

Part II. Legislative Drafting: Initial Materials

Chapter III: General Overview

It seems reasonable to start our discussion on legislative drafting by asking: “*Why is legislative drafting important to us at all?*” “*Where in the legal system is its place any way?*”

Most of us at this level are at least familiar with the principle of: “*Ignorance of the law is no excuse!*” Even if we can not argue every lay person has learned the principle by heart like most that have been to the gates of a law school, it would be safe to assume that, no sane person would go to a court of law and argue by claiming that, “*they killed because they did not know it was legally wrong!*” I am sure you’re taught in earlier law classes: “*Every one is presumed to know the law!*” For that purpose, laws are made accessible. What remains for you to do is start to thoroughly learn the details of the available laws.

So it becomes clear that if we are to take a position that the laws are accessible and everyone is presumed to know them, it is but logical to require that they answer societal needs, clearly and properly. And that is exactly what a course in legislative drafting tries to do. Equip future legislators (and interpreters of the law), with the capacity to draft legislations that solve social problems in a structure and language that is understandable to them, including lawyers.

But not FOR lawyers ONLY as law is TO the people. Some might need representation by a lawyer, every now and then. But we do not have to put them in a position that they need to call a lawyer every time they turn a page in legislation for interpretation. We hope lawyers have better things to do! To do this clearly requires a clear knowledge of drafting techniques, which we are going to deal with, in later chapters. But even before that, it is important that future drafters recognize their role in the big picture – the impact the draft document they will be working on is going to have on the society.

The draft-law, first and for most, should not be considered as an answer to the needs of the project owner, which might either be the policy maker, a particular ministry or an organ of government. The draft-law is, but rather a solution facilitating document to a designed

problem solving principle. Only after giving recognition to these facts can we ask the right questions in the process of drafting legislations. Accordingly, we should recognize legislation as a means of bringing the necessary changes.

So, our discussion in this Chapter will start by outlining what legislative drafting is, how it could be used to solve social problems and as to how it should be used as a tool for social change. In later chapters, we will outline the role of the drafter. Then we will deal with the specific aspects of the drafting process. Due consideration is given to the importance of language, '*legalese*' and translation, followed by some particular cases that require drafters' attention.

What Legislative Drafting is Legislative drafting is just one form of legal writing, which is considered as one of the most important part of legal writing, because of the number of people it affects as in drawing up of contracts or wills. Thus it needs independent discussion, because it also is one of the most highly regulated forms of writing. It is said that legislative drafting is one of the most rigorous forms of writing next to logic.

Any discussion on legislative drafting can not be seen independently of the primary actor, the person who actually does the job of drafting, the drafter. It is also important to discuss on the role of the legislative drafter not only because it is inseparable from the act of drafting but also because his/her duty is highly misunderstood. Some consider the drafter as a person merely given the duty of translating the ideas of other people in to legal language. This misunderstanding arises from the fact that the ideas for drafting are not raised by the drafter, but rather on instructions of a respective ministry or public office that require legislation. Therefore, based on this we are going to see what the real role of the drafter is and what it should be. At what point the drafter should be called in to the drafting process.

Section I. Distinguishing Legislative Drafting from other Forms of Legal Writing

Legislative drafting is one form of legal writing. The term legal writing in general includes all forms of writing in the legal field including the drafting of individual contractual agreements, wills and the like inclusive of legislative drafting. Legal writing had been, for example,

defined as *"the crystallization and expression in definitive form of a legal right, privilege, function, duty or status [and] . . . the development and preparation of legal instruments such as constitutions, statutes, regulations, ordinances, contracts, wills, conveyances, indentures, trusts, and leases."*¹

Legal writing, as any other form of writing basically adheres to most rules of grammar and punctuation. The biggest difference from other forms of writing however lies because it is a more formal form of writing. This formality being expressed in; avoiding first person pronouns, contractions, abbreviations, idiomatic phrases, and punctuation marks like exclamation marks that might suggest informality.²

Generally speaking, most people consider all forms of legal writing to be complicated, cumbersome and incomprehensible.[3] Within this category, legislative drafting is considered the most difficult form of legal writing. This difficulty could be considered as having two aspects. From the point of view of the drafter the problems faced arise in trying to draft a comprehensive document and how the document would be understood by the lay person. Being able to present it in simple words, while, at the same time, being able to include all policy interests, following the rules of legal writing is necessary. These points raise the issues of ethics and language. They make us question what exactly the role of the drafter is. Who is responsible for and in what manner (what type of language) is to be employed to communicate the idea. This will be dealt with in detail later when looking at the difficulty of legal drafting.

