addressed is the special relationship between the Parliament and non-governmental parties. The key message is that Parliaments cannot successfully carry out their work, and cannot pass sound and effective laws, unless they meaningfully engage and collaborate with non-governmental parties. In addition, consensus on the part of the governed generates respect for laws and the legislative drafting process, and dramatically reduces the costs of implementation and enforcement.

## **II. Which Parliamentary Procedures Should Be Open and Participatory?**

Many different aspects of the work of Parliament should be as open and participatory as possible, and benefit from being carried out in this fashion. These include:

1. Oversight of the Executive Branch of Government
2. Investigations
3. Approval of nominations and withdrawal of confidence
4. The work of Committees
5. The drafting, review, and approval of new laws

Provisions concerning which aspects of the legislative drafting process are open and participatory, and under which circumstances, can be found in:

1. The Constitution
2. Major laws such as a Law on Normative Acts
3. Codes, such as Administrative Procedure Acts
4. Procedural rules for Parliaments and executive authorities
5. Regulations, By-laws, Protocols, Executive Orders, and other forms of secondary legislation



Naturally, Parliaments have to set limits upon transparency. Requirements for access depend upon the type of proceeding and the content/subject matter. Appropriate measures are customarily taken to protect:

- National security
- Confidential information
- Personal safety and property rights

In these cases, access is obtained through qualification, and by opening the right doors.



It is important to carefully define and limit the circumstances under which parliamentary work is conducted behind closed doors. There should be very sound justification, beyond a routine desire for secrecy. Closed parliamentary procedures should be rare and exceptional. Furthermore, procedures for deciding to close parliamentary activities should be carefully structured, strictly followed, and fully documented. Lack of transparency in the work of Parliament or procedures for deciding to close the work of Parliament undermine public confidence and create suspicion.

One parliamentary function which has to be extremely open and transparent, due to its nature, is constituent relations. Members of Parliament have several obligations to their constituents, such as:

1. Conducting outreach, to inform and explain about parliamentary activities and affairs
2. Investigating and monitoring actual circumstances, to know and understand the situation on the ground
3. Facilitating communication, in both directions, through diverse channels and media
4. Providing opportunities to observe and participate in governmental processes

Members of Parliament should have appropriate staff, to conduct and support interface with their constituents. They also require local offices, so that contact with constituents takes place on their own ground. This improves communication, shows respect, and complements the rights of constituents to observe their representatives in action at parliamentary sessions.



By working with and listening to constituents in an atmosphere of transparency, Members of Parliament a) strengthen democracy, b) perform their duties more successfully, c) provide better services to the people, and d) increase their prospects for re-election.

### **III. Why Should Legislative Drafting Be Open and Participatory?**

There are two main justifications for opening the legislative drafting process to non-governmental parties, and making the work participatory and inclusive:

1. This is sound democratic practice. Open and participatory legislative drafting processes a) build links between the government and the governed, b) bring government officials closer to



- the people, c) generate respect for governmental processes and laws, d) reduce alienation on the part of the governed, and e) strengthen all democratic institutions.
2. This improves the quality of laws. Open and participatory legislative drafting processes lead to better results, and improve both the legal framework and specific laws.

Experience shows that open and participatory legislative drafting processes effectively:



- Define and refine governmental policies, and facilitate their implementation
- Make laws more practical, effective, and implementable
- Make laws more legally correct and technically sound
- Promote respect for and eventual compliance with new laws

This is because open and participatory legislative drafting processes obtain and take advantage of input from an incredibly valuable resource; namely the people who are most familiar with, most interested in, and most affected by a law. Simply stated, specialists and organizations dealing with particular issues are in an excellent position to inform and advise officials and drafters about key issues before laws are passed. When it comes to avoiding mistakes in draft legislation, *an ounce of prevention is definitely worth a pound of cure.*

#### **IV. What Are the Pre-requisites for Open and Participatory Legislative Drafting?**

Open and participatory legislative drafting processes do not just happen by themselves. They require time, energy, resources, and commitment from many sources. At first glance, it may seem more comfortable and expeditious to draft laws in a closed environment. After all, there will be fewer parties to consult, fewer comments to consider, and less criticism. Indeed, experts working in a closed room seem to get their work done more rapidly when there isn't any "interference" from outside parties who have different ideas and opinions.

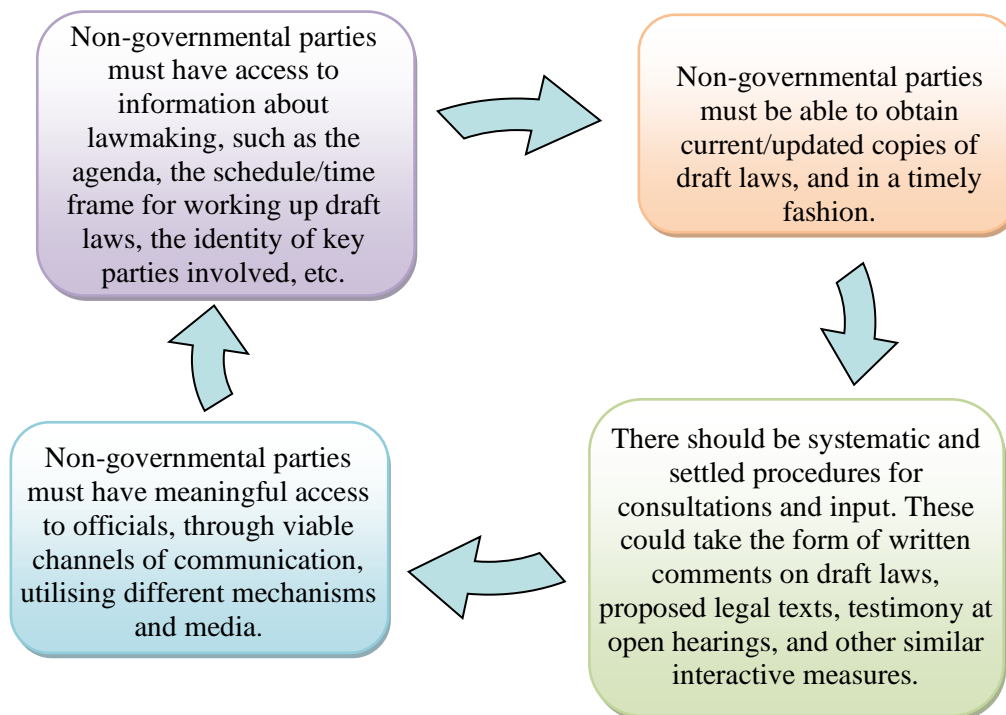
However, this contravenes the basic premises of participatory government, and undermines everything leaders do. Furthermore, and most importantly in the current context, this reduces the quality of laws. Laws are less likely to meet the goals of their proponents when outside access to the drafting processes is limited. The future consequences of a proposed law are best analyzed through exchanges between drafters and parties who know the subject and will deal with the law.

Prerequisites for open and participatory legislative drafting processes include:

1. Political will on the part of leaders and key officials. Ideally, this should start from the very top levels of government.
2. A law (such as a Law on Normative Acts), Rules of Procedure, Protocols, Manuals, Guidelines, or Instructions setting required procedures and practices. Laws have the advantage of formal and universal application, but are inflexible and difficult to modify. For a single institution, Rules of Procedure or By-laws are best. For Parliamentary Committees or Departments, an Operations Manual or Guidelines are suitable. In any event, rules should be clear, have defined scope, and be accessible to and known by all interested parties, for full monitoring and enforcement.
3. Effective and well-established communication channels linking key institutions involved in drafting laws and the non-governmental parties who should be involved.

4. Laws on Freedom of Information (FOI).
5. Efficient Information Management. In particular, this includes the organization, updating, and dissemination of information about the legislative calendar and specific draft laws.
6. Effective utilization of Information and Communication Technology (ICT). This includes databases, computers, telephones, faxes, Internet (Websites, E-mail, social networking), etc.
7. Sufficient resources. There should be appropriate budgetary allocations to cover expenses for skilled personnel, ICT and office equipment, office supplies, utilities, and operations.

