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Legislative Strengthening Program (LSP)

EFFECTIVELY IMPLEMENTING POLICY THROUGH LAW

September 2009

Contract No. 263-I-03-06-00015-00 (REDI Task Order No. 3)

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EFFECTIVELY IMPLEMENTING POLICY THROUGH LAW

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IRAQ LEGISLATIVE STRENGTHENING PROGRAM

EFFECTIVELY IMPLEMENTING POLICY THROUGH LAW

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I. Introduction

Laws are tools for ordering economic and social activities in a country. They are designed to solve or prevent problems, or to promote welfare. Policy making or formulation is the process whereby the objectives of governmental action and laws are established. It involves selecting and prioritizing the issues to be addressed, and then determining how to handle them. Therefore, the first step in the legislative drafting process is to identify the policies which should be carried out.

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

The initiators or proponents of laws have a crucial role to play in developing policy and laying the foundation for its proper implementation. They are responsible for 1) determining what the new law should do, 2) demonstrating that this is necessary and appropriate, 3) building consensus, and 4) making sure that the final version of the new law and the mechanisms for its implementation are sound, practical, and viable. The initiators or proponents should start by determining that a law (as opposed to a different legal instrument or another kind of governmental action) is most appropriate and effective. Then they should guide the legislative drafting process, collaborating with legislative drafters and parties who will mark up the law. This requires effective communication, meaningful consultation, sound information management, and constant attention to the structure and content of the law. The goal is to combine sound policies, accurate drafting, and productive review, to produce a good law.

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

II. Where do Policies Come From?

Objectives for major legislative initiatives usually originate in a Government Program. This is customarily developed and elaborated through electoral and political processes. Thus, it reflects the positions and interests of the governing party (or parties if there is a coalition), and starts with party platforms. In many countries, the Government also formulates and issues a legislative agenda, which identifies and prioritizes the subject matters to be addressed, and indicates the timing for doing so. This agenda may be prepared annually, or correspond to the legislative session. In Commonwealth countries, the Head of State usually opens the first session of

Parliament by reading the annual legislative program. It serves as a reference point and calendaring mechanism for institutions and parties which prepare and review draft laws.



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

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

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

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

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

III. How Should Policies be Made, and What are the Key Steps?

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

There are four key steps in the policy making process:

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

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

STEP ONE: Identifying the problem

It is necessary to precisely identify a problem in order to find ways to solve it. When a problem is defined and stated accurately and concretely, it is much easier to find a coherent solution. Far too often, causes and symptoms are confused, and the core nature of the problem is not identified. In order to avoid this problem, it is important to ask a number of poignant questions, and assess how well the answers lay the groundwork for designing solutions.

The following questions exemplify this approach:

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

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

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

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

STEP TWO: Analyzing and explaining the causes of the problem

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

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

1. The legal framework. Laws and regulations may be poorly drafted, ambiguous, outdated, impractical, counterproductive, or even contradictory. Many socio-economic problems have their origins in laws or regulations which lack cogently formulated objectives, or which are not soundly designed to meet their objectives.
2. Implementation of the law. Laws and regulations may be difficult to implement. Juridical or administrative institutions may not be able to fulfill designated roles, due to management difficulties or lack of resources (financial, capital, technical, human, or informational). Capacity constraints may be compounded by the absence of a clear mandate, or excessive administrative discretion. Corruption may be an issue.
3. Capacity of Target Groups. Target groups may lack the necessary skills, resources, and technical capacity to take appropriate actions or comply with legal requirements. There are both individual and institutional aspects to capacity requirements.
4. Information management. Parties may be unable to effectively access, analyze, organize, utilize, and/or share information. Indeed, information management problems often contribute to or compound socio-economic problems.
5. Communication issues. Lack of communication between parties who need to work together often causes socio-economic problems. Technology limitations, obstacles to mobility and transportation, and geographical distance create communication problems. This can cause target groups to be unaware of their legal obligations, or applicable working procedures. There may be barriers between official institutions and target groups, particularly those which are marginalized or disadvantaged.
6. Procedural obstacles. Ineffective procedures for making decisions, performing and documenting work, or engaging in collective action can cause socio-economic problems. Bureaucratic procedures often create obstacles, alone or in combination with the circumstances identified above.
7. Incentives and ideologies. It is extremely important to understand the motivation and ideology of target groups, in order to solve socio-economic problems. What are their goals? How do they perceive and rationalize their behavior? How do they evaluate costs and benefits? Sometimes target groups do not actually know what is in their own interests, due to disincentives, inconsistent reward structures, or confusion

between material and non-material rewards. There may be special motivational factors (like protecting cultural heritage, natural resources, or group interests).

