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Editor in Chief—John Mark Keyes, CALC Council Member

Correspondence

Correspondence about *The Loophole* should be addressed to—

John Mark Keyes, Editor in Chief, *The Loophole*,

E-mail: jmkeyes13@gmail.com

Contents

Editor's Notes

This is the third issue of the Loophole devoted to papers presented at the CALC Conference in Hyderabad in February of 2011.

It begins with three papers dealing with the challenges of drafting laws in more than one language. As Marie-Claude Guay notes in her paper, 19 of 54 Commonwealth countries have more than one official language. In addition, many others publish their laws in English as well as in their official languages. Multilingual law-making is a surprisingly current phenomenon that is addressed in a variety drafting approaches, both in terms of the way each language version is prepared as well as the standards of linguistic equivalency that are applied. The three papers on this subject provide a sampling of this variety in the context of Canada (Marie-Claude guay), Hong Kong (Angie Li and Alan Lai) and Rwanda (Vastina Nzanze). They are supplemented by a fourth paper by Raymond Gateraruke) that provides further background on law drafting processes in Rwanda.

The next two papers consider the IT aspects of law-making. Wim Voermans and his co-authors suggest that it is time to throw off the shackles of paper-based publishing and more fully use the potential that IT offers in terms of both law-making and law-publishing. In turn, Ed Hicks advances a framework for the acquisition of IT systems, particularly by smaller jurisdictions with more limited resources.

This issue concludes with a paper from the final session of the Conference, which addressed current issues in drafting legislation. Anna Kotzeva and her co-authors present their case for implementing the Statute of the International Criminal Court (the Rome Statute) in domestic legislation so as to apply to crimes committed in the past.

The next issue of the Loophole will contain the remaining papers from the Hyderabad Conference along with others that deal with the legislative counsel's role in terms of the functionality of legislative texts, including their readability.

Finally, I would note that planning has begun for the next CALC conference in Capetown, SA 10-12 April, 2013. I am the chair of the programme committee, which also includes Peter Quiggin, Katy LeRoy and Edward Stell. If you have ideas for the programme, we would be delighted to hear from you.

John Mark Keyes

Ottawa, January, 2012

Upcoming Conferences

Clarity Conference

Clarity's 5th international conference will be held from May 21-23, 2012 at the National Press Club Washington DC. Details are available at https://sites.google.com/site/claritydc2012/.

Annual International Conference on Law, Regulations and Public Policy

This conference will be held at Hotel Fort Canning, Singapore 1-12 July, 2012. Details are available at http://www.law-conference.org/index.html.

Bi-annual Legislative Drafting Conference of the Canadian Institute for the Administration of Justice (CIAJ)

This conference will be held in Ottawa, Canada 10-11 September, 2012. The theme will be *Legislative Architecture – Building with Words.* It will examine the general structure of legislative systems, including the interplay of different forms of legislation with other regulatory instruments as well as the legislative revision and regulatory reform. The keynote speaker will be Professor Edward Rubin of Vanderbilt University in Tennessee. He will set the context of the conference with an address on Re-thinking Politics and Law in the Modern State. The conference will also include updates on recent case law on legislative matters, the impact of international accessibility standards on the publication of legislation and workshops on practical aspects such as ethical issues for legislative counsel and drafting provisions governing the commencement of legislation or authorizing the making of delegated legislation. Details will be available soon on the CIAJ website: http://www.ciaj-icaj.ca/.

Subject Catalogue of Loophole and Newsletter Articles

Nick Horn[1]

You know you read that interesting article in the *Loophole* about legislative intention. Sometime in the last decade. Or your colleague has just been chatting about this fantastic conference she attended, and you are just positive you recall reading an overview of conference proceedings in the *Newsletter*...a few years back. Or you're absolutely certain you read...something, somewhere, sometime...about the retirement of the head of the drafting office of *[insert Commonwealth jurisdiction of choice here]*. But you're just not sure...where!

Now here is your answer - the **CALC catalogue of Loophole and Newsletter articles**! All significant articles from each (to date) are listed conveniently by subject, with each listing accompanied by a thumbnail summary. The catalogue includes separately listed 'personalia', with notes about individual legislative counsel, and also lists reports from CALC conferences and other relevant drafter meetings. After its first appearance in the *Loophole*, February 2011, the catalogue has been updated in January 2012, and you can find it on the CALC website linked at the top of the archive pages for the *Loophole* and the *Newsletter*:

http://www.opc.gov.au/calc/loophole.htm

http://www.opc.gov.au/calc/newsletters.htm

Having perused the catalogue, all you have to do now is go back to the archive page - the website offers free access to all published editions of each- and Bobby's your Auntie!

[1] Australian Office of Parliamentary Counsel.

The Yin and the Yang of Drafting in Two Languages: From Finesse to Faux Pas

A Canadian perspective

Marie-Claude Guay[1]

Abstract:

Laws at the federal level in Canada are published in English and French. This article describes the multiple challenges faced at the federal level in Canada in preparing law in both languages and how they are dealt with. Some are obvious, like the challenge of conveying the same rules in both languages. The article also discusses other less obvious challenges that result from cultural differences.

Linguistic duality has been a longstanding concern in our nation. Canada is a country with both French and English solidly embedded in its history. The constitutional language protections reflect continued and renewed efforts in the direction of bilingualism.

Dickson, CJC in Société des Acadiens v. Association of Parents[2]

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[1] Senior Counsel at the Legislative Services Branch of the Justice Department of Canada. The views expressed in this article are the personal views of the author and do not necessarily reflect the official views of the Department.

[2] [1986] 1 S.C.R. 549, par. [19].

Introduction

Many countries and international organizations publish their laws, agreements and other documents in more than one language. In the Commonwealth, 19 of the 54 members have more than one official language.[3] Some of those 19 countries publish their laws in one language only, but the majority of them publish their laws in two or more languages.[4]

In Canada, there are two official languages: English and French.[5] At the federal level, laws must be published in both official languages.[6] At the provincial level, publication in both languages is not always mandatory. In fact, only the provinces of Quebec,[7] Manitoba[8] and New Brunswick[9] are constitutionally obliged to publish their laws in English and French. In addition, the province of Ontario requires by statute the publication of some of its laws in both languages.[10] The laws of Canada's three territories (Yukon, Northwest Territories and Nunavut) must also be published in English and in French.[11]

Drafting law in more than one language necessarily comes with challenges. It is a job that requires open-mindedness and great teamwork from everyone involved, but also sometimes requires certain concessions to be made. Having regard to the experience at the federal level in Canada, this paper will explore the main challenges faced in drafting in a bilingual jurisdiction and suggest ways to deal with them.

Avoiding discrepancies

One of the challenges of drafting in a bilingual jurisdiction is to convey the same message in both languages. The goal of publishing laws in two languages is to

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[3] Those countries are Botswana, Cameron, Canada, Cyprus, India, Lesotho, Malta, New Zealand, Rwanda, Seychelles, Singapore, South Africa, Sri Lanka, Swaziland, Tonga, Tuvalu, Uganda, Tanzania, Vanuatu. See the country profiles on the website of the Commonwealth Secretariat at http://www.thecommonwealth.org/Internal/142227/members/.

[4] The linguistic profiles of these countries are set out in *L'aménagement linguistique dans le monde*, Quebec, TLFQ, Laval University, by Jacques Leclerc at http://www.tlfq.ulaval.ca/axl/.

[5] Section 16 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982* (U.K.), 1982, c. 11.

[6] Section 133 of the *Constitution Act, 1867*, (U.K.), 30 & 31 Vict., c. 3 and subsection 18(1) of the *Canadian Charter of Rights and Freedoms*.

[7] Section 133 of the Constitution Act, 1867.

[8] Section 23 of the *Manitoba Act, 1870*, 33 Vict., c. 3.

[9] Subsection 18(2) of the Canadian Charter of Rights and Freedoms.

[10] Section 3 of *French Language Services*, R.S.O. 1990, c. F.32.

[11] Section 4 of the *Languages Act*, R.S.Y. 2002, c. 133, subsection 7(1) of the *Official Languages Act*, R.S.N.W.T. 1988, c. O-1 and subsection 10(1) of the *Official Languages Act*, R.S.N.W.T. (Nu.) 1988, c. O-1.

ensure that both linguistic groups are made aware of the law or are at least capable of comprehending it. Having one version that is of poor quality would defeat that purpose, because it would force the members of the target linguistic group to read the other version in order to ascertain how they need to act to comply with the law. A poorly drafted version in one language might arguably fail to convey the same rule as the other language version. Of course, the same can also be true of two intelligible versions: though they may be properly drafted in their respective languages, they might nonetheless convey a different rule in each language.

In some multi-lingual jurisdictions, this is dealt with by providing that one version prevails over the other in cases of discrepancy.[12] This certainly easily resolves the issue if it ever gets to the courts. However, one can wonder if the objective of creating a second-language version is achieved in such a case. The linguistic group to whom the non-prevailing version is targeted cannot rely on that version; it would have to read the prevailing version to ascertain what the law is.

In other jurisdictions, no one language version prevails over the other. That is, for example, the case at the federal level in Canada.[13] Neither language version has priority over the other in case of a discrepancy: both versions have equal authority.[14] However, even when both versions have equal authority, there can be some risk in relying on only one version when the two versions differ. As Justice Binnie of the Supreme Court of Canada eloquently observed:

> It has been truly remarked in the context of bilingual legislation that "Canadians read only one version of the law at their peril".[15]

This being said, if there is a discrepancy between the two versions in Canada, the meaning must be determined using interpretative rules developed by the courts.

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[12] See, for example, Art. 25.4.6 of the *Constitution of Ireland* that provides that the Irish version prevails over the English version.

[13] For the situation at provincial and territorial levels, see the following provisions and cases: for New Brunswick, subsection 18(2) of the *Canadian Charter of Rights and Freedoms* and section 10 of the *Official Languages Act*, S.N.B. 2002, c. O-0.5; for Manitoba, section 23 of the *Manitoba Act, 1870*, 33 Vict., c. 3, the *Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721 and section 7 of the *Interpretation Act*, C.C.S.M. c. I80; for Quebec, section 133 of the *Constitution Act, 1867*, *Blaikie* v. *Québec (Attorney General)*, [1979] 2 S.C.R. 1016 and section 7 of the *Charter of the French Language*, R.S.Q., c. C-11; for Ontario, section 65 of the *Legislation Act*, 2006, S.O. 2006, c. 21, Sch. F; for Saskatchewan, section 10 of the *Language Act*, S.S. 1988-89, c. L-6.1; for Yukon, section 4 of the *Languages Act*, R.S.Y., 2002, c. 133; for Northwest Territories, subsection 7(1) of the *Official Languages Act*, R.S.N.W.T., 1988, c. O-1; for Nunavut, subsection 10(1) of the *Official Languages Act*, R.S.N.W.T. (Nu.) 1988, c. O-1.