Section II. What is the importance of Legislative Drafting?

Even if there could be a difference on the following of codified laws or not exists we could all agree that it is important to have written proof of what we believe is right and wrong or our agreements and disagreements on the basis of which violators are to be held liable and face the consequences of their acts.

¹ Reed Deickerson, Fundamentals of Legal Writing, Boston: Little Brown & Co.1965, pp. 20ff

² Ibid.

The importance of written law is highly associated with the idea: “ignorance of the law is no excuse”. The use of this idea necessarily leads to the primary obligation of the state to make the laws available (known) to its citizens. That is what we call giving prior notice. And the best way to do that is to publish the laws and this is where the topic of legislative drafting comes to existence.

Once we start talking about legislative drafting our focus would be the drafter. To talk about importance of legislative drafting is to talk about the importance of the role the drafter is to play.

Usually the drafter is not himself/herself the authoritative arbiter or maker of the policies to be embodied in the provisions he/she draws. This division between the drafter's function and the ultimate authority in matters of policy has contributed to widespread misunderstanding of the nature of drafting itself. It has been assumed, for example, that the drafter's task is primarily a task of English composition. He/she is merely a scrivener, it is thought, and who is engaged in putting the ideas of others "into legal language". But this is to misjudge badly the work required of the drafter, the responsibility he/she normally carries, and the contribution he/she makes to the development of law. In fact, a very minor fraction of his/her time is spent in formal composition, while the overwhelmingly greater portion of endeavors is devoted to research and investigation clarifying and elaborating the intent of the policy-maker and assisting in the determination of the best means of achieving that intent. The drafter, in order to be effective, must participate closely and as early as possible in the policy-making process, not, to be sure, as a sponsor of policy, for a draftsman who would seek to substitute his judgment for that of the policy-maker on significant issues would not only run afoul of professional ethics but would also jeopardize his own effectiveness. Participation of the drafter in the policy-making process is that of a researcher and expert technical consultant, who can help the policy-maker arrive at sound decisions by providing data to evaluate the effects of particular policies, by calling attention to policy alternatives, and by aiding him in weighing their relative merits. The phases of the drafting process are neither sharply distinguishable logically, nor are they strictly chronological, for each phase is likely to give rise to new policy issues, requiring research or additional policy consultation with the policy-maker.

The drafting process begins with the obtaining the objectives for a legislative proposal from either the legislator who is sponsoring the bill or from the legislator's authorized agent. The drafter then converts the sponsor's request into proper form, style and legal terminology and fits the proposal into the framework of existing statutory law. The drafter reviews pertinent provisions of the Constitution, existing laws, and other relevant sources and advises the legislator of any known problems or conflicts.

1.2.1 Legislative Drafting as a Tool for Social Change

Ann Seidman a renowned legislative drafting writer and educator whose lectures have been translated in so many languages and whose books has served as manuals for so many countries says the role of the drafter is to bring about social ,political and economic transformation. And she says to bring about development and social transformation our legislation should promote good governance. According to her poverty and riches aren't directly proportional to the availability of resources but rather their allocation and use. Hence if we are going to bring about development or/and social problem our law should be able to pin point the basic social problems and see how to resolve those and for this good governance is considered the most basic aspect. To quote directly from her,

*“A country’s institutions shape, not only its resource allocations, but the quality of that country’s governance. The institutions of governance define a government’s capacity to manage social and economic resources to facilitate development or transition. Poor governance consists of ineffective, arbitrary government decision-making processes – that is, ineffective decision-making by non-transparent, non-accountable, non-participatory (and frequently corrupt) processes.”*³

Good governance is defined as *“the manner in which power is exercised in the management of a country’s economic and social resources for development.”*⁴

Four elements characterize those processes:

³ Look for the interconnection between law and social change, Ann Seidman, etla, legislative Drafting for Democratic Social Change, Kluwer International London, pp. 7 – 19.

⁴ Ibid.