The following diagram summarizes the requirements for open and participatory legislative drafting processes from the perspective of non-governmental parties:



## V. How Can Non-Governmental Parties Improve Laws?

Non-governmental parties can play a crucial role in making laws practical and effective. They do so by helping conduct Regulatory Impact Analysis (RIA), which determines the likely results and consequences of draft laws. Unfortunately, due to tight deadlines, government officials and legislative drafters often abbreviate their legal analysis, and do not spend enough time consulting others. This ignores the significant difference between passing a law and implementing it. It is also a short-term response to a long-term challenge, which is likely to be inefficient and potentially even counterproductive.

Government officials and legislative drafters need to realize that they face an inherent disadvantage compared to the target groups who will live and comply with their laws. Passage of a law is the end of the legislative drafting process. But it is only the start of a much longer period of time, during which different institutions and officials try to enforce the law, and different target groups react to it. Target groups have incentives, time, and resources to figure out how to respond to the law. They always look for loopholes and means to advance their own interests.

Therefore,

- Every new tax law is an opportunity for good tax lawyers to serve their clients by reducing their taxes
- Every new commercial law is an invitation for businessmen to figure out how to increase their profits
- Every new criminal statute is an invitation to clever outlaws to find a way to get what they want without legal complications

And, compared with people who draft and pass laws, those who live with them have all the time in the world.

The only way for government officials and legislative drafters to resolve this dilemma is by consulting outside parties or Non-State Actors who will provide an honest assessment of what will really happen with a law after it is passed. These parties include representatives of NGOs, legal experts, law professors, lawyers, representatives of commercial enterprises and chambers of commerce, lobbyists, trade unionists, scientists, specialists, leaders of professional associations, community leaders and activists, expatriates living abroad, and other parties knowledgeable about the issues being addressed.

The Organization for Economic Cooperation and Development (OECD) Checklist for assessing laws was introduced in Principle III. Question Nine, which is discussed on Page 52, asks:

**Have all interested parties had the opportunity to present their views?**

This question highlights the importance of full consultation with non-governmental parties and Non-State Actors for making legislation substantively sound, practical and effective, and technically sound. It also emphasizes the need for transparency in the legislative drafting process, in order to promote legitimacy and accountability, and enhance respect for laws and the Rule of Law.

Simply stated, non-governmental parties are in an excellent position to provide information, analysis, counsel, advice, ideas, and recommendations concerning:

- Implementation and enforcement (costs, impediments, institutional and administrative capacity, technical resources, human resources, possibilities for corruption, etc.)
- The financial impact on State and local authorities
- The distribution of effects (who wins and who loses)
- How human health and welfare will be affected
- Environmental impact and the protection of natural resources
- How local and community interests will be affected
- Communication requirements and obstacles
- Information resources (collection, management, dissemination)
- How target groups will determine their obligations and comply
- Loopholes and difficulties which might arise over time
- Unintended consequences



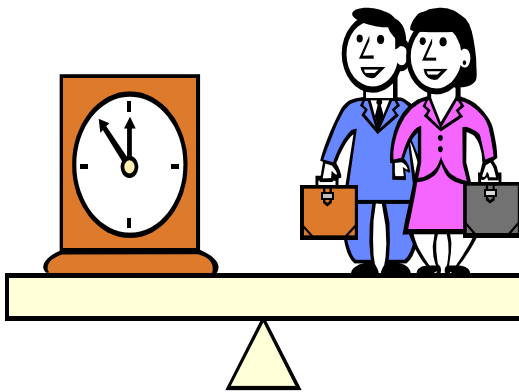
Finally, it is important to point out that meaningful dialogue concerning draft laws depends upon the capacity of non-governmental parties to serve as partners in the drafting process. For this to happen, Parliaments must promote their development. This can only be done by facilitating their work, and

giving them opportunities to gain experience defining policy, analyzing draft laws, preparing comments, networking, and testifying. Through experience, non-governmental parties enhance their level of expertise, and become more adept at their roles. Increased skills and professionalism make them more valuable for Members of Parliament and legislative drafters, and strengthen their contribution to the drafting process.

Appendix “B” contains information concerning “How to Testify in Parliament”, which has already proven useful for non-governmental parties in several jurisdictions.

## **VI. When Should Consultation With Non-Governmental Parties Take Place?**

The optimal timing for consultations with non-governmental parties depends upon the substantive issues being addressed and the type of input which is required. Sometimes it is extremely advantageous to involve outside parties early in the process, at the policy development stage. Mistakes in policy and design of a law compromise the entire drafting process, and render the ultimate product counterproductive and incapable of serving the interests of society.



Outside assistance with Regulatory Impact Analysis (and consideration of the issues raised in Section V above) is helpful any time during the drafting process. However, different institutions might conduct different kinds of Regulatory Impact Analysis at different stages of the drafting process. Outside parties should always be given a chance to review laws before final deliberation by Parliament. But at this stage, it is usually too late to make major changes, and special measures may be needed to ensure that input is fully considered.

Accordingly, the best practice is for Parliamentary Committees and Members to consult non-governmental parties a) when they start work on draft laws submitted by the Executive, and b) at different stages of the drafting process when they initiate their own laws. This approach is most likely to make laws practical and effective, and avoid the need for corrective amendments.

## **VII. How Can Legislative Drafting be Made More Open and Participatory?**

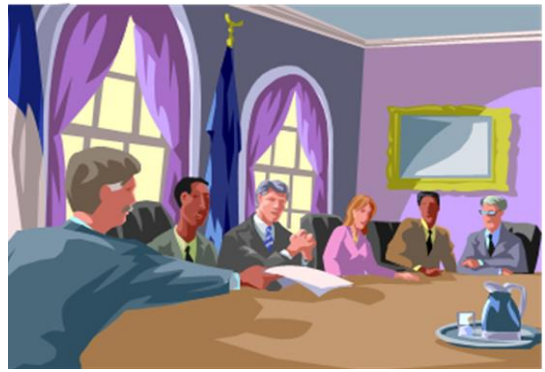
Many different procedures and mechanisms are available for opening the legislative drafting process, and making it more transparent and participatory. The choice amongst them depends on actual circumstances and requirements, and what is most feasible, appropriate, and beneficial.

The first step is to carefully consider the roles and functions of the Parliament and different Committees, and how they are inter-related with other governmental institutions.

The following formal mechanisms, which are regularly utilized in a number of jurisdictions, should be given the fullest possible consideration and application. While the mechanisms are directed towards primary legislation, and the term “law” is used, they can and should often be applied to secondary legislation (regulations, by-laws, decrees).

## **A. Legislative Working Groups**

Working Groups are *ad hoc* bodies which are formed with the specific purpose of drafting legislation, or carrying out a similar governmental function. They can be established by one or more ministries having jurisdiction over a proposed law, or by Members of Parliament or representatives from different Parliamentary Committees. When select Members of Parliament exercise their right of legislative initiative, they are forming a *de facto* Working Group.



The best way to diversify input to Working Groups is by including non-official experts. Their participation could be formal (as official members, with drafting and voting rights) or informal (as counsel, entitled to attend meetings, review drafts, and make suggestions, but not vote on the final output). The authority which forms the Working Group should carefully consider how to diversify membership. Legal experts, professors, representatives of think tanks or NGOs, and former officials can participate. In addition, experts working on development projects financed by international organizations and multi-lateral or bilateral donors can provide technical assistance to Working Groups, and help at other stages of the legislative drafting process. The objective is to produce the best possible law, by a) accessing high-quality independent expertise, and b) putting this expertise to the best possible use at the most appropriate times.