[14] Subsection 18(1) of the *Canadian Charter of Rights and Freedoms*: "The statutes, records and journals of Parliament shall be printed and published in English and French and both language versions are equally authoritative." See also section 13 of the *Official Languages Act*, R.S.C., c. 31, (4th Supp.).

[15] *Canada (Citizenship and Immigration)* v. *Khosa*, [2009] 1 S.C.R. 339, at [38].

The case *R.* v. *Daoust* of the Supreme Court of Canada summarized how to proceed:

> We must determine whether there is an ambiguity, that is, whether one or both versions of the statute are "reasonably capable of more than one meaning" … If there is an ambiguity in one version but not the other, the two versions must be reconciled, that is, we must look for the meaning that is common to both versions … The common meaning is the version that is plain and not ambiguous … If neither version is ambiguous, or if they both are, the common meaning is normally the narrower version ... The second step is to determine whether the common or dominant meaning is, according to the ordinary rules of statutory interpretation, consistent with Parliament's intent … Finally, we must also bear in mind that some principles of interpretation may only be applied in cases where there is an ambiguity in an enactment.[16]

In an attempt to avoid discrepancies in federal legislation in Canada, two principal measures have been taken in the drafting of legislation within the Department of Justice. The first is to assign two bilingual legislative counsel – an anglophone and a francophone – to each project.[17] The legislative counsel for each version is involved from the beginning to the end of the drafting process, allowing him or her to understand the policy behind the legislation and the context in which the rules are to operate. Both counsel receive the original instructions in both official languages and may pose questions to the instructing officers in their own official language. Each counsel is responsible for his or her own version, but each one is also responsible to ensure that both versions convey the same message.

It is worth noting that only differences in meaning constitute discrepancies. For example, there is not necessarily a discrepancy if one version simply contains more words than the other. Some concepts can be expressed in one language with fewer words than in the other.[18] Also, some words or expressions from one language have no direct counterpart in the other. In such a case, the version in the second

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[16] *R.* v. *Daoust*, [2004] 1 S.R.C. 217, at [28] to [31]. This approach has however been criticized: P. Salembier, "Rethinking the Interpretation of Bilingual Legislation: The Demise of the Shared Meaning Rule", (2004) 35 Ottawa LR 75.

[17] This is not, however, the case for the texts prepared by Canada's Finance Tax Drafting Services Section. The French version of those texts is prepared by an on-site translator. Also, both versions of regulations are sometimes prepared by a single legislative counsel who is fluent in both languages. See the *National Survey of Legislative Drafting Services*, Department of Justice International Cooperation Group (Ottawa, 2002), at 60. Available online at http://www.justice.gc.ca/eng/pi/icg-gci/sur-eng/index.html.

[18] Michael J. B. Wood, "Drafting Bilingual Legislation in Canada: Examples of Beneficial Cross-Pollination Between the Two Language Versions", (1996) 17 Stat. LR 66, at 69.

language would necessarily require more words to reflect the same meaning.[19] As well, it is recognized that the sentence structure must sometimes differ from one version to the other in order to respect the characteristics of each language. For example, it would not constitute a discrepancy if a section were divided into paragraphs in the English version, but not in the French version. As well, it may occasionally be necessary to define a term in one language, but not in the other. This would not constitute a discrepancy either.

The drafting of laws at the federal level in Canada has not always been done by two legislative counsel.[20] Legislation used to be drafted in English and then translated into French.[21] According to certain authors, in those days the quality of the French version was poor and was prone to discrepancies.[22] Following criticism from the Commissioner of Official Languages, the use of translation was abandoned at the end of the 1970's.[23] It is worth noting that the translators at that time did not have access to the drafter.[24] If that had not been the case, the quality of the French version might have been different.[25]

Another measure taken at the federal level in Canada is to have drafts systematically reviewed by jurilinguists, who have an excellent knowledge of both languages and a degree in a language or in translation, or a related degree and experience in translation. They assist the legislative counsel in achieving the highest

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[19] William J. McIver Jr., *Technical Issues in Collaborative Multilingual Legislative Drafting*, IT Governance and Civil Society Research Network, Information Technology and International Cooperation (ITIC) Program, Social Science Research Council, at 2.3, available online at http://mediaresearchhub.ssrc.org/technical-issues-in-collaborative-multilingual-legislative-drafting/resource_view.

[20] For the drafting history at the federal level in Canada, see Serge Lortie and Robert C. Bergeron, "Legislative Drafting and Language in Canada", (2007) 28 Stat. LR 83.

[21] "All officials we interviewed confirmed that the universal rule for all federal statutes is that they are drafted in English…Only after completion of the final draft in the English Language is the French version prepared by the Law Translation branch." C.-A. Sheppard, *The Law of Languages in Canada*, Study 10 of Royal Commission on Bilingualism and Biculturalism, Ottawa, Information Canada, 1971, at par. 3.06.

[22] "Anyone who has examined the French text of any federal statute, even in the most perfunctory manner, has become painfully aware not so much of grammatical errors as of the totally non-Latin and non-idiomatic use of language, In fact, the French text is frequently almost incomprehensible to a French lawyer. " C.-A. Sheppard, *The Law of Languages in Canada*, above, note 21, at par. 3.09. See also Rémi Michael Beaupré, *Interprétation de la législation bilingue* (Wilson & Lafleur, Montréal, 1986) at 209.

[23] Beaupré, ibid. n. 22 at 212.

[24] Lionel Levert, "Bilingual and Bijural Legislative Drafting: To Be or Not to Be?", (2004) 25 Stat. LR 151, at 154 and 155: "For the translators who prepared the French language versions, it was extremely difficult to produce high quality texts since their contribution would come at the very end of the process and they would be imposed with tight deadlines. Also, the translators had very little access to drafters of the original text, as well as to relevant materials, and would seldom be part of the discussions held between the drafters and the departmental instructing officers."

[25] Louis-Philippe Pigeon, *Rédaction et Interprétation des lois*, (Les Publications du Québec : 1986) at 81; Donald L. Revell, "Bilingual Legislation: The Ontario Experience", (1998) 19 Stat. LR 32; Lionel Levert, "Bilingual and Bijural Legislative Drafting: To Be or Not to Be?", (2004) 25 Stat. LR 151, at 157.

possible quality of language and in ensuring that both language versions have the same effect. Drafts are normally submitted to them at the end of the drafting process. However, legislative counsel may also consult them at any time during the process. In addition, jurilinguists produce linguistic articles on topics such as avoiding the pitfalls of using terms that appear similar in both languages but which have different meanings in certain contexts.[26] Those articles are incorporated into the Canadian federal government's *Guide fédéral de jurilinguistique législative française*[27] and *Legistics*.[28]

In addition to these two measures, the instructing officers in the client ministry are strongly encouraged to read both language versions of every draft[29] they receive not only to ensure that both versions reflect the intended policy, but also to detect any discrepancies between the versions. Although the drafts are reviewed by both legislative counsel and jurilinguists, discrepancies may sometime be subtle and, as such, may be identifiable only by those who are specialized in the subject-matter in question. This, of course, pre-supposes that the sponsoring department or agency has the capacity to conduct a meaningful review of both versions. This should not, in principle, be a difficulty given that the Canadian federal government's *Cabinet Directive on Law-Making* states that "sponsoring departments and agencies must ensure that they have the capability to develop policy, consult, and instruct legislative drafters in both official languages."[30] This said, it is unfortunately not always the case.

Co-drafting

As noted earlier, at the federal level in Canada, two bilingual legislative counsel – an anglophone and a francophone – are normally assigned to each drafting project. Those two legislative counsel "co-draft" the text. As Lionel Levert (former Chief Legislative Counsel of the Department of Justice Canada) once observed, "The Department of Justice's objective is to produce, with the same professional care and

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[26] One example of this would be "government/gouvernement". See article "Gouvernement et administration" of the *Guide fédéral de jurilinguistique législative française*, available online at http://canada.justice.gc.ca/fra/min-dept/pub/juril/no64.html.

[27] The guide is available online at: http://www.canada.justice.gc.ca/eng/dept-min/pub/juril/index.html.

[28] *Legistics* is available online at: http://www.canada.justice.gc.ca/eng/dept-min/pub/legis/index.html.

[29] Except on some rare occasions, both language versions of a draft are sent at the same time: Lionel Levert, "Bilingual Drafting in Canada", (1995) *The Loophole* 39 at 40-41:

> As a general rule, both versions of our drafts are sent out to the sponsoring departments at the same time, even if, as is usually the case, the first drafter's version is ready well in advance of the second drafter's version. The purpose of this practice is to incite sponsoring departments to read and compare the two versions, and also to avoid giving them the impression that the second drafter's version is only a translation of the first drafter's version.

[30] Government of Canada, *Cabinet Directive on Law-Making*, 2003, available online at http://www.pco-bcp.gc.ca.

attention, two original and authentic versions of the same bill."[31] Now, one may well ask, what does co-drafting mean in practice? What is at stake?

There are two main ways to "co-draft": drafting simultaneously or drafting alternately.

The simultaneous drafting method consists of having both legislative counsel draft each section together, sometimes in the presence of the instructing officers and sometimes not. In Canada, special drafting rooms have been created for that purpose. In these rooms, two computers are installed side by side on one side of a conference table and two extra screens are installed on the other side of the table. Each legislative counsel can then see what is being drafted by his or her colleague and the instructing officer can see the progress being made in both versions from the other side of the table.

By contrast, the alternate drafting method contemplates more work being done individually. This method is rarely used for an entire project and is instead used only for portions of it. It requires having one of the legislative counsel take the lead in producing a first draft of his or her version. The second legislative counsel then produces the other version after having read this first draft. The version produced by the second legislative counsel is not simply a translation of the draft produced by his or her colleague. The second counsel has to read the first draft with a critical eye to see, for example, if it reflects the client department's intended policy, if there are holes in it and if the structure used in the first draft is appropriate for the language in which the second draft is to be prepared. The second counsel then makes any changes in his or her draft that he or she feels are necessary or preferable. After that, the two meet to discuss their drafts and make any necessary modifications.

