

African Parliamentary Knowledge Network

Legislative Handbook

Using Evidence to Design and Assess Legislation

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I. Introduction

Purpose of this Handbook

The African Parliamentary Knowledge Network’s mission is to increase the capacity and effectiveness of Parliaments by improving the skills of the parliamentarians and their staff.¹ The APKN provides both a platform for sharing information between legislative bodies and by developing tools aimed at improving the quality of legislation. A significant accomplishment of the APKN to date has been the creation of the *Drafting Guidelines*, which offer instruction on the technical aspects of legislative drafting. To complement the *Guidelines*, this handbook is meant to offer instruction and advice on designing and assessing legislation through the use of an evidence-based methodology. The Handbook has been supported by the [Africa i-Parliament Action Plan](#), a project funded by [United Nations Department of Economic and Social Affairs](#)

Legislation in many countries—whether developed or developing—often falls short of the parliament’s goals. What causes a law to not work properly?

- The law’s language may be technically defective or vague;
- the law does not fully instruct the appropriate ministry;
- the law only addresses the superficial problem;
- lawmakers copy legislation from other nations without regard to their country’s needs;
- lawmakers write laws based on anecdotes rather than carefully gathered facts;
- the law is the result of raw legislative bargaining and ends up being a mishmash of provisions that cannot work together.

“Evidence-based legislation” (EBL) is a relatively new effort to change these poor practices. EBL offers various methods to gather and analyze information about a social problem and then use this information to better design, draft and assess legislative solutions. Through EBL parliaments have the ability to address society’s problems by changing the way government officials, institutions and people behave and respond to the law. This can only be achieved, however, through a deep understanding of the problem as it exists and designing the law with those particular needs in mind. Rather than imposing a so-called “best practice” solution or enacting laws according to a “cookbook” formula, EBL requires that parliaments develop their own answers that best fit the needs of their people. Another EBL principle is that only parliament can determine the best path for its country. Experts from a ministry, academia or outside organizations have a role to play, but only in helping the parliament gather needed information, providing useful analysis and making proposals for solutions. Parliament must be equipped to take this information and develop effective.

This handbook covers what EBL is and how it can be used, discusses what the proper roles of the parliamentarian and the staff, offers a detailed framework for designing and assessing legislation, discusses mechanisms for gathering reliable information, has information for parliamentarians in bijural jurisdictions, and offers several tools to aid the legislator and drafter. One of these is an annotated law from South Africa that illustrates some of the principles contained in this book and the APKN *Drafting Guidelines*.

1. For more information, see, <http://www.apkn.org/apkn-in-detail/context>.

II. What is Evidence-Based Legislation?

“Evidence-based legislation” is a relatively new effort to improve the quality and effectiveness of legislation. EBL provides methods to gather and analyze information about a social problem and then use this information to better design, draft and assess legislative solutions. Central to EBL is an understanding that:

- parliaments have the ability to address problems existing in their society by changing the way government officials, institutions and people behave and respond to the law;
- parliament needs a thorough understanding of the problem as it exists in its nation and should design the law with those particular needs in mind; and
- only parliament can determine the best path for its country.

EBL can be an effective tool for both policymakers, who think in general, big-picture terms and the drafter concerned with the details of the bill. Evidence based legislation is a useful tool for ensuring that the laws being drafted and implemented have sound basis, and therefore are more likely to have the desired positive impacts on society.¹

This chapter will discuss what evidence-based legislation is and is not, offer some methodologies for using EBL, and discuss some of the potential misuses of EBL.

A. Evidence Based Legislation Defined

Evidence based legislation is legislation that has been drafted in conjunction with **rigorous research** regarding the bill’s subject matter, followed by **extensive monitoring and evaluation** once the bill is in effect.² A solid evidentiary footing helps build political support by offering an objective method for winning the approval of those who are unconvinced or opposed to a measure.³

Designing and assessing evidence based legislation requires the legislator and drafter to:

- Gather all available evidence on a subject;
- Combine qualitative and quantitative analysis;
- Involve local stakeholders;
- Involve experts in the field;
- Identify winners and losers with any proposed change;
- Perform a cost benefit analysis;
- Explain any assumptions or guesses due to a lack of reliable evidence;
- Provide for the continued gathering of information for Parliament; and
- Defend a legislative proposal by synthesizing all of the above, often in a written report.⁴

Evidence-based methods have been successfully employed in other disciplines, most notably in the field of medicine. Pioneered in Paris in the mid-19th century, evidence based medicine was seen as the cutting edge of medical care and has remained an important, and developing, movement ever since.⁵ Several leading experts in the field define evidence based medicine as, “the conscientious, explicit, and judicious use of current best evidence in making decisions about the care of individual patients.”⁶ This requires a combination of the best available systematic research and the clinical expertise of the physician to apply that knowledge in the best way possible to the individual patient.⁷

Likewise, any time a parliamentarian or her staff takes the time to gather evidence, assess its worth, use it to analyze a social problem fully, and then design a legislative solution that best meets the needs of their particular state or nation, they are practicing evidence based legislation. Organized and analyzed evidence can turn a politicized situation into a discussion of facts. By using evidence to back up policy proposals, members of parliaments can build political support across party lines.⁸ The negotiations, amendments and compromises will then also have to be rooted in evidence in order to overcome the original drafter's position thus elevating the entire debate.

One important consideration, however, is that in many cases there will be evidence supporting both sides of an argument. Drafters and parliament members should try to avoid a situation where members are trying to search for the best evidence supporting their position. Rather, EBL works best when legislators and drafters reserve judgment until the evidence has been fully researched and examines all of the evidence with a healthy amount of skepticism.

B. Alternatives to EBL

EBL is intended to replace less effective drafting methodologies including:⁸

1. Copy a law drafted elsewhere

Copying an existing law may be an attractive option—it certainly saves time and effort. While this method may be fast, it may not be effective. By using another country's law a drafter may miss the different root causes of a problem unique to her own society.

2. Draft a law that is a compromise between two viewpoints

Compromise is often central to what parliament does, and accommodating different groups is one of the strengths of a parliament. However, the quest for compromise can often lead to a bill that has provisions that either does not address a problem in the most effective way possible, or even may work at cross purposes with each other.

3. Create a superficial or simplistic solution

Another option is to create a law with an obvious solution such as simply forbidding an undesirable behavior—either criminally or civilly. A deeper inquiry, however, often reveals that the problem is too complex to be simply forbidden and the threat of punishment alone is not enough to stop the behavior.

4. Draft in broad, general terms, giving the implementing agency a lot of discretion

Legislators often leave the details and logistics of implementation to one or several ministries. Ministry may be expert in a subject matter and has personnel and resources, but it is dangerous for parliament to rely too heavily on the executive's ministries. Legislation that identifies a problem, but does not provide a remedy gives the ministry too much control over the law. Furthermore, there is no guarantee that the ministry will develop an effective solution on its own. Finally, a ministry may ignore certain segments of the population or aspects of the problem due to its own institutional culture and limitations.

An evidence-based methodology is intended to provide a more thoughtful approach than these options. No one method fully captures what EBL is, and EBL methods often have to be adjusted to the needs of a jurisdiction or the issue being debated.

C. What is Evidence?

Central to EBL is obviously evidence, but what is it? Evidence, as a legal matter, may be defined as:

- “Testimony, writings, or material objects offered in proof of an alleged fact or proposition. That probative material, legally received, by which the tribunal may be lawfully persuaded of the truth or falsity of a fact in issue”;
- “That which demonstrates, makes clear, or ascertains the truth of the very fact or point in issue, either on the one side or on the other”; and
- “That which tends to produce conviction in the mind as to existence of a fact.”⁹

Evidence, however, is not necessarily either proof of something or the “truth.” “Proof” is enough evidence to convince someone beyond a reasonable doubt—the legal standard for proving someone guilty of a crime in a court of law. The “truth” would leave a person with no doubt. Most people argue that “truth” is an unobtainable standard. After all, no scientist says, “I have found the truth.” Rather, scientists have a working hypothesis and conduct tests to either prove, disprove, or alter the hypothesis. Further, legislators must often vote on a bill even when they have a healthy amount of doubt as to whether the proposal before them will be effective or is the right course of action. For this reason it is all the more important for the parliament to continue to gather information and monitor the effects of the new law and make adjustments according to the new evidence generated. In this way, law creation is an on-going project.

We are now in the information age—which can be both a blessing and a curse to the researcher. With the internet there is now far more data, reports, studies, anecdotes and opinions cheaply and instantly at our fingertips than ever before. That is a blessing. The curse is that the researcher can be easily overwhelmed by this information and not know what to rely on—what is good or reliable evidence? From a practical standpoint, the answer would be whatever convinces a majority of parliament to enact a certain solution. In evidence based medicine, however, there are recognized standards and classifications that indicate the reliability of evidence.¹⁰ Standards are needed in evidence based legislation as well.

I propose the following classes of evidence from most reliable to least¹¹:

1. Information on a topic or issue that was requested by the parliament and produced under oath or under the penalties of perjury.

This is often the most reliable sources of information because the parliament is targeting specific information and may take efforts to obtain credible information through the use of oaths and the perjury laws.

2. Surveys of practices in other jurisdictions.

This information can be very useful when deciding what the parliament’s options are and how different approaches worked in other places. This information may, however, be unreliable in that every state and nation is different, and solutions from one place may not work the same way in another.

3. Studies / information provided by a government ministry.

Ministries are often one of the best source of information because: they can study an issue over a lengthy period of time; develop true expertise in a field; and have the resources to gather and analyze data. Although parliamentarians should work closely with ministers and their staff, there should be independent corroboration and research. First, ministries can be biased toward a region or group of people. Second, ministries are often so focused on one problem, they do not understand the “big picture” and why resources are allocated the way they are—this is truly parliament’s role. Finally, ministries are institutions with a

culture and institutional history that cases the organization to act a certain way, prefer certain methods and be very resistant to change. Drafting legislation with ministries in mind will be dealt with below.

4. Academic studies

Academic studies are often a good independent source of evidence that is often also analyzed. Academics often differ with one another, so the research or must look for competing points of view from other academics.

5. Data from economic or mathematical models

This type of evidence can be extremely useful, but must be understood for what it is. Models such as these always rely upon certain assumptions by the researcher. To evaluate the data, one must have a thorough understanding of the assumptions and biases that are built into the model. With that understanding, however, and if the assumptions stay consistent, this data can provide accurate predictions on the effectiveness of a law.

6. Information provided by special interests

“Special interests” is defined broadly here. It may be an advocacy group, a corporate or business interest, a labor union, a political party, a non-governmental organization, or a church. Each has its own point of view and will provide evidence that tends to “prove” their agenda. Over time, members of parliament and their staff may build a relationship with these interests and be able to easily assess the reliability of their evidence. It is always important to independently verify this information and look for other points of view to give parliament a full and accurate picture of a problem and potential solution.

7. Stories, apocrypha, uncorroborated tales

This is the least reliable source of evidence. Still, stories and tales can serve a legitimate purpose for the legislator: these can be effectively used to illustrate a social problem, or to help other members of parliament how conditions are different in other parts of the state or nation.

D. Examples of Evidence Based Legislation Methodologies

Evidence based legislation can take different forms. This section will discuss some options for the parliamentarian and staff.

1. Institutional Legislative Theory and Methodology

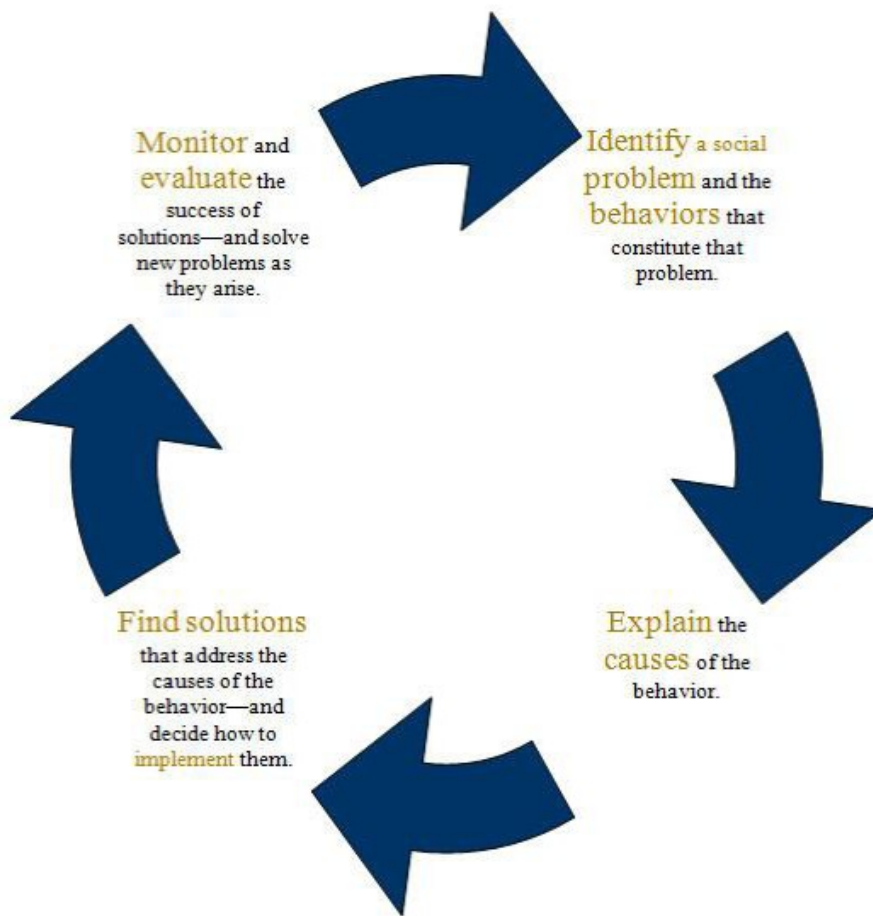
Institutional Legislative Theory and Methodology (ILTAM) is an evidence based methodology to write legislation developed over the lengthy careers of Professors Ann and Robert Seidman.¹² Bob, a lawyer, and Ann, an economist, started to develop this theory in the 1960s while teaching in various African countries and taught the methodology to generations of law students at Boston University School of Law and to legislative drafters around the world through the International Consortium for Law and Development (ICLAD).¹³ ILTAM holds that an institution, defined as a pattern of repetitive social behavior, will continue to act as they always have until the behavior is changed by some outside force.¹⁴ When these behaviors cause or exacerbate a social problem, legislation is an effective way to change the institution’s behavior.¹⁵ The ILTAM methodology consists of 4 basic steps for creating evidence based legislation:

- **Step 1a:** Describe the superficial appearance of the targeted social problem.
- **Step 1b:** Describe whose and what behaviors constitute that social problem.