## **B. Specialized Drafting Institutions**

Members of Parliament need technical support for analyzing and revising draft laws submitted by the Executive, and for preparing their own laws. In either case, this includes a) drafting provisions, b) making sure the draft law is technically sound, c) assessing compliance with the constitution, legal framework, and international requirements, and d) determining how to make the law practical and effective. When exercising their right of legislative initiative, Members of Parliament also require support for policy development, and design and structure of the law.

The Executive receives this support from Legal Departments. They are usually attached to the Office of the President, the Council of Ministers, and ministries playing a prominent role in the drafting process (such as the Ministry of Justice). In some countries, most particularly members of the Commonwealth having “common law” traditions, there are specialized legislative drafting institutions attached to the Parliament. Prominent examples include the Parliamentary Counsel Offices in the United Kingdom, Australia, New Zealand, and Canada. In the United States, both the Senate and House of Representatives have an Office of Legislative Counsel, as do legislatures in almost all of the individual States. Provincial legislatures in Canada and Australia also have their own specialized drafting institutions.

Members of Parliament can also usually rely upon a Legal Committee, a Research Department, and a Legal Department. However, these institutions do not always have the same human resources and access to information as their counterparts in the Executive Branch. For this reason, Parliaments must use innovative mechanisms to obtain access to and input from the governed.





Unfortunately, specialized legislative drafting institutions attached to Parliaments often find it difficult to obtain the resources necessary for carrying out their work and keeping their experts. Legislative drafters face considerable pressure from excessive workloads and very short deadlines. This makes it difficult for them to collaborate with outside parties. Members of Parliament do not always critically assess their own policy objectives, or communicate them to drafters. There are almost always challenges associated with access to information and information management.

Therefore, Parliaments need to allocate additional resources, and build institutional capacity for legislative drafting. They require mechanisms for ensuring that drafting services are professional, organized, and objective. Outreach between drafters and non-governmental parties needs to be formalized and systematized. Finally, it should be noted that demand for drafting services tends to increase over time, particularly in countries which are in transition or reforming their legal systems.

### **C. Committee Procedures**

Parliamentary Committees are a natural focal point for opening the legislative drafting processes to non-governmental parties. They perform detailed analysis of draft laws within their jurisdiction, and are in an excellent position to develop on-going relationships with knowledgeable outside experts, and organize open and consultative meetings. Committees handling socio-economic matters (health, education, welfare, family, and environmental issues) tend to be the most active in this regard. Committees which handle national defense, law and order, and security issues tend to be less open.

The following steps are recommended for opening legislative drafting at the Committee level:

1. Committees need to regularly disseminate information concerning their responsibilities and activities pertaining to draft laws. It is important for non-governmental parties to know what Committees are doing with draft laws, and when they are doing it, so they can present expertise and input at appropriate times. Committees can use different communication channels to share information about which draft laws they are handling, the status of their work, and the schedule for key activities or events. When Committees schedule an open hearing or similar event, the Secretary needs to contact departments or individuals handling media relations and outreach, to place announcements on the Parliamentary Website, and send information by email to parties registered on the electronic mailing list.
2. Communication between non-governmental parties and Committees needs to be registered, tracked, and answered. It is important to ensure that non-governmental parties always receive responses to their written recommendations and petitions concerning draft laws. To promote public accountability, written submissions to Committees need to be registered, tracked, answered, and archived in databases.
3. Committee work on draft laws should be open to the widest possible range of non-governmental parties. Communication cannot be limited to those having personal contact with Committee Members or economic power. Committees need mechanisms to expand participation to include any and all parties that can offer valuable information and expertise. Restrictions on civil society (like NGO registration requirements) should not prevent experts from providing input. Citizens must not be intimidated when standing before the doors of government!



4. Committee work on draft laws should be open to the widest possible range of non-governmental parties. Communication should not be limited to non-governmental parties having personal contacts with Committee Members or powerful business interests. Committees need to have mechanisms for expanding participation to include any and all non-governmental parties which can offer valuable information and expertise. Restrictions on civil society (such as NGO registration requirements) should not be allowed to prevent experts from providing input. Citizens should not be intimidated when standing before the doors of government!

5. There should be key focal points for channeling input from non-governmental parties. Specific Parliamentary Committees can have a prominent role in this process. Possible mechanisms include a) systematizing electronic communication and the use of “hot lines” for working with non-governmental parties, b) answering requests for information, and c) keeping copies of input concerning draft laws which is sent to any Committee, and d) following up on this input when appropriate.



6. When Committees or Members exercise their right of legislative initiative, it is best practice to involve non-governmental parties in the policy making stage. Expertise from non-governmental parties should not be confined to the review of draft laws. Outside expertise can be extremely valuable during the crucial stage of policy development and the design of draft laws. After all, *there is little point in improving individual articles in a law which does not properly address key issues in the first place.*

When Committees or Members exercise their right of legislative initiative, non-governmental parties should be included in Working Groups. As indicated in Section VII (a) above, this is an extremely effective way to bring diverse expertise into the drafting process.

7. Committee Hearings and Plenary Sessions considering draft laws should be open to non-governmental parties. While taking security precautions, Parliaments and Committees can open their work and make it more accessible to outside parties interested in draft laws. In-person attendance is best, and is an important exercise of civic rights, but broadcast media can also be utilized.



8. Committees need to engage in outreach. Committee Secretaries can play a key role, working directly with outside contacts and the media, and by going through departments handling media relations and outreach. Secretaries can publicize the Committee schedule and agenda, provide information concerning the status and importance of their work, and facilitate input concerning draft laws.

Finally, important Committee procedures concerning open legislative drafting should be set forth in formal documents, such as Protocols or a Committee Operations Manual. To systematize and regularize the Committee procedures outlined above, it is important that they be included in organic documents which govern Committee operations. This helps ensure that requirements for open procedures are fully documented, widely known, and regularly fulfilled.

## **D. Information Management, Communications, and Outreach**

Cooperative information management and sound communication procedures are important for opening the legislative drafting process and standardizing good practice. Many of the recommendations presented in Section VII (c) above relate to this subject. However, other steps can be taken by the Parliament as an institution. In addition, geographical outreach is extremely important, to bring in expertise and input from the regional, municipal, and local governmental units, including local officials and NGOs. The media has a key role to play in these processes.

The following steps improve information management, communications, and outreach:

1. Publication and widespread dissemination of the Government Legislative Programme. Non-governmental parties need to be fully apprised of the legislative agenda, so that they can track draft laws in their areas of interest from the earliest stages.
2. Publication and dissemination of the legislative calendar. All interested parties should be able to track the schedule for drafting and passing laws, the general parameters of drafting assignments, deadlines for completing laws, and dates of readings and hearings. It is also important to be able to identify responsible parties. For these purposes, information on Parliamentary Websites should be accurate, and fully and constantly updated. Non-governmental parties must be able to precisely identify the status and content of draft laws.
3. Dissemination of draft laws. Full access to the latest versions of draft laws is a *sine qua non* for the participation of non-governmental parties in the legislative drafting process. Ideally, there should be access before the First Reading. Then, it is necessary to establish procedures for disseminating the latest/current version of draft laws, even when different parties are working on them. Websites, electronic communication, publications, and the media can all be recruited into this process. Automatic dissemination of draft laws through emails to non-governmental parties who register for this service greatly facilitates and systematizes outside participation in the legislative drafting process.
4. Preparation and dissemination of the Minutes of Plenary Sessions, Committee meetings, and hearings. Minutes of all non-confidential business meetings need to be carefully taken, and then made available to all interested parties. This documents the handling of issues and the positions of parties. It promotes transparency, and ensures accountability for the final text/contents of draft laws.
5. Full use of Explanatory Memoranda. Explanatory Memoranda are descriptive documents which accompany draft laws. They are designed to standardize and disseminate crucial information concerning the objectives, affects on exiting laws, obstacles to implementation, potential costs and benefits, etc. Their use is routinely required by Parliamentary Rules of Procedure, and sometimes by law. However, they are not always used to their full potential, or given the appropriate level of attention.