The choice between the two methods really depends on the circumstances and the preferences of the legislative counsel involved. If the drafting file is urgent and the instructions raise a lot of questions, the simultaneous drafting method in the presence of the instructing officer may be preferable. The legislative counsel can then quickly get answers from the instructing officers and feedback on what is being drafted. It also has the advantage of forcing both legislative counsel to read the other language version as it unfolds. Discrepancies can therefore be identified and dealt with immediately.[32] In principle, fewer discrepancies should result.

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[31] L. Levert, "Bilingual and Bijural Legislative Drafting: To Be or Not to Be?" (2004) 25 Stat. LR 151 at 155.

[32] William J. McIver Jr., *Technical Issues in Collaborative Multilingual Legislative Drafting*, IT Governance and Civil Society Research Network, Information Technology and International Cooperation (ITIC) Program, Social Science

Moreover, the simultaneous method permits drafters to quickly identify structures in one version of the text that cannot be properly reproduced in the other language. However, even in a non-urgent situation, some legislative counsel may feel pressured to produce a draft quickly in the presence of instructing officer, which may in turn affect the quality of the draft or, ironically, can even slow down the drafting process if a drafter's speed is affected by the pressure introduced by the presence of an audience.

In addition, the simultaneous drafting method may not be the best way to proceed if the drafting abilities or typing speeds of the two legislative counsel are quite dissimilar. That is particularly true when drafting with the instructing officers present. The slower legislative counsel will feel great pressure to keep up with his or her colleague, which may unfortunately sometimes have the effect of further reducing drafting speed. In such a case, the advantages of simultaneous drafting may be more apparent than real, since the faster legislative counsel will produce his or her text first, and the slower counsel then produces a text following the lead taken by the faster counsel. Under these circumstances, it may be preferable to use the alternate drafting method, which permits both legislative counsel to work at their own speed.

That being said, even with the simultaneous drafting method some individual work is needed. Legislative counsel will need to return to their offices after such a drafting session to individually read their drafts through carefully and correct any errors. Following this read-through, substantive changes are sometimes required. Although most instructing officers are open to substantive changes being made after having seen a draft in a drafting room, others are quite reluctant to accept them. This is therefore something that should be factored in when choosing the simultaneous drafting method and that should be explained to instructing officers before the drafting session begins.

The alternate drafting method is preferred by some drafters because it allows each legislative counsel to go at his or her own pace. It also gives them more time to

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Research Council, at 2.4, available online at http://mediaresearchhub.ssrc.org/technical-issues-in-collaborative-multilingual-legislative-drafting/resource_view.

think. It is also more flexible because if one legislative counsel is not available, the other can still start the work.

For the alternate drafting method to work well and to avoid wasting drafting time, the structure of the legislation must be established collaboratively before the drafting begins. However, the legislative counsel might agree to skip this step if they have often worked together and have a similar approach to drafting.

That being said, this method is not for everyone. Even if the second drafter makes his or her points tactfully, some people have more difficulty than others in accepting to make changes to their draft after having taken the lead. It requires humility from the leader to accept criticism (however constructive) from his or her colleague: he or she must not be easily offended. This quality is also needed for the simultaneous drafting method, though maybe to a lesser extent, since with the simultaneous drafting method any criticisms tend to flow in both directions.

One of the disadvantages of the alternate method is that it does not leave room for as much creativity in the approach of the second drafter, because he or she will have to work with the draft produced by the lead drafter instead of starting from scratch. Also, if the changes proposed by the second drafter are extensive, time may be required to reach an agreement on the approach to be taken.

It is worth stressing that whichever method is used, both legislative counsel must, throughout the drafting process, have access to the same information and, except in exceptional circumstances, attend every meeting with the instructing officer.

For further information on co-drafting at the federal level in Canada, please refer to the *Federal Regulations Manual*.[33]

Working with differences

Aside from difficulties that may arise from the method used for co-drafting, legislative counsel encounter other challenges that are rooted in culture. At the federal level in Canada, the two legislative counsel who are assigned to a file normally have a different mother tongue and usually also have backgrounds in different legal systems.

In bilingual co-drafting, it is necessary for each legislative counsel to have a good knowledge of the other official language. This sort of knowledge is assessed by Canada's Public Service Commission on three bases: reading comprehension, written expression and oral proficiency. This said, even with a strong emphasis on

[33] See Part 1, s. 7 (Working Together), available online at http://www.justice.gc.ca/eng/dept-min/pub/legis/rm-mr/.

bilinguism, misunderstandings between legislative counsel are bound to happen. Even though everyone may have a good knowledge of the other language, it is unlikely that they will master it as well as their mother tongue. Such misunderstandings can not only create tension between the legislative counsel, but can also give rise to discrepancies in the draft. Those discrepancies are generally picked up by jurilinguists or the instructing officers, though, and are usually resolved by obtaining clarification from the instructing officer.

Differences between the two legislative counsel also arise from having backgrounds in two different legal systems. In Canada, two different legal traditions co-exist: the civil law in Quebec and the common law in the other provinces and the three territories.[34] As a result, both systems must be considered while legislation is being drafted. This is reflected in the policy on legislative bijuralism adopted by Canada's Department of Justice in 1995. It states:

> [I]t is imperative that the four Canadian legal audiences (Francophone civil law lawyers, Francophone common law lawyers, Anglophone civil law lawyers and Anglophone common law lawyers) may, on the one hand, read federal statutes and regulations in the official language of their choice and, on the other, be able to find in them terminology and wording that are respectful of the concepts, notions and institutions proper to the legal system (civil law or common law) of their province or territory.[35]

This idea has been reiterated in the Canadian federal government's *Cabinet Directive on Law-Making*,[36] which says:

> It is equally important that bills and regulations respect both the common law and civil law legal systems since both systems operate in Canada and federal laws apply throughout the country. When concepts pertaining to these legal systems are used, they must be expressed in both languages and in ways that fit into both systems.

The rules of interpretation set out in Canada's *Interpretation Act*[37] also reflect this:

> **8.1** Both the common law and the civil law are equally authoritative and recognized sources of the law of property and civil rights in Canada and,

[34] For more information on legislative bijuralism, see *Legislative bijuralism: its foundation and its application* by Marie-Claude Gaudreault, available online at http://www.justice.gc.ca/eng/bijurilex/tax-fisc/gaudr/fo1.html.

[35] See appendix III of *Bijuralism in Canada: Harmonization Methodology and terminology*, prepared by Louise Maguire Wellington, available online at http://www.justice.gc.ca/eng/dept-min/pub/hfl-hlf/b4-f4/ann3-app3.html.

[36] Government of Canada, Cabinet Directive on Law-Making, 2003, available online at http://www.pco-bcp.gc.ca.

[37] R.S.C., c. I-21

> unless otherwise provided by law, if in interpreting an enactment it is necessary to refer to a province's rules, principles or concepts forming part of the law of property and civil rights, reference must be made to the rules, principles and concepts in force in the province at the time the enactment is being applied.
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> **8.2** Unless otherwise provided by law, when an enactment contains both civil law and common law terminology, or terminology that has a different meaning in the civil law and the common law, the civil law terminology or meaning is to be adopted in the Province of Quebec and the common law terminology or meaning is to be adopted in the other provinces.

Given this, the two legislative counsel working on a file may at times feel that they do not fully understand the concepts or approach of the other's legal system and consequently cannot adequately reflect the two systems in relation to some aspects of the file. To help them out with this, a team of specialists in bijuralism has been created. The members of this team systematically review every text to ensure that both legal systems are properly reflected in both language versions.[38] They also conduct ongoing reviews of existing legislation with the same goal, and introduce bijural concepts into existing legislation by way of omnibus harmonization bills. In addition, they create Bijural Terminology Records[39] and provide training to legislative counsel so that those counsel can detect and resolve bijural problems in legislative drafts.

Other tools that help legislative counsel to properly reflect the common law in legislation can be found on the PAJLO website (Promoting Access to Justice in Both Official Languages)[40] such as the *Canadian Common Law Dictionary - Law of Property and Estates*. This dictionary provides standardized French common law vocabulary.

Aside from the substantive differences between the common law and civil law systems, the drafting approach has also historically been different. Marie-José Longtin, Associate Director General at Legislative Affairs (directrice générale associée aux Affaires législatives) at the Department of Justice of the Province of Quebec, describes the differences in the following terms:

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[38] For drafting approaches, see Lionel Levert, "Bilingual and Bijural Legislative Drafting: To Be or Not to Be?", (2004) 25 Stat. LR 151 at 159, Marie-Claude Gaudreault, "Legislative bijuralism: its foundation and its application", available online at http://www.justice.gc.ca/eng/bijurilex/tax-fisc/gaudr/fo1.html, and Louise Maguire Wellington, "Bijuralism in Canada: Harmonization Methodology and Terminology", available online at http://www.justice.gc.ca/eng/dept-min/pub/hfl-hlf/b4-f4/toc-tdm.html.

[39] Available on line at: http://canada.justice.gc.ca/eng/pi/bj/harm/Index.html.

[40] For more information about PAJLO, see http://www.pajlo.org/index.htm.

> Compared to other legal traditions, laws in civil law states are more discursive. The definitions tend to focus on texts and the civil terminology serves, in many respects, as substrate to the language of the law. In addition, the hierarchy of the texts found in civil law is found increasingly in many statutes. Sections are short and dense, linkages are closer and more integrated, references are more conceptual than numerical, titles are more numerous, the normative density is stronger, and principles are better highlighted by the very structure of law and the organization of statements. [*unofficial translation*][41]

René David and John Brierley describe the difference between the common law and civil law approach to the concept of legal rules in the following terms:

> For English Law, evolved through judicial decisions, the legal rule is something different from the doctrinally systematised or legislatively enunciated *règle de droit* familiar to the French jurist. It is, most obviously, framed in less general terms than the continental legal rule…[42]

To overcome these differences in drafting approach, legislative counsel necessarily have to make concessions from time to time. But there are also some drafting practices that have been established to help to prevent these problems and to create a more uniform legislative corpus. These drafting practices are found in two Canadian manuals that are available in both official languages: the *Legislation Deskbook* and the *Federal Regulations Manual*.[43]

The two legal systems also have a different approach to detail. Peter Johnson, a former Chief Legislative Counsel of the Department of Justice Canada, points out that, in this respect, bilingual drafting has had a beneficial effect on the English version:

> A feature which also appears to be emerging from bilingual drafting is the blending of the common law considerable detail approach with the civil law concise concept approach. The coming together of these very often leads to less cumbersome legislative language on the English side and as our experience progresses in this regard, clearer statutes seem to be a positive related result. It is really through the influence of the civil law that the common law lawyers have come to appreciate that expressions such as

[41] Marie-Josée Longtin, *Le style civiliste et la loi* in *Le droit civil, avant tout un style?* (Themis, Quebec Research Centre of Private & Comparative Law, 2003) at 202.