- **Step 2:** The drafter states the explanations or ‘causes’ of the problematic behaviors discussed in Step 1.
- **Step 3:** Come up with a legislative solution that addresses the causes found in Step 2.
- **Step 4:** Monitor the implementation of the new law.¹⁶

ILTAM attempts to systematically categorize the “role-occupants” and their behaviors in Step 1b and the explanations of those behaviors in Step 2. ILTAM does this by utilizing seven categories (in bold):

- The wording of whatever **rule** exists;
- The addressee of the law’s **opportunity** and **capacity** to obey the law;
- Whether the law has been properly **communicated** to the addressee;
- Whether the addressee has **incentives** to follow the law;
- The addressee’s **process** for deciding how to behave as a result of the law; and
- The addressee’s **ideology** or thoughts that help determine how she will respond to the law.¹⁷



A key aspect of evidence based legislation generally, and ILTAM specifically, is research. ILTAM requires the drafter to research and write a detailed research report for every bill.¹⁸ The research report forces the drafter to confront the real causes of a problem, with the expectation that the resulting legislation is more likely to solve the problematic institution’s behavior. Ideally, this report makes the bill easier to defend in

parliament by providing, “sufficient available evidence to convince a rational skeptic that the proposed legislative solution will likely work in the public interest.”¹⁹

Finally, monitoring the implementation and effects of the new law is a crucial—but often forgotten—step. Even if a law is conceived and drafted through an evidence based methodology, the only way to be sure that it is having its intended effect is to gather more information so parliament can monitor the law after implementation. Repeated analysis of the environment that the law is operating within ensures that the legislation will be able to continue to accomplishing the goals over time.²⁰

The most serious drawback to ILTAM is that it can be time consuming and labor intensive. Students who spend a semester researching an issue and drafting a bill using ILTAM will routinely write reports between 50-70 pages. Unfortunately, parliamentarians and staff rarely have the same luxury of time or resources.²¹

2. APKN AfricaLaw Clinic

The APKN AfricaLaw Clinic is a joint-venture between universities and legal practitioners to provide a hands-on legislative drafting experience. The Clinic’s participants provide legal services such as legislative research and bill drafting to legislators, parliamentary staff responsible for drafting, and other relevant stakeholders while also aiding in the professional development of practicing drafters and students at Boston University School of Law. The students work on projects based on the direction, inputs and revisions of the clinic’s client, typically members of parliaments, legal counsel, parliamentary staff, or Attorneys General staff to discuss issues for research, legislative design and the potential impacts on social issues. Clinic participants strive to:

- draft logically organized research reports based on the available data,
- design bills with detailed provisions mean to address the targeted social problem;
- draft bills that translate the design of the legislator into legal terms;
- find ways to increase the participation of civil society and other relevant stakeholders in parliaments law making process.

The objective of the Clinic is to teach an evidence based methodology and provide work product that parliaments may freely apply to policy debates based on what may be most suitable for each parliament.

The AfricaLaw Clinic is conducted online, using e-mail and moderated discussion groups. Clients provide a specific issue for consideration and the students work with other Clinic participants to draft problem statements, conduct research around the problem, and through a continuous dialogue with the client and other stakeholders, propose legislative options for discussion and future evaluation. The results of the Clinics are then potentially shared (with the client’s permission) on the APKN website and further disseminated in Africa through APKN/CALC Africa workshops aimed principally for MPs, legislative counsel, committee clerks and researchers.

During a recent semester, the AfricaLaw Clinic worked on a petroleum bill under consideration by the Uganda Parliament and a basic health care bill to be filed with the Liberian Senate. While the Clinic employed a methodology similar to ILTAM, it made two interesting adjustments. First, participants tried to more closely simulate the work performed by parliamentary drafting offices—particularly by having a shorter period to research, design and draft a bill. The students and APKN network worked as a team on each bill sequentially with the hope that each project would take a few weeks rather than several months. Second, the Clinic agreed that the lengthy report required by ILTAM was not practicable for many, if not most drafting offices. Still, all agreed that researching and analyzing evidence was crucial to good legislative design and drafting. Rather than a 60-70 page report, the Clinic students produced 10-12 page memoranda offering specific legislative changes and options, while citing to the evidence that the students relied upon. This seemed a more practical output and was more likely to be read and used by parliamentarians.

Hopefully, as the AfricaLaw Clinic continues, this evidence-based methodology will continue to evolve and become ever more useful for legislative drafters.

3. Canadian Law Reform Commissions

Canadian law reform commissions also use a form of evidence based legislation. These commissions research an issue or set of problems and recommend ways to simplify and modernize the law. While many law reform bodies are created and authorized by governments, they are typically not controlled by the government. This feature removes political interference and gives the law reform commission a high level of intellectual independence.²²

A “Law Reform Project” in Canada or in other Commonwealth countries is the phrase used for any effort where the commission:

- Examines an area of law or a social problem is thoroughly examined, and
- Recommends changes to the legal system to address the problem.
- Although these commissions are typically publically funded, they are meant to be removed from government and therefore insulated from political influence. A law reform commission is meant to be a multidisciplinary team called a “project team” or “working group.” Typically project teams include:
 - A chairperson who acts as leader, facilitator, mediator;
 - One or multiple lawyers;
 - Experts in the field; and
 - A good representation of multiple stakeholders.

Once assembled, the project team/working group creates a work plan. The project team will then meet regularly to discuss research and to carry out public consultations. First, the team examines evidence and conducts a public consultation to identify the problem or “mischief” that needs to be addressed. Second, the team researches the current state of the law, identifying all legal provisions (constitutional, statutory, regulatory, tradition, etc.) that govern the targeted problem. Third, conduct research, including another round of public consultations, to determine the various options that would offer a solution to the problem. Fourth, choose the preferred options for reform based on all available evidence. Finally, write a final report for the legislature’s consideration.

A hall mark of these law reform commissions is the extremely high quality and “scholarly excellence” of the team’s working papers and final reports. The final report contains the team’s evidence based research and analysis; options for reform with the pros and cons for each proposal; and recommendations for reform. The recommendations often include model legislation drafted by the team. Sometimes, however, the recommendations merely instruct the government’s legislative counsel—either in the Attorney General’s Office or the Legislature—on how to draft the bill. Given the careful research and the independent evidence-based nature of the law reform team’s recommendations, implementation rates are typically very high.

NOTES

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1. World Development Report 2008, THE WORLD BANK, 249 (2008), available at http://siteresources.worldbank.org/INTWDR2008/Resources/2795087-1192112387976/WDR08_20_ch11.pdf.
 2. Id. at 249.
 3. Id. At 250.
 4. Id. At 250 (pointing out that assessments “should combine quantitative and qualitative analysis,” and “involve local stakeholders and experts in identifying winners and losers”); My colleagues Ann & Bob Seidman’s Institutional Legislative Theory and Methodology (ILTAM) require “a bill grounded on available

- evidence, logically presented;” a “transparent, accountable and participatory monitoring and evaluation mechanism;” and all bills to be accompanied by a research report. Ann Seidman and Robert B. Seidman, “Instrumentalism 2.0: Legislative Drafting for Democratic Social Change”, 5 *LEGISPRUDENCE* 95, 133-4 (2011)
5. Sackett, et al., “Evidence based medicine: what it is and what it isn’t” 312 *BMJ* 71 (January, 1996).
 6. *Id.*
 7. *Id.*
 8. Paul A. Sabatier, Policy Change Over a Decade or More, in *POLICY CHANGE AND LEARNING, AN ADVOCACY COALITION APPROACH* 13, 18 (Paul A. Sabatier & Hank C. Jenkins-Smith eds., 1993).
 9. These four categories of faulty drafting are taken from Seidman and Seidman, *supra* note 4 at 115.
 10. Black’s Law Dictionary 6th Edition (West Publishing Co, 1990), (Definition of “evidence”)
 11. Sackett, *supra* note 3, p. 71-72.
 12. We first used these categories of evidence during the Fall 2012 AfricaLaw Clinic held with Boston University Law Students and legislative drafters associated with the Commonwealth Association of Legislative Counsel (CALC) and APKN.
 13. The Seidmans have written extensively on their methodology. For a shorter treatment see, “Instrumentalism 2.0: Legislative Drafting for Democratic Social Change”, 5 *LEGISPRUDENCE* 95, 133-4 (2011). For a lengthier treatment, see Seidman, Seidman & Abeysekere, *LEGISLATIVE DRAFTING FOR DEMOCRATIC SOCIAL CHANGE: A MANUAL FOR DRAFTERS* (2004).
 14. See, <http://iclad-law.org/>
 15. Seidman, Seidman & Abeysekere, *LEGISLATIVE DRAFTING FOR DEMOCRATIC SOCIAL CHANGE: A MANUAL FOR DRAFTERS*, 11 (2004).
 16. See, generally Seidman & Seidman, “Instrumentalism 2.0” *supra* note 4.
 17. *Id.* Step 1 is covered on pages 104-108. Steps 2-4 are covered on pages 136-137.
 18. *Id.* at 136. These categories are dealt with in greater depth in Seidman, Seidman & Abeysekere, *LEGISLATIVE DRAFTING FOR DEMOCRATIC SOCIAL CHANGE: A MANUAL FOR DRAFTERS*, chapter 4.
 19. Seidman & Seidman, “Instrumentalism 2.0” *supra* note 12, p. 101.
 20. *Id.* At 137-140.
 21. World Development Report 2008, *supra*, note 1, at 251 (“Yet in emerging democracies, especially in Africa, parliamentarians lack the resources, information, and support staff to engage in the formulation of [legislative] strategies, policies and budgets.”)
 22. Carolyn Laws Presentation to ICLAD Roundtable October 2012. Presentation Slides on File with the author. Definition of Law Reform Commission taken in part from Wikipedia (http://en.wikipedia.org/wiki/Law_reform).

III. The Roles of Parliamentarians and Drafters

The parliamentarian and the legislative drafter have an important relationship that makes evidence based legislation not just effective, but possible. Although these two groups are working in the same branch and on the same issues, the parliamentarian and the drafter have certain distinct functions and strengths that complement each other. The legislative process actors need to understand and appreciate those differences.

A. Parliamentarians and Drafters as Intellectuals

"Now it is a fact that an intellectual is someone who fails to mind his own business" -Jean-Paul Sartre¹

Before discussing the differences between parliamentarians and drafters, how are they similar? The most noteworthy way that they are similar is that both groups should view themselves--and each other--as intellectuals. This may be unusual for parliamentarians who, as elected officials, typically see themselves as men and women of action and responding to many political pressures and interests. This view may also be new to the drafters, even if they are lawyers or some other professionally trained staff. Traditionally, drafters have been seen as scribes or at best technicians who put legislative proposals into the right form. To work in an evidence-based system, however, both groups need to accept and appreciate their roles as intellectuals.

Some commentators point out that "active and engaged public intellectuals play a crucial part in the ongoing life of democratic societies."² These same commentators decry the fact that so many prominent intellectuals in South Africa retreated from public affairs during the mid to late 1990s.³ Given Sartre's comment, however, how can a person engaged in parliamentary work be anything other than an intellectual? A functioning parliament has no option but to mind the business of every aspect of the country: different groups of people, the government ministers and their departments, the military, business interests, school systems--the list is nearly endless. As was stated earlier, an evidence based legislative system requires not only the gathering and use of reliable evidence, that evidence must be applied in a way that is best suited for that state. Staff will tend to focus on the gathering and use of legislation, and parliamentarians will focus more on the needs of the state and the best way to apply what has been learned. Both are highly intellectual exercises. Ultimately, parliamentarians and drafters must embrace their particular roles and understand the role the other plays.

B. The Parliamentarian's Role

What is the role of a member of parliament? Parliamentarians fill many possible roles: representing constituents; representing a party; setting the budget; being a check on the other branches of government; understanding the issues facing the state; debating and enacting legislation and so on. If this is reduced to one important function, it would be to collectively set policy. To do this effectively, parliamentarians should have a deep understanding of the needs of the people they represent both within their elected district, ethnic group, party, etc., but also for the country as a whole. Some commentators argue that the most important function of a legislature is to bring together different parts of the country to engage in a continuous dialogue that may eventually produce legislation, but has the positive effect of teaching law-makers about the needs and priorities of other parts of the country.⁴ The parliamentarian is therefore an expert on the needs of the people and the country, just as a doctor becomes an expert on the needs of a

patient. Some would say this is just politics--but such a viewpoint probably undervalues this information. The ability to bring many diverse points of view together and using those points of view make the perspective of parliament unique. It cannot be replicated by the government or courts, nor do "the experts" outside government truly have as complete an understanding of the needs of the country.

If understanding the needs and priorities of the population is the expertise of the legislator, they also need a firm understanding of several other subjects:

- constitutional law-- in particular the constitutional limitations on legislative power;
- legislative procedure;
- the substantive issues facing the legislature;
- and legislative drafting.

These subjects may be an expertise of various legislative personnel: legislative counsel for constitutional law; the clerk for procedure; substantive issues for the the researcher and drafting for the drafter or counsel. As the people who make the final decisions, however, legislators must know enough of these subjects to not only assess the work of the staff, but to understand why staff may raise questions or potential objections to the details of the policy, and the ability to give the staff new directives as policy is developed and put into legislative language.

Ultimately, legislators must understand that when drafting laws, **form and substance** cannot be neatly separated. While the drafter is not a policymaker, the words they choose, the design of the legislation, and the provisions that are included and not included will have a profound effect on how the law is used and interpreted. In that sense, drafters also make policy. The Parliamentarian, therefore, must be aware that the drafter's choices will help set policy, take care to leave those choices pointed out, and work with the drafter to make the language carry out the Parliament's policy as closely as possible.

C. The Drafter's Role

Who drafts legislation is often a matter of necessity. Parliaments with few resources must often rely on either members of parliament or outside resources, such as an Attorney General's Office or other government agency, to draft legislation. In fact, it is only in the past 90 years has the United States Congress invested in professional, non-partisan offices of lawyers to draft legislation.⁵ Another issue is that there is no standard education for a drafter. While being a lawyer may be an advantage, non-lawyers can and do draft effective legislation. While a few law schools provide opportunities to study legislation and legislative drafting as a discipline, most do not. Given the facts that the task of drafting effective legislation is very different from other areas of legal practice, it is difficult for even experienced lawyers to draft a law that will have the desired effect. As a result, most legislative drafters are trained in the traditional apprenticeship model. The office will hire a lawyer who will then work with more experienced drafters. After several years of training, the drafter will be ready to work on major pieces of legislation that will become law.

The legislative drafter must learn a variety of skills: the technical aspects of legislative drafting; an understanding of the Constitutional limits on government, especially the legislature; the ability anticipate questions of interpretation; and the ability to spot issues and raise questions that will help develop policy.

What is the proper role for the drafter working within parliament? This differs from parliament to parliament. At one extreme, the drafter may fill the role of scrivener or technician who simply puts down into words what he is told to write; at the other extreme the drafter may be closer to a partner or alter-ego to the parliamentarian in the policy-making process. Often the role is determined by how the drafter sees the legislator or organization for which they work.⁶ In the United States, drafters tend to see the lawmakers they serve as "clients," reflecting a point of view that the drafter is a lawyer in the form of a counselor and advisor. In the British Commonwealth tradition, lawmakers are often considered to be "instructors," with the drafter's involvement coming only after the policy has been settled. The drafter then puts the

"instructed" policy into bill form. These drafters may see themselves more as a technician or wordsmith than a counsel. These traditional models have been evolving lately. Some American lawmakers are now frequently relying on outside parties to draft legislation and relying on their drafting offices to simply put the bill into the correct form. In contrast, the Commonwealth country of Canada, is evolving due to technological advances. With the advent of the internet, e-mail and instant messaging, drafters are now in close communication with policy makers during the policy making stages.⁷ As legislators have demanded shorter deadlines, it becomes necessary for the drafter to be involved early in the law making process when the policy is still being developed. As a result, Canada's drafters have been more involved in developing policy, managing projects, and working in parallel with other drafters.

Regardless, all drafters play a key role in shaping the legislation. Drafters must analyze the parliamentarian's policy, spot potential issues, and work with the policy maker to resolve the issues. Form and function are not easily separated in legislative drafting. While the parliamentarians are responsible for the final policy, the drafter has a key role to improve legislation and shape policy choices while designing legislation.

Example:

Suppose a member of parliament requests a law that there be "a chicken in every pot."⁸ As a scrivener or technician, the drafter may simply return the following:

"An Act Relative to Chickens and Pots

Be it enacted by Parliament,

SECTION 1. There shall be a chicken in every pot."

Regardless of whether the careful drafter sees the lawmaker as a client or an instructor, they will immediately see that the idea given to them is not fully formed. As such, the bill is woefully incomplete and inadequate. A thoughtful drafter would probably ask the following questions (if not more):⁹

- What kind of chicken?
- Does it have to be a whole chicken?
- What kind of pot?
- Who provides the chicken, and when, and where, and how?
- Is it one chicken per pot, or one chicken per person who owns a pot, or one chicken per household with a pot?
- If I own more than one pot, do I get more than one chicken?
- When do I get the chicken: when I want one? When I need one? On a regular basis?
- How will this program be paid for?
- What if the organization responsible for this program gives out no chickens?
- What happens if the person doesn't want the chicken?
- Can the government be sued if the chicken makes someone sick?
- What happens if there is a chicken shortage?
- What are the tax consequences of receiving the chicken?