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

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

STEP THREE: Proposing multiple solutions to the problem

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

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

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

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



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

The following chart identifies the major types of actions and mechanisms which are most appropriate, depending upon the nature of the problem:

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

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

PROBLEM SOLVING MECHANISMS	
Direct Measures	Generally punishments and rewards. Designed to have an immediate and express effect on targeted behavior. Punishments are disincentives for targeted behavior, such as fines and taxes. Rewards are incentives for targeted behavior, such as in-kind benefits or tax reductions.
Indirect Measures	Affect the status and circumstances of the target group. Include steps to enhance capacity, improve communications, develop access to information and information management, and modernize management.
Motivational Measures	Directed towards interests of the target group. May affect ideology, belief structures, and approach to the problem. Utilize advocacy, outreach, and dialogue.
Educational Measures	Closely related to motivational measures, but emphasize raising the level of knowledge of target groups, and helping them utilize relevant information. Numerous different delivery mechanisms can be utilized to teach and inform.

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

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

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

The customary mechanism for solving problems is by assigning tasks to an administrative or executive agency. It is also possible to rely on autonomous agencies, public corporations, courts,

or private institutions, or a combination thereof. Sometimes there are multiple candidates, and it is necessary to perform comparative analysis. When an existing institution is assigned new tasks, the issues raised above and the following questions need to be addressed:

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

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



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

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

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



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

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

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

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

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

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

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

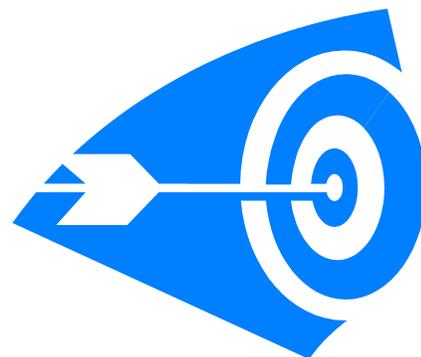
Although it may be difficult to come up with precise numbers, there are definite advantages to a quantitative approach. Market values can be used to aggregate different costs and benefits, and compare them. Sample budgets can be used to monetize costs (give them an actual or estimated financial value). Time factors can be factored into the equation by discounting costs (calculating their current value). This will indicate whether it is better to incur costs over longer periods of time. It will also reveal the true costs of securing immediate benefits by borrowing from future tax revenues (which is politically expedient but fiscally irresponsible).

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

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

When performing cost benefit analysis, it is always necessary to consider the cost of doing nothing. Sometimes it is more efficient to let a problem be, or solve only part of it. For example, it would not be efficient to impose rigorous safety measures with major costs on businesses if they only marginally enhance public welfare. Solutions should not be more expensive than the problems they address.

When finalizing legislative solutions, it is extremely important to remember that the best approach may be to combine elements of different potential solutions. In other words, different tactics may be combined into a single solution. Or multiple solutions may be combined into an overall policy. For example, the best approach could be to combine prohibitions and incentives, or conduct an informational campaign prior to an enforcement campaign, or improve both information management and bureaucratic procedures at the same time. In addition, it may be best to combine approaches to achieve incremental improvements over time, rather than tackling every aspect of a problem at once. Creativity and flexible thinking are in order, when combining the best elements of different legislative solutions to develop an optimal approach.



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



Under these circumstances, policy makers and legislative drafters may go directly to step three, by developing a limited range of potential solutions, and then conducting a rapid pro forma analysis to choose a preferred approach. From a subjective perspective, this may seem expedient and efficient. However, it is not possible to carry out Stage Four, and select the optimal solution or combination of solutions from a carefully developed set of practical and effective options. In other words, by not fully and honestly carrying out the process described above, policy makers reduce the chances of solving important socio-economic problems.

IV. How can Laws be Drafted to Implement Policy Objectives and Legislative Solutions?

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

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

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

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

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

In order to perform their tasks, legislative drafters require:

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

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

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



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

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

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

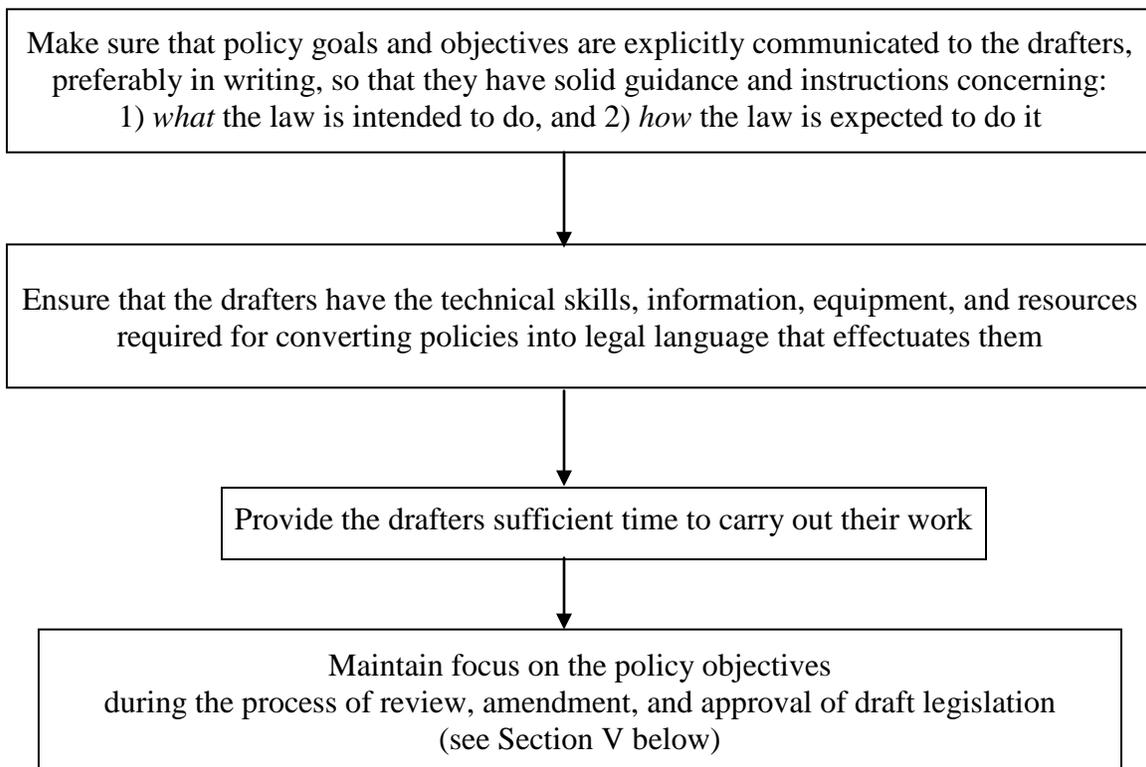
The second approach is more likely to be applied in systems where policy making and legislative drafting are combined. In Continental legal systems, and countries following Civil Law traditions, ministries and other governmental bodies often carry out these two functions more or less simultaneously.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

Despite the formal differences between these two systems and approaches, legislative drafters always have a crucial role in problem solving. They are responsible for formulating written norms which set the parameters for permissible and/or prohibited behavior on the part of the governed, and create incentives and disincentives for target groups. They also make sure that

these norms are in compliance with legal traditions and existing law, and are practical and implementable. Therefore, legislative drafters have a crucial role in converting policy into law, and making sure that legislative objectives will in fact be met.

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

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



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

Information concerning legislative intent is sometimes included in the preliminary provisions of laws. In some jurisdictions, Preambles provide background information or explain objectives. Citations (“Having regard to...”) and Recitals (“Whereas...”) may be used to explain the legal basis, rationale, and goals, but they are more commonly found in treaties and conventions. In any

event, preliminary provisions are not part of a law, and can not create enforceable norms. The body of the law must contain all of the required normative provisions.

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

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

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

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

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

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

Therefore, in countries where the legal system is in transition, or where administrative institutions are still developing and building capacity, it is counterproductive to delegate significant regulatory discretion. Implementing regulations may be deficient, and administrative machinery may not be up to the task. The policies and objectives of the drafters are less likely to be realized. Further, disproportionate discretion gives administrative agencies and personnel more power than they can responsibly manage. This can set the stage for manipulation,

inconsistent/selective enforcement, and corruption. Accordingly, the best practice in countries that are reforming their legal system is to very precisely define the relative roles of laws and regulations, and make sure that laws contain sufficient detail concerning rules and norms, and how they should be applied.