[42] R. David and J.Brierly, *Major Legal Systems in the World Today*, 3rd ed (Stevens & Sons, London, 1985) at 335.

[43] The *Federal Regulations Manual* is available online at http://www.justice.gc.ca/eng/dept-min/pub/legis/rm-mr/.

"null, void and of no effect" or "good and valuable consideration" can be adequately expressed in statutes by "void" and "valuable", respectively.[44]

Managing a bilingual drafting office

Up to now, we have discussed the challenges faced by legislative counsel, but drafting in a bilingual jurisdiction also generates challenges for the managers of the drafting unit and for the organization.

First of all, as the number of employees involved in each file is multiplied, the associated costs increase. The number of support teams needed to achieve a good result is also increased, again adding to the cost. Two teams of editors are required, one for the English version and one for the French version, plus a team of jurilinguists for comparing the two versions. If the legislation to be drafted will reflect two legal systems, specialists in comparative law need to be hired to help out the legislative counsel in that area.

Moreover, the material costs are also increased. Most of the time, legislative counsel do not draft in isolation and, as noted, often work together to produce English and French drafts simultaneously. As a result, there is a need for the specialized drafting rooms discussed earlier. Those rooms must be equipped so that both legislative counsel and the instructing officer can see what is being drafted in both languages, which increases costs for computer equipment and monitors. Data management and publishing costs are also increased, given that there are two versions to publish rather than one.[45]

It is also more difficult to find lawyers qualified for the job. Although lawyers draft legal documents, not all of them have the skills needed for legislative drafting, especially in a bilingual context. A legislative counsel must have an excellent knowledge of the language in which he or she drafts and must also have the capacity for clear and concise expression. Because the drafting of legislation requires teamwork, all legislative counsel must also have an attitude appropriate to working in teams and the ability to maintain good working relationships. Moreover, counsel must be capable working under pressure, be well organized and tactful. And if this is not enough, we must add the requirement of a good knowledge of the second official language. Although Canada is officially bilingual, only a small minority of its population is. According to the 2006 census, only 17.4%

[44] Peter E. Johnson, "Legislative Drafting Practices and Other Factors Affecting the Clarity of Canada's Laws", (1991) 12 Stat. L.R. 1 at 2.

[45] For more information on financial implications, see Donald L. Revell, "Multilingualism and the authoring of laws", *Revue Internationale de Langues et de Droit Comparé*, 2001 (*1*) 34.

of the population identified themselves as being able to conduct a conversation in both French and English.[46]

Finally, challenges also arise when the time to assign drafting files comes around. Aside from having to consider the workload of each francophone and anglophone legislative counsel and the complexity of the pending drafting assignments, the managers must also consider the personality of each one before assigning a file. For one reason or another, some counsel do not get along well together, and it is better not to team them up. Also, the manager may want to make the most use of his or her workforce in teaming up the faster drafters together or teaming experienced drafters with those who are less-experienced.

Conclusion

As we can see, a bilingual drafting jurisdiction challenges legislative counsel and the organization on many levels. However, great benefits flow from it. It is a stimulating environment where cultures meet and where each one learns from working with the other. The constant comparison of two language versions results in more consistency and clarity in each version.[47] Moreover, the collegial structure of working in a drafting team gives birth to friendships and an understanding of the other culture. Arguably, having two legislative counsel assigned to a file rather than only one results in a more comprehensive analysis of the legislative scheme being proposed and of any legal issues posed by it, resulting in a superior quality of text. After all, as the adage says, two heads are better than one…

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[46] *The Evolving Linguistic Portrait, 2006 Census : Highlights* of Statistics Canada online at http://www12.statcan.gc.ca/census-recensement/2006/as-sa/97-555/p1-eng.cfm.

[47] Peter E. Johnson, "Legislative Drafting Practices and Other Factors Affecting the Clarity of Canada's Laws", (1991) 12 Stat. L.R. 1, at p. 2. For example on how both versions can benefit from the comparison see Michael J. B. Wood, "Drafting Bilingual Legislation in Canada: Examples of Beneficial Cross-Pollination Between the Two Language Versions", (1996) 17 Stat. LR 66.

Through the Looking Glass: What a Reader of Hong Kong Legislation Found There

Allen K.P. Lai and Angie S.L. Li[1]

Abstract:

This article discusses the transition to a bilingual legislation system in Hong Kong since 1989. It describes how the different literal and liberal drafting approaches have been received in Hong Kong's legal and wider communities. The traditional word-for-word translation approach may not the best way to communicate the effects of legislation in Chinese given the fundamental linguistic differences between the two official languages. However, whether legislative counsel in Hong Kong are able to do that depends on whether a consensus on the bilingual drafting approach can be reached among the key players, namely the Government, the legislature and the legal community.

Introduction

In Hong Kong today, legislation is published in Chinese and English, the two official languages of the Special Administrative Region. Yet little more than two decades ago, Hong Kong legislation was drafted and enacted in English only. The transition to a bilingual legislation system began in 1989 in step with a number of political reforms leading up to the reunification of Hong Kong with the People's

[1] Mr. Allen Lai and Ms. Angie Li are Senior Government Counsel of the Law Drafting Division, Department of Justice of Hong Kong Special Administrative Region of the People's Republic of China.

Republic of China in July 1997. Since then, the Law Drafting Division of the Department of Justice has been tasked with the delicate balancing act of communicating Hong Kong's law clearly, precisely and equivalently in its two diverse languages. This article describes those efforts and how the different literal and liberal drafting approaches adopted by the Division have been received in Hong Kong's legal and wider communities.

Bilingual Legislation Programme

In April 1989 the enactment of the Official Languages Ordinance (Cap. 5) and amendments to the Interpretation and General Clauses Ordinance (Cap. 1) provided the statutory authority for bilingual legislation. The bilingual legislation programme was then instituted to translate extant English enactments into Chinese and to prepare bilingual texts of new enactments. Under the first part of the programme, the Chinese texts were "translated" into Chinese and then declared authentic by the Governor-in-Council after consulting an advisory body (the Bilingual Laws Advisory Committee). This law translation programme was completed in 1997.

Under the second part of the programme, new enactments were drafted and enacted in Chinese and English. However, as English was historically the working language of the Government, drafting instructions continued to be prepared in English only. In practice, English-language legislation was drafted first and formed the basis on which the Chinese text was prepared. However, in terms of legal status and effect, under Cap. 1 both texts are considered equally authentic and legislative provisions are presumed to have the same meaning in each text.

Translation Approach

The Chinese texts of legislation published in the early years of the bilingual legislation programme were basically translated texts. Drafting counsel were required to adhere to the style and format of the corresponding English texts in a "word-for-word" translation approach that aimed to produce a "mirror-image" of the English texts in Chinese. Three main factors prompted this drafting approach. Firstly, the drafting counsel who prepared the Chinese texts were then relatively inexperienced in original legislative drafting. Secondly, discerning whether a Chinese provision could give effect to the legislative intention was difficult since the instructing officers of the time did not read Chinese. Thirdly, it was usually impractical, if not impossible, within the limited time available to ascertain the legislative intention of laws enacted a long time ago.

Unfortunately, this drafting method produced less than satisfactory results. Some provisions were criticized as being anglicized and even not readily comprehensible.

Rather than clearly reflecting the English text, it seemed that the mirror-image approach could lead readers through the looking glass into an unfamiliar world. In fact, this strict literal approach ran against some of the key principles of translation proposed by Martin Luther, the sixteenth century German theologian.

Luther's translation of the Bible from Latin into the language of the ordinary people informed a liberal approach to translation that remains pertinent today. Five principles that seem relevant to the Hong Kong context are as follows:

- the translator must understand perfectly the content and intention of the author's work being translated;
- the translator should have a perfect knowledge of the language from which he or she is translating, and an equally excellent knowledge of the language into which he or she is translating;
- the translator should avoid a word-for-word rendering, for to resort to this would destroy the meaning of the original and ruin the beauty of expression;
- the translation should employ forms of speech in common usage;
- the translator should choose and order words with a view to creating an appropriate "tone" in the overall effect.[2]

It appeared that certain translated texts of Hong Kong legislation fell short of some, if not all, of these principles.

An Attempt to Improve the Readability of the Chinese Text

In response to these criticisms, the Law Drafting Division adopted a new drafting policy to improve the readability of the Chinese text of new enactments. The policy shifted towards ensuring that legislation not only clearly reflected the client's policy intent, but was also easy to understand.

Chinese-language legislative counsel have always made it a priority for the Chinese text to be as accurate and consistent as possible with the legal meaning articulated by the English text. It was now understood that for the sake of comprehensibility and grammatical correctness, they might occasionally have to present Chinese provisions differently from the English text, provided there was no change to the substantive meaning.

[2] Jin Di and Eugene A. Nida, *On Translation*: *An Expanded Edition* (Hong Kong: City University of Hong Kong, 2006) at15.

This breakthrough from the word-for-word translation approach was enabled by two major changes that have taken place since the 1990s. Firstly, the English and Chinese texts are now drafted at the same time, so it is no longer a problem for legislative counsel to clarify the policy intent from instructing officers. Secondly, legislative counsel have accumulated more experience and greater confidence in preparing the Chinese text of legislation.

The Chinese text of the Securities and Futures Bill, introduced to the Hong Kong Legislative Council ("LegCo") in 2000, provides a useful example of the new non-literal drafting approach. The passage of this Bill also demonstrates the storm of concerns aroused in the legislature, as well as the Hong Kong legal community, over alleged discrepancies between the Chinese and English legislative texts. Examples of these textual "dissimilarities" are set out in the Annex.

Setbacks

LegCo noted with concern the following differences in drafting and style between the Chinese and English versions of the *Securities and Futures Bill*:

(a) the Chinese text contained fewer details than the English text;

(b) there were structural differences between the two texts;

(c) a reader of the Chinese text would have to refer to another part of the Bill for certain details while a reader of the English text would not have to.

LegCo was alarmed that these differences would lead to different interpretations of the two texts. Examples of the perceived differences between the two texts are set out below.