When the drafter brings these questions to the lawmaker, she may give answers (the instruction model) or ask the drafter for their thoughts and recommendations (the client model). Either way, the bill will probably be much longer and complicated, but with a better chance to create the desired changes.

Not only must legislators understand the proper role of the drafter, but the drafter should understand the pressures facing legislators. Legislators are not making policy in a vacuum. There are numerous external factors that are constantly influencing the policy-making process: their constituents,

domestic and foreign institutions, differing rules and ideologies, the media, and even other members of their Parliament. To overcome these challenges, legislators must set priorities and distinguishing between the *optimal* versus the *acceptable* outcomes. Knowing these helps the drafter in her role of developing policy, and perhaps why their finely crafted work gets amended in ways that may not make any sense.

The relationship between the drafter and the parliamentarian is a crucial one for designing legislation. While the parliamentarian alone is responsible for the final policy that is made law, the drafter plays an important role in developing and shaping that policy. The parliamentarian and the drafter both bring different perspectives to the process--the parliamentarian brings a deep understanding of the needs of the state, and the drafter the technical and evidentiary knowledge that makes evidence based legislation possible.

Notes

1. Gumede & Dikeni ed. *The Poverty of Ideas, South African Democracy and the Retreat of Intellectuals*, p. 1 (Citing, PLAIDOYER POUR LES INTELLECTUALS (Paris:Gallimard, 1972) p. 12.)
2. Gumede & Dikeni ed. *supra*, note 1.
3. *Id.*
4. Jeremy Waldron, "The Dignity of Legislation" 54 MARYLAND LAW REVIEW 633, 657-658 (1995).
5. Tobias Dorsey, LEGISLATIVE DRAFTER'S DESKBOOK: A PRACTICAL GUIDE 27-29 (The Capitol Net, Inc. 2006).
6. Tobias Dorsey, "The Impact of Information Technology on Drafting Offices" (unpublished article on file with the author).
7. *Id.*
8. Herbert Hoover made this promise while running for President of the United States in 1928.
9. Several of these questions are taken from Tobias Dorsey, *supra* note 6.

IV. Legislative Design

Evidence based legislation can be particularly helpful when the policy-maker and the drafter are either designing or assessing a bill. EBL can offer a systematic method for deciding 1) what is the legislative goal or problem parliament faces? 2) what are the true root causes of these problems or roadblocks to a goal? 3) how can the bill design address each of those causes? and 4) what information will be needed in the future to assess how the law is working? This section will examine each of these issues.

A. What Do You Want The Law To Accomplish?

Long before the policy objectives are settled or the drafter puts pen to paper, there are basic questions that need to be answered. The first and foremost is what problem is the bill meant to address? Is the bill's scope very narrow—meant to deal with a specific case issue that a constituent brought to the legislator's attention or a ruling in a court case? Or is the bill meant to create a sweeping program to change an entire area of the law? The effective legislator and drafter need a firm grasp of the situation that they are being asked to commit their limited attention and time. Lay out the nature and scope of the problem in clear and logical terms.

- What statistical analysis is available to show the scope of the problem?
- What believable qualitative information is available— anecdotes, media reports, testimony, etc. that shows the nature of the problem?
- What is the current state of the law?
- Why is the law ineffective? Give an analysis of what circumstances prevent the law from addressing the problem identified above: Did the identified problems not exist when the law was drafted? Have circumstances changed?
- Identify which social groups benefit or suffer from the current state of the law
- What has this jurisdiction tried to do in the past to resolve the problem?

B. Identifying The Problem In A Comprehensive Way

Once the problem has been established, the second step is to determine what is causing the problem. Institutional Legislative Theory and Methodology (ILTAM) requires a drafter to identify all of the social actors whose behaviors contribute to the problem and to pinpoint the specific behaviors that are problematic.¹ These social actors may include ordinary citizens, government officials, entire ministries and departments, or organizations. All of these may be considered institutions, whose repetitive behavior and actions will not change until the law forces it to change. Second, because laws that only address the symptoms, and not the causes, of problematic behaviors are unlikely to lead to more desirable behaviors, ILTAM requires a drafter to come up with explanations for each actor's problematic behaviors.² Only after understanding the causes of problematic behaviors can a drafter design a bill to change or eliminate those behaviors. ILTAM holds that the ultimate object of the bill will be to change these problematic behaviors.³ By looking at a problem through the lens of these categories, the drafter will start to see the deeper root causes:⁴

1. Rule Does existing law or regulation—

- Contain vague, ambiguous, or confusing language?
- Allow or order the actor to behave problematically?

- Fail to address the causes of the actor's problematic behavior?
- Give government officials clear guidelines telling them how to enforce the law?
- Give government officials too much discretion in deciding whether and how to implement the law?
- Allow government officials to overlook an actor's problematic behavior?

2. Opportunity

- Do the actor's physical or other circumstances make it difficult or impossible for him or her to obey existing law?
- Is it difficult for government officials to ensure that people are complying with the law?
- Do government officials have to rely on information from outside sources to find out whether the law is being violated?

3. Capacity

- Does the actor lack the knowledge, skills, or resources he or she needs to comply with the law?

4. Communication of the law

- Is the actor ignorant of existing law?

5. Interest/Incentives

- Does the actor have an incentive to obey existing law?
- Do the benefits of obeying the law outweigh the costs?
- Does the actor not obey existing law because he or she does not expect a government agency to enforce the law? In other words, does the actor think that he or she can get away with breaking the law?

6. Ideology

- Do the actor's values, attitudes, tastes, assumptions about the world, religious beliefs, or political, social, or economic ideologies explain his or her behavior?

For almost every social problem, the behavior of the relevant ministry or implementing agencies must be considered carefully. While any of the above factors may apply to an agency's behavior, there is one that is particular to agencies:

7. Decision-making process

- What kinds of issues and ideas come to the attention of the agency? Who is allowed to introduce them?
- Do the people most affected by the agency's decisions have a chance to make their voices heard when the agency makes its decisions?
- How does the agency's staff formulate and justify its decisions? Do staff members have to assess the ideas and facts they receive by specific criteria and using specific procedures? Or are they allowed to ignore ideas and facts that conflict with their own values or interests?

- Do staff members have to justify their decisions transparently, in writing? Are decisions made by individuals or groups? Does a reviewing body exist to determine whether the agency's decisions are reasonable?
- Does the agency receive meaningful feedback regarding its decisions? Does the agency learn about its decisions' impacts from the people those decisions affect the most?

Case Study: A Witness Protection Program

In 2001, public officials in an American jurisdiction realized that they had a significant problem with the criminal justice system--many witnesses either disappeared or changed their testimony just before trial. This was very often due to threats to the witness or to the witness's family by criminal gangs who were highly organized and controlled sections of the jurisdictions' cities. The threatened witnesses were often children, and the problem came to a head when a gang member accused of murder was found not guilty after the state's main eye witness did not show up to the trial. The boy's mother moved the family out of state rather than endanger her son.

When this situation received significant attention in the press, the Chairwoman of the relevant legislative committee began to search for the causes of this problem. To the 11 elected prosecutors in the jurisdiction, the cause was simple--a lack of funds for their offices. they argued that if given more money, they would spend more to protect witnesses. The Chair and her staff felt as though this was a simplistic explanation and were not satisfied. After all, the prosecutor's offices were relatively well funded, and protective services were almost never offered to witnesses. Plus the call for money created several questions:

- How would the new money be divided between the prosecutor's offices? By population? By crime rate? Where gangs were most prevalent?
- What sort of protection would be offered?
- Who would make sure the money was well spent?
- What would happen if the money ran out?
- What would happen if the money was not spent?
- Would the prosecutors divert the money to other areas of their operations?
- How did other states handle this problem?
- How much would such a program cost?

The Chair directed her staff to conduct a comprehensive investigation of this issue. The staff began to collect the evidence necessary to design a comprehensive solution to the problem of witness protection. First, the staff researched the documented instances of witness intimidation over the past 20 years to look for patterns and who was typically involved. Next, they designed a survey to be sent out to the *staff* of the various prosecutors, particularly the line prosecutors and support staff who most often had contact with witnesses. The survey also went to various law enforcement organizations, and non-government organizations that had crime as a focus. Next, the staff interviewed the directors of witness protection offices that had been established in other jurisdictions. Next, the staff examined the budgets and the population served by those programs to get some sense of how much money a similar program would cost.

The result of this research revealed several problems that caused the intimidation of witnesses that went beyond the lack of money:

Rule: while there was a law prohibiting witness intimidation, the penalties were relatively low and the crime was rarely prosecuted. In addition, there were few if any laws regarding the sharing of what witnesses testified to during the charging stage. This allowed defense lawyers to share witness transcripts with their client, who would give them to gang associates and the associates would threaten the witnesses.

Capacity: On occasion, witnesses would contact the prosecutors' offices and ask for protection for themselves or their family. Most staff members reported that they did not think the office had the resources to help and told the witness that they could not help. In a few instances, the threat was so significant that the staff member paid for the witness and their family to stay in a hotel for a few nights on their own personal credit card with the hope that they would be reimbursed.

Communication: this was one of the major problems revealed by the evidence: witnesses often did not know who to contact if they were threatened; the prosecutors' staff did not know who to request help from, or what they could offer for assistance; local and state prosecutors did not know what other offices were doing for witness protection; and prosecutors and police did not communicate about witness protection.

Interest and incentives: While gang members had a great incentive to intimidate a witness into silence--they could escape criminal punishment; there was little incentive for the witness or their family.

Ideology: this category was closely related to interest--but more difficult to overcome. The ideology held by most people in high crime rate areas where gangs flourished was that the gangs were powerful and could do what they wanted and that the prosecutors really did not care about the well-being of the witnesses. In addition, prosecutors often could not understand why someone would suddenly change their testimony and would try to then prosecute them for perjury. On both sides of the equation, there was an "us" versus "them" mentality-- or ideology. Whereas interests can be changed fairly quickly--for example by increasing the penalties for witness intimidation; ideology is far harder to change, and often takes a very long time to accomplish.

C. Designing Solutions

Creating solutions is perhaps the crucial step before drafting the bill and will determine the design of the proposed law. By understanding the actors involved and the causes of the problem, policy-makers and drafters will realize that most problems require several changes or additions to the law.

ILTAM holds that, to be successful, legislative solutions must alter or eliminate the causes of problematic behaviors in a cost-effective manner.⁵ Once the drafter or policy maker has established the "best" solution based on the available evidence, the bill should only be amended if someone else offers further or different evidence that dictates an altered or different solution.⁶ This keeps the entire debate based on evidence rather than bargaining or bending a bill to sheer political will.⁷

This may be an ideal that is not necessarily achievable--or even desirable. If evidence based legislation is at its base a methodology that:

- requires the policy-maker and drafter to think about a problem systematically,
- to gather evidence about the problem and the behaviors that lead to the problem,
- to draft legislation based on that evidence to address the problem as it exists in that particular country,

- and to use the evidence to justify the bill to other policy makers;

there is still room for flexibility in the solution.

As stated above, the drafter may become an expert in the issue and is in the best position to propose a solution. Still, the law-maker may have a responsibility to other factors than the “best” solution as proposed by experts. These factors may include building coalitions, taking into account different populations, party concerns, and budgetary limitations. These considerations are often public policy and political realities. Far from trumping evidence, these nation-specific considerations are essential to understanding what will and will not work in that country at that time. Evidence based medicine requires a thorough understanding of not just the evidence, but also of that particular patient. Likewise, the legislator is in a unique position to see the evidence through the lens of their country’s specific needs.

While the idea of creating a “perfect” or “best” law may be impossible, evidence should still form the basis for the proposal and be the main vehicle for arguing the merits of the bill. Understanding that legislators cannot always accept the “best” solution, but will be persuaded by evidence, the drafter can often—and should—offer a menu of potential solutions. Often the drafter and policy maker must go back and forth in considering solutions to come up with a bill that is both rooted in evidence, but also takes into account of the needs of the country.

ILTAM also requires a legislative drafter to accompany each proposed bill with a research report that justifies the bill’s many provisions.⁸ This research report should provide logically-organized facts to demonstrate that the proposed bill will be effectively implemented and achieve its desired social impact. A research report allows not only members of Parliament, but also interested members of the public to evaluate a draft bill’s quality and confirm that the bill’s provisions rest on facts and logic instead of growing out of the drafter’s opinions or political loyalties. In other words, a research report acts as a form of “quality control” for a bill.⁹ A research report should mirror ILTAM’s four steps in its form and content. Our students at Boston University School of Law will often produce reports of 50-60 pages on an individual bill. A sample outline of an ILTAM style research report is attached in the appendices.

Once again, writing such a lengthy report is more of an ideal and is not always possible in the legislative context. Often the speed of the legislative process and the lack of personnel will prevent the writing of a lengthy formal report. It would be counterproductive to evidence based legislation to demand something that cannot be achieved—the good should not be sacrificed for the perfect. Far more preferable is for drafters and policy makers to base their work in evidence and use that evidence as the primary method for winning support and votes for a bill.

1. Sanctions

Often the most popular solution, because they are easy to construct and implement, is often the direct sanction. Direct sanctions can take many different forms:

- Criminal Punishments
- Civil Penalties
- Fines
- Forfeiture
- Court costs
- Loss of professional license
- Rewards
- Taxes

While it is easy to see a behavior and impose a criminal, civil or other penalty, to do so without any other measures often proves unsuccessful. The criminal punishment is simple to write. Here is one that punishes a variety of offensive acts:

“Prostitutes, both male and female, persons who with offensive and disorderly acts or language accost or annoy persons of the opposite sex... shall be punished by imprisonment in a jail or house of correction for not more than 6 months, or by a fine of not more than \$200, or by both such fine and imprisonment.”¹⁰

Still, even with a simple crime such as this one, there are several questions that the drafter must ask and be satisfied that the statute is properly written:

-
- Will the agency charged with the enforcement of this crime be able to identify the criminals?
- Will this crime be a priority for the agency? Will this law get ignored?
- Will the crime be reported to the authorities?
- Is there a possibility of corruption in the non-reporting or non-enforcement?
- Is there a prison overcrowding problem? If so, will anyone ever go to jail for this offense?
- Is this penalty in or out of proportion to other crimes?
- Is this behavior so widespread that the criminal penalties will have no effect?
- Is there a more efficient or cost effective way to achieve the desired behavior?

If a crime is already in place, and yet the behavior continues, lawmakers will often try increasing the penalty. Unfortunately, an increased penalty will often be no more effective than the original law unless the problem is dealt with in other complementary ways as well.

The reason that increased criminal penalties—or any other sanction—has a limited effect is that such punishments or inducements only really affect two of the seven categories of behavior above: interest and ideology. By putting a criminal or civil penalty, tax, or a reward in place, the person’s interest in doing the behavior may be overcome by the sanction or inducement. Likewise, a person may have the belief that their behavior is acceptable or even beneficial. Direct measures such as penalties or rewards may cause a person to put aside these beliefs and overcome their ideology. For example, with the crime above—a person may think it is acceptable to call out lewd things to a member of the opposite sex while passing them in the street. Putting a criminal law in place may demonstrate that this is not acceptable to a majority of the population. The person’s ideology may change as a result. Between a change in interest and ideology, these direct solutions may make a person less likely to continue what society considers the unacceptable behavior. Still, ideology often takes a long time--perhaps years or generations--to change. Also, most problems are more complex than just changing interests through sanctions.