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

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

V. How can Policy Objectives be Secured During the Legislative Process?

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

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

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

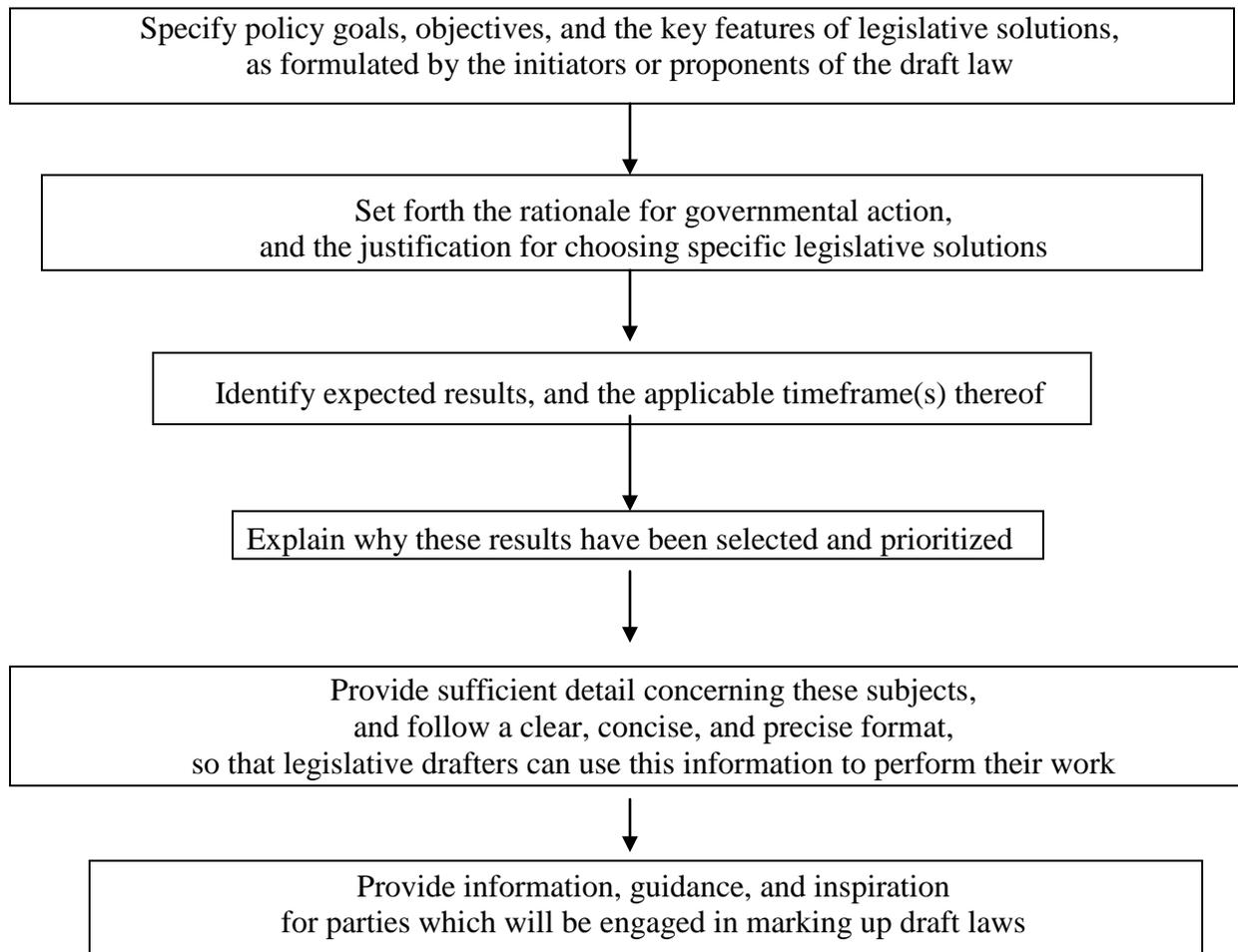
- Document and communicate their policy objectives and proposed legislative solutions
- Utilize technological and IT solutions to facilitate rational marking up of draft laws
- Help provide required information to parties engaged in marking up draft laws
- Facilitate legal scrutiny and expertise for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

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

In many jurisdictions, an Explanatory Memorandum accompanies draft laws, and is circulated widely. Its contents and use are usually specified in organic documents, such as Parliamentary

Rules of Procedure, Protocols, Executive Decrees, or a Law on Normative Acts. Typically, the Explanatory Memorandum provides background information concerning the draft law, statements of policy objectives, information concerning legal conformity, lists of related laws or those being amended, analysis concerning expected consequences (including Cost Benefit Analysis and Regulatory Impact Analysis), and other relevant details.

In the current context, the Explanatory Memorandum should:



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

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

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



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

VI. How Can Policy Making Be Evaluated?

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



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

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

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

The optimal way to approach this issue is to have Government officials establish quantitative indicators to determine if policy goals are being met, and identify the most appropriate measurement tools, as part of the policy making process. Parameters for monitoring and evaluating the results of policies can be adopted, to see if the intended solutions have been realized. Timing issues should also be addressed. But this is a time consuming process, and it opens the door to critical review.

The second best solution is to perform a qualitative review. Although not as rigorous, it can still be very useful. And it is much less threatening. Key parties involved in policy making and legislative drafting can answer the following questions:

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

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

VII. Conclusion

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

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

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

