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Legislative Strengthening Program (LSP)

LEGISLATIVE DRAFTING AND THE LEGAL PROFESSION

December 2009

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

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LEGISLATIVE DRAFTING AND THE LEGAL PROFESSION

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Table of Contents

	Page
I. Introduction	2
II. What is the role of the legal profession in the legislative drafting process?	2
III. How can the legal profession contribute more to the quality of legislation?	6
A. What can be done to improve the utilization of existing legal expertise?	6
B. What can be done to build the capacity of the legal profession?	7
IV. Conclusion	9

I. Introduction

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

At the same time, in order to prepare sound laws, there must be a balance between legal and non-legal expertise. Lawyers are indispensable for legislative drafting, and non-lawyers cannot draft legally correct legislation on their own. However, legislation is not the exclusive province of lawyers. A wide variety of input is important for making laws practical and effective. Further, elected representatives and government officials are officially responsible for carrying out legislative and administrative programs which further the interests of the country/people, and effectuate the results of electoral processes.

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

II. What is the role of the legal profession in the legislative drafting process? 3

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

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

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

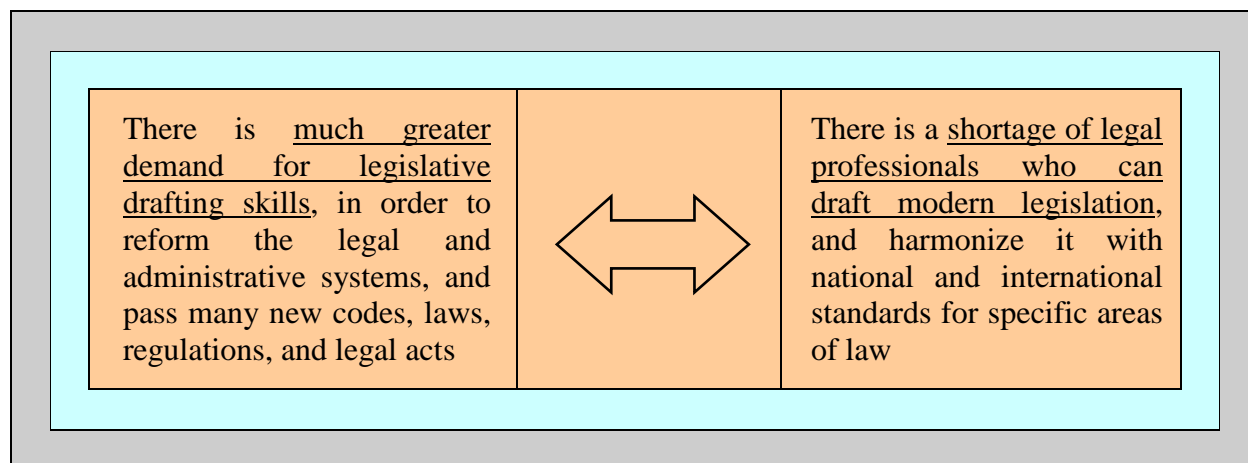
The first question to consider is *what* kinds of legal expertise can optimally contribute to the quality of legislation, and *when* (at which stages of the drafting process). Naturally, this must be in accordance with national practice. The following chart summarizes the possibilities:

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

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

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

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



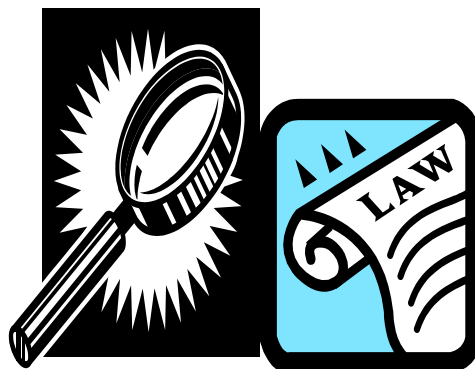
This creates a dilemma. The supply of legal expertise is insufficient to meet current demand. Meanwhile, the level of demand is increasing rapidly (mainly from officials and the business community, but also from the general public). This dilemma is exacerbated by the fact that it takes many years to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

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



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

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



It is important to understand that active drafting skills are rarer and harder to develop. They require specialized training and experience, and significant time and commitment. Generally

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

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

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

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

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





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

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

III. How can the legal profession contribute more to the quality of legislation?

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

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

Both of these approaches will be considered in turn.

A. What can be done to improve the utilization of existing legal expertise?

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

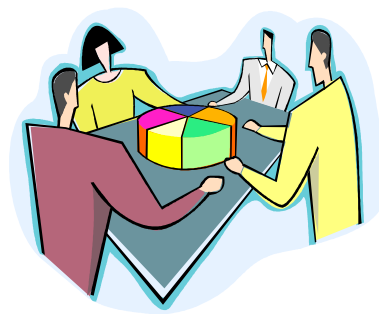
When legislation is drafted behind closed doors, and without input from diverse legal experts and social actors, it is less likely to be legally and substantively sound, and less likely to achieve its objectives in the real world. Leaders and officials need to work diligently to open the doors of government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



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

To facilitate input into the legislative drafting process:

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



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

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

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

B. What can be done to build capacity of the legal profession?

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

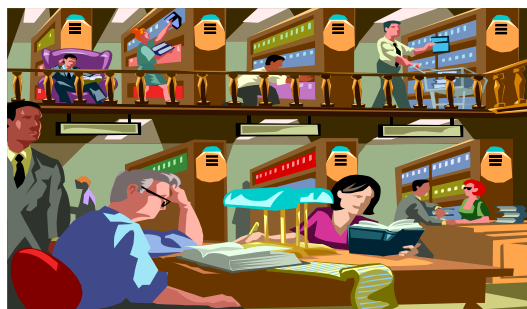
Until recently, the demand for legislative drafting skills in Iraq was more limited. Now, there is insufficient supply to meet the demand. It is expected that law faculties will start to play a more prominent role, and that there will be more opportunities for legal professionals to develop legislative drafting and interpretation skills. However, as mentioned in Section II, changes in the composition and skills of the legal profession take time. Further, there must be strict quality control measures. There is no “margin for error” when it comes to drafting legislation!

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

1. Improve law faculties and the legal education system

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

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



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

2. Expand access to information concerning legislative drafting

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

3. Expand access to specialized training on legislative drafting

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

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

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

4. Recognize contributions to the quality of legislation

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



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

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

IV. Conclusion

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

It is important to manage both the demand and supply of legal expertise in Iraq. Demand is managed by ensuring that expertise is put to best use, and making the drafting process open and participatory. Supply is managed by enhancing capacity, through a long-term approach. The most important measures include strengthening law faculties, promoting freedom of information about legislative drafting, expanding opportunities for specialized training, and offering different kinds of recognition to legal experts who contribute. By taking these measures, Iraq can improve the quality of its legislation and governance, and promote socio-economic development.