2. Indirect Solutions

Often overlooked, but at times more effective than direct solutions, are indirect solutions. These legal changes or programs can address the other causes of the behaviors that lead to the targeted social problem.

Different bill provisions could be aimed at:

- *restricting or increasing capacity*: for instance, the law could forbid or regulate the sale of tools commonly used in the commission of a crime. Drug abuse prevention often takes this form—restricting the sale of syringes or requiring a doctor’s permission to purchase certain drugs. If parliament wishes to encourage employment in a certain sector, it may provide education to potential employees or loans to businesses.

- *encouraging communication*: Does the general population know or understand a law? Are they aware of government programs? Have a country's different languages been taken into account? Do different parts of the government communicate regularly and effectively? Are the relevant agencies communicating with the parliament?
- *Changing the decision making process*: If an agency is not acting in a way that parliament wants, it could set out a new decision making process.
- *Attempting to change ideology*: As pointed out above a direct solution may have the effect of changing a person's or a group's ideology. Often it does not. Changing ideology is a very difficult task and may be something that takes years or even generations to accomplish. For example, in the United States 30 years ago drunk driving was not only common but accepted. In addition to tougher criminal penalties, there has been an ongoing public education effort—especially with new young drivers—that drunk driving is not acceptable.

Case Study:

Given the witness protection problem discussed above, what solutions did the legislators implement?

- First, the legislature appropriated dedicated funds similar to what was spent by other jurisdictions with similar programs. This money was not given directly to the prosecutors, but to a panel of law enforcement personnel (including prosecutors), who would ensure that the money was divided according to need. This new panel also increased communication and cooperation between the various parts of the criminal justice system.
- Second, the legislature gave fairly detailed parameters for both the prosecuting offices and witnesses participating in the program so that the services offered would be fairly uniform and that the duties and obligations of all of the parties were well established and in writing.
- Third, the law increased penalties for witness intimidation and created new penalties for improperly sharing pre-charging testimony.
- Fourth, the law required prosecuting offices to inform witnesses of the protection now available, and how to contact the appropriate member of the prosecutor's staff to request protection.
- Fifth, the law required prosecutors to create an outreach program to high crime rate communities to inform them of the new witness protection program and the benefits to their community by cooperating with law enforcement. The legislature intended the fourth and fifth actions to improve communication; change the interests and incentives of potential witnesses, and to start attempting to change the long held ideologies of the community and the law enforcement community.

The solution, therefore, consisted of a combination of direct and indirect methods.

Selection and Organization of Implementing Agencies

An essential, but difficult, relationship exists between parliament and the executive ministries that implement and enforce parliament's statutes. The relationship between ministers and parliament changes—sometimes dramatically—according to the country's constitution. Ministers in some nations are key voting members of the parliament, and other countries separate the executive and legislative branches. Regardless, the law makers and the law implementers must work closely with each other to make legislation

effective. At times, however, this relationship can become dysfunctional: ministries may expect parliament to blindly approve its draft legislation, ministries and parliament fail to share needed information, ministries may not fully implement—or even ignore—legislation, etc.

Parliaments must take care to understand the strength and weaknesses of the ministries and agencies and design legislation accordingly. That is not to say that the parliament should treat the ministry as an opponent—rather ministries are important partners in the legislating process. Still, if parliamentary drafters take care in the design and drafting of legislation, they can push—and if necessary force—ministries to implement parliament's policy.

This section will use the broad term of “agency” for any entity that has been authorized by parliament to carry out its policy and enforce the laws. Agencies can take many forms—with the most common and visible being the ministries that report to a president or other chief executive—but can also take the form of commissions and committees, state corporations, licensed private actors and courts. Regardless of the size or the form they take, each is a bureaucracy and is tasked by the parliament to carry out its policy.

1. The Legal Problem With Delegating Law-Making Power

Most democracies reserve the law-making power to the representatives of the people in the form of a parliament, senate, assembly, or congress. The reality, however, is that social problems are often too complex to have the policy decided and effectively communicated through legislation. There is an ever present temptation for parliamentarians to outline broad policy concepts in statutes, and then delegate power to decide policy details to an agency. Often these details take the form of regulations.

In certain situations delegating law-making authority to an agency makes the most sense:

- **Parliament may not have proper capacity:** The parliament may not have the staff, resources or time to fully investigate the issue;
- **The social problem is too complicated:** To fully understand an issue often takes evidence gathering, consultation with experts, collecting data, etc. --all strengths of agencies.
- **The situation is changing rapidly:** This is a common reality—the modern world changes too fast and parliaments may not want to put into place a solution that could be outmoded within a few months or years. Parliaments may write a law broadly or intentionally vague so that the law can survive changing situations through regulatory changes; and
- **The problem exists in different forms in different regions:** there may be a common social problem, but the causes and most effective solution may differ from region to region and among different populations. Rather than have a one-size fits all solution, legislation may have to be flexible enough to allow different solutions.

Implementing agencies may be better suited to move with greater knowledge, more resources, more speed, and greater flexibility than parliament. If one or more of the situations above exists, then it justifies giving power to an agency. However, each time parliament delegates a portion of its constitutional law-making power to unelected bureaucrats there are risks. First, and maybe most importantly, delegation of power diminishes the importance of parliament. Second, agencies may not be capable of accomplishing what parliament wants. Finally, the agency may implement policies that are inconsistent or even contrary to parliament's intentions. At times delegating law-making power is necessary and wise. At other times, it constitutes parliament failing to carry out its responsibilities. Parliamentarians should take care that delegating law-making power to agencies occurs only when absolutely necessary, and that certain controls are put into place so that the parliament remains the most important—and final—developer of public policy.

2. The Nature Of Implementing Agencies

Agencies are institutions that develop expertise, an ideology, a culture, biases and processes that may be unique to that organization. By nature, an agency's behavior is difficult to change or redirect. When new people come into the organization they learn the "way things are done" and the institution perpetuates itself. Long established agencies can be frustrating for the law-maker. The agency may not see a problem the same way as parliament, and may differ on the best course of action. How can a parliamentarian overcome this problem? To start parliamentarians should fully understand what different agencies do and do not do well. Often parliamentarians learn about the strengths and weaknesses of individual agencies by working with them over time. At times, this is a subject for research when designing a legislative solution.

What do agencies do well?

The answer is many things -agencies can:

- **Be efficient** -at least in theory: because agencies can divide labor among its personnel, the organization should be efficient at handling even complicated tasks;
- **Have expertise:** because an agency can focus on one set of related issues, and can employ experts in a particular field to gather and analyze data, agencies may be the most reliable source of information;
- **Be proactive:** executive agencies can move much more quickly than parliaments, and so long as they have the resources and no legal barriers, agencies can address situations proactively;
- **Have long "life-spans":** the advantage of being an institution is that the agency can develop and sustain programs over a long period of time often outlasting multiple generations of presidents and parliaments;
- **Be flexible:** agencies can use different methods to achieve similar goals in different locations

What are the drawbacks of agencies?

Unfortunately, there are drawbacks to agencies as well:

- **Special interests:** at times, the agency may come under the undue influence of "special interests" such as corporations, or NGOs and may be more responsive to the outside organization's desires rather than parliament's policy;
- **Inefficiencies:** The division of labor that make agencies efficient, can also make these organizations difficult to navigate and "bureaucratic;"
- **Narrow focus:** the specialization that can be a strength can also be a drawback—by focusing on one topic, the agency may not understand what other parts of the government are doing or how the agency fits into the government as a whole;
- **Not responsive:** bureaucracies are often not responsive to the general public, and may focus on elites or urban areas.

3. Designing Legislation With Agencies In Mind

With a solid understanding of what an agency does well and where there may be problems, the legislative drafter can better design the bill. A few important considerations are below.

- **Should there be a new agency or use an existing agency?** This is one of the most important questions in bill design. Often policy makers will suggest creating a new agency to avoid trying to change the entrenched behavior of existing agencies. There are, of course trade-offs:

New Agency Advantages

New Agency Disadvantages

Enthusiastic officials	More expensive
Create a new ideology / culture	Longer time to implement law
Avoid existing patterns of behavior	Create possibility of “turf wars”

If the parliament is unwilling to spend far more money or to take much longer to implement the new law, it should consider using an existing agency. If, however, the existing agency simply cannot properly implement the new law, parliament should consider creating a new agency.

Case Study:

In the witness protection case study there were several different possibilities for what part of government would administer the witness protection program: the appointed head of the Executive Office of Public Safety, the elected Attorney General, the regionally elected chief prosecutors, the trial court system, or placed within the state-wide police service. None of these entities had a strong desire to take on the program, yet all had particular strengths to contribute to the new program. None, however, communicated with the others about witness protection and often did not know what other agencies were doing. The legislature wanted several agencies to have a stake in this program, not just to combine strengths, but also to avoid “turf wars” between agencies. The legislature created a new Witness Protection Board located in the Executive Office of Public Safety, but with seats going to the Attorney General, the elected Auditor, a chief of police, and a regional prosecutor. The Board’s mission was to “oversee the commonwealth’s witness protection program and coordinate the efforts of state, county and law enforcement agencies to protect the health, safety and welfare of witnesses including, but not limited to, the administration and approval of funding for witness protection services.” By giving a seat at the table to several stakeholders, communication was improved, battles to control the funding were avoided, and new ideas could be brought to an existing agency. By placing the new Board within the Office of Public Safety, however, the start-up time for the new program was greatly reduced because the new Board had immediate access to personnel and resources.

- **If an existing agency has jurisdiction, why isn’t it dealing with the problem now?**

A frustrating aspect of being a legislator is to think that the parliament has given an agency a mandate to act and solve a problem in a particular way. Often the agency will claim that they would address the problem, but need more money. That is typically a simplistic assessment. Other possibilities are:

- **Defect in the law/rule:** Did the law fail to specify which agency was to carry out the policy? Was it clear as to what the new policy was? Did it include sanctions or incentives to help enforce the policy? Did it address the problem in a systematic way?
- **Defect in capability:** Was the law passed without giving the agency the needed personnel to carry out the mission?
- **Lack of opportunity:** Has the agency had enough time to fully implement the policy? Is the agency having difficulty in reaching parts of the population because of a breakdown in regional government or civil strife?
- **Lack of communication:** Did the law include provisions that would inform the agency and the general population of the new law? Were the reasons for the law or the potential benefits of the law properly communicated?
- **Unwillingness/ Ideology:** Did parliament take into account resistance from either agencies or people to the law? There are many historical examples of agencies “dragging their feet” or people simply

ignoring unpopular laws. Ideology is a particularly hard thing to change, but can be done through sustained effort over time.

- **How much freedom should the agency have?**

As stated above, there are times when parliament must delegate some of its law-making power to an agency. If a law is too specific, it may become quickly outdated or un-workable and if an agency can't experiment with solutions, it may not discover what works best in different parts of the country. Still, if parliament has a legitimate reason for delegating some law-making power to an agency, it should be: limited, clearly expressed, and parliament should maintain oversight powers.

- **Does the situation require experimentation?** Parliament can gather different potential solutions to the same problem—but which will work in their country? The law could direct the agency to take a range of actions so it can experiment with solutions;
- **Do different regions require different solutions?** Different areas—urban and rural, rich and poor, different ethnicities, often need different solutions.
- **Will circumstances change the nature of the problem?** Legislation often deals with new and rapidly changing areas of society like technology, medicine and science, commerce, etc. If legislation is too specific and does not allow an agency to adapt quickly to changing circumstances, the law will need to be re-written.

- **Agencies should be held accountable for their decisions**

If parliament has given some law-making power to an agency, parliament should make sure that the agency's decisions—and the reasons for their decisions—are available to parliament and to the public.

- **Transparency:** Parliament should have the opportunity to monitor how an agency uses its law making power. Why did an agency take certain actions? How did the agency come up with its regulations? How is the program administered? The evidence-based methodologies presented above suggest that every law have a research report to explain what the parliament saw as the problem, the problem's causes and the solutions that best attack that problem. Agencies often have greater resources than parliament to produce such reports, and as appointed officials, they should be required to explain their actions in detail and regularly.
- **Parliamentary oversight:** Parliament's ability to gather information and to require answers from agency personnel is an essential part of parliament's power. Without constant monitoring parliament is blind to how the laws are working and whether agencies are carrying out parliament's policy decisions. Oversight includes the agency gathering information and regularly reporting back to parliament.
- **Regulatory Approval:** When an agency makes law it usually takes the form of regulations. Some jurisdictions have standing procedures for publicizing and allowing commentary—or even legislative approval—before the regulations go into effect. There are three styles of regulation oversight:
 - *Public hearings:* popular in the United Kingdom, draft regulations are scrutinized at one or more hearings with public and parliamentary participation;
 - *Notice and comment:* popular in the United States, draft regulations are published and the agency adjusts the regulations according to commentary offered by the public, experts and lawmakers.
 - *Legislative approval:* popular in Australia, draft regulations are sent back to the legislature for approval before they go into effect. This method gives the parliament greatest control over how the agencies operate.

Some jurisdiction will use different styles in different situations depending on the agency it is working with and the level of involvement parliament wants to have.

- **Provide a Cost Benefit Analysis:** Parliaments not only pass legislation, but also budget and allocate resources. To do this effectively, agencies should be required to perform cost/benefit analysis of its programs so that parliament can evaluate whether the law is working and if it is worth the expense.

Notes

1. See Seidman, Seidman & Abeysekere, *Legislative Drafting for Democratic Social Change: A Manual For Drafters* 15-17 (2004).
2. *Id.* Chapter 4, pp. 93-99.
3. *Id.* Pp. 99-107.
4. *Id.* Pp. 94-95. The following categories are discussed at great length in *A Manual For Drafters*, ch. 4.
5. *Id.* Pp. 111-112.
6. *Id.* Ch. 2.
7. *Id.* pp. 36-37.
8. Ann Seidman and Robert B. Seidman, “Instrumentalism 2.0: Legislative Drafting for Democratic Social Change”, 5 *Legisprudence* 95, 136 (2011). These categories are dealt with in greater depth in *A MANUAL FOR DRAFTERS*, supra note 1, chapter 4.
9. Seidman, Seidman & Abeysekere, supra, note 1 at 86.
10. Massachusetts (USA) General Laws chapter 272 §53;
(<http://www.malegislature.gov/Laws/SessionLaws/Acts/2006/Chapter48>).

V. The Structure of a Bill

Bills should generally follow the format below. Still, this structure is not absolute—again, this is what makes drafting more of an art than science. The best structure of a bill is one that will effectively communicate the will of Parliament. To see the structure of an actual piece of legislation and examples of the following parts, please see the annotated law in Appendix D.

A. Title.

Titles of an Act should give a succinct, non-misleading and, where possible, a complete indication of the bill's subject matter.¹

B. Enacting Provisions.

These provisions inform the readers of a statute that the legislature has enacted a document with the force of law. The exact wording of an enacting provision will depend on an individual country's constitution, laws, or drafting conventions. The enacting provision usually appears before the first section or chapter of a law. Everything below the enacting provision is considered part of the law.²

C. Statements of Intent / Purpose.

In some Acts, the front-matter may include statements of purpose, which set out concise reasons for the substantive provisions to come, without reproducing or paraphrasing the provisions.³ Intent sections are often helpful when courts and agencies are interpreting provisions of the statute.

D. Definitions.

Definitions may be necessary to eliminate ambiguities or introduce new terms. They should be placed in a single basic-unit at the beginning or at the end of an act.⁴ Standard drafting practice is that legislative terms should be used, as far as possible, according to its everyday or technical meaning. A definition should be provided only when it is necessary for the sake of clarity and precision. This often is necessary when the drafter wishes a term to be read differently from the terms commonly understood definition. A definition may also be used for a new term when no existing word properly expresses the legislative intent.⁵

E. Substantive Provisions

All bills should be broken down into units that help a reader follow the bill and reference specific parts of the bills later.⁶ Each of the following levels should be enumerated with Arabic or Roman numerals in a bill.