1. Governance by rule: decision-makers decide, not pursuant to the decision-maker's intuition or passing fancy, but according to agreed-upon norms grounded in reason and experience;
2. Accountability: decision-makers justify their decisions publicly, subjecting their decisions to review by recognized higher authority, and ultimately by the electorate;
3. Transparency: officials conduct government business openly so that the public and particularly the press can learn about and debate its details; and
4. Participation: persons affected by a potential decision — the stakeholders — have the maximum feasible opportunity to make inputs and otherwise take part in governmental decisions.

Together, these characteristics tend towards maintaining the rule of law, and ensuring representativeness and predictability in state action.⁵ Ann Seidman says the following about the definition of institutions:

Definitions of 'institution' differ. Some emphasize the rules that govern the behaviors of the people who constitute the institution, some the participants' mental orientation towards those rules. All include the concept of repetitive patterns of social behaviors. "Institution" means a set or interrelated sets of repetitive patterns of social behaviors. Defining an 'institution' as its constitutive sets of repetitive patterns of social behaviors focuses attention on the central problem: through their society's repetitive patterns of behavior — their institutions — people shape the uses of their country's resources. Banks, schools, courts, family structures, prisons, farms, social clubs, legislatures, industries, welfare systems: these and a myriad of other institutions make up your country's political, social and economic system. Historically-shaped institutions define a country. Their institutions and how they work distinguish one country from the other. A country's institutions determine the relative wealth and income levels of its population, and of the groups and classes within it. They also determine the quality of its governance.

It is therefore under the definition given above that a country's legislative institution falls with all its elements. Hence legislators must devise ways to change the institutions that fasten

⁵ Ibid.

poverty and vulnerability, and poor governance onto fellow-citizens. The kinds of laws that legislators enact can play a principal role in ensuring good governance that facilitates transition and development. Even if as a legislator you can not resolve all the problems that are present in the country, still you can enact laws to create an enabling institutional environment, one which facilitates the efforts of relevant social actors to develop and use resources in more desirable ways.

As a legislator, you may enact laws designed to facilitate development or transition by different kinds and degrees of state intervention:

- Direct government management of an agency – for example, the post office, prisons, the courts;
- Through indirect measures – for example, laws providing training for cooperative officers, changes in land tenure rules, or financing research in new products and markets;
- Through the creation of a framework of rules within which individual actors supply the moving force — for example, contract laws.

What degree of intervention the law should adopt in a particular circumstance depends not on ideology but the specific facts of the particular social problem the law attempts to solve.

To facilitate democratic social change, you as a legislator, must do more than pronounce inspiring policies. You must enact effective legislation.

That task requires you to perform three law-making jobs: enacting legislation, overseeing its implementation, and communicating with constituents. Whether you contribute to all three tasks depends on your capacity to assess a bill in the public interest.

To assess a draft in the public interest requires that you as a ‘trustee for the public interest’ assess it on the basis of reason informed by experience.

To do that – and thus to exercise the legislative power effectively – you must answer a central question: Why do people behave as they do in the face of a rule of law? This is a question we are going to answer in the next part of the problem solving approach. But even before we have to answer “Why must governments use law to induce deliberate change? Can it use the legal order to do so?”

“A law” means a rule promulgated by the state and implemented by officials. A law may take many forms: statutes, local ordinances, subsidiary legislation, ministerial rules, administrative regulations, a military junta’s decrees;

“The legal order” means the entire normative system in which the state has a finger. It includes, not only the laws themselves, but also the institutions that make the laws (legislatures, independent agencies, ministries, and courts) and that implement the laws (courts, ministries, the police) (others sometimes call this ‘the legal system’).

Contrarian’s argument #1: Society makes law; law constitutes an artifact of society. How can society’s artifact change the society that made it?

Answer: ‘Society’ does not make law. Law-makers – like yourself – make law. Within the limits of law, law-makers can use law to bolster existing institutions, or to change them.

Contrarian’s argument #2: The ruling class controls both the law-making system and the economy. The ruling class will never introduce laws that disadvantage the ruling class.

Answer: In every country’s history, moments occur when opponents of the class that controls the economy control the lawmaking machinery. Immediately after the defeat of colonialism, giant colonial companies often still held controlling economic power. New, populist parties held political power. These new parties had an opportunity to use law to change the inherited economic institutions. (Too often they failed – but that is another story.)

Contrarian’s argument #3: Many laws do not achieve their stated goals, not due to accident, or law-makers’ inattention, but because using law to induce social change cannot work.