6. Geographical outreach. The work of Parliaments should not be completely centralized. Just as Members have constituent offices, Parliaments can have regional or liaison offices. They can be used for holding sessions, Committee hearings, or events outside of the national capital.



Meetings in localities are particularly appropriate for addressing issues which mostly affect local interests. Liaison points for providing input into the legislative drafting process can be very helpful. Some countries use innovative mechanisms to bring representatives of provincial and municipal governmental entities and local experts to the Parliament.

7. Video conferencing. Input from non-governmental parties, particularly those in different geographic locations, can be secured through Voice Over Internet Protocol and videoconferencing. It is easy to hold virtual meetings over the Internet. The time and costs of travel are eliminated, and there are no security concerns. Indeed, many electronic communications mechanisms are free of charge to Internet users.



8. Comment Periods. Natural and legal persons can be given a defined period of time to provide feedback on draft laws, before they are enacted. Procedures should be settled, known, and followed. Comment periods are particularly appropriate for secondary laws (regulations) prepared by Executive institutions. In some countries, regulations cannot receive final approval until comments have been collected, summarized, and published.

9. Media Relations. Parliaments should have special services from media experts with all of the tools and equipment required to carry out their work. Detailed information concerning the legislative drafting process should be provided to all interested parties. Newspapers, television, radio, and other media can promote public awareness by publishing the calendar and schedule of legislative activities, and texts or summaries of important draft laws. It is also possible to use special mechanisms like websites and social media to establish outreach to and obtain feedback from NGOs.



## **E. Open Hearings**

The most prominent example of an open legislative process is the open or public hearing. Open hearings are formal and structured events arranged by a governmental body to give official and non-governmental parties an opportunity to present their views. This is done through testimony and written statements. Open hearings can be used by all levels of government to solicit input from different parties concerning any important issue. But they are most frequently employed by Parliamentary Committees, and are most effective for evaluating draft laws. Open hearings allow many aspects of an issue to be addressed simultaneously, by a variety of informed parties. Through interactive exchanges of information, the presentation of diverse opinions, and question and answer sessions, officials and participants can learn what they really need to know.



NGOs can play a special role in open hearings. Parliamentary oversight of the Executive and testimony from government officials on draft laws are important for democracy. But they are exercises in “inter-governmental” relations. NGO participation in open hearings is a direct exchange between the governors and governed. NGOs fulfil their mandate to give input on public affairs, and their work and representatives get the spotlight. Transcripts of open hearings serve as a permanent record of their involvement and expertise.

Appendix “A” contains sample “Guidelines for Holding Open Hearings”. Variations of these Guidelines have already proven useful for holding open hearings in several jurisdictions.

## **F. Electronic Governance**

Open legislative drafting processes are intimately related to “Electronic Governance”. This involves the use of electronic communication, automated computer functions, and databases to speed up governmental operations and reduce paperwork. The term “Electronic Governance” sounds “futuristic”, and even intimidating. However, many of the applications are essentially informational exchanges using basic computer functions.

Indeed, many of the communications and outreach mechanisms outlined above can be categorized as Electronic Governance. Interactive Websites, electronic mailing lists, video-conferencing, and computerized databases are basic components of Electronic Governance. These mechanisms are already being employed by many governments around the world, to expedite and facilitate the exchange of information with governmental departments, regulatory agencies, tax authorities, court systems, etc.



In order to take fuller advantage of the benefits of Electronic Governance, Parliaments need high standard information and communications technology. To effectively carry out the information management and outreach activities identified above, it is necessary to have high-speed internet connections, an electronic calendaring system, an electronic system for tracking draft laws, Website facilities providing full access to the latest versions of draft laws, Website pages directly serving the interests of non-governmental parties, and videoconferencing capacity.

For this purpose, strategic planning is required. *It is not sufficient merely to automate governmental functions as they are currently being performed.* Instead, it is necessary to consider how Electronic Governance can change and improve governmental operations, and how funding can best be utilized. For these purposes, **business re-engineering** and **change management** principles have to be applied. After all, no matter how effective, rapid, and inexpensive electronic communication becomes, it cannot be used to replace or avoid personal contact.

## **VIII. Conclusion**

Open legislative drafting processes are an important aspect of good government, particularly for Parliaments. This is because of their crucial role in promoting democratization, the Rule of Law, and economic development. Open legislative drafting processes build links and dialogue between leaders and citizens, inform citizens, enable citizens to better understand how government works, empower citizens to participate in governance, increase confidence in all democratic institutions, and enhance transparency. Of most importance in the current context, they are also one of the best ways to improve the quality of laws.

It is necessary to take a strategic and systematic approach to opening the legislative drafting process. This includes:

- Fulfilling all pre-requisites
- Determining how to best engage the most appropriate non-governmental parties
- Identifying optimal types of input and expertise
- Arranging for the most advantageous timing of consultations
- Putting in place the most suitable mechanisms (such as Working Groups, specialized drafting institutions, open hearings, and Electronic Governance)
- Setting up sound information management, communication, and outreach practices
- Monitoring and evaluating the results being achieved, to strengthen what works well and take remedial steps to correct what does not work so well

By proceeding as suggested herein, it is possible to make the legislative drafting process more open and participatory, and thereby improve the quality of laws.



## **APPENDIX “A”: SAMPLE GUIDELINES FOR AN OPEN HEARING**

- 1) Quorum. It is not necessary to have a quorum for an Open Hearing if no official action is taken.
- 2) Rulings. The Chairperson of the Committee organizing the Open Hearing is empowered to make Rulings concerning all procedural issues and points of order. For a joint Open Hearing involving two Committees, the Chairpersons can a) decide that one of them will act as leader for all or part thereof, or b) make Rulings jointly, by consensus, after consultation. The terms “Chairperson” and “Committee” in these Guidelines should be understood to include the plural “Chairpersons” and “Committees” in cases of joint Open Hearings.
- 3) Opening Statements. The Chairperson has the right to make a brief opening statement. Members of the organizing Committee can only make an opening statement with express approval from the Chairperson.
- 4) Participation. Any Member of Parliament can attend any Open Hearing. All Members of the organizing Committee are entitled to participate equally and ask questions. Members of Parliament who are not on the organizing Committee need to submit questions in writing to the Chairperson of the Committee. The Chairperson decides whether to ask the question. The Chairperson can choose to ask the question, or can authorize the Member of Parliament to ask the question.
- 5) Public Announcements. The Chairperson shall prominently announce the location and time of the Open Hearing at least one week in advance. The Chairperson shall announce the identity of witnesses at the Open Hearing and the order of their testimony at least three working days in advance. All witnesses should be notified directly.
- 6) Testimony. The final identification of witnesses who will testify, the final determination of the order of testimony, and decisions concerning whether witnesses will testify individually or as part of a panel are the responsibility of the Chairperson, after full consultation with Committee Members and other appropriate parties. Additional witnesses will be included if they are requested by at least one-third of the Members of the Committee.
- 7) Testimony. The order of witnesses should generally be: a) representatives of Ministries which have had a role in drafting the law, b) members of the Working Group which has drafted the law, c) Members of Parliament who want to testify d) independent experts or representatives of interested organizations. Factors that should be considered in the selection of witnesses from the latter category include status, level of expertise, interest in the subject matter, and diversity of viewpoint.
- 8) Testimony. Each witness is allotted a maximum of ten minutes to present his/her testimony.
- 9) Questions. Each Committee Member has a maximum of five minutes with each witness for questions and answers.
- 10) Questions. The Chairperson has the right to ask questions first or last. Committee Members question witnesses in order, based on their level of seniority on the Committee. In cases of equal seniority on the Committee, priority will be given on the basis of seniority in the Parliament, and in cases of further equality, on the basis of age (oldest person first).