The Chinese text contained fewer details than the English text:

Clause 105(1) of the Bill in the English text read as follows (emphasis added):

> Subject to subsection (5), where, in relation to an authorization of a collective investment scheme under section 103, or an authorization of the issue of an advertisement, invitation or document under section 104, the Commission decides that — …

The same clause in the Chinese text read as follows (emphasis added):

> 在符合第(5)款的規定下，就根據第103或104條給予的認可而言，如證監會斷定 — …

To enhance the readability of the provision in Chinese, references to the object of authorization within the cross-references were omitted. These were, in the case of

the reference to section 103, "a collective investment scheme" or, in the case of the reference to section 104, "the issue of an advertisement, invitation or document".

Structural differences between the two texts

LegCo also observed that there were structural differences between some of the provisions of the two texts. By way of illustration, Clause 151(1) of the Bill in the English text read as follows:

> A licensed corporation, and an associated entity of a licensed corporation, shall —
>
> (a) in the case of the licensed corporation, within one month after it becomes licensed; or
>
> (b) in the case of the associated entity, within one month after it becomes such an associated entity,
>
> notify the Commission by notice in writing of the date on which its financial year ends.

The same Clause in the Chinese text read as follows (emphasis added):

> (a) 持牌法團須在獲發牌後一個月內，以書面將其財政年度結束的日期通知證監會。
>
> (b) 持牌法團的有聯繫實體須在它成為該實體後一個月內，以書面將其財政年度結束的日期通知證監會。

The English text uses a "sandwich clause", where the subjects (the licensed corporation and the associated entity) are mentioned in the opening sentence and then repeated in paragraphs (a) and (b). In the Chinese text, however, the provisions are drafted as two separate paragraphs. Without an opening sentence the two subjects are mentioned once only in their respective paragraphs.

The need for a reader of the Chinese text to refer to other parts of the Bill

LegCo's third concern is best illustrated by Clause 281 of the Bill (emphasis added):

> For the purposes of section 277(2) and Division 2, a person shall be regarded as dealing in listed securities or their derivatives if, whether as principal or agent, he sells, purchases, exchanges or subscribes for, or agrees to sell, purchase, exchange or subscribe for, any listed securities or their derivatives or acquires or disposes of, or agrees to acquire or dispose of, the right to sell, purchase, exchange or subscribe for, any listed securities or their derivatives.
>
> 就第277(2)條及第2分部而言，凡任何人(不論以主事人或代理人身分)售賣、購買、交換或認購任何上市證券或其衍生工具，或與別人協議作出上述作為

> ，或取得或處置任何上市證券或其衍生工具的售賣、購買、交換或認購的權利，或與別人協議取得或處置該等權利，則他視為進行上市證券或其衍生工具的交易。

LegCo commented that in the English text the information is set out in full that a person "sells, purchases, exchanges or subscribes for, or agrees to sell, purchase, exchange or subscribe for, any listed securities or their derivatives". However a reader of the Chinese text has to use a cross-reference to the acts specified in an earlier part of the sentence. The cross-reference "與別人協議作出上述作為" directly translates as "agreeing with another person to perform the abovementioned acts".

Views from the legal profession and academia

The debate on the drafting approach for the Chinese text in the Bill soon went beyond the relevant Bills Committee of LegCo. The topic had touched a nerve. In a follow-up discussion at the Panel on Administration of Justice and Legal Services of LegCo (AJLS Panel), the overall drafting policy of bilingual legislation was reviewed and views from members of the public were invited.

The Law Society of Hong Kong, representing the solicitors' branch of the legal profession, expressed their support for the Law Drafting Division'sattempts to improve the readability of legislation. But it also had reservations that the new drafting approach could lead to interpretative difficulties. Its submission to the AJLS Panel stated:

> We support any effort which makes our statute law more easily understood. We do not believe that literal translations are easily understood by a reader who is not bilingual … We also do not have any objection to the Administration adopting a drafting approach whereby the Chinese text may contain less details then the English text so long as the two texts have the same result. However, we would be concerned if [the drafting approach] results in words used in the English text not being fully reflected in the Chinese text to such an extent which may give rise to a different interpretation of the Chinese and the English text of the Bill.[3]

The Hong Kong Bar Association, representing Hong Kong's barristers, approached the concern from a different angle:

> … a primary concern of bilingual law drafting was to ensure that both the English and Chinese texts carried the same legal effect. In order to achieve

[3] "Submission of the Securities Law Committee of the Law Society of Hong Kong to the Panel on Administration of Justice and Legal Services" dated 19 March 2001. (LC Paper No. CB(2) 1127/00-01(01)).

this aim, the two texts of legislation should, as far as possible, match in terms of style and presentation.[4]

In addition to the legal profession, views from academia were canvassed. Dr. Zhao Yuhong of the City University of Hong Kong presented a submission to the AJLS Panel, noting that strict literal translations might not be the best method for communicating the effect of the legislation.[5] In her study of the provisions of the Bill, she considered that a number of syntactic restructurings and deletions in the Chinese text were less than ideal, but that on the whole the discrepancy in the format and layout between the two texts was acceptable. She also remarked that while there was some support for the Division's efforts to enhance the readability of the Chinese text, there was also resistance, stemming from concerns that the dissimilarity between the two texts might lead to discrepancies in meaning.

Aftermath

Following the AJLS Panel discussions, amendments were introduced to the Chinese text of the Bill to align the textual appearance of the Chinese text more closely to that of the English text. Although a number of the original provisions were retained, most of the provisions in the new drafting style were amended.

The AJLS Panel asked the administration to add an element to the drafting policy that the Chinese and English texts should match language-wise as far as possible, in order to minimize the chance of textual differences opening up the possibility of different legal interpretations.[6] This request may be seen as a step back toward the literal translation approach, and a restraint on the scope to clarify the Chinese text by making appropriate changes to the wording or adjustments to the syntax.

Continuing Efforts

Although the move away from the literal translation mode was not well received in the Securities and Futures Bill in 2001, efforts to improve the readability of the Chinese text have not ceased. The Division has maintained its position that an exact match between the two texts is not always practical because of linguistic differences

[4] Paragraph 10 of the minutes of the meeting of the Panel on Administration of Justice and Legal Services held on 20 March 2001; Mr. Alan Leong of the Hong Kong Bar Association. (LC Paper No. CB(2)1516/00-01).

[5] Dr. Zhao Yuhong, "Drafting Policy on Bilingual Legislation: Comments on the Hong Kong Securities and Futures Bill", circulated as part of the minutes of the meeting of the Panel on Administration of Justice and Legal Services held on 20 March 2001. (LC Paper No. CB(2)1136/00-01(01)).

[6] Paragraph 10 of the minutes of the meeting of the Panel on Administration of Justice and Legal Services held on 28 April 2008. (LC Paper No. CB(2) 2325/07-08).

between the Chinese and English languages. Its policy on bilingual legislative drafting was clarified in a subsequent paper to the AJLS Panel in April 2008.[7]

Recently, during the course of scrutinizing bills, LegCo members have observed the departure from word-for-word translations and their views have at times been encouraging. On a number of occasions, members pointed out that Chinese-language bills were still drafted in a cumbersome style with convoluted sentences, despite the Division's commitment to produce legislation in plain language that is intelligible to both ordinary and professional users of legislation.[8]

Responding to this, the Division explained that legislative counsel have often been challenged by LegCo members when they have tried to achieve clarity by structuring the Chinese text in a manner different from that of the English text. Yet the members' comments that the two texts did not match could not be supported by evidence of any difference in meaning. LegCo members' reply to this was that it was up to the drafters to convince LegCo that the non-literal version was more readable than the word-for-word translation.[9] From this, it may be reasonable to deduce that the legislature is at least open to a more flexible approach to bilingual drafting.

It is also interesting to point out that there is some degree of two-way traffic in terms of the pendulum between a literal approach and a more flexible approach. LegCo cited an example where components of a sentence in the English text did not appear in the Chinese text. In Clause 16(4)(e) of the Karaoke Establishments Bill, the English text was:

> … not being a police officer or a public officer in the course of his duty or a person authorized by the licensing authority in writing, enters or is in a karaoke establishment while an order under section 15 is for the time being in force.

The Chinese text was:

> 違反第15(3)條.

In this offence provision, elements of the relevant offence created were stated in the English text but not in the Chinese text (which simply referred to Clause 15(3)

[7] Information Paper submitted by the Law Drafting Division of the Department of Justice to the Panel on Administration of Justice and Legal Services for the meeting on 28 April 2008 (CB(2)1699/07-08(07)).

[8] Paragraph 42 of the minutes of meeting of the Panel on Administration of Justice and Legal Services on 24 January 2005. (LC Paper No. CB(2) 946/04-05)

[9] Paragraph 21 of the minutes of meeting of the Panel on Administration of Justice and Legal Services on 28 April 2008. (LC Paper No. CB(2) 2325/07-08)

containing the elements of the offence). Although LegCo had requested the Administration to amend the Chinese text to mirror the form of the English text, an amendment to amend the English text to follow the Chinese text was eventually introduced and passed. The English text was amended to "contravenes section 16(4)".[10]

Conclusion

In their work *On Translation,* Jin Di and Eugene A. Nida offer an interesting perspective on the history of translation:

> The history of translating in a particular language or cultural contexts is highly instructive. In general, however, the history consists of an alternation between literalism and unrestricted freedom.
>
> Shifts from one pole of translating to another often change over a period of time, but usually opposite tendencies exist throughout long periods of time, with people having very diverse views as to what translation should be like. Only rarely translators aim at a kind of "golden mean" between opposite extremes.
>
> Though they may argue about the importance of a middle course, most translators either show decided preference for the source language text or they give priority to receptors' interest in naturalness.[11]

Although this comment relates to the translation of texts, it has relevance to the practice of drafting bilingual legislation in Hong Kong. In many ways, Hong Kong's own process of finding its legislative voice in two official languages mirrors the narrative described above.

Currently, there seems to be agreement that the traditional word-for-word translation approach is not the best way to communicate the effects of legislation in Chinese, given the fundamental linguistic differences between the two official languages. Therefore, it seems that it is still necessary to adapt the Chinese legislative text in accordance with the grammatical and stylistic considerations of the Chinese language. Of course, these adaptations should be carefully worked out to ensure that the overall comprehensibility is enhanced without affecting the intended legal effects.

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[10] Clause 15(3) of the Bill became section 16(3) of the Ordinance enacted because of the addition of a provision. See the *Karaoke Establishment Ordinance* (No. 22 of 2002).