Answer: Sometimes, law works. Before an income tax law, nobody paid income taxes. Without a national election law, people cannot vote in national elections. Sometimes law does not work. In no country does a law forbidding sexual intercourse between unmarried people achieve 100% conformity to its commands. The problem is to discover what makes some laws work and others fail, and then to use that knowledge to write effective laws.

Contrarian's argument #4: Law's function concerns dispute settlement. The laws declare rights and duties to instruct judges how to decide cases. It has no function in behavioral change.

Answer: Law has many functions. Among them, it decides disputes. To facilitate development and transition, law serves as government's principal instrument to change problematic social behaviors.

Contrarian's argument #5: The post-modern school of literary criticism 'deconstructionism' – holds that a 'text' (the words on their face) has no inherent meaning. A reader's own perceptions and values shape its meaning. A law's readers – its addressees – similarly interpret its text to suit their convenience – and never mind what the law-maker intended.

Answer: Words constitute more than silly putty. Society exists because we can and do communicate with each other. We can draft a law sufficiently precisely to convey its core meaning to its addressees.

Contrarian's argument #6: Only the rule's underlying political decision counts, not the technical process of stitching words together into a law. Design good policies, and legal technicians will draft good laws. Study policy, not law.

Answer: Of course a government must have sound policies. A policy, however, does not enforce itself. You must ensure that a bill sufficiently translates its generalities into the operative commands, prohibitions and permissions of the law.

Contrarian's argument #7: Behaviors reflect multiple causes. Of these, the law constitutes only one. These causes interact in ways so complex that nobody can say whether or how law causes behavior. Unless one can do that, one cannot use law purposively. The law and development project becomes a mission impossible.

Answer: Behavior never has a single, determinative cause. In addition to a law's words, other non-legal factors do influence behaviors (see Section E below). In assessing a bill, you must understand not only its words, but also the non-legal

constraints and resources that will affect the behavior of its addressees. By changing the causes of problematic behaviors, however, law can induce more desirable ones.⁶

The contrarians overstate the case. Law works sometimes (income tax, election law); it does not work other times. The problem becomes to understand the factors that produce in one case effective law, and in another, merely symbolic law.

To help solidify the above arguments and the conclusion reached following is presented the idea of the problem solving approach to drafting. This idea of the problem solving approach in drafting is considered vital to developing nations like Ethiopia and makes a very good sense to take good note of.

1.2.2 Problem Solving Approach to Drafting

The legislative problem-solving approach is a methodology that seeks to solve or prevent social problems based on reason (that is, looking at the facts as they are in the “real world”) and the experience of those who are connected with the social problem. The legislative problem-solving approach is simply away to explain problematic behavior in order better to understand the behavior. By better understanding the behavior, we can begin proposing precise legislative policy responses to change this behavior. Thus, the legislative problem-solving approach is a step by step method of finding effective legislative solutions to social issues or problems. The basic steps are

- A) To identify the problem as it exists,
- B) To analyze and explain the problem and create hypotheses based on the causes of the problem,
- C) To propose solutions based on the these hypotheses, and
- D) To create a system to monitor and evaluate the chosen policy in order to understand which hypotheses were incorrect (and why) and to modify the policy accordingly.

Here are the steps in more detail:

⁶ Id., pp. 21ff.

Step 1—Identify and describe the social problem and the persons and institutions involved in the problem.

- a) Identify and describe the main problem.
- b) What is the problematic behavior and who is responsible? Identify the persons and institutions (including current implementing agencies) that may contribute to the problem).
- c) What is the underlying problematic behavior? Identify the problematic behavior of these persons or institutions.
- d) Identify other persons that are affected by the problem (usually in a negative way).
- e) Identify possible implementing agencies: Any agencies that now have (or could in the future have) responsibility for implementing the legislative solutions to the problem.

Step 2—Analyze and explain the problematic behavior and create hypotheses (explanations) based on the causes of the behavior.

- a) Analyze the problematic behavior of the persons and institutions (possibly including current implementing agencies) that contribute to the problem in order to create hypotheses about why these persons and institutions act, or fail to act, as they do.
- b) Seven analysis factors to help determine the causes of problematic behavior, namely
 - ☒ Rules.
 - ☒ Opportunity
 - ☒ Capacity.
 - ☒ Communication.
 - ☒ Process.
 - ☒ Interest.
 - ☒ Ideology.
- c) There may be multiple and overlapping explanations for problematic behavior.
- d) Create hypotheses or explanations as to the causes of the problem using the 7 analysis factors.