- **Part** - the “part” is the bill's largest division and contains the major topics of the bill. Parts can be designated the an Arabic numeral (1,2, or 3) or a Roman numeral (I, II, or III).
- **Chapter/Division** - chapters group sections within each Part. Many jurisdictions number Chapters consecutively throughout the bill, regardless of which part they are in.
- **Section/Article** - sections are the Bill's basic building blocks. Each section should only cover one topic, and sections can be broken down further into subsections. The section should not be too long.

If a bill has more than eight subsections, you might want to consider whether the section covers more than one topic.

- **Paragraph** - subsections of bills can be further divided into paragraphs, which can then be divided into subparagraphs and then items, if necessary.

Table 1:⁷

	Anglophone tradition Designation	French tradition Designation	Portuguese tradition Designation
Higher Division	Part	Partie (codes) Livre (codes)	Parte (codes) Livro (codes)
	Chapter	Titre Chapitre	Título Capítulo
	Subchapter	Section (codes) Subsection (code)	Secção SubSeção
	Basic Unit	Section	Article
Subdivision	Subsection	Alinéa	Alíneas
	Paragraph		Parágrafo
	Subparagraph		
Annex	Schedule	Annexe	Anexo

Table 2 - A Bill's Structure

Anglo tradition	French tradition
Part I	Partie I
Chapter 1	Chapitre 1
Section 1	Article 1
Section 2	Article 2
Subsection (a)	Alinéa (a)
Subsection (b)	Alinéa (b)
Chapter 2	Chapitre 2
Section 1	Article 1
Subsection (a)	Alinéa (a)
Part II	Partie II
Chapter 3	Chapitre 3
Section 1	Article 1
Section 2	Article 2

Although legislative acts are typically structured according to national tradition,⁸ a common format for the substantive provisions of chapters and sections is:

- Establish new ministries, boards, commissions, tribunals, etc.
 - State mission and powers of agency
 - Specify decision making process
 - Power of agency to write regulations
 - Method of reviewing regulations

- Sanctions or inducements
- Exceptions to those sanctions and inducements
- Dispute resolution process
- Funding mechanism
- Reporting requirements

F. Transitional Clauses.

When a bill might have impacts on rights, programs, relationships, or transactions under existing law, a transitional clause or savings clause is often necessary to:

- Preserve rights created under previous laws;
- Preserve positions or appointments created under previous laws;
- Preserve existing causes of action or litigation currently underway;
- Preserve regulations promulgated under an enabling act that a proposed bill aims to repeal;
- Prevent judges, lawyers, and government officials from interpreting a new law as repealing an earlier law or a common law rule;⁹ and
- Clearly repeal previous acts or provisions that are “inapplicable, superfluous or redundant” because of the new act.¹⁰

G. Effective Dates.

These provisions tell the reader when a statute, or any of its provisions, becomes effective.¹¹ Many countries have an Interpretation Act that specifies when new laws come into operation, typically a set period after publication. Sometimes, a drafter may want to draft a bill that comes into force on a different date from the one prescribed by the Interpretation Act. This is often needed when the legislature wishes to give an agency adequate time to properly implement the new law.¹² In those cases, a drafter should include a coming-into-force provision stating *as specifically as possible* when the bill becomes effective. Retroactive or immediate effective dates are sometimes necessary, but should only be used in exceptional circumstances.¹³

H. ‘Sunset’ Clauses.

These clauses specify a date on which a law terminates, unless Parliament decides to approve the law’s continuation.¹⁴ Sunset clauses are very useful because they require a legislature to evaluate a bill’s effectiveness after it becomes a law. For example, a statute might include a sunset clause stating that a law terminates one year after it comes into force. One year later, if Parliament decides that the law has been a failure, it can simply rely on the sunset clause and let the law lapse automatically. On the other hand, if Parliament believes that the law has achieved its objectives, it can reenact the law.

I. Severability clauses.

- II. These clauses state that if a court finds that a specific provision of a law is invalid for example, if it violates the constitution, the court should cut off or “sever” that provision from the rest of the law, which would continue in force.¹⁵

J. Annexes and Schedules.

An Act may be complemented by annexes or schedules, which should be introduced in the basic-units. There are three kinds of annexes: integral-part-annexes, attached instruments, and informative-annexes.¹⁶

Integral-part-annexes are used to set out provisions (or parts of provisions) which expand on or complement the basic-units of the legislative act.¹⁷ An attached instrument is an autonomous legal instrument that confers additional legal effects on the legislative act.¹⁸ Informative annexes are not legally binding, but provide information on the legislative act, often through documentation and reports, that facilitate the act's interpretation, understanding and application.¹⁹

Notes

1. Guidance and examples for these legislative parts can be found in the APKN Legislative Drafting Guidelines which are available in English, French, Spanish, Portuguese, and Arabic at: <http://www.apkn.org/lrp/guidelines/guidelines>
Information on titles can be found at Guideline 10.
2. APKN Drafting Guideline 12.
3. APKN Drafting Guideline 13.
4. APKN Drafting Guideline 16.
5. Id.
6. APKN Drafting Guidelines 17 & 18.
7. APKN Drafting Guideline 18.
8. APKN Drafting Guideline 9.
9. APKN Drafting Guideline 17.
10. APKN Drafting Guideline 34.
11. APKN Drafting Guidelines 45-48.
12. APKN Drafting Guideline 45.
13. APKN Drafting Guidelines 46 (urgent enforcement) and 47 (retroactive enforcement).
14. APKN Drafting Guideline 17.
15. APKN Drafting Guideline 48.
16. APKN Drafting Guidelines 19-22.
17. APKN Drafting Guideline 20.
18. APKN Drafting Guideline 21.
19. APKN Drafting Guideline 22.

VI. Reports to Parliament

An important aspect of an evidence based legislation methodology is the constant need for information. Rather than simply gathering evidence once to draft a bill, there is an ongoing need for parliament to monitor the effectiveness of the new law, to continue working with the agency to fully implement the law, to properly fund the program year to year and to understand how the law must change.

A. Importance of information flowing to Parliament

The need for ever more information is a result of the nature of “evidence” itself. As discussed above, there is little chance of achieving a perfect amount of information—let alone finding “truth.” In fact, one of the great frustrations of legislative researchers is a lack of reliable information.

This is one of the great difficulties students have during the AfricaLaw clinic. Every semester several students come and say, “I can’t find any reliable evidence,” and “what do I do now?” Part of this comes from their legal training—in law school they get used to working with case law where the “facts” come from actual situations and can be reasonably well established in the official record of a court case. In contrast, legislation requires a drafter look into the future and speculate how a proposed law will affect the behaviors of individuals, groups and government organizations.

What does a legislative drafter do when faced with the challenge of a lack of evidence? Often they make an educated guess based on the evidence at their disposal. This does not make legislative drafting any less scientific—scientists often start with a hypothesis that is then tested through experimentation leading to a revised hypothesis and further experiments.

In the same way, law creation is an ongoing process. Evidence based methods should reveal what information is lacking or generate questions that the researcher would like answers to. Part of the challenge of designing the bill, therefore, should be to include provisions to compile more and more complete information going forward. As discussed above, this information will be extremely reliable because:

- It is focused on the particular problem that parliament wants to know about;
- It shows what needs to be done in that nation—not somewhere else;
- It can be tailored to the needs or problems in different regions or populations;
- It is reported and gathered without reliance on special or outside interests;
- It allows parliament to see how the law is working and will give a good indications as to how it should be amended.

B. Considerations in creating reporting requirements

When creating reporting requirements, the classic formulation for good journalism questions works best: ask Who? What? When? Where? and Why?

Why: Although last in journalism, this consideration is first because it informs the answers to all of the other questions: why does parliament want this information?

- Was this an issue that the parliament avoided because it did not have enough information to act?
- Has there been trouble getting this information in the past?
- Is it because different agencies have traditionally had very different viewpoints?
- Is it to see how a new law is operating?

- Is it to see if an agency or court is capable of administering a program or enforcing the law?
- Is it to see what sort of financial resources and personnel are needed for the law to be effective?

Who: Who is going to gather the information and report back? There are many possibilities depending on what parliament wants to accomplish:

- *Ministry or agency:* This is the most popular of the options because agencies are often the undisputed experts in a field, have institutional memory as to what has been tried in the past, and often has the resources to conduct a lengthy or comprehensive study. Agencies need to be told to do research and report. Unless compelled to do so, agencies will only share limited information—often that makes the organization look good—with other parts of government. Instructing an agency to conduct research and make a report forces the agency to produce the information *parliament* needs.
- *Commission:* Commissions are often popular when a problem crosses many disciplines or the jurisdiction of several ministries, and when there has been a problem of communication between parts of the government. Commissions often include both ministry officials, outside experts and members of parliament. In this way, a problem can be looked at from several angles and the different parts of the government can gain an understanding of what is important to other officials and what they think needs to be done. Commissions can be used to not just conduct research, but to gain consensus on what evidence is most reliable and then what solutions will be most likely to solve a problem.
- *Research Bureau:* Some legislatures will invest resources in creating a research bureau within the legislative branch. This gives parliament its own group of researchers who are acting independently to provide reliable information and analysis to the legislators. An example of this type of office is the United States Congressional Research Service.
- *University:* Academic institutions have many experts in a variety of fields and have the benefit of students who will conduct research and analysis under the guidance of their professor. Since the university is paying the professor and the students are working for academic credit, the cost of this kind of research is minimal. Also, since the people doing the research do not have a stake in the interests of the relevant ministries, or have a financial interest like a corporation or even an NGO, the information may be more reliable.
- *Private research organization:* There are organizations such as NGOs, think tanks, and public policy organizations that will undertake a study for a fee. This may be the least cost effective option, but can provide parliament with the information it needs in a short period of time, and depending on the organization, may be highly reliable.

What: What does parliament want to know? Often this will become apparent as the drafter and parliamentarian examine the available evidence while drafting the statute. Statements like “I wish we knew more about that,” or “How many people will this law affect?” or “How much will this cost?” all should be noted and considered when crafting the reporting provisions. Once this information is provided to parliament, it will be in a much stronger position to change—or defend—the laws it has passed.

When: Well written reporting requirements will give a deadline for making a report. Without a deadline, agencies or organization may fail to gather and report the requested information to parliament in a timely fashion. The timing report also depends largely on why the information is needed—information on a program’s funding needs must come to parliament in time to be considered for developing or voting on the

budget. In addition, commissions should report to parliament early enough in the legislative session to allow parliamentary action.

Where: The reporting requirement should state clearly who will receive the report. What committee or parliamentary officer should get the information? Will the information be confidential, or will the results be published?

Case Study:

What reporting requirement did the legislature include in the Witness Protection case study? It was actually a very short requirement with its main focus on two questions: how much the program cost each year and how many witnesses were benefiting from the program. On both points, the legislators knew they were taking educated guesses as to the need for the program and how much money would be needed. Neither the prosecutors, police, nor law-makers could tell with any precision. Would there be one case a year? 100? How expensive will each case be? The legislature included the following provision:

SECTION 11 The witness protection board shall make an annual report to the legislature, including the house and senate ways and means committees and the joint committee on the judiciary, not later than January 1 of each year on the fiscal and operational status of the witness protection program including, but not limited to, the number of memoranda of understanding issued by each of the district attorneys pursuant to chapter 263A of the General Laws.¹

The Board's 2012 annual report informed the legislature that 53 witnesses were assisted in fiscal year 2010 and 49 witnesses were assisted in fiscal year 2011. One prosecutor credited the law with his office recently achieving a 95% conviction rate in murder cases.²

Notes

1. Massachusetts (USA) St. 2006 ch. 48, "An Act Relative to Gang Violence"

2. 2012 Annual Report of the Massachusetts Witness Protection Board,
(<http://www.mass.gov/eopss/docs/eops/witness-protection-report2012.pdf>)

VII. Bill Assessment

Bill assessment maybe one of the most important tools for both the parliamentarian and drafter. While in some parliaments relatively few bills are generated by members, every bill should be closely assessed by parliamentarians and drafters for: constitutionality; whether the proposed legislation will be effective; whether the proposed solution will be clearly understood by courts, agencies, and the people; and whether the bill structure and language effectively communicates the intended policy.

Every parliamentarian may be responsible for assess a bill at some point in the legislative process—when this happens depends on their role. The committee chairman and staff will be the first to assess a bill, working closely with outside drafters like ministry staff, assistant attorneys general, and special interests. Parliamentary leadership may assess the legislation later in the process when setting the agenda for the entire chamber. Parliamentarians responsible for budget writing or appropriations will assess the bill to see if it can be afforded. The vast majority of members and staff will assess the legislation perhaps a few days before the matter comes to the floor for debate.

A. What Should Be Assessed?

What is the parliamentarian and drafter assessing? Obviously the text of the bill itself, but also the evidence that led the drafter to produce the bill she did. Why were certain provisions included? Why were certain provisions left out? Why was that particular language chosen? As discussed above, evidence-based methodologies often require that a bill be accompanied by a research report explaining the bill’s provisions. Even if it is often not practical to produce a formal report for every bill, the bill’s drafter—especially if from outside parliament, should be able to explain each aspect of the bill based on evidence. It is the job of the parliamentarian and staff to test the evidence.

- Is there evidence that the drafter was not aware of?
- Is the drafter's evidence either contradicted or bolstered by the new evidence?
- If there is no direct evidence, are the drafter’s assumptions valid?

The chair and members of the relevant legislative committee often test the evidence and make a thorough assessment of a bill. After gathering evidence from the drafter and other sources, the parliamentarians and staff can make evidence-based alterations to the bill and explain the bill’s provisions and expected effects to their colleagues based on evidence. Hopefully, evidence becomes both the basis for amending the bill and convincing a majority of parliament that this is the best possible solution for the identified problem.

B. Accepting “Defects” In A Bill

What happens if a legislator demands an amendment that has no basis in evidence—or worse—contradicts the gathered evidence? This can often be an extremely frustrating situation for the legislative drafter who uses and believes in evidence based methodologies. This is especially the case when the drafter has spent a great deal of time assembling the best available evidence and carefully constructs the bill accordingly. The drafter—and anyone who engages in the legislative process—should bear in mind that the parliamentarian is responding to other pressures, especially the needs of their constituents that may not be apparent in the evidence.

Case Study:

As the Witness Protection Bill neared final enactment in the Senate, the senator

who represented a very poor, urban, and crime ridden neighborhood proposed an amendment to change the funding for the program. Since such a program had never existed in that state, there was no way to precisely determine how much money should be devoted to the proposed program. The drafters conducted a survey of other states with a similar program, determined how much was spent over the course of several years, and then correlated those costs for the state's population. This was a guess, but an educated guess based on very reliable evidence. The drafters determined that to be a success, the program needed \$300,000 in the first year, and around \$500,000 in the second year. Any more than that probably would not be spent and budget writers would start taking money away from the program just when it needed more funds as the program grew and people started to take advantage of it. As the bill moved to the Senate floor for debate, this particular senator demanded that the program be given \$1 million and announced that she would be filing an amendment. The drafters went to this senator and presented the evidence they had gathered that the program would not require \$1 million for years, and argued that it could hurt the program. The senator steadfastly refused to accept the evidence or the drafters' assumptions. Over the drafters' continued objections the Senate replaced their evidence-based figures with \$500,000 in the first year, \$1 million in the second year and \$1.5 million in the third year; for an average of \$1 million a year.