[11] Jin Di and Eugene A. Nida, *On Translation*: *An Expanded Edition* (Hong Kong: City University of Hong Kong, 2006) at 14.

However, whether legislative counsel in Hong Kong are able to do that depends on whether a consensus on the bilingual drafting approach can be reached among the key players, namely the Government, the legislature and the legal community. A more liberal approach would allow legislative counsel to draft in a way that best achieves clarity and comprehensibility in legislation, according to the needs of each language. Perhaps in time, as statute readers become more comfortable in using Chinese as the primary operating language or a parallel operating language, people may gain confidence in reading and interpreting the effect of Chinese text without resorting to the English text. In other words, "through the looking glass" readers of Hong Kong legislation will find "Tweedle-dee and Tweedle-dum 2.0". They may look different in certain ways, but they are saying the same thing that everyone understands.

Annex – Examples of Textual "Dissimilarities" between the Chinese and English Texts under the New Approach

Certain words and phrases that appeared in the English text were omitted in the Chinese text if the omission did not result in failing to convey the intended meaning. Sometimes, in the English text, certain elements were repeated in later provisions to save readers the effort of referring to former provisions but, for the Chinese text, this repetition did not always assist the readers. Rather, the repetition made the provisions longer with the result that the readers found the provisions difficult to understand. To avoid this problem, the "linguistically undesirable" repetitions were omitted in the Chinese text when their omission did not affect the meaning of the provision as a whole. See Examples 1 and 2.

Example 1

The English text of clause 206(7) of the Securities and Futures Bill reads as follows :

> (7) Where the Commission applies to the Court of First Instance for an order pursuant to subsection (1), it shall not be required, as condition of the granting of an interim order under subsection (6), to give an undertaking as to damages.

The Chinese text reads as follows :

> (7) 凡證監會依據第(1)款申請命令，該會無須就損害賠償作出承諾，以作為根據第(6)款頒發臨時命令的條件。

It seems that there is a discrepancy between the English text and the Chinese text in that the reference to "the Court of First Instance" is omitted in the Chinese text. The reference, however, is not strictly required in clause 206(7) when it is read with clause 206(1).

The English text of clause 206(1) reads as follows:

(1) Where—

(a) …… ; or

(b) ……... ,

the Court of First Instance, on the application of the Commission, may, subject to subsection (4), make one or more of the orders specified in subsection (2).".

The Chinese text of clause 206(1) reads as follows:

(1) 凡—

(a) ..... ; 或

(b) .....,

在符合第(4)款的規定下，原訟法庭可應證監會的申請，作出第(2)款指明的一項或多於一項命令。".

Obviously, under clause 206(1), the Commission is required to apply to the Court of First Instance. Although this point is repeated in the English text of clause 206(7) but not in the Chinese text, no ambiguity would arise if both clauses 206(1) and 206(7) are read together. There is no question of any difference in meaning between the two texts.

Example 2

Clause 103 of the Securities and Futures Bill proposes to empower the Securities and Futures Commission to authorize any collective investment scheme. Clause 104 proposes to empower the Commission to authorize the issue of any advertisement, invitation or document. Clause 105 proposes to empower the Commission to withdraw an authorization under clause 103 or 104. The English text of clause 105(1) reads as follows:

(1) Subject to subsection (5), where, in relation to an authorization of a *collective investment scheme under section 103, or an authorization of the #issue of an advertisement, invitation or document under section 104, the Commission decides that—

(a) …… ;

(b) ……... ;

(c) …… ; or

(d) ……... ,

the Commission may withdraw the authorization.

The word-for-word translation of the English into Chinese would read as follows :

(1) 在符合第(5)款的規定下，就根據第103
條就*集體投資計劃給予的認可而言，或就根據第104
條就#廣告、邀請或文件的發出給予的認可而言，如證監會斷定 —

(a) ..... ;

(b) ..... ;

(c) ..... ; 或

(d) ..... ,

則證監會可撤回該項認可。

Under the new approach, references to "**集體投資計劃**"and "**廣告、邀請或文件的發出**" in the Chinese text were omitted. This did not affect the meaning of the provision but in fact improved its readability.

The revised clause 105(1) reads as follows :

"(1) 在符合第(5)款的規定下，就根據第103 或104
條給予的認可[12]而言，如證監會斷定—

(a) ..... ;

(b) ..... ;

(c) ..... ; 或

(d) ..... ,

則證監會可撤回該項認可。".

Owing to the different choice of words, the sentence structure of the Chinese provision could be seen as being different from that of the corresponding English text, but in fact both provisions carried the same meaning: see Example 3.

Example 3

Clause 211(3) of the Securities and Futures Bill specifies the time within which an application for review of a decision of the Securities and Futures Commission must be made.

[12] "For the purposes of the authorization given under section 103 or 104".

Clause 224(2) specifies when the decision takes effect. The English text of clause 224(2) reads as follows :

(2) A specified decision, ... , takes effect—

(a) where, prior to the expiration of the time specified in section 211(3) as that within which an application for review of the decision shall be made, the person in respect of whom the decision is made notifies the Commission that he will not make the application, at the time when he so notifies the Commission;

(b) subject to paragraph (a), where the person does not make an application for review of the decision within the time specified in section 211(3) as that within which the application shall be made, at the time when the time so specified expires; or

(c) .....".

In the English text of clause 224(2)(b), the word "time" is used for two different purposes. It is therefore desirable to clearly identify the time specified by clause 211(3) to avoid any doubt. But in the Chinese text of clause 224(2)(a), the time specified by clause 211(3) is referred to as "**限期**"[13], while "**時**"[14] is used in relation to the time on which the decision takes effect. Thus, repeated reference to "**第211(3)條指明提出覆核申請的限期**"[15] in clause 224(2)(b) can be avoided. Instead, the word "**time**" can be referred to as "**(a) 段提述的限期**"[16].

Under the new approach, the Chinese text reads as follows :

(2) 凡證監會就任何人作出指明決定..... —

(a) 如該人在第211(3)條指明的就該決定提出覆核申請的限期屆滿前，通知證監會他不會提出覆核申請，則該決定在該人如此通知證監會之時生效；

(b) 除(a)段另有規定外，如該人沒有在該段提述的限期內提出覆核申請，則該決定在該限期屆滿之時生效；或

(c) .....。

[13] "Deadline".

[14] "A point of time".

[15] "The time specified in section 211(3) as that within which the application shall be made."

[16] "The deadline referred to in paragraph (a)."

3. If it was necessary, a definition could be added in the Chinese provision as an aid to achieve clarity. This could also avoid repetition and shorten the provision: see Example 4.

Example 4

The English text of clause 265(3) of the Securities and Futures Bill reads as follows :

> (3) False trading takes place when, in Hong Kong or elsewhere, a person takes part in, is concerned in, or carries out, directly or indirectly, one or more transactions (whether or not any of them is a dealing in securities or futures contracts), with the intention that, or being reckless as to whether, it or they has or have, or is or are likely to have, the effect of creating an artificial price, or maintaining at a level that is artificial (whether or not it was previously artificial) a price, for dealings in securities or futures contracts traded on a relevant recognized market or by means of authorized automated trading services.

In the Chinese text, grammatical correctness requires the reference to "**the effect**" to appear twice. To avoid the repetition and to make the Chinese text easier to understand, "**the effect**" is referred to as "**有關效果**" and defined at the end of the provision.

Under the new approach, the Chinese text reads as follows :

> (3) 如任何人在香港或其他地方意圖使一宗或多於一宗交易(不論其中是否有證券交易或期貨合約交易)具有或相當可能具有有關效果，或罔顧該宗或該等交易是否具有或相當可能具有有關效果，而直接或間接參與、牽涉入或履行該宗或該等交易，則虛假交易即告發生。在本款中，"有關效果"指為在有關認可市場或透過使用認可自動化交易服務交易的證券或期貨合約，設定非真實的買賣價格或維持非真實的買賣價格水平(不論該水平先前是否非真實的)。

Overview of the Rwandan Legislative Process

Raymond Gateraruke[1]

Abstract:

"The country must be built by law". The basic idea of building a society by law is still appropriate for a modern democratic constitutional State. This article describes the process of drafting and enacting laws in Rwanda, which is structured through a familiar and constitutionally provided separation of powers between the executive and legislative branches of government. The process in Rwanda includes: initiation of draft legislation, review by the Ministry of Justice, submission to the cabinet, submission to the lower House of parliament, submission to the Senate, submission to the President of the Republic for signature and submission to the Prime Minister for publication.

Introduction

The process of drafting and enacting laws in Rwanda is structured through a familiar and constitutionally provided separation of powers between the executive and legislative branches of government. The executive has primary responsibility for setting policies and drafting bills (legislation) while Parliament has responsibility to review, amend, and pass bills into law.

In addition to these constitutional provisions, the legislative drafting is based on two instructions: instructions of the Minister of Justice n° 01/11 of 20 May 2005 on

[1] Principal State Attorney/Legislative Drafting, Rwanda.

the procedure to be followed when drafting bills and orders[2] and instructions of the Minister of Justice n° 01/11 of 14/11/2006 relating to the drafting of the texts of laws[3]. The following steps comprise the Rwandan legislative process.

Initiation of Draft Legislation

Draft legislation is initiated at the sector ministry level based on policy directives from the minister. The right to initiate and amend legislation is concurrently vested in each Deputy and the Executive acting through the Cabinet: article 90 of the Constitution of the Republic of Rwanda of 04 June 2003.[4] Commonly there is both a policy expert and a lawyer with legal drafting skills involved early on. Often the expert is a short-term consultant. The lawyer may be one of the dedicated legal staff members signed to ministries or may be a consultant as well. The initial draft is generally written in French, English or Kinyarwanda depending on which language the initial legal drafter is most familiar with.

In terms of engaging with experts or organizations in the civil society and private sector, this may happen in several ways. As the policy and legislative intent is clarified and drafted into legal language, the expert and the lawyer are expected to consult external stakeholders and experts as required. This is done in an *ad hoc* manner, however, and there are no systematic procedures in place. Once the draft legislation is complete, it is provided to the relevant minister. The minister may invoke a gathering to present the draft legislation to members of the public as well as other stakeholders (for example, the private sector), both to sensitize them and to solicit comments.