Step 3—Propose possible solutions based on these hypotheses.

a) Formulating solutions

- ☒ Finding solutions that address the causes of problematic behaviors.

- ☒ Explanations for problematic behavior dictate potential solutions.
- ☒ Where to look for solutions: (a) foreign law and experience, (b) professional literature, and (c) your own country's past experience.

b) Designing implementation provisions.

- i. General categories of solutions:
 - direct measures,
 - indirect measures, and
 - educational measures.
- ii. Choose an implementer from the following types of implementers:
 - courts and tribunals,
 - administrative agencies,
 - public corporations, and
 - private-sector organizations.
- iii. Choose between using an existing implementer or establishing a new one.

c) Elaborating alternative solutions.

d) Assess the costs and benefits of each of the possible solutions and choose the solution most likely to solve the problem in the most effective way.

- i. Purposes of cost-benefit analysis.
- ii. Monetary and non-monetary considerations.
- iii. Basic methods of analyzing costs and benefits.
 - Comparing the chosen policy with doing nothing (“status quo” analysis).
 - Comparing the chosen policy with alternative policies.

e) Judging between alternative solutions.

f) Combining the provisions into a comprehensive policy.

Step 4—Create a system to monitor and evaluate the chosen policy in order to understand which hypotheses were incorrect (and why) and modify the policy accordingly.

To further explain in detail the problem-solving approach to legislation, the essential job of a professional legislative drafter is to make sure that the legislation will solve the problem being addressed by the sponsor (proponent) of the legislation. It is very important to ask the right kinds of questions of the proponent of the legislation in order to understand the “actual” intent of the legislation, not just the “superficial” intent that may appear in the words of the draft. The problem-solving approach is a practical tool you can use to obtain (or seek) the

information you and other policymakers will need to put together legislation that is actually effective in solving social problems in society.

Step 1—Identify and describe the social problem and the persons and institutions involved in the problem.

Identify the social problem.

Legislations should be designed to fix social problems. Therefore, drafting effective legislation requires the drafter to be able to precisely identify the social problem or issue to be addressed by legislation. You must ask yourself and others involved in drafting the legislation, what is the problem the legislation seeks to solve? What are ways not to state the problem? (e.g., “*There is no law on [topic]*”). What is the best way to state the problem? (e.g., “*Rural farmers are unable to get their crops to market in a cost-effective way*”).

If possible, state the problem as a specific action or omission on the part of the persons and institutions involved in the problem. In doing this, you must distinguish between causes and conditions. In order to do this, you must identify who may be responsible for behavior that contributes to social problems and what exactly the behavior is. That is, you must determine who — whether stakeholder or implementing agency (or both) — is responsible for what problematic behavior. Remember that, you are not blaming the persons or you are identifying. (So, for example, it is not the farmer’s fault that he cannot get his crops to market.) That is what is meant by distinguishing between causes of the problem and the conditions of the problem. Here, you are describing the conditions. Later, you will seek to explain the causes. Finally, you must also identify the persons and institutions that are affected by the problem (usually in a negative way).

Who is responsible?

Identify the persons and institutions (including current implementing agencies) that contribute to the problem. Here, the first step in more precisely describing the social problem is to separate “symptoms” of the problem from actual problem behavior. That is, you must be able to distinguish between causes and conditions. This is not to say that you should disregard the symptoms. However, in order best to begin at this stage, we must move past the “symptoms” and search for the problematic behavior. When we find the problematic behavior we will also discover the persons or institutions that either contribute to, or are affected by, the problem. At this stage you must ask, who is involved (generally) in the problem? (This can include individuals, organizations, and Government agencies.) More specifically, what persons (individuals, organizations, governmental agencies) and what behaviors (actions or inactions/omissions) of these persons actually contribute to (or cause) the problem? In other words, who is contributing to (or causing) the problem? And what are they doing (or not doing) that is contributing to (or causing) the problem?

What is the underlying problematic behavior?

Identify the problematic behavior of these persons or institutions.

Each social problem is caused by more than one problematic social behavior. Therefore, it is important to identify each of the problematic behaviors, even though the ultimate policy or law may not deal with all of them. You can use the checklist of questions below in order to help identify problematic behaviors.