11) Testimony. The Chairperson is entitled to limit the testimony and the question and answer session for any witness to an overall total of forty-five minutes, if this is necessary to ensure that all scheduled witnesses have an opportunity to testify. In such cases, the amount of time granted to Committee Members for their questions will be reduced equally and proportionally. If there is sufficient time, witnesses may be called back at the end of the Open Hearing. Witnesses are always permitted to answer additional questions in writing.

12) Time Management. The Chairperson is empowered to enforce all time limits.

13) Record Keeping. The Committee Secretary is responsible for organizing stenography, taking minutes, preparing a transcript, and designating an individual who will monitor/track the time taken by each witness. These tasks are to be carried out in cooperation with Parliamentary Departments having expertise in these matters.

14) Decorum. Only the Chairperson is allowed to interrupt Members of Parliament during questioning. This can be done to enforce time limits or maintain order. Witnesses can only be interrupted by the Chairperson or the Member of the Committee questioning them.

15) Decorum. The Chairperson has the right to exclude any individual who is acting in an unprofessional manner or who disrupts the Open Hearing.

16) Written Statements. All interested parties are entitled to submit a written Statement before or at the Open Hearing, provided that they comply with all requirements concerning its format and length, and follow all procedures concerning its submission.

17) Written Statements. All witnesses who testify, with the exception of government officials and Members of Parliament, must submit a written Statement at least 48 hours before the Open Hearing. Witnesses who fail to comply with this requirement will not be permitted to testify.

18) Written Statements. Written Statements must be less than five pages long, double-spaced, with normal font and margins. Written Statements must have a one-page cover sheet that clearly states the law or subject matter being commented upon and the professional background and contact information of the author. Written Statements should be in both printed and electronic format.

19) Written Statements. Written Statements are submitted to the Secretary of the organizing Committee. The Secretary is responsible for making copies and distributing them to all Committee Members.

20) Hearing Record. The Hearing Record consists of a verbatim transcript of the entire proceeding, plus all written Statements and documentary submissions. The Chairperson of the Committee has the right to exclude materials that are inappropriate or irrelevant.

21) Hearing Record. The Hearing Record shall be made available within seven days after the Open Hearing, but in no event less than two days before final consideration of the draft law by the Committee.

22) Hearing Record. The Hearing Record shall be made available to all interested parties, and placed on the Parliamentary Website. Printed copies should be provided free of charge to Members of Parliament and witnesses who testify. Other parties may be obliged to pay a nominal fee for transcripts, corresponding to the actual costs of reproduction.

23) Delegation of Responsibilities. The Chairperson of the Committee has the power to delegate responsibilities to another Committee Member in the event of necessity. This should be done only after consultation with other Committee Members.



## APPENDIX “B”: HOW TO TESTIFY IN PARLIAMENT

### ADVANCE PREPARATIONS

**1) Understand the purpose of the hearing.** It is extremely important to understand why Members of Parliament are holding the hearing, and what they are looking for. What legal, economic, and social issues are being addressed? What are the positions and motivations of the key parties? Find out the context for the hearing. Relevant information can be obtained from the announcement for the hearing, public statements, party platforms, and reference documents. The most effective testimony is that which answers the questions Members of Parliament want answered.

**2) Consult officials such as Parliamentary Staff in advance of the hearing.** Contacts with Parliamentary Staff in advance of the hearing can yield valuable information concerning which issues are most important and for whom, the personalities and political considerations involved, the identity of other witnesses, the Guidelines/format for the hearing, and how to communicate most effectively. No attempt should be made to obtain confidential or internal information. However, Parliamentary Staff should legitimately share much of this information. After all, they have an interest in making the hearing valuable and efficient for the Members of Parliament.

**3) Prepare and submit a concise and precise written statement or summary of testimony.** Written statements or summaries of testimony must be submitted prior to the hearing, so that they can be reviewed in advance. Preparing the statement helps to organize the testimony and improve advocacy. Simplicity, brevity, and clarity are necessary, and organization is paramount. It should be easy to determine at a glance what the writer sees as the main problems and the most effective solutions. State the position being advocated, and explain the rationale. Use short sentences, tight paragraphs, and bullet points to cover key details. Use bold print and/or underlining to highlight key phrases with compelling data and conclusions. Use concrete facts, but make sure they are summarized and accurate. It is acceptable to use illustrative examples, but they should be short, on point, and not distract the reader.

**4) Fulfil all administrative requirements.** All Parliamentary Guidelines concerning the format and timing of written submissions and oral testimony should be carefully followed. All rules and procedures for testimony should be understood and adhered to. In case of any doubt, ask.

**5) Carefully prepare the testimony.** Be thoroughly familiar with the issues, facts, and contents of the testimony. Rehearse the testimony several times, starting a few days in advance, until every point is familiar. It should be possible to give the testimony by heart. However, prepare and bring excellent notes, for organizational purposes, and to help stay on track. Notes should be in the form of a short summary/outline, to trigger memory. Key themes should be listed in bold type or be capitalized, with substantive matters in bullet points, or color coded. The goal of such materials is to make sure that all main points are covered, in order, and on time. Never read anything longer than two sentences. Write out any quotes, but make sure that they are very short and directly on point. Supplemental materials should be well organized, so time is not wasted going through them to find something. It is very important to know exactly how long the testimony will take, and how much leeway there is. Time the practice testimony carefully. One of the most common mistakes witnesses make is wandering off-track and getting behind in timing.



## PRESENTING TESTIMONY

**1) Arrive at the hearing early.** Use the time to walk around, become familiar with the set-up, talk to officials who are present, and read available documents. Be sure to attend the testimony of prior witnesses, and listen carefully to what they have to say. It may be necessary to refer to prior testimony, or even to refute it. This should always be done in a respectful manner. Any show of disrespect undermines credibility. Listen carefully to questions presented to prior witnesses. They provide valuable clues concerning the interests/perspectives of Members of Parliament.

**2) Pay strict attention to the audience, and how you are perceived.** Witnesses are like actors on stage, but with a very special audience and a very concrete message. It is important to be a good advocate, and consider all aspects of communication. This includes dress, manner, posture, body language, facial expressions, tone of voice, and eye contact. In fact, it is estimated that as much as half of all communication occurs through body language. Therefore, it is important to know which gestures communicate understanding, confidence, and authority. Speak clearly, at a reasonable pace, and avoid monotones. Be assertive without being overbearing. Maintain interest by being animated and enthusiastic, and using examples and imagery. Avoid technical language, jargon, gimmicks, and planned jokes. Be sure to adjust the style of testimony to the characteristics of the specific audience.

**3) Use audio-visual materials sparingly and with great care.** It can be cumbersome and time-consuming to set up and use audio-visual aides. "Technical difficulties" can disrupt the hearing and create a negative impression. Be very attentive to logistical issues. Carefully consider the benefits and alternatives. A multi-colored chart handed to each Member of Parliament may work better.

**4) Prepare for an effective dialogue, and use the statement to set the stage.** A major part of advocacy in open hearings is effectively answering the questions that are presented. A cogent and forceful statement, which is precise and brief, can provoke serious questions, which enable the witness to sway opinions. It is a good idea to anticipate and prepare for questions in advance. Listen very carefully to the questions, and respond concisely and on-point. Leave time for follow-up questions. If uncertain about the answer to a question, it is best to admit this, and then explain the parameters for the answer or indicate where to find it, without being overly equivocal. As all good salespeople know, the substance and tone of questions/objections reveal exactly what must be done to convince the customer to buy. Be sure to make eye contact when answering questions. The best practice is to look at the party who is asking a question, but provide the answer to everyone.



## FOLLOW-THROUGH AFTER THE HEARING

**1) Pay attention to important post-hearing measures.** It may be necessary to submit additional information, or answer supplementary questions in writing. Be prepared to promptly review the hearing transcript, if this is allowed. Follow the further progress of the law or issues addressed. Do not be afraid to contact Parliamentary Staff for their appraisal of how things went. Carefully consider the results, so that adjustments and improvements can be made. Remember that by improving your skills, you increase your capacity to effectively advocate positions and help Members of Parliament, and enhance your chances of being invited to testify again.