Although this example seems to be the antithesis of an evidence based methodology, one could argue that it was still a legitimate change to the bill. The drafters later came to realize that the senator meant the large amount of money to signal to her constituents that the state was serious about protecting them. Although a symbolic change, her hope was that it would convince potential witnesses and their families that the state could keep them safe. Given her unique understanding of the people who would use this program, the extra money would make the bill more effective. Although this argument was not made on the floor of the Senate, or even behind closed doors, it exemplifies what the legislator brings to an evidence based system—the human element. In an evidence based system, bills are written and debated according to evidence and hypothesis. Still, parliament is an extremely human organization. At times the legislators may feel they need to override the evidence to satisfy that human element. Like evidence-based medicine, the doctor is not doing her job unless she employs or sets aside the best available evidence *according to the needs of the patient*. Likewise, the legislator should appreciate and use evidence, but this is not a mechanical process. The bill must fit the needs of the people who will use it. Ultimately, the change in funding was an exception that proved bills could be based on evidence; the bill was nearly entirely the result of careful study and analysis, and deviated from the evidence because a legislator had a good reason.

C. Assessing A Bill

What questions should a parliamentarian or her staff ask when assessing a bill? Below are some of the questions—but certainly not all of the questions. In many ways this is similar to designing a piece of legislation from the ground up, but in reverse. What questions would the drafter ask when formulating this bill and what evidence would he look for? All of them remain pertinent during the assessment phase:

- *Is the bill constitutional?*

The most basic of questions, but it is very important for a legislator and staff to ask: can the legislature do what is proposed according to the legislature's constitutional powers? Often parliament is writing legislation on new issues and there will be no court decisions to guide the legislature. Courts also often show great deference to the parliament that it was acting constitutionally. To preserve the rule of law, and the parliament's legitimacy, the legislature should recognize the limits of its own power and not enact laws that overstep its powers or infringe on the protected rights of the citizens.

- *Does the bill deal with the problem comprehensively?*

Is the bill focused on just the most obvious part of the problem, or has it contemplated the problem from several points of view? Has all of the available evidence been considered when crafting the legislation?

- *Does the bill contemplate a complete legislative scheme?*

Are there provisions to address each of the different causes of the problem?

- *Does the bill contain enforcement provisions?*

A law that directs people or organizations to behave in a certain way, but contains no method for enforcement will be ineffective. To avoid being a purely symbolic exercise a bill must contain provisions that will encourage—or even force—the target of the law to change their or its behavior. These may be criminal penalties, taxes, financial incentives, etc.

- *Will it be easy for the reader to understand and use the law?*

The legal staff of a ministry may understand what the legislature meant by particular language—often because they were involved in the drafting. Courts do not have such an advantage. Will they be able to easily understand and interpret the legislature's meaning? Even more important, with the average person understand the new law? If they are to obey the law it should not be confusing or impossible to understand. Many legislatures are embracing the "plain-language" rule for legislation—that is eliminating as much "legalese" as possible. Of course, on occasion, a term of art or difficult word with a specific meaning must be used for clarity. Still, the drafter should do everything that can be done to make the law understandable.

- *Does the architecture of the bill help the reader understand the law?*

Do the provisions progress logically and lend greater understanding of the legislation? Are portions of the bill that are essential to understanding the legislation—such as definitions and effective dates easily found and referenced?

- *Are there Technical Defects?*

- Does the bill:
 - Have the correct enacting formula?
 - Specify when particular parts come into force?
 - Contain any problematic retroactive clauses?
 - Contain a "Sunset Clause"?
 - Contain a transitional clause?

- *Does the bill give ministries and agencies only as much flexibility as needed?*

There are many reasons to give ministries, courts, and other agencies flexibility in implementing a law. Often this comes in the form of authorizing an agency to issue regulations. While often this flexibility is often a necessity, legislators should be careful to not give away too much of the power to legislate to the executive or judicial branches. In addition, if a ministry is authorized to promulgate regulations, has the legislature mandated the criteria and procedures for making these regulations? Does the legislature reserve the right to comment or even veto those regulations before they go into effect? Does the ministry have to report information back to the legislature on the operation or effectiveness of the new law?

- *Will there be good governance?*

An evidence based system of legislation presumes that the purpose of legislation is to improve some aspect of society and better the governance of the state. Related to the point above, is the implementing official's

discretion limited? Does the legislature retain the ability to monitor how the law is operating? Will there be accountability and transparency as the law is implemented?

- *Is the bill language correct?*

Words are imperfect tools. An important part of bill assessment is asking whether the bill language is:

- Clear;
- Precise;
- Useable;
- Flexible; and
- Compatible with other laws.

- *Reporting & Monitoring*

Does the bill provide for further information and evidence to be gathered and reported back to parliament?

- *And finally, is their evidence to back each provision in this law?*

VIII. Considerations for Bijural Jurisdictions

Jurisdictions that have elements of more than one legal system is often called a "bijural system." Some bijural legal systems, such as Egypt, have mixed French Civil Law and Islamic Sharia Law. Others, such as South Africa, have melded British Common Law with a Dutch influenced Civil Code. Still others, such as Rwanda and Burundi are currently Civil Law countries, but may be adding elements of Common Law to better integrate with the rest of the East Africa Community. A bijural system requires the legislative drafter to employ certain techniques to make a statute effective. This section will: briefly distinguish the two main law systems in Africa: French Civil Law and British Common Law; offer examples of five distinct bijural systems; and finally some drafting techniques used in bijural countries.

A. General Distinctions Between Civil Law and Common Law Systems

When considering a bijural legal system, it is useful to have a background in both common and civil legal systems because each tradition has developed unique characteristics over time.

The most obvious difference between civil law and common law jurisdictions is the source of law. In a civil law jurisdiction, legislation is the main source of law, and laws are often codified systematically into a code.¹ The Civil Law code tends to be a collection of broad principles within a particular subject area, meant to be general enough to cover the many situations that can arise in the future.² When a case is brought to court, the judge's job is to apply the applicable code sections. If there is not an applicable principle in the code, practice varies, but judges are often expected to rely on general principles of law to fill in any gaps. Academics are responsible for writing the treatises that will guide the judges' interpretation of the relevant code.

In common law jurisdictions, the main source of law is judicial decisions.³ Judges are powerful and influential figures with the power to make law through their decisions. A central feature of common law is the doctrine of *stare decisis*, which requires lower courts to follow decisions rendered in higher courts.⁴ Case decisions create law, providing continuity and predictability throughout the legal system. In contrast *stare decisis* is unknown in the civil law tradition. Still, if a common law case is similar to a previous judgment, but the judge thinks it would be socially desirable to alter or change a rule to suit that situation or fact pattern, the judge can find a way to distinguish the facts of the case from existing precedent and thereby reach a different result. Common law jurisdictions also use legislation. If a statute is directly applicable then it will be controlling, but judges will look to case law in the case of any ambiguities in the statute. Because common law statutes only cover specific portions of the law and given the power of the judiciary to make or alter law, statutes must be precise and written with great detail to direct citizens, courts and administrators to behave in a particular way.⁵

Summary of the Differences Between Common Law and Civil Law Systems⁶

Legal Aspect	Common Law	Civil Law
Continuity of Legal System	Evolutionary	Arbitrary
Major Source of Law	Custom & Practice	Legislative Statutes
Reliance on Precedent	Yes (Strong)	No (Weak)

Stare Decisis	Yes	No
Legislative Drafting	Specific & Precise	General & Comprehensive
Legislative Interpretation of Ambiguous Statutes	Look to standard rules of statutory interpretation	Look to relevant legislative history and surrounding provisions
Judicial Role in Law-Making	Active & Creative	Passive & Technical
Role of Legal Scholarship	Secondary & Peripheral	Extensive & Influential

In practice, however, these differences are not always clear-cut. Common law jurisdictions often make use of general application statutes, such as the Uniform Commercial Code in the United States.⁷ Likewise, case law is generating precedential value in some modern civil law courts, and court decisions are increasingly published and cited.⁸

B. Examples of Bijural Systems

There are several examples of jurisdictions with forms of “bijural systems.” This section briefly describes the legal systems in Scotland, the Canadian province of Quebec, the United States of America state of Louisiana, South Africa and Egypt.

Scotland

Scotland is the oldest mixed legal system in the world.⁹ Although Scotland shares a tradition of British Common Law with the rest of Great Britain, in the 16th and 17th centuries, Scottish students began studying law in France, Italy, and the Netherlands, and the books that they brought back stocked the Advocate’s Library in Edinburgh.¹⁰ Lawyers began using both the civil law and common law to make legal arguments, while judges would look to both for legal analysis and interpretation.¹¹ In 1999, Scotland achieved a measure of autonomy from Great Britain and created its own Scottish Parliament to enact legislation on certain topics such as: education, tax, tourism, arts/sports/language, food standards, some environmental policy, and providing social services.¹²

Egypt

Egypt’s legal system derives from the influence of both Arabs and Europeans. From the introduction of Islam to Egypt in 641 c.e., Islamic Shari’a law has been a dominant influence.¹³ Starting in the 19th century, however, other legal traditions such as French civil law became influential.¹⁴ By the late 1800s, “mixed courts” began applying “mixed codes” to govern the relations of foreigners, which were modeled on the corresponding civil, penal, commercial, and procedural codes in France.¹⁵ At this time, Shari’a courts governed Muslims on family matters, and separate religious judicial councils applied their own law to the family matters of their religious followers.¹⁶

During the 20th century Egypt underwent a legal reform to create “a unified national judicial system applying uniform rules of law,” and reform the substantive law.¹⁷ While many Egyptians felt that Shari’a law was becoming outdated, others thought that Civil Law was foreign and did not appropriately address the needs of Egyptians.¹⁸ The new Egyptian Civil Code had the French Code as its foundation, it also had elements of Egyptian Civil Law and Shari’a Law.¹⁹ Whenever Egyptian legislation was mute on a subject, Shari’a law would be a guide because it was more in accord with Egyptian traditions.²⁰ Today, Shari’a law is increasingly the primary source of law in Egypt.²¹

Quebec

Quebec is the primarily French speaking province of Canada. During the 18th century, England and France fought for dominance in Canada, each bringing their own legal systems. The Quebec Act of 1774 restored the French civil code in Quebec for private law matters,²² with the common law governing public law.²³ To get a full understanding of the law in Quebec, one must consult both the Civil Code of Quebec and court cases.

In private law matters, courts consult the Code to find and apply the correct legal principle without being bound by the precedent. Conversely, when dealing with an issue of public law, the court's primary source of authority is court decisions.²⁴ This bijural system has created some tension; the Supreme Court of Canada has jurisdiction over all Canadian provinces but cases from Quebec are rarely selected,²⁵ and the Quebec Court of Appeal is, effectively, the court of last resort for those living under Quebec's law.²⁶ Some Quebec citizens are even in favor of creating a wholly separate Supreme Court of Quebec, because they are not confident in common law judges' ability to apply the Civil Code.²⁷ Finally, some feel that decisions from Quebec courts are not given equal authority compared to decisions from courts in the other provinces.²⁸

In regards to legislative drafting the Quebec Cabinet issued a 1999 directive which stressed the importance of respecting both the common law and civil law traditions, "When concepts pertaining to these legal systems are used, they must be expressed in both languages and in ways that fit into both systems."²⁹ Canadian legislators recognize that they are drafting for four audiences:

- French speakers under civil law,
- French speakers under common law,
- English speakers under civil law, and
- English speakers under common law.³⁰

Very few drafters in Quebec are trained in both the common and civil law traditions. As a result, drafters consult with a team of specialists in comparative law, Committee on Bijuralism, who review all new legislation, and amendments to existing legislation.³¹

Louisiana.

Louisiana's bijural system is a result of French and Spanish colonization. When the United States purchased Louisiana in 1803, efforts to impose a common law system failed, however, and the civil law traditions of France and Spanish remained the dominant legal structures.³² Today, private law-- including areas of law such as property, contracts, sales, and family law is governed by a civil code.³³ Public law is governed by the common law system;³⁴ and the state adheres to the federal constitution, statutes and precedents.³⁵ The Louisiana Civil Code continues to be the most respected authority, with legislation and custom as the sources of law.³⁶ If no legislation and custom is on point, the Code refers judges to principles of equity.³⁷ Judicial decisions are viewed as "interpretations" rather than binding precedent, and there is no hesitation to overrule previous decisions.³⁸ In recent years, the use of common law principles, especially the use of judicial precedent, has been steadily increasing.³⁹ Louisiana has codified judicial precedents--often to conform to federal and other state's decisional law; by inserting judge-made law into the Code.⁴⁰ Still, the Legislature considers whether the changes are consistent with the civil law."⁴¹

South Africa.

South Africa's legal system is a "unique blend of common law and civil law."⁴² Modern South African law has its origins in two main traditions: Roman-Dutch civil law, which Dutch colonists introduced to the Cape of Good Hope beginning in the mid-1600s, and English common law, which the British later transplanted in the 1800s and early 1900s.⁴³ Today, Roman-Dutch civil law principles and concepts dominate South African contract law, the law of willful wrongs, family law, criminal law, and property law.⁴⁴ British common law principles and rules dominate the laws of evidence and civil and criminal procedure, administrative law, and commercial law.⁴⁵

Today, few areas of South African law remain purely Roman-Dutch or British, but have "developed a distinct character by moving beyond its traditional sources of inspiration."⁴⁶ While judges help develop the law

through precedent, courts still rely on the writings of legal scholars and academics for guidance in reaching their decisions as in civil law jurisdictions.⁴⁷ Still, citations to classic sources of civil and common law are becoming increasingly rare as courts relying more on legislation and precedents.⁴⁸

South African legislative drafters write legislation in the common-law style of “detailed and comprehensive rules intended to minimize judicial gap filling.”⁴⁹

Statutes must take into consideration the Constitution, existing legislation, case law, and customary law.⁵⁰ Drafters must also consider language issues. South Africa has eleven official languages, and bills must be submitted to Parliament in both English and one other official language.⁵¹ One version of a bill is eventually signed, but a court may consult the second version to help guide its interpretation.⁵² South Africa's diversity requires drafters to be careful in using words that may have different meanings to different communities. Drafters must exercise caution and “avoid ... words or terms that could ... be regarded as offensive or insensitive” in an indigenous language.⁵³

C. Bijural Drafting Techniques

Drafting in a bijural legal system can be challenging, so legislatures around the world have developed drafting techniques that incorporate its legal traditions. Examples of drafting tools in bijural legal systems are:

1. Doublets

Doublets involve listing both legal systems' terms of art, one after the other. Sometimes, the Canadian legislature provides doublets of entire paragraphs to accurately reflect the law as it exists in both systems.⁵⁴ The relevant language is in **bold print**.

Examples:

Insurance Companies Act (Quebec)

Section 100. (1) Subject to the provisions of Part VII and any applicable law relating to the collection of taxes, a person referred to in paragraph 97(2)(a) is entitled to become registered as the owner of a security, or to designate another person to be registered as the owner of a security, if the person referred to in paragraph 97(2)(a) delivers to the company of its transfer agent

(a) The original grant of probate or of letter of administration, or a copy thereof certified to be a true copy by (...), or

(b) **In the case of transmission by notarial will in the Province of Quebec**, a copy there of authenticated pursuant to the law of that Province (...)

Federal Real Property and Federal Immovables Act (Quebec)

Section 16. (1) Despite any regulations made under subsection (2), the Governor in Council may, on the recommendation of the Treasury Board, in accordance with any terms and subject to any conditions and restrictions that the Governor in Council considers advisable, (...) (k) authorize he acceptance or the release or discharge, in whole or in part, on behalf of Her Majesty, of any security, by way of **mortgage, hypothec** or otherwise, in connection with any transaction authorized under this Act.

2. Neutrality

Neutrality requires a drafter to avoid terms of art exclusively associated with one of the legal systems. Legal concepts from one legal system could be reworded in neutral terms to clearly apply regardless of the

legal system. In some cases, this could result in excessively wordy or unclear statutes, so it should only be used when it can be used effectively.⁵⁵

Example:

2004 Income Tax Act (Quebec)

Section 220. (4) The Minister may, if the Minister considers it advisable in a particular case, accept security for payment of any amount that is or may become payable under this Act.