Checklist of questions for identifying problematic behaviors:

- What are the overt manifestations of the problem?
- Who is directly affected by the manifestations?
- Where is it happening?
- When is it happening?
- Whose behavior causes or contributes to the problem directly?
- Whose behavior causes, contributes to, or permits the problem indirectly?

(NOTE: This checklist is not comprehensive. These are examples of the most basic types of questions that are generally applicable. Moreover, not all of the questions above may always

be applicable in the examination of every social problem. The drafter should ask whatever questions are appropriate.)

Identify other persons that are affected by the problem (usually in a negative way).

Who is affected by the problem? In what way are these persons affected?

Identify possible implementing agencies.

Any agencies that now (or could in the future) have responsibility for implementing the legislative solutions to the problem.

What is an “implementing agency”? The term “implementing agency” means an organization or person assigned with the duty to implement a given rule. Usually, the implementing agency is one or more governmental organizations (or officials). But sometimes a pseudo-governmental or nongovernmental entity is given responsibility for implementing the law. When addressing a social problem through legislation, it is essential to choose an appropriate implementing agency (or agencies) to carry out the solution to the problem. It is also important not to exclude a potential implementing agency before an appropriate legislative solution has been chosen. This is because often the choice of solution will determine the choice of the appropriate implementing agency. And solutions are not chosen until a thorough analysis of the problem is completed.

Step 2—Analyze and explain the problematic behavior and create hypotheses (explanations) based on the causes of the behavior.

A) Analyze the problematic behavior of the persons and institutions identified in ‘Step 1’ (above) that contribute to the problem in order to create hypotheses or explanations about why these persons and institutions act, or fail to act, as they do.

B) Seven factors to help determine the causes of problematic behavior.

The legislative problem-solving approach uses seven analytic factors to help explain why the problem is occurring. Each factor focuses on one aspect of a behavior and asks questions that

will lead to a better understanding of the problem and helps to come up with more meaningful policy responses. The seven factors are described below.

1– **Rules.** The term “rules” most often refers to law, rule, or social norm that affects a stakeholder (regulated person) and contributes to the problematic social behavior. Some examples of ways in which the rules contribute to the problem are the following:

- a) Laws which are vague or ambiguous.
- b) Laws that permit or require the problematic behavior.
- c) Laws that do not address the causes of the problematic behavior.
- d) Laws that do not provide for accountability in their implementation.
- e) Laws that grant too much discretion in their implementation or that too greatly restrict discretion.

2– **Opportunity.** The term “opportunity” refers to the circumstances, occasion, chance, or probability that a stakeholder has to engage in the problematic social behavior, to obey or disobey a law, rule, or social norm. One possible example is the opportunity of governmental officials to engage in corrupt behavior (such as accepting or soliciting bribes).

3– **Capacity (or ability).** The term “capacity” refers to the ability (or inability) or capability that a stakeholder has to engage in the problematic social behavior, obey a law, rule, or social norm. Capacity also includes any obstacles that may impede or prevent the stakeholder’s ability to engage in the problematic behavior or the inability to engage in desired behavior. (In practical terms, “capacity” often overlaps with “opportunity”.) Some possible examples that address the “capacity” factor are: inability to obtain credit, lack of expertise, or lack of transportation (for example, a farmer who cannot get produce to market).

4– **Communication.** The term “communication” refers to the effectiveness with which a law, rule, or social norm is communicated to the stakeholders affected by the law, rule, or social norm. If people do not know what actions the law permits, requires, or prohibits, how can they possibly be expected to act in conformity with the law? It also includes communication between implementing agencies (regulators) and stakeholders and among different implementing agencies.

5– **Processes and procedures.** The term “process” refers to criteria and procedures (or other pragmatic or logistical aspects) that

a) explain the decision-making process that leads a stakeholder to decide whether to conform or not to conform to a law, rule, or social norm, and b) encourage or discourage a stakeholder in confronting the problematic social behavior. This factor is particularly important in the case of an institution (such as a governmental agency, a corporation, or other complex organization), in which the decision-making process is not vested on a single individual; how an institution's complexity, structure, and procedures can affect the institution's decision on its course of action — especially when it comes to obeying or disobeying the rules.