## SUPPLEMENTAL LEGISLATIVE DRAFTING EXAMPLES AND EXERCISES

What is wrong with the following provisions? How can they be corrected?

1) From a criminal law:

This Article does not apply to the aiding and abetting of criminal activity that takes place outside of the jurisdiction.

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2) From a financial law:

In accordance with this Law, the Chief Executive Officer is responsible for filing the Annual Company Report. The Annual Company Report cannot be filed without a certified copy of the Annual Financial Statement prepared by the Chief Financial Officer.

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3) From a regulation designed to prevent corruption:

Prohibited commercial expenses include commissions not mentioned in the main contract or not stemming from a properly concluded contract referring to the main contract, commissions not paid in return for any actual and legitimate service, commissions remitted to a tax haven, commissions paid to a recipient who is not clearly identified, or commissions paid to a company which has every appearance of being a front company.

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4) From the Licensing Act of the Department for Culture, Media and Sport:

Food or drink supplied on or from any premises is "hot" for the purposes of this Schedule if the food or drink, or any part of it,

(a) before it is supplied, is heated on the premises or elsewhere for the purpose of enabling it to be consumed at a temperature above the ambient air temperature and, at the time of supply, is above that temperature, or

(b) after it is supplied, may be heated on the premises for the purpose of enabling it to be consumed at a temperature above the ambient air temperature.

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5) From the regulations of a building society:

The completion certificate must be submitted by the relevant person as defined by the Building (Scotland) Act 2003, that is –

*Legislative Drafting: Principles and Materials – by Mark Segal*

- a) Where the work was carried out, or the conversion made, otherwise than on behalf of another person, the person who carried out the work or made the conversion.
- b) Where the work was carried out, or the conversion made, by a person on behalf of another person, that other person.
- c) If the owner of the building does not fall within paragraph (a) or (b) and the person required by these paragraphs to submit the completion certificate has failed to do so, the owner.

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6) From a Statute in the State of Ohio:

Subject to division (B)(4) of this section, if, within six years of the offense, the offender has been convicted of or pleaded guilty to one violation of division (A) or (B) of section 4511.19 of the Revised Code, a municipal ordinance relating to operating a motor vehicle while under the influence of alcohol, a drug of abuse, or alcohol and a drug of abuse, a municipal ordinance relating to operating a motor vehicle with a prohibited concentration of alcohol in the blood, breath, or urine, section 2903.04 of the Revised Code in a case in which the offender was subject to the sanctions described in division (D) of that section, section 2903.06 or 2903.08 of the Revised Code, former section 2903.07 of the Revised Code, or a municipal ordinance that is substantially similar to former section 2903.07 of the Revised Code in a case in which the jury or judge found that the offender was under the influence of alcohol, a drug of abuse, or alcohol and a drug of abuse, or a statute of the United States or of any other state or a municipal ordinance of a municipal corporation located in any other state that is substantially similar to division (A) or division (B) of section 4511.19 of the Revised Code the judge shall suspend the offender's driver's or commercial driver's license or permit or non-resident operating privilege for not less than one year and not more than five years.

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7) From a policy document concerning the Information Society:

4. Member States may take measures to derogate from paragraph 2, in respect of a given information society service, if the following conditions are fulfilled:

a) the measures shall be:

i) necessary for one of the following reasons:

— public policy, in particular the prevention, investigation, detection and prosecution of criminal offences, including the protection of minors and the fight against any incitement to hatred on grounds of race, sex, religion or nationality, and violations of human dignity concerning individual persons;

— the protection of public health;

— public security, including the safeguarding of national security and defence;

— the protection of consumers, including investors;

ii) taken against a given information society service which prejudices the objectives referred to in point (i) or which presents a serious and grave risk of prejudice to those objectives;

iii) proportionate to those objectives;

b) before taking the measures in question and without prejudice to court proceedings, including preliminary proceedings and acts carried out in the framework of a criminal investigation, the Member State has:

- asked the Member State referred to in paragraph 1 to take measures and the latter did not take measures, or they were inadequate;
- notified the Commission and the Member State referred to in paragraph 1 of its intention to take such measures.'

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8) If the license application is incomplete or inaccurate, the municipal authority shall reject the application, unless the applicant makes all required additions or corrections within three business days. The municipal authority shall inform the applicant of the need for any such additions or corrections within a period that does not exceed three business days.

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9) From a Taxation Office, concerning Goods and Services legislation:

For the purpose of making a declaration under this Subdivision, the Commissioner may:

- a) treat a particular event that actually happened as not having happened; and
- b) treat a particular event that did not actually happen as having happened and, if appropriate, treat the event as:

- i) having happened at a particular time; and
- ii) having involved particular action by a particular entity; and

- c) treat a particular event that actually happened as:

- i) having happened at a time different from the time it actually happened; or
- ii) having involved particular action by a particular entity (whether or not the event actually involved any action by that entity).'

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10) From Bansal Estates of Coventry, to be signed by a parent as guarantor of rent payments:

The guarantor in consideration of the demised herein before contained having been made at their request hereby jointly and severally covenant with the landlord that the Tenant will pay the rent hereby reserved on the days and in manner aforesaid and will perform and observe all the tenants covenants herein before contained and that in case of default in such payment of rent or in the performance of such covenants as aforesaid the Guarantors will pay and make good to the landlord on demand all losses damages costs and expenses therefore arising or incurred by the Landlord PROVIDE ALWAYS and it is hereby agreed that any neglect or forbearance of the landlord in endeavouring to obtain the payment of the rents hereby reserved

when the same become payable or to enforce the performance of the several stipulations herein to the Tenants part contained and any time which may be given to the Tenants by the landlord shall not release or exonerate or in any way affect the liability of the Sureties under this covenant. If the Tenant (being a Company) shall be dissolved or (being an individual) shall become bankrupt and the Liquidator of the Trustee in Bankruptcy (as the case may be) shall disclaim this tenancy the Surety shall nevertheless upon demand payment to the Landlord a sum equal to the rent that would have been payable under the tenancy but for the disclaimer in respect of the period from the date of the said disclaimer until the expiration of three months there from or until the property shall have been re-let by the Landlord whichever shall first occur.

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11) From a legal contract, this sentence of 516 words:

In the event that the Purchaser defaults in the payment of any instalment of purchase price, taxes, insurance, interest, or the annual charge described elsewhere herein, or shall default in the performance of any other obligations set forth in this Contract, the Seller may: at his option: (a) Declare immediately due and payable the entire unpaid balance of purchase price, with accrued interest, taxes, and annual charge, and demand full payment thereof, and enforce conveyance of the land by termination of the contract or according to the terms hereof, in which case the Purchaser shall also be liable to the Seller for reasonable attorney's fees for services rendered by any attorney on behalf of the Seller, or (b) sell said land and premises or any part thereof at public auction, in such manner, at such time and place, upon such terms and conditions, and upon such public notice as the Seller may deem best for the interest of all concerned, consisting of advertisement in a newspaper of general circulation in the county or city in which the security property is located at least once a week for Three (3) successive weeks or for such period as applicable law may require and, in case of default of any purchaser, to re-sell with such postponement of sale or resale and upon such public notice thereof as the Seller may determine, and upon compliance by the Purchaser with the terms of sale, and upon judicial approval as may be required by law, convey said land and premises in fee simple to and at the cost of the Purchaser, who shall not be liable to see to the application of the purchase money; and from the proceeds of the sale: First to pay all proper costs and charges, including but not limited to court costs, advertising expenses, auctioneer's allowance, the expenses, if any required to correct any irregularity in the title, premium for Seller's bond, auditor's fee, attorney's fee, and all other expenses of sale occurred in and about the protection and execution of this contract, and all moneys advanced for taxes, assessments, insurance, and with interest thereon as provided herein, and all taxes due upon said land and premises at time of sale, and to retain as compensation a commission of five percent (5%) on the amount of said sale or sales; SECOND, to pay the whole amount then remaining unpaid of the principal of said contract, and interest thereon to date of payment, whether the same shall be due or not, it being understood and agreed that upon such sale before maturity of the contract the balance thereof shall be immediately due and payable; THIRD, to pay liens of record against the security property according to their priority of lien and to the extent that funds remaining in the hands of the Seller are available; and LAST, to pay the remainder of said proceeds, if any, to the vendor, his heirs, personals representatives, successors or assigns upon the delivery and surrender to the vendee of possession of the land and premises, less costs and excess of obtaining possession.