This is confirmed by Article 2 of the Instructions of the Minister of Justice n° 01/11 of 20 May 2005 on the procedure to be followed when drafting bills and orders: the drafting of laws initiated by Government shall begin in the Ministries as bills or draft bills. Before being approved as a relevant and well-elaborated bill, the latter must undergo a long process that includes discussion with all parties concerned, exchange of ideas and drafting as to the techniques of elaboration of laws and consideration by Cabinet. The same procedure also applies to draft orders.

It is also mandatory that the debate process of law has to involve the target people. A law or an order is drafted to serve the concerned community. This is the reason why, when a Ministry initiates a bill or draft order affecting the public in general, it should first discuss its relevance with those concerned so that the resulting law or

[2] Official Gazette n0 12 of 15 June 2005.

[3] Official Gazette n0 22 bis of 15 November 2006.

[4] Official Gazette special number of 4 June 2003.

order can adequately address their situation (Article 3 of the Minister of Justice n° 01/11 of 20 May 2005).

The drafter has a crucial role. Each Ministry prepares a bill or a draft order relating to its sphere of activities. Technicians in the area concerned should be involved to play a key role in this exercise. But the legal adviser should be the primary channel of this process so that the bill or draft ministerial order is technically well elaborated and finalised to ensure easy comprehension of its content by everyone and its conformity with the relevant laws referred to in the statement of the law. Where a Ministry does not have the expertise required to draft a bill or an order, it gathers all ideas it wants to include in the bill and expresses them clearly in a written document (Article 4 of the Minister of Justice n° 01/11 of 20 May 2005).

Any bill or draft order of interest to the population in general or any document containing ideas to be included in the said draft should be discussed between the Ministry which initiated the draft and any other interested Ministries or other institutions before transmission to the Ministry of Justice. The Ministry of Justice is, whenever possible, represented in meetings to exchange ideas on the draft, but this does not exclude transmission of the bill once finished or ideas gathered to the Ministry of Justice to finalise the bill or draft a new bill on the basis of such ideas (Article 5 of the Minister of Justice n° 01/11 of 20 May 2005).

Conclusions by the team of legal advisors should be forwarded to Secretaries General of the two ministries concerned and then to the concerned Ministers who should have a common understanding about the bill before presentation to Cabinet (Article 6 of the Minister of Justice n° 01/11 of 20 May 2005).

This process of consultation is referred to as "validation" in Rwanda and includes procedures and processes for publicizing meetings, disseminating drafts, soliciting input and feedback, and responding to input and feedback.

Review by the Ministry of Justice (MINJUST)

MINJUST Mandate

The Attorney General's Office/Ministry of Justice has the following mandate: effecting administration of law and justice as well as constitutional governance (Article 2 of Prime Minister's Order **N° 18/03 of 10/09/2007** establishing the mandate and structure of the Attorney General's Office/ Ministry of Justice).[5]

[5] Official Gazette n^0 18 bis of 15 September 2007.

Under the supervision of the Assistant Attorney General in charge of Legislative Drafting, the Legislative Drafting Services has the following mandate:

1. drafting Bills;
2. coordinating the drafting of National Legislation;
3. harmonizing translations in the three official languages;
4. assisting Government institutions in the drafting of legislation;
5. participating in deliberations in the preparation of Bills (Article 12 of Prime Minister's Order N° 18/03 of 10/09/2007 establishing the mandate and structure of the Attorney General's Office/ Ministry of Justice).

Review

Following completion of the draft legislation, the relevant minister sends the legislation for a further review to MINIJUST, which has a team of legal drafters in the Legislative Drafting Unit. As mentioned above, the role of MINIJUST is not to alter the substantive intent of the draft legislation. Rather, the legislative drafting team at MINIJUST reviews the draft to ensure

- consistency with the Constitution, the international treaties ratified by Rwanda, and existing law;
- that proper drafting protocols and formats are respected; and
- that the draft is translated into Rwanda's three official languages.

There is no time frame for how long MINIJUST may take at this stage. The legal drafting team at MINIJUST includes legislative officers and translators able to ensure consistency of the three versions (English, French, Kinyarwanda) of the text. As a result of the MINIJUST review, the quality of the draft legislation is improved from the initial draft.

Following completion of this review by the MINIJUST drafters and translators, the Minister of Justice sends the draft legislation back to the initiating minister and may offer recommendations for additional work that should be undertaken on the draft by the ministry.

A bill must be finalised before submission to Cabinet. The Ministry that drafts a bill ensures its transmission to Cabinet for possible additional insights based on such ideas as may be expressed during its consideration by Cabinet (Article 7 of the Minister of Justice n° 01/11 of 20 May 2005).

Transmission to Cabinet

The draft legislation is next transmitted from the minister to the Cabinet. In cases of significant draft legislation, a cabinet paper is also drafted by the ministry that

explains the policy intent of the draft in non-technical language, and includes the draft legislation itself in an annex.

When the draft legislation leaves the ministry it may go directly to the Cabinet for consideration or, more commonly, may first go to an inter-ministerial committee for review. The inter-ministerial committee does not recommend some drafts for transmission to the Cabinet, and so this legislation returns to the initiating ministry to be changed or abandoned.

Once a draft is before the cabinet, it may be (1) adopted, (2) adopted with amendment, or (3) refused. Adoption with amendment is most common.

Determination of which draft legislation moves through this stage is largely a political matter. Draft legislation that moves forward is that most central to the president's political agenda and supported by the Cabinet.

Any bill approved by Cabinet must be translated in the three official languages by the Ministry that elaborated it and then sent to the Office of the Prime Minister for transmission to Parliament. Any draft order approved by Cabinet must be translated in the three official languages. The Ministry of Justice checks on the accuracy and harmonisation of translation in different languages before the draft order is signed.

Any bill or draft order to which amendments were made by Cabinet must be sent back to the initiating Ministry for finalisation while the Ministry of Justice checks whether the final version of the bill or draft order has taken into account all observations made before its translation in the three official languages, even though the two operations may be carried out concurrently (Article 8 of the Minister of Justice n° 01/11 of 20 May 2005).

Concerning the translation of texts, the translation of the texts of bills must be made with necessary technicality and with due diligence owing to the fact that the three official languages mentioned in the Constitution of the Republic of Rwanda (namely Kinyarwanda, English and French) have equal value, even if the project would have been conceived in only one language.

All the people in charge of the preparation of the bills within the Ministries and other institutions involved in the legislative drafting process at all times must bear in mind that any law voted by Parliament must by law be promulgated within 30 days from the date of reception by Government of the text adopted by Parliament. For this reason everything possible must be done at each level of the process so that the law is voted in its perfect language versions (Articles 4 and 5 of instructions of the Minister of Justice n° 01/11 of 14/11/2006 relating to the drafting of the texts of Laws).

If the cabinet adopts the draft legislation, it is then presented as a bill to the Chamber of Deputies. Following this stage, the responsibility for or "ownership" of the draft legislation or bill passes from the executive to the legislative branch of government.

Transmission to Chamber of Deputies

Next, at the request of the Prime Minister, the bill is transmitted to the Lower House of Parliament to the Members of Parliament (MPs)—generally by the Prime minister—in a plenary session of the Chamber of Deputies. Parliament may also directly initiate legislation through private members' bills (Art. 90 of the Constitution of the Republic of Rwanda). While these are rare in Rwanda, as elsewhere in eastern Africa (approximately two such bills are initiated per legislative session), it does occur. In any case, once a bill is presented, it is considered by the plenary for relevance, or opportunity. It then goes to a parliamentary committee.

MPs in a standing committee discuss a bill and review and offer proposed amendments that will be voted on by the plenary. As part of its review, the standing committee may invite experts or interested civil and public sector organizations to comment on the bill. The process of consideration involves the MPs sitting to discuss each clause of a bill. Those bills that are discussed and then referred back to the plenary (with or without proposed amendments) will then be voted on. If passed, the bill is then sent to the upper house (Senate) if it is to be passed by both Chambers.

Article 94 paragraphs 2 to 4 of the Constitution of Rwanda provides that

> When such a petition is made by a member of Parliament, the relevant Chamber decides on the validity of the urgency. When the petition is made by the Cabinet, the request is always granted. Upon a decision confirming the urgency, the bill or matter is considered before any other matters on the agenda.

Transmission to Senate

The process for reviewing a bill in the Senate is similar to that in the Chamber of Deputies. The bill may be voted on directly in plenary or referred for discussion to a committee.

The committee may invite interested experts and members of the public to comment and may recommend amendments to the bill back to the plenary, which then votes on the amendments and the overall bill. If the Senate votes favourably

without amendment to the text received from the Chamber of Deputies, the bill becomes law.

If the bill was amended by the Senate, then a joint committee of the two houses is formed to synchronize the two versions of the bill. Once synchronized, both houses need to vote on the bill again. Once both Chambers have passed the identical text, it becomes law and is then sent to the President of the Republic for signature (promulgation, art.108 of the CRR).

The 4th amendment of 17/06/2010, the Constitution of Rwanda in Article 88 paragraph One, 5^0 provides that in legislative matters, the Senate is competent to vote laws relating to the criminal procedure. Since the publication of the 4th amendment, the Chamber of Deputies is competent to vote the criminal law and the law relating to the jurisdiction of courts, which were on the competence of the Senate.

Transmission to President of the Republic

The President can accept the law and promulgate it, that is sign it as it is. The President can also use his right to request Parliament to reconsider it. In this case, the Constitution provides Parliament with the option to override the request by a majority of two-thirds for an ordinary law or three-quarters for an organic law (Art.108).

Transmission to Prime Minister

The Prime Minister countersigns the laws adopted by Parliament and promulgated by the President of the Republic. Then the Prime Minister's Office publishes the law in its three versions (English, French, Kinyarwanda) in the Official Gazette after the checking of the staff of the Ministry of Justice in charge of Legislative drafting. The checking focuses mainly on the harmonization of the three versions.

Challenges of Drafting Laws in One Language and Translating Them: Rwanda's Experience

Vastina Nzanze[1]

Abstract:

This article looks at legislative practices in Rwanda, particularly from a linguistic perspective. It considers the challenges of drafting laws in Rwanda in three language (French, English and Kinyarwanda, which is the local language spoken in Rwanda) and provides examples of particular difficulties in achieving equivalency among the three languages. These challenges are accentuated by the combination of civil law and common law traditions as well as the absence of a centralized system for drafting laws. However, progress is being made with a restructured Legislative Drafting Unit in the Ministry of Justice and a variety of training initiatives and technical assistance projects. Although the challenges described in this paper are real, they can be addressed with the commitment of the government and the good will of friends and partners of Rwanda.