6– *Interest and incentive (or disincentive)*. The term “interest” refers to the incentive or motivation (both material and non-material) for a stakeholder to engage in the problematic social behavior. This is the stakeholder's perception of the personal costs and benefits of complying with the law, rule, or social norm. Many types of personal incentives or motivations may constitute an interest that is sufficient to affect or contribute to the problematic social behavior. This factor also includes “disincentives” that discourage good behavior. Some possible material incentives (or benefits): Money or increased employee fringe benefits. Some possible non-material incentives (or benefits): Personal or political power or the esteem of family, friends, associates, and others.

7– *Ideology*. The term “ideology” refers to the values and attitudes that shape how we look at the world and, therefore, shape our decisions. Ideology also encompasses any subjective motivations that do not constitute “interests”. These are the backgrounds and personal values each person brings to any set of circumstances, which, in turn, affect how the person behaves in the face of those circumstances.

C) There may be multiple and overlapping explanations for problematic behavior.

Remember that often more than one factor may interact to affect or contribute to the problematic behavior. For example, a rule affecting a person may require the person to do something that cannot be completed because the person lacks the capacity to do it. In this example, the “rule” factor has combined with the “capacity” factor to explain the problematic behavior.

D) Create hypotheses as to the causes, based on the causes of the problem using the 7 analysis factors.

Step 3—Propose possible solutions based on your explanations.

In this session, we will discuss a) where to look for solutions, b) what to consider when deciding how to implement the solution, c) the importance of elaborating several alternative solutions, and d) how to test the possible solutions for adequacy, including how to conduct a basic cost-benefit analysis.

A) Formulating solutions.

The next step is to propose solutions for each of the causes of problematic behavior you have just identified, and then to combine the solutions into a policy that will address the social problem you originally identified.

1– Finding solutions that address the causes of problematic behaviors.

Now you must a) propose possible solutions to each of these causes, and b) use the individual solutions to build a comprehensive policy.

2– General categories of solutions. There are three general categories of solutions: direct measures, indirect measures, and educational measures.

(a) Direct measures address factors associated with interest or incentive. Direct measures include both punishments and rewards.

Some examples of direct measures might include

- a fine for violating a policy (punishment),
- tax benefits that encourage certain types of businesses or activities (reward).

(b) Indirect measures. Indirect measures address factors associated with opportunity, capacity, communication, and process. Such measures are generally not rewards or punishments.

(c) Educational measures. Educational measures are generally aimed at influencing ideology, but may also deal with capacity in situations in which the capacity factor involves a lack of information or expertise.

3– Explanations for problematic behavior dictate potential solutions.

It is important to think of the analytic factors not only as factors that affect or contribute to problematic social behaviors, but also as factors on to which new policy or law should focus on in order to change the problematic behavior. The table below shows the general types of solutions that are suggested by the particular category of problem they address. (*Problem, Factor, Possible Solution(s)*)

Opportunity: Indirect measures that include a) eliminating opportunity to engage in the problematic behavior, or b) providing the opportunity to engage in the desired or preferred behavior.

Capacity: Indirect measures, educational measures that include

a) limiting the capacity of the stakeholder to engage in the problematic behavior, or b) capacity-building to improve or enhance the role occupant's ability to engage in the desired or preferred behavior.

Communication: Indirect measures that include provisions for informing those affected by the rule or law, so that they are aware of what the law or rule requires, permits, or prohibit and can, therefore, conform their behavior appropriately.

Process: Indirect measures that simplify or eliminate overly complicated processes or procedures.

Interest: Direct measures (reward and punishment) that include

a) eliminating or reducing the interest or incentive to engage in the problematic behavior, or b) introducing or increasing the interest or incentive to engage in the desired or preferred behavior.

Ideology: Educational measures that show the negative aspects of the ideology and the positive aspects of the solution.

4– Where to look for solutions.

Your own ideas, based on logic and your experience, are the first place to look for solutions. Other possible sources for solutions include a) foreign law and experience, b) professional literature, and c) your country's own past experience.

A) Foreign law and experience: Foreign law and experience — including both successes and failures — can be an important source for solutions.

B) Professional or academic literature.

Professional or academic literature may also provide a good source of ideas for proposing solutions.

C) Your own country's past experience.

Your country's own past experience can also provide ideas for solutions.

Designing implementation provisions

You must make it clear in your policy that “the implementation provisions” are responsible for implementation of the policy. You also must select, choose an implementer that has adequate structure, processes, and resources.