12. From the Regulations of the Britannia Building Society:

Definition of Special Resolution: in relation to a resolution proposed or to be proposed, means any resolution that the Statutes or these Rules require to be passed as a Special Resolution if it is to be effective for its purpose or which is a resolution (not being a resolution which if passed would purport to interfere with the Directors' right and duty to manage the affairs of the Society) which is specified in a Members' requisition referred to in Rule 31 (3) (a) or in a Members' Notice referred to in Rule 33 (1) (c) and which as its only or main object or consequence or as one of its main objects or consequences seeks that the Board consider, investigate, effect or supply information in relation to a transfer of the Society's business to a commercial company or a merger with another building society or a dissolution or winding up of the Society.

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13) From the European Commission document “Innovate for a Competitive Europe”:

The Commission will introduce aid to innovation in the future 'LASA' (aids without a significant impact on competition) instrument 46. Before the end of 2004 it will elaborate a Vade-mecum on the State aid rules applicable in the field of innovation.

In the context of Better Regulation, the Commission will develop ex-ante assessment of the impact of regulations and standards on innovation.

The Commission and the Member States will work to unlock clusters, through internationalization, inter-regional cooperation and cross-sector fertilization. Sector-specific benchmarking and dissemination of best practices will be encouraged by extending the current PAXIS initiative 38 to local systems of innovation and clusters.

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14) From the Circular of the Department of Social Security Housing Benefit and Council Tax:

12) The rate of Child Benefit for the eldest child will be increased from £14.40 to £15.00 and the rate of Child Benefit for the second and subsequent child will be increased from £9.60 to £10.00. The element of these increases which represents an above inflation increase are reflected in the income-related benefits, including the rate of Family Premium (Lone Parent) which has previously been frozen since April 1997.

13) As a result the uprated child allowances are increased by the above inflation increase to Child Benefit for the second child. The uprated Family Premium and previously frozen rate of Family Premium (Lone Parent) are increased by the difference between the above inflation increases to Child Benefit for the eldest and second child.'

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15) From a Deed of Indemnity of the British Ministry of Defense:

The Ministry of Defense shall not be discharged or released from our obligations under this deed by any arrangement or agreement made between you and the contractor or a receiver, administrative receiver, administrator, liquidator or a similar officer of the contractor, or by any renegotiation, substitution, alteration, amendment or variation (however fundamental) and whether or not to our disadvantage, to or of, the obligations imposed upon the contractor or any other person or by any forbearance granted by you to the contractor or any other person as to payment, time, performance or otherwise or by any release or variation (however fundamental) of, any invalidity in, or any failure to take, perfect or enforce any other indemnity, guarantee or security in respect of the obligations to which this deed relates or by any other matter or thing which but for this provision might exonerate us and this notwithstanding that such arrangement, agreement, renegotiation, substitution, alteration, amendment, variation, forbearance, matter or thing may have been made, granted or happened without our knowledge or assent;'

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16) From the Rules of a Golf Club:

The Club is a mutual undertaking not carried on for profit or gain. It is not subject to any commercial influence and no Member shall, except for professional services rendered at the request of the Committee, receive any profit, benefit or payment from or at the expense of the Club nor any commission or percentage with reference to the purchase or provision of intoxicating liquor nor any direct or indirect pecuniary benefit from its supply by the Club to its Members, Guests or Visitors apart from any benefit accruing to the Club as a whole and apart also from any benefit which a person derives indirectly by reason of the supply giving rise to, or contributing to the general gain from the carrying on of the Club.

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17) From a share offer document of the Department of Energy:

You authorize the relevant receiving bank and the Custodian Bank to send a letter of acceptance for the number of Ordinary Shares for which your application is accepted and/or a cheque for any money returnable by post at your risk to the address of the person (of the first-named person) named in the application form and to procure that your name (and the name(s) of any other joint applicant(s) is placed on the register of holders of interim rights in respect of such Ordinary Shares the entitlement to which has not been renounced and thereafter to procure that your name (and the name(s) of any other joint applicant(s) is placed on the register of such Ordinary Shares the entitlement to which has not been effectively transferred; and in these terms and conditions references to rights being effectively renounced mean the renouncee(s) being registered by a receiving bank in relation to such rights.'

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18) From the terms and conditions of a computer firm:

The Company shall not be liable for the cancellation by it of any order or any unfulfilled part thereof or for effecting partial delivery or performance if performance by the Company is prevented or delayed whether directly or indirectly by any cause whatsoever beyond the reasonable control of the Company whether such cause existed or was foreseeable at the date of acceptance of the Customer's order by the Company or not and without prejudice to the generality of the foregoing any cause shall be deemed to prevent, hinder or delay the Company if the Company is thereby prevented, hindered or delayed from fulfilling other commitments whether to the Customer or to third parties.

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19) From the terms and conditions of a Company:

Except in respect of death or personal injury caused by the Company's negligence the Company shall not be liable to the Customer by reason of representation (unless fraudulent) or any implied warranty, condition or other term or any duty in common law or under the express terms of the Contract for any indirect, special or consequential losses or damages (whether for loss of profit or otherwise) costs expenses or other claims for compensation whatsoever (whether caused by the negligence of the Company, its employees, agents or otherwise) which arise out of or in connection with the supply of the Goods or their use or resale by the Customer and the entire liability of the Company under or in connection with the Contract shall not exceed one and a half times the price paid for the Goods in question by the Customer.'

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20) From a public notice issued by the Halton Borough Council in 2005 about relocating a path:

A path from a point approximately 330 meters east of the most south westerly corner of 17 Batherton Close, Widnes and approximately 208 meters east-south-east of the most southerly corner of Unit 3 Foundry Industrial Estate, Victoria Street, Widnes, proceeding in a generally east-north-easterly direction for approximately 28 meters to a point approximately 202 meters east-south-east of the most south-easterly corner of Unit 4 Foundry Industrial Estate, Victoria Street, and approximately 347 meters east of the most south-easterly corner of 17 Batherton Close, then proceeding in a generally northerly direction for approximately 21 meters to a point approximately 210 meters east of the most south-easterly corner of Unit 5 Foundry Industrial Estate, Victoria Street, and approximately 202 meters east-south-east of the most north-easterly corner of Unit 4 Foundry Industrial Estate, Victoria Street, then proceeding in a generally east-north-east direction for approximately 64 meters to a point approximately 282 meters east-south-east of the most easterly corner of Unit 2 Foundry Industrial Estate, Victoria Street, Widnes and approximately 259 meters east of the most southerly corner of Unit 4 Foundry Industrial Estate, Victoria Street, then proceeding in a generally east-north-east direction for approximately 350 meters to a point approximately 3 meters west-north-west of the most north westerly corner of the boundary fence of the scrap metal yard on the south side of Cornubia Road, Widnes, and approximately 47 meters west-south-west of the stub end of Cornubia Road be diverted to a 3 metre wide path from a point approximately 183 meters