Federal Real Property and Federal Immovables Act (Quebec)

Section 5. (2) Federal real property and federal immovable's within Canada may, at the discretion of the Minister of Justice, be granted or conceded as the case may be, by any instrument or act by which, under the laws in force in the province in which the property is situated, real property and immovables may be transferred by a natural person.⁵⁶

3. Definitions

Definitions can make a term applicable to different legal traditions.⁵⁷

Example:

Clause 25 of Bill S-4 (Quebec)

“Secured creditor” means a person holding a mortgage, hypothec, pledge, charge or lien on or against the property of the debtor or any part of that property as security for a debt due or accruing due to the person from the debtor, or a person who claim is based on, or secured by, a negotiable instrument held as collateral security and on which the debtor is only indirectly or secondarily liable, and includes:

(a) A person who has a right of retention or a prior claim constituting a real right, within the meaning of the Civil Code of Quebec or any other statute of the Province of Quebec, on or against the property of the debtor or any part of that property, or

(b) Any of: The vendor of any property sold to the debtor under a conditional or installment sale; the purchaser of any property from the debtor subject to a right of redemption; or the trustee of a trust constituted by the debtor to secure the performance of an obligation; if the exercise of the person's rights is subject to the provisions of Book Six of the Civil Code of Quebec entitled *Prior Claims and Hypothecs* that deal with the exercise of hypothecary rights;

4. Interpretive Clauses

Interpretive clauses clarify one system's term to avoid the apparent preference for one legal system over another.⁵⁸

Example:

Bankruptcy and Insolvency Act (Quebec)

Section 2 (2) A reference in this Act to land or real property shall be construed as including a reference to an immovable.

5. Explanatory Notes

Explanatory notes, which are often separate from the main provision, explain or limit the provision's effect or interpretation, especially when the law may contradict religious or customary laws.

Example:

Muslim Personal Status Law (Egypt)

- Women may divorce for specified reasons, with Parliament explaining in a note that the purpose was to keep women from committing adultery because it was “against nature that a woman live alone.”⁵⁹
- allows a woman a divorce if her husband marries another wife, but the explanatory note shows that the purpose is to offer a remedy to a woman who can show that harm was caused to her by her husband’s remarriage.⁶⁰

6. Separate provisions.

A law may have separate provisions that apply to specific jurisdiction. When the United Kingdom passes legislation that will also be applied in bijural Scotland, the law will often contain separate provisions.

Example:

Banking Act (United Kingdom)

In this Part “the court” means—

- (a) in England and Wales, the High Court,
- (b) in Scotland, the Court of Session, and
- (c) in Northern Ireland, the High Court.

A bank liquidator removed by order has release with effect from a time determined by—

- (a) the Secretary of State, or
- (b) in the case of a bank liquidator in Scotland, the Accountant of Court.⁶¹

Legislative drafting can be particularly challenging in a bijural jurisdiction. Still, with a thorough understanding of the legal history of the country and techniques for designing legislation in other bijural jurisdictions, drafters can put parliamentary policy into effective legislative language.

Notes:

1. Joseph Dainow, *Civil Law and the Common Law: Some Points of Comparison*, 15 AM. J. COMP. L. 419 (1967).
2. *Id.*
3. *Id.*
4. William Tetley, *Mixed Jurisdictions: Common Law v. Civil Law (Codified and Uncodified)*, 60 LA. L. REV. 677 (2000).
5. *Id.*
6. *Comparison: Common Law versus Civil Law Systems*, ILLINOIS STATE UNIVERSITY, <http://my.ilstu.edu/~ewells/cjs102/CommonvsCivilLaw-Chart.pdf>.
- 7 Gillian K. Hadfield, *The Quality of Law in Civil Code and Common Law Regimes: Judicial Incentives, Legal Human Capital and the Evolution of Law*, University of Southern California Law School, 1 (March 2006), available at http://www.law.yale.edu/documents/pdf/the_quality_of_law_in_civil_code.pdf ;
8. *Id.*
9. Lionel Cohen Lecture: *The Place of a Mixed System in the Common Law World*, 35 ISRAEL L. REV. 1 (Apr. 19, 2001), <http://www.heinonline.org.ezproxy.bu.edu/HOL/Page?handle=hein.journals/israel35&id=9&collection=journals&index=journals/israel>.
10. *Id.* at 6-9.
11. *Id.* at 9-10.
12. A guide to devolved powers, BBC NEWS, (Dec. 2, 1999), http://news.bbc.co.uk/2/hi/uk_politics/546315.stm#defence.
13. Tetley, *supra* note 4, at 699 (explaining that Sharia law is based on Islamic jurisprudence rooted in Islamic religious texts and other sources). There was, however, an exception allowing non-Muslims to follow family law systems based on their religious faiths. See also, S. H. Amin, MIDDLE EAST LEGAL SYSTEMS 361, Royston Limited (1985).
14. *Id.*
15. *Id.* at 699-700.
16. *Id.* at 700 (stating that the Coptic Christians were the second largest religious group with separate judicial councils).

17. RICHARD A. DEBS, *ISLAMIC LAW AND CIVIL CODE: THE LAW OF PROPERTY IN EGYPT* 98 (Columbia University Press, 2010).
18. *Id.* at 111-112.
19. Debs, *supra* note 17, at 114. Indeed, the new Code references twenty foreign codes, although these codes are primarily referenced for form and structure rather than for their substantive content. Enid Hill, *Al-Sanhuri and Islamic Law*, 3 ARAB L. Q. 33, 60-61 (1988).
20. Hill, *supra* note 19, at 61.
21. Tetley, *supra* note 4, at 700.
22. Lionel A. Levert, *Bilingual and Bijural Legislative Drafting: To Be or Not To Be?*, Statute L. Rev. 25(2) 151, 152.
23. *Id.* at 153.
24. Pawel Laidler, *The Distinctive Character of the Quebec Legal System* 277, 282-283 in PLACE AND MEMORY IN CANADA: GLOBAL PERSPECTIVES (M. Paluszkiwicz-Misiaczek, A. Reczynska, A. Spiewak eds., 2005).
25. *Id.*
26. *Id.* at 283.
27. Levert, *supra* note 22, at 158.
28. *Id.* at 158-9.
29. Laidler, *supra* note 24, at 283.
30. *Id.*
31. Levert, *supra* note 22, at 153.
32. Mary Garvey Algero, *The Sources of Law and the Value of Precedent: A Comparative and Empirical Study of a Civil Law State in a Common Law Nation*, 65 LA. L. REV. 776, 776-7 (2005).
33. Gordon Ireland, *Bench and Bar*, 11 TUL. L. REV. 585, 595 (1937).
34. *Id.* at 596.
35. John J. Costonis, *The Louisiana State University Law Center's Bijural Program*, 52 J. LEGAL EDUC. 5 (2002).
36. Alain A. Lavoisier, *Bijuralism in Federal Systems and in Regions of Local Autonomy*, 38 AM. J. COMP. L. SUPP. 23, 39 (1990); Algero, *supra* note 32, at 793.
37. Algero, *supra* note 32, at 793; *Ardoin v. Hartford Acc. & Indem. Co.*, 360 So. 2d 1331 at 1335 (1978).
38. *Holland v. Buckley*, 305 So. 2d 11 at 119-120 (1974).
39. Algero, *supra* note 32, at 781.
40. Lavoisier, *supra* note 36, at 45.
41. Harry R. Sachse, *Report to the Louisiana Law Institute on Article Nine of the Uniform Commercial Code*, 41 TUL. L. REV. 505, 505-06 (1967).
42. Reinhard Zimmermann & Daniel Visser, *Introduction: South African Law as a Mixed Legal System*, in SOUTHERN CROSS: CIVIL LAW AND COMMON LAW IN SOUTH AFRICA 1, 9 (Reinhard Zimmermann and Daniel Visser eds., 1996).
43. See Obeng Mireku, THREE MOST IMPORTANT FEATURES OF THE SOUTH AFRICAN LEGAL SYSTEM THAT OTHERS SHOULD UNDERSTAND, IALS CONFERENCE: LEARNING FROM EACH OTHER: ENRICHING THE LAW SCHOOL CURRICULUM IN AN INTERRELATED WORLD, 215 (2007), available at <http://www.ialsnet.org/meetings/enriching/mireku.pdf>. The British colonists in South Africa did not replace Roman-Dutch law entirely with their own law. See Gerhard Lubbe, *Three aspects of South African law*, IALS CONFERENCE: LEARNING FROM EACH OTHER: ENRICHING THE LAW SCHOOL CURRICULUM IN AN INTERRELATED WORLD, 209 (2007), available at <http://www.ialsnet.org/meetings/enriching/lubbe.pdf>. They did, however, restructure South Africa's court system and legal profession in the British image. They also passed laws that reflected English company, bankruptcy, negotiable instrument, civil procedure, and evidence law. *Id.*
44. See Mireku, *supra* note 43, at 215; See Kenneth Reid & Reinhard Zimmermann, *The Development of Legal Doctrine in a Mixed System*, in A HISTORY OF PRIVATE LAW IN SCOTLAND 1, 4 (Kenneth Reid & Reinhard Zimmermann eds., 2000).
45. See Eduard Fagan, *Roman-Dutch Law in Its South African Historical Context*, in SOUTHERN CROSS: CIVIL LAW AND COMMON LAW IN SOUTH AFRICA 33, 51, 56-57 (Reinhard Zimmermann and Daniel Visser eds., 1996); Reid & Zimmermann, *supra* note 44, at 4.
46. See *id.* at 62. See also H.J. Erasmus, *The Interaction of Substantive Law and Procedure*, in SOUTHERN CROSS: CIVIL LAW AND COMMON LAW IN SOUTH AFRICA 141, 160-61 (Reinhard Zimmermann and Daniel Visser eds., 1996); Lubbe, *supra* note 43, at 210.
47. See Zimmerman and Visser, *supra* note 42, at 10.
48. See Lubbe, *supra* note 43, at 210. See also Zimmermann & Visser, *supra* note 42, at 10.
49. Francois du Bois, *Introduction: History, System, and Sources*, in INTRODUCTION TO THE LAW OF SOUTH AFRICA 1, 3 (C.G. Van Der Merwe & J.E. Du Plessis eds., 2004).
50. In particular, South African legislative drafters must ensure that their draft bills or regulations do not violate the 2000 Promotion of Access to Information Act, the 2000 Promotion of Administrative Justice Act, and the 2000 Promotion of Equality and Prevention of Unfair Discrimination Act. See Andrew J. Burger, A GUIDE TO LEGISLATIVE DRAFTING IN SOUTH AFRICA 108-109 (2002). When drafting bills or regulations that impose penalties or fines, drafters should keep in mind the Criminal Procedure Amendment Act of 1997 and the Adjustment of Fines Act of 1991, which set maximum sentences and fines for different offenses; See also Bernard Bekink & Christo Botha, ASPECTS OF LEGISLATIVE DRAFTING: SOME

SOUTH AFRICAN REALITIES (OR PLAIN LANGUAGE IS NOT ALWAYS PLAIN SAILING), 17 (2007), available at http://137.215.9.22/bitstream/handle/2263/3430/Bekink_Aspects%282007%29.pdf?sequence=1.

51. See Bekink & Botha *Id.* at 11, 39. Section 6(1) of the South African Constitution states: “The official languages of the Republic are Sepedi, Sesotho, Setswana, siSwati, Tshivenda, Xitsonga, Afrikaans, English, isiNdebele, isiXhosa and isiZulu.”

52. See Burger, *supra* note 50, at 12.

53. *Id.* at 20

54. See, Lionel A. Levert, *Bilingual and Bijural Legislative Drafting: To Be or Not To Be?*, 25 STATUTE L. REV. 151, 161-162 (2004).

55. *Id.* at 159.

56. Use of real property and immovables here is also an example of a doublet.

57. Levert, *supra* note 54 at 163.

58. *Id.*

59. Natalie Bernard-Maugiron and Baudouin Dupret, *Breaking Up the Family: Divorce in Egyptian Law and Practice*, 6 J. OF WOMEN OF THE MIDDLE EAST AND THE ISLAMIC WORLD 52, 55 (2008),

http://recherche-iedes.univ-paris1.fr/IMG/pdf/Divorce_in_Egypte_Published_Version.pdf (citing No. 25/1929, Article 14).

60. *Id.* at 57.

61. Banking Act of 2009, art. 92(B) &108(4).

http://www.legislation.gov.uk/ukpga/2009/1/pdfs/ukpga_20090001_en.pdf. This Act even has a separate article for Scottish Partnerships followed by an article for Northern Ireland. *Id.* arts. 133 and 134.

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Appendix A

Legislative Design & Assessment Checklist

- Is the bill constitutional?
- Does the bill deal with the problem comprehensively?
- Does the bill contemplate a complete legislative scheme?
- Does the bill contain enforcement provisions?
- Will the language be understandable to the intended reader?
- Does the architecture of the bill help the reader understand the law?
- Are there Technical Defects?

Does the bill:

- have the correct enacting formula?
- specify when particular parts come into force?
- contain any problematic retroactive clauses?
- contain a “sunset clause”?
- contain a transitional clause?

- Does the bill give ministries and agencies only as much flexibility as needed?
- Will there be good governance?
- Is there evidence to back each provision in this law?
- Is the bill language correct?

Is the bill language:

- clear;
- precise;
- useable;
- flexible; and
- compatible with other laws.

- Are there reporting & monitoring requirements?

Appendix B

Legislative Drafting Organizations

- African Parliamentary Knowledge Network (APKN) <http://www.apkn.org>. APKN provides an excellent portal to many web based resources for the drafter. Perhaps one of the most useful are the APKN Drafting Guidelines, which provide standards and examples to promote better legislative drafting while respecting various national traditions. The Guidelines may be found at: <http://www.apkn.org/lrp/guidelines/guidelines/leg-guidelines>.
- United States: National Conference of State Legislatures (NCSL) www.ncsl.org.
- United States: Congressional Research Service (CRS) Provides non-partisan research on a range of substantive topics, legislative procedure, and drafting. www.crs.gov
- Europe: European Centre for Parliamentary Research and Documentation (ECPRD) ecprd.secure.europarl.europa.eu
- Commonwealth Association of Legislative Counsel (CALC). CALC's object is to promote cooperation in matters of professional interest among people in the Commonwealth engaged in legislative drafting or in training people in legislative drafting. <http://www.opc.gov.au/calc/index.htm> . CALC puts out a very useful newsletter called *The Loophole* found at <http://www.opc.gov.au/calc/loophole.htm>
- International Association for Legislation (IAL). IAL is dedicated to promote science and research in the field of legislation and focuses on the civil law tradition. The group may be accessed at: <http://www.ial-online.org/>.
- International Consortium for Law and Development (ICLAD) www.iclad-law.org The ICLAD publication *Legislative Drafting for Democratic Social Change: A Manual for Drafters*, is available to order online at <http://www.iclad-law.org/publications.html>

Appendix C

ILTAM Project Report Outline

This project report outline has been adapted from the Institutional Legislative Theory & Methodology (ILTM) as created by Boston University School of Law Professors Ann & Bob Seidman. Our students follow generally follow this outline:

I. Introduction

As is true in any good writing, your report should have a strong introduction that makes the reader want to read the rest of the report. The introduction should contain the following:

- A “grabber paragraph” that offers a striking anecdote or statistic that illustrates the problem or the importance of making a change in the law;
- A short (one paragraph) description of the current law and the social problem(s) that your bill targets;
- A brief review of the circumstances: legal, social, economic, etc. that created this need for changed legislation;
- A “table of contents” paragraph that lays out the structure of the paper;
- The reason the current law is defective or ineffective, particularly what institutional problems prevent the law from working?
- Other states or nations efforts to answer the same or similar problems;
- The reasonable policy alternatives
- The solution (your proposed bill’s provisions) that adapt the policy alternative to the unique circumstances faced by your client;
- Your proposal to monitor and evaluate the law’s impact going forward.