- Choosing an implementer. Once you have considered the types of measure you need, you must next choose an appropriate body to implement the measure. Who will be responsible for administering the provisions of the legislation? What governmental agency or official, or private organization or person, is responsible for oversight of the persons that are involved in the problem (identified above)? There are 4 basic types of implementers:
 - Courts and Tribunals,
 - Administrative Agencies,
 - Public Corporations, and
 - Private-sector Organizations.

Each type of implementer has both advantages and disadvantages

Courts are the most formal tribunals in a State for resolving disputes between various parties.

Other tribunals are less formal types, which are sometimes established to deal with specific issues.

Administrative agencies include governmental ministries, departments, and other public entities.

Public corporations can also be important tools in carrying out public policies.

Private-Sector Organizations include hospitals, universities, research institutions, charities, and other non-governmental organizations.

b) Choosing between using an existing implementer or establishing a new one.

You may find that existing implementers are unable successfully to implement the measures called for in your policy. In such a case, you will have to weigh whether to establish an entirely new entity or to use an existing one. Is a new official or agency or an existing agency appropriate to administer the legislation? Does the administrator need additional powers, resources, or personnel? If an existing agency is appropriate to administer the legislation, does the agency need expanded authority, resources, or personnel?

c) Elaborating alternative solutions.

At this stage, it is important to include several possible solutions. Later, you will choose from among these possibilities to identify your final proposed policy solution.

d) Assess the costs and benefits of each of the possible solutions and choose the solution most likely to solve the problem in the most effective way.

In order to determine which of the various possible solutions will be most effective, you must ask the following questions:

Do the foreseen benefits of the policy outweigh the costs? If so, how does the ratio of costs and benefits compare to the current situation (the “status quo”) and other policy alternatives? To answer these questions, you must conduct a basic cost-benefit analysis of each of the possible solutions.

- Purposes of cost-benefit analysis.

The cost-benefit analysis provides a threshold for whether a particular legislative policy solution to a social problem will be more effective than the current state of affairs. That is, a chosen policy must provide more benefits than it costs. The cost-benefit analysis also helps to quantify the costs and benefits of each possible choice of policy solutions in a comparative way. This enables choosing the most effective among the alternative proposed solutions.

- Monetary and non-monetary considerations.

It is important to consider in a cost-benefit analysis both monetary and non-monetary costs and benefits.

- Basic methods of analyzing costs and benefits.

In order to determine the relative costs and benefits associated with your possible policy solutions, you must

ask what would happen if there were no change in the current policy (that is, if you kept the “status quo”), At this point, it is probably relatively easy to determine the costs of taking no action. Also make sure to include in the analysis any benefits of taking no action (since someone is often benefiting from the current state of affairs).

compare the costs and benefits associated with the alternative policy solutions. Here, analyze each of the alternative policy solutions to determine how they compare to each other in terms of how well they eliminate or reduce of the current social problem. Also make estimates of the relative monetary and non-monetary costs of implementing the alternative policy solutions.

5– Judging between alternative solutions.

After conducting a basic cost-benefit analysis of the various possibilities, you should choose the most effective solution to include as a part of the larger comprehensive policy.

6– Combining the provisions into a comprehensive policy.

After you have chosen provisions that deal effectively with each of the causal factors you have identified, you will combine the provisions into a comprehensive policy. You can use a checklist to “test” whether the comprehensive policy will be an adequate solution.

Following is a Checklist to Ensure Comprehensive Policy, which will provide an Adequate Solution:

- Does the policy actually induce the desired behavior?
- Alternatively, does the policy eliminate or reduce the problem behavior?
- Does the policy systematically address each of the causal factors you have identified?
- Does the policy prescribe appropriate implementing agency behaviors likely to result in :
 - a) Effective implementation, and
 - b) Implementation that is consistent with good governance?
- Can the government allocate sufficient resources to ensure effective implementation?
- Are there sufficient provisions for reviewing the law and making changes later if required?

Step 4—Create a system to monitor and evaluate the chosen policy in order to understand which hypotheses were incorrect (and why) and modify the policy accordingly.

Review Questions

1. What do we mean by legislative drafting?
2. How is legislative drafting from other forms of legal writing?
3. How could legislative drafting be used as a tool for social change?
4. State some of the basic steps in the problem solving approach.