east-south-east of the most easterly corner of Unit 5 Foundry Industrial Estate, Victoria Street and approximately 272 meters east of the most north-easterly corner of 26 Ann Street West, Widnes, then proceeding in a generally north easterly direction for approximately 58 meters to a point approximately 216 meters east-south-east of the most easterly corner of Unit 4 Foundry Industrial Estate, Victoria Street and approximately 221 meters east of the most southerly corner of Unit 5 Foundry Industrial Estate, Victoria Street, then proceeding in a generally easterly direction for approximately 45 meters to a point approximately 265 meters east-south-east of the most north-easterly corner of Unit 3 Foundry Industrial Estate, Victoria Street and approximately 265 meters east of the most southerly corner of Unit 5 Foundry Industrial Estate, Victoria Street, then proceeding in a generally east-south-east direction for approximately 102 meters to a point approximately 366 meters east-south-east of the most easterly corner of Unit 3 Foundry Industrial Estate, Victoria Street and approximately 463 meters east of the most north easterly corner of 22 Ann Street West, Widnes, then proceeding in a generally north-north-easterly direction for approximately 19 meters to a point approximately 368 meters east-south-east of the most easterly corner of Unit 3 Foundry Industrial Estate, Victoria Street and approximately 512 meters east of the most south easterly corner of 17 Batherton Close, Widnes then proceeding in a generally east-south, easterly direction for approximately 16 meters to a point approximately 420 meters east-south-east of the most southerly corner of Unit 2 Foundry Industrial Estate, Victoria Street and approximately 533 meters east of the most south-easterly corner of 17 Batherton Close, then proceeding in a generally east-north-easterly direction for approximately 240 meters to a point approximately 606 meters east of the most northerly corner of Unit 4 Foundry Industrial Estate, Victoria Street and approximately 23 meters south of the most south westerly corner of the boundary fencing of the scrap metal yard on the south side of Cornubia Road, Widnes, then proceeding in a generally northern direction for approximately 44 meters to a point approximately 3 meters west-north-west of the most north westerly corner of the boundary fence of the scrap metal yard on the south side of Cornubia Road and approximately 47 meters west-south-west of the stub end of Cornubia Road.’

21) From a contract:

Know All Men By These Presents: That Pierce Corporation ("Pierce"), a Pennsylvania corporation, in consideration of the sum of \$\_\_\_\_, and other good and valuable consideration, received in accordance with the terms of a certain letter agreement dated April 7, 1993 by and between Pierce and Blue Avenue Associates, a Pennsylvania limited partnership, receipt of which Pierce hereby acknowledges, does hereby remise, release, and forever discharge Blue Avenue Associates and its successors and assigns of and from all, and all manner of, actions and causes of action, suits, debts, dues, accounts, bonds, covenants, contracts, agreements, judgments, claims, and demands whatsoever in law or equity, arising out of that certain lease commencing October 1, 1992 by and between Pierce and Blue Avenue Associates, which, against Blue Avenue Associates Pierce ever had, now has, or which its successors, assigns, or any of them, hereafter can, shall, or may have, for or by reason of any cause, matter or thing whatsoever, arising on or before the date of this General Release, but reserving all rights with respect to the return of the security deposit held by Blue Avenue Associates.

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22) From a Court Order:

BE IT REMEMBERED that on the 30th day of March, 1993, came on for hearing before this Honorable Court the motion of Plaintiff to Supplement XYZ Corporation's Appendix to Plaintiff's Memorandum of Points and Authorities in Support of Motion for Summary Judgment, and this Court being of the opinion that such Motion is well taken and should be granted, does hereby grant the motion of Plaintiff to Supplement XYZ Corporation's Appendix to Plaintiff's Memorandum of Points and Authorities in Support of Motion for Summary Judgment

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23) From a Manual on Legislative Drafting:

“The word '**clause**' is frequently defined as any group of words that contain a subject and a predicate and, from the grammatical point of view, can therefore be either a part of a sentence, or stand alone as a separate sentence. The word "**paragraph**" identifies a distinct piece of writing which relates to a particular point, beginning on a new, usually indented, line, allowing the writer to break down complex ideas into manageable parts. Paragraphs can consist of (i) one word; (ii) a group of words; (iii) one sentence; or (iv) a group of sentences. The existence within a paragraph of a subject and a predicate, which is the essential characteristic of a clause, is possible *but not necessary*. Therefore, Sections and subsections may consist of clauses (and sub-clauses) and paragraphs (and subparagraphs), clauses (and sub-clauses) may consist of paragraphs (and subparagraphs), and one- or several-sentence paragraphs (or subparagraphs) may include clauses (and sub-clauses) (See Box 2). Clauses can also form separate provisions outside sections (for example, enacting clauses, purpose clauses, etc.).”

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24) From Irish Circular 12/96 relating to exemption from the requirement to learn Irish:

“Pupils who, in the professional opinion of the reporting psychologist, are considered as functioning intellectually above the ranges indicating the presence of Mental Handicap are not considered as eligible for the granting of an exemption from the study of Irish on the grounds of a general learning disability alone.”

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25) From a Judicial Code, concerning the responsibilities of the Judicial Training Centre:

“Studies shall be conducted in the form of lectures, seminars, moot court games, debates, discussions of issues related to adopted judicial acts and their peculiarities, familiarization with specific cases in courts, and didactic materials, video tapes, audio-recorded lectures, and other contemporary techniques of education, which promote self-learning on the part of the attendees.”

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26) From a Judicial Code, concerning the responsibilities of the Judicial Training Centre:

“An attendee shall, upon presentation by the Director and decision of the Board, be dismissed if... a final judgment of court has recognized him to be incapacitated, to have limited capacity, to be missing, or declared dead”.

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27) From an Act Relating to Legal Aid:

2(a) “Prescribed” or “as prescribed” means prescribed or as prescribed by the rules framed under this Act”

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28) From a Code of Conduct for Lawyers:

3.1 (i) “Lawyers should not misuse the funds of corporations or institutions”

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29) From a Law on a Judicial Training Academy:

Article 46. Recipients of training of court and prosecutorial staff are judges’ and prosecutors’ assistants, judicial and prosecutorial interns and volunteers, as well as judicial and prosecutorial staff who perform administrative work. The training of court and prosecutorial staff is voluntary, except for judicial and prosecutorial interns and volunteers.

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30) From a Law on a Judicial Training Academy:

Article 58. The Government is obliged to secure necessary preconditions for the initiation of work and implementation of the programmes of the initial and continuous training no later than three months from the entry into force of this law.

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31) From a constitution:

The elections law shall aim to achieve a percentage of representation for women of not less than one-quarter of the members of the [Parliament].

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32) Article 284 of the Code of Criminal Procedure Act of 2008:

“When any adult is convicted by a Magistrate of the First or Second Class or by a Court of any greater powers, of an offence punishable with imprisonment for not more than seven years, or when any juvenile or any woman is convicted by any such Court as foresaid of an offence not punishable with death, and if in either case no previous sentence of an imprisonment exceeding six months is proved against such a person during the period of five years preceding the present conviction or that a period of ten years has passed since he or she served the sentence and it appears to the Court taking into consideration the age, character and past story of the offender, and to the circumstances in which the offence was committed, that it is expedient that the offender be released on probation, the Court may instead of sentencing him at once to any punishment, direct that he or she be released on his or her entering into a bond with or without sureties to appear and receive sentence, when called upon during such period not exceeding three years or as the Court may direct, and in the mean time to keep peace and be of good behavior, and the Court may make it a condition of such bond that the victim be paid by or on behalf of the offender such damages for injury or compensation for loss caused by the offence, as the Court deems reasonable.”

33) From a Code of Criminal Procedure:

Inadmissible shall be evidence obtained through **significant** violation of human rights and fundamental freedoms guaranteed by the Constitution and international treaties... as well as any other evidence resulting from the information obtained through **significant** violation of human rights and fundamental freedoms.

34) Article 89 of a Code of Criminal Procedure:

Declaration of inadmissibility of evidence

1. The court shall decide on admissibility of evidence during their evaluation while retired for rendering a court decision.
2. Where evidence has been found manifestly inadmissible during trial the court shall declare such evidence inadmissible, which shall entail impossibility of its examination or termination of its examination if such was commenced.