II. The problem

The effective legislator needs a firm grasp of the situation that they are being asked to commit their limited attention and time. Lay out the nature and scope of the problem in clear and logical terms.

III. Explanation of the behaviors.

This section should discuss whose and what behaviors constitute the identified social problem? Examine various potential categories that can explain the behavior of both the people who the law will target and the executive agencies that will be expected to enforce the laws.

- Why do certain people or groups contribute to the problem?
- Is the problem caused by more than one category of actor? Do they have different reasons for contributing to the identified problem? If so, the proposed solution (the bill) will have to address the problem in different ways.
- Is the problem caused or exacerbated by other government actors—often the executive agents who implement or enforce the law? Do executive agencies not feel empowered to address the problem? Is there a disagreement with other parts of government that there even is a problem?

IV. What are the options available?

On nearly every issue, there will be different points of view on how a particular problem should be addressed. Even if the client has a firm position on an issue, a paper that simply justifies that position does a disservice to the client. The legislator must know and be able to address their opponent's arguments, understand their options if a majority legislators do not agree with their position or there are other roadblocks to implementing their first choice solution, and perhaps have their views change according to well-developed evidence and arguments.

- What do different advocates want to see happen?
- What have other states/ countries done or are considering?
- How do the options relate to the behaviors identified in Section III?

V. The Proposed Solution

What is the best course of action based on the evidence you have gathered and your analysis? Describe the bills' provisions in some detail, along with a discussion of why you drafted the statute as you did:

- Have you done a cost / benefit analysis?
- What do you expect the social impact of this new law to be?
- Did you have to leave some points vague due to lack of information or because you want to give greater flexibility to the executive branch?
- Could there be negative consequences from changing the law? What did you do to minimize or eliminate those problems?

VI. Monitoring & Evaluation

How should the Legislature monitor the effects of the new law going forward?
Should there be:

- Annual reports by executive agencies?
- A commission?
- Periodic oversight hearings by particular committees?
- A sunset clause?

VII. Conclusion

Appendix D: An Annotated Bill

This is a bill produced by a recent APKN AfricaLaw Clinic for the Senate of Liberia. It has been annotated to help drafters see how a bill should be structured and the provisions that should be included in a well-designed bill.

The APKN Drafting Guidelines may be found at: <http://www.apkn.org/lrp/guidelines>

<p style="text-align: center;">A BILL TO ESTABLISH THE NATIONAL HEALTH INSURANCE SCHEME</p>	<p>Titles: should be succinct, non-misleading and offer a complete indication of the bill’s subject matter. Guideline 10.</p>
<p>I. FINDINGS AND PURPOSES</p> <p>Whereas, the popular saying “health is wealth” is true and encouraging to all men; and</p> <p>Whereas, a healthy nation produces a healthy and prosperous future of any nation on earth; and</p> <p>Whereas, Liberia embrace a sizable portion of the continental globe and her citizen’s health and wellbeing translate into the health and wellbeing of the nation; and</p> <p>Whereas, the opposite of this proposition constitutes a dangerous venture for any people and nation; and</p> <p>Whereas, the health and wellbeing of Liberians is paramount on the national agenda and it is the primary duty of the government to ensure their safety and to put into place the appropriate measures to enable them live a better and healthier life; and</p> <p>Whereas, thousands of Liberians expire at hospitals in emergency rooms due to little or non-payment at accountants’ desks, while in the meantime the patient suffers the debility of sickness like malaria, fever, typhoid, headache, pneumonia, appendicitis, and other minor sicknesses daily; and</p> <p>Whereas, accident victims die in emergency rooms on a daily basis as nurses and doctors watch the last breath ebb out of their nostrils due to dire monetary position; and</p> <p>Whereas, Liberia is a rich country which must use its wealth to tend to its young population in ensuring their wellbeing; and</p> <p>Whereas its National Health Scheme will be a tremendous benefit to all Liberians and will be a catalyst for rapid development because the people will be healthy and exposed to free medical attention for minor sicknesses and diseases including pregnant women and their babies; and</p> <p>Whereas, portion of the annual revenue of Liberia can be set aside</p>	<p>Findings & Purposes: Set out concise parliamentary reasons for the substantive provisions. These sections are often helpful when courts and agencies are interpreting provisions of the statute. Guideline 13.</p> <p>In this bill, the AfricaLaw Clinic did not alter the findings from the original bill since it encapsulated the desires of the elected member of parliament. In fact, when suggesting changes to the substantive provisions, Clinic members often referred back to these purposes to make sure we were being true to our client’s wishes.</p>

<p>to provide health insurance for Liberians at every health center in the country;</p>	
<p>NOW THEREFORE, the National Health Insurance Bill is passed into Law for the benefit of the people of Liberia;</p> <p>It is enacted by the Senate and the House of Representatives of the Republic of Liberia in Legislature assembled.</p>	<p>Enacting Provisions: Done according to constitutional law or national tradition, these provisions indicate that this parliamentary act has the force of law. Everything below this provision is law. Guideline 12.</p>
<p>II. DEFINITIONS</p> <p>1. As used in this chapter the following words shall have the following meanings unless the context clearly requires otherwise:</p> <p>"Board", The Board of Directors of the National Health Insurance Scheme.</p> <p>"National Health Insurance System", a health insurance program administered by the government of Liberia to provide Basic Care to all persons within Liberia.</p> <p>"Basic Health Care" consists of the following types of services:</p> <p>Maternal and Newborn Health includes the provision of health care services to Antenatal care, Labor and delivery care, Emergency obstetric care, Postpartum care, Newborn care, Family Planning;</p> <p>Child Care including, but not limited to the following services: Immunization, Integrated management of childhood illnesses, Infant nutrition;</p> <p>Reproductive Health which shall include, but not be limited to, Family planning and Sexually transmitted infection;</p> <p>Prevention and Control of Communicable Diseases is a medical condition or disease which by definition is non-infectious and non-transmissible among people, including, but not limited to Sexually Transmitted Infections/Human Immunodeficiency Virus/Acquired Immunodeficiency Syndrome, tuberculosis, malaria, other diseases with epidemic potential;</p> <p>Prevention and Control of Neglected Tropical Diseases, including, but not limited to, the following: Soil transmitted helminths, including roundworms such as <i>Ascaris lumbricoides</i> which causes ascariasis; whipworm which causes trichuriasis; hookworms which cause necatoriasis and ancylostomiasis, schistosomiasis, Lymphatic filariasis, Trachoma, onchocerciasis, Kala-azar black fever and other clinical forms of leishmaniasis, American trypanosomiasis, Leprosy, Human African Trypanosomiasis, dracunculiasis, Buruli ulcer;</p> <p>Emergency Services.</p>	<p>Definitions: Although most words in legislation should be understood according to common usage, it is often necessary to use definitions. Definitions may eliminate ambiguities or introduce new terms that have specialized meanings. Guideline 16.</p> <p>In this instance, the AfricaLaw Clinic found it necessary to define just 3 terms, but the definition of "Basic Health Care" defines the scope of the entire bill. Therefore, the drafter should always take great care in crafting the definitions.</p>
<p>III. BOARD OF DIRECTORS</p> <p>2. There shall be a board of directors within the Ministry of</p>	<p>Substantive Provisions: This bill is divided into Parts (Roman numerals) and sections (Arabic</p>

<p>Health and Social Welfare, which shall be responsible for carrying out the National Health Insurance System.</p>	<p>numerals). Guidelines 16 & 17. The bill is structured this way because the AfricaLaw Clinic tried to be true to traditional Liberian drafting practices. Guideline 9.</p> <p>This part empowers a new board within an existing ministry to carry out this program.</p>
<p>3. The board shall consist of the Minister of Health and Social Welfare, or the Minister’s designee, who shall serve as chair, 1 representative from the National Social Security and Welfare Corporation, 1 representative from the National Insurance Corporation, and 4 members appointed by the Minister, 1 of whom shall be a doctor, 1 of whom shall be a nurse or a midwife, and 2 of whom shall be experienced in health care administration. At least 2 of the board members shall be women. At least 1 board member shall have experience in providing or administering health care in rural counties.</p>	<p>This section mandates a certain composition for the new board.</p>
<p>4. Board members shall serve for a 5 year term and shall be eligible for reappointment.</p> <p>5. The Board shall make regulations designed to implement the National Health Insurance System, including but not limited to:</p> <p>(1) Setting the minimum requirements for healthcare professionals;</p> <p>(2) Establishing a registration program for healthcare facilities;</p> <p>(3) Auditing reports submitted by health care providers regarding</p> <p>(a) Patients served and services provided; and</p> <p>(b) Referrals given.</p>	<p>This section gives the term of appointment for board members.</p> <p>This section authorizes the board to make specific regulations to help carry out this program.</p> <p>Bills should be broken down into units that help a reader follow the bill and reference specific parts of the bill later. Guidelines 17 & 18.</p>
<p>6. The Board shall publicize the existence of government funded basic health care services.</p> <p>7. The Board shall be responsible for hiring those necessary to implement the National health Insurance System, including but not limited to:</p> <p>(1) Healthcare Administrative Professionals;</p> <p>(2) Support staff for the Board.</p>	<p>indirect solution: The AfricaLaw Clinic was concerned that even if Liberia created a health care scheme, many people would not know about it, so we mandated that the board publicize the program.</p>
<p>8. The Board shall monitor implementation of the National Health Insurance System.</p>	<p>Provision 8 clearly places responsibility for administering the new health care program with the new board.</p>
<p>9. Board members who have a financial interest in a matter before the board shall recuse themselves from any related vote.</p>	<p>Sections 9 & 10 provide transparency and a mechanism to prevent corruption</p>

<p>10. The Minister may remove a member of the Board—</p> <p>(1) If information relating to the conduct of a member, which could have precluded his or her appointment if it had been made available to the Minister, is brought to the attention of the Minister;</p> <p>(2) For incompetence;</p> <p>(3) For misbehavior or misconduct;</p> <p>(4) For failure to disclose, at a Board meeting, a matter in which he or she has a financial interest;</p> <p>(5) For inability to perform the functions of his office arising from infirmity of body or mind;</p> <p>(6) Who has been convicted of an offence and sentenced to imprisonment for six months or more by a competent court in Liberia or outside Liberia;</p> <p>(7) For absence, without prior permission of the Chairperson, or without reasonable cause to the satisfaction of the Minister, for more than four consecutive meetings of the Board, or absence from Liberia for more than twelve months.</p> <p>11. The members of the Board shall be paid such remuneration as the Minister shall specify at the time of appointment, subject to appropriation.</p> <p>12. If there is a vacancy on the board, the Minister shall appoint a new member within 30 days. The replacement member shall serve out the remainder of the original term.</p>	<p>by empowering the Minister to remove board members for cause.</p>
<p>IV. GOVERNMENT OF LIBERIA</p> <p>13. There shall be a National Health Insurance System that ensures all persons in Liberia receive basic health care.</p> <p>14. Subject to appropriation, Basic Health Care shall be funded by the Government of Liberia.</p> <p>15. At the direction of the board, the National Insurance Corporation of Liberia shall administer the National Health Insurance System.</p>	<p>These provisions establish the program that the board will administer.</p> <p>Funding mechanism: This program will be paid for by the Government of Liberia.</p>
<p>V. HEALTH CARE PROVIDERS</p> <p>16. Health care providers shall receive compensation from the National Health Insurance System for basic health care services provided.</p> <p>17. Health care providers shall not receive payment from patients receiving basic health care services.</p> <p>18. Health care providers shall maintain written records of the patients served and services provided, as required by the board. If a</p>	<p>The AfricaLaw Clinic was aware that to be effective, this legislation had to directed at both the Government ministries and boards, but also the health care providers.</p>

<p>health care provider cannot provide a service within Basic Health Care as needed by a patient, the provider shall refer the patient to an appropriate alternative facility and shall maintain a written record of the referral, including the services desired and recommended facilities, as required by the board.</p> <p>(1) The board may access and audit those records, as needed.</p> <p>19. Basic health care services shall be provided by qualified health care providers, as defined by the board.</p>	
<p>VI. DENIAL OF CARE</p> <p>20. Qualified health care providers shall not deny basic health care services any person covered by the National Health Insurance System.</p> <p>21. Qualified health care providers who deny basic health care to a patient without reasonable cause shall be fined 20 currency units. Reasonable cause shall include:</p> <p>(1) inability to provide care due to insufficiency of medicine, equipment or facilities, or lack of staff due to illness;</p> <p>(2) a credible threat to safety of the medical facility or its staff at the time basic health care is requested;</p> <p>(3) the presence of a quarantine or other medical emergency; or</p> <p>(4) the facility's closure according to regularly scheduled hours.</p>	<p>Sanction: Here the bill provides a clear punishment in the form of a civil fine if a health care provider denies care to a patient.</p> <p>Exceptions: There are, however, reasonable exceptions to the sanction.</p>
<p>22. Qualified health care providers who have reasonable cause to deny care shall inform the patient where the appropriate care is available and how to access that care.</p>	<p>Communication: Mandates the provider give valuable information to patients</p>
<p>23. Qualified health care providers who deny basic health care to a patient shall document and explain the denial to the Board in writing within 20 days. A qualified health care provider, or the director of a medical facility, who fails to provide such documentation shall be fined 40 currency points for each failed documentation, up to a total of 200 currency points.</p> <p>24. The Board shall review the status of qualified health care providers who violate provision (24) five or more times and may disqualify providers from receiving future payment from the National Health Insurance System.</p>	<p>Communication: This provision mandates communication between the health care provider and the Board. Failure to meet this requirement carries another sanction.</p>
<p>VII. DISCRIMINATION</p> <p>25. A qualified health care provider who fails to provide basic health care services or provides disparate treatment due to a patient's race, religion, gender, or ethnicity shall be fined 50 currency units. A second or subsequent violation of this provision shall be punished by a fine of 100 currency units.</p>	<p>Another Sanction: This part offers a more significant fine for discriminatory acts.</p>

<p>VIII. REPORTING AND MONITORING</p> <p>26. The Board shall submit to the Committee on Health of the Senate and the House of Representatives, on October 1, a report detailing the activities and operations during the previous term, including, but not limited to, reporting on:</p> <p>(1) Fiscal management, including sources of revenue, expenditures categorized by facility and services provided, and actual and projected shortages/surpluses;</p> <p>(2) Services provided, including type of ailments treated, demographic information on patients served, and the location of services rendered;</p> <p>(3) Shortages, including lack of personnel, supplies, facilities, and other critical resources;</p> <p>(4) Sanctions, including infractions, sanctions issued, and the facilities or health providers receiving sanctions;</p> <p>(5) Other information as the Board may consider necessary.</p>	<p>Reporting & Monitoring: As stated in pages 48-52, it is important that parliament create methods for getting more information on a topic on an ongoing basis. Here the Board is required to report on its activities to the relevant committees by a certain date each year. The date was chosen to coincide with the end of the Liberian fiscal year. These provisions also require specific information that members of the AfricaLaw Clinic thought would be useful to parliamentarians.</p>
<p>IX. END MATTER</p> <p>27. This Act becomes effective 180 days after the President assents to it.</p> <p>28. Any laws providing basic health care services shall continue in effect until the effective date of this act.</p> <p>29. If a court holds a provision of this Act or its application to a person or circumstance invalid, the remainder of this Act or the application of the provision to another person or circumstance remains unaffected.</p> <p>30. Unless Parliament renews this Act on or before October 1, 2020, this Act shall cease to be in effect.</p>	<p>Effective Date: gives time for the Ministry and Board time to start the program. Guidelines 45-48.</p> <p>Transitional Clause: preserves existing programs, rights, positions, etc. until the Act comes into force. Guidelines 17 & 34.</p> <p>Severability Clause: preserves the rest of the law if a court holds a provision invalid. Guideline 48.</p> <p>Sunset Clause: Specifies a date the law terminates unless renewed. Guideline 17.</p>