Historical Background

The early history of Rwanda during the colonial days was no different from that of many other African countries in the region. The Kingdom of Rwanda had been established in the 15th century and continued to exist even during the colonial rule first by Germany, then Belgium after the Second World War. The kingdom of

[1] Rector, Institute of Legal Practice and Development, Rwanda.

Rwanda continued to exist as such until 1959 when the King was overthrown and a republic was established. Rwanda follows the civil law system. The scope of this paper does not permit me to include the most despicable recent history of genocide which many of you may be aware of. I will therefore skip that part and move straight to the recent history that covers the system of government and recent judicial reforms in Rwanda.

System of Government

The system of government in Rwanda consists of the three arms of government, the Executive, the Legislature and the Judiciary. The Republic of Rwanda is headed by a President who is the Head of State. Executive power vests in the President and the Cabinet.[2] The President is elected by universal suffrage through a direct and secret ballot.[3]

Legislative power is vested in a Parliament composed of two chambers, namely: the Chamber of Deputies and the Senate.[4]

Judicial power is exercised by the Supreme Court and other courts of judicature established by the Constitution and other laws[5].

Judicial Reforms

Before 2003, the judicial system in Rwanda was in a deplorable state. It may sound strange to learn that some of the people who held the post of judge or prosecutor prior to the judicial reforms had no legal education or indeed any academic degree of any type, but such was the position in Rwanda before the judicial reforms. It is often reported that the only qualification for some of the judicial officers or State prosecutors was that they had worked as faithful servants/ house help for the priests or military commanders and were promoted to the positions as a way of motivation/retention.

This situation therefore called for urgent attention by the post-genocide Government among many other challenges that it had to deal with.

In 2003 the Government of Rwanda embarked on major judicial reforms. The entire justice system was overhauled as a first step in the reform. Other reforms included the establishment of a law reform commission with the task of making

[2] Article 97 of the *Constitution of Rwanda*, available at www.amategeko.net.

[3] Ibid., article 100.

[4] Ibid., article 62.

[5] Ibid., article 140.

legislative proposals to replace the Belgian Code and other archaic laws with new and modern laws. The commission's task was to reform specific commercial laws. Once that was done, the commission ceased to exist.

A deliberate and aggressive recruitment and training exercise for new judges and prosecutors with legal qualifications, as well as lawyers and other personnel involved in the administration of justice, was embarked on. Other reforms were the restructuring of the courts, their jurisdiction and their procedures, which were based on Belgian procedures.

A new Constitution was made in 2003. It abrogated all previous constitutional provisions. That Constitution was amended in 2005 as well as in 2008 and, more recently, in June 2010.

An important process in the reform was to train many lawyers at the only university in the country at that time. The young lawyers were, immediately on graduation, deployed as judges or lawyers in government Ministries and in the Office of the Prosecutor General (equivalent to the Directorate of Public Prosecutions (DPP). The vast majority of law graduates in Rwanda have about five years working experience. It is no wonder that Rwanda has the youngest judiciary in the East African region. A few individuals have attended short courses of not more than a few weeks in legislative drafting at the International Law Institute in Uganda (ILI) or in Rwanda itself, but with limited experience in actual practice .

More recent judicial reforms introduced some common law principles, for example Habeas corpus, decisions by a single judge in all courts except in the Supreme Court and more use of precedents.

Regional integration in the context of the East African Community also made it necessary for Rwanda to adopt some common law principles. On 1st July, 2007 Rwanda and Burundi became members of the East African Community and on 1st July 2009 both countries joined the EAC Customs Union. Since joining the EAC, Rwanda became an active member of the EAC in various sectors, including the legal sector.

One of the important requirements under the EAC Treaty is that member states have to harmonize their national laws with the laws of the EAC. Today the country applies a hybrid of civil law and common law.

Current Legislative Practice

The initiation and adoption of laws in Rwanda is concurrently vested in the Chamber of Deputies and the Executive acting through the Cabinet.[6]

The first step for a Government legislative proposal is that the sponsoring Ministry drafts the bill and submits it to Cabinet for approval. If Cabinet approves the bill, it is forwarded to the Chamber of Parliament and considered by the plenary session. The Chamber of Parliament may either adopt the bill or refer it to the relevant committee of Parliament for scrutiny before it is considered and adopted by the plenary session of Parliament.

If either Chamber of Parliament does not approve the bill, both Chambers appoint a commission composed of an equal number of members from both Chambers to consider the bill and report back to the Chambers for a final decision. If the bill is still not adopted by the two Chambers, it is referred back to the initiator.

A bill adopted by both Chambers is submitted to the President for promulgation. The President shall promulgate laws within 30 days from the date of receipt of the final draft law by the Executive. But the President may, before promulgation, request Parliament to reconsider the bill. The Prime Minister countersigns the bill adopted by Parliament and promulgated by the President.

Hierarchy of Laws

In 2008 the Constitution was amended in Article 93 by providing for the hierarchy of laws and their mode of adoption. The hierarchy of laws starts with the Constitution followed by international treaties ratified by Rwanda, then organic laws and lastly ordinary laws, including Presidential Orders, Prime Minister's Orders and Ministerial Orders. That article was further amended in June 2010 to stipulate the mode of adoption of laws. The 2010 amendment provides, among other things, that

> Each law shall be considered and adopted in Kinyarwanda or in the language in which the law was prepared and in case of conflict between the three versions, the version in which the law was adopted shall prevail.

Private members bills may be drafted by consultants and submitted to the Chambers of Parliament. The same procedure for Government bills is followed from this stage until promulgation. The consultant need not have any training or experience in legislative drafting.

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[6] Above n. 2, article 90.

The Constitution provides for three official languages: French, English and Kinyarwanda, which is the local language spoken in Rwanda. The Government, a member of either Chamber of Parliament or a citizen through his or her representative in Parliament or by a member of the Bar Association may request the interpretation of any provision of a law. The interpretation of laws is by a decision of both Chambers of Parliament after the Supreme Court has given an opinion on the matter.[7]

Drafting and Translation of Laws

Who Does What?

In Rwanda the drafting of Government bills is done by lawyers in the Legislative Drafting Unit in the Ministry of Justice, which is equivalent to the Office of the First Parliamentary Counsel (FPC) in Commonwealth jurisdictions. The Legislative Drafting Unit is composed of legislative drafters and translators. As their titles suggest, drafters and translators play different roles. While the drafters draft laws, the translators translate them. The various offices also have legislative drafters who send draft bills to the Legislative Drafting Unit for polishing up.

Lawyers in various Ministries and in the office of the Prime Minister also draft laws initiated by those offices. Unlike in many Commonwealth jurisdictions, the drafting of laws is not centralized in the Office of the First Parliamentary Counsel. The Office of the Prime Minister also has lawyers who draft and translate laws. The drafter in the Legislative Drafting Unit is not given drafting instructions in prose. Drafting instructions come in the form of a draft law.

What happens in practice is that most of the laws are drafted in Kinyarwanda and translated to French and English except is a few cases where original drafts are prepared in English or French.

This arrangement has numerous imperfections, mainly due to inaccurate translations to English or French. The original draft of Law No.13/2009 of 27/05/2009 regulating labour in Rwanda was prepared in French, but considered and adopted in Kinyarwanda and translated to English. It provides examples of interesting translations.

Examples of Translated Versions.

Article 37 which provides for payment of "funeral indemnities" (read " funeral expenses"), states that "The employer shall give to the deceased family funeral

[7] Above n. 2, article 96.

indemnities." But obviously this is not the intended meaning. The translated version in Kinyarwanda states that "the employer shall pay to the family of the deceased employee funeral expenses ". The Kinyarwanda and French versions refer to payments to the family of the deceased employee.

Article 54, which provides for annual leave, states that

> At the beginning of every year the employer establishes the annual leave timetable for all her/his staff. The leave period shall not be delayed or **anticipated** by the employer for more than three months unless it is so agreed by the worker and the employer.

Simply put, this article requires the employer to make a leave roster for all his/her employees and on the basis of that roster leave shall not be deferred for more than three months except with the agreement of the employer and employee.

The head note of Article 73, which deals with forms of child labour, is "Nature of the worst forms of child works and prevention mechanisms". The article states that

> An order of the Minister in charge of labour shall determine the list of worst forms of child labour, their nature, categories of institutions that are not allowed to use them and their prevention mechanisms.

It would seem from this language that certain institutions are allowed to use the worst forms of child labour, i.e. those not listed in the Minister's order. But the correct meaning in the Kinyarwanda version is that the Minister's order will list prohibited forms of employment of children and measures to prevent employment of children.

Other examples of clumsy translations can be found in the new *Companies Act.*[8] Article 3 of the English version, which is the original version, states

> A company is a legal entity which is made up of one physical person or corporate person for commercial purposes and after filling in a form related thereto and basing upon the provisions of this law. The company shall be formed by filling in the form attached herewith as Appendix 1.

As you can see, legalese lives on.

Article 44 of the *Companies Act* provides in the English version that

> A company, including a foreign company, shall not be registered under a name which is identical with (*read "to")* that of an existing company, or a

[8] Law N°07/2009 OF 27/04/2009 Relating to Companies.

> statutory corporation, or so nearly resembles that name as to be likely to mislead, except where the existing company or statutory corporation is in the course of being dissolved and signifies its consent in such manner as the Registrar General requires.

The Kinyarwanda version of that article omits the text "as to be likely to mislead". This would mean that if a name of a company nearly resembles the name of another company even if it is not likely to mislead, it is prohibited.

Article 77 of the *Companies Act*, which is about the value of shares, stipulates in the English version that " Any shares created or issued after the commencement of this law may either be of par value or of no par value". The Kinyarwanda and French versions of that article refer only to the issue of shares and make no reference to shares created after the commencement of the Act.

Drafting Style

Apart from the resultant sloppiness in the translation process, the drafting style is inconsistent and could be improved in numerous respects.

A quick look at the Constitution itself indicates a great need for legislative drafting skills and the difficulties in translation. There is no table of contents and there are no marginal notes or head notes in the Constitution except in a few articles introduced by the 2008 and 2010 amendments, which make it even more inconsistent.

More generally in Rwandan legislation, the sequence of provisions is not always logical and the nomenclature of divisions and subdivisions of a law is not standardized. The articles of laws are so long that it makes readability and comprehension difficult. Articles are not subdivided into short numbered clauses as is done in sections, subsections, paragraphs and subparagraphs commonly used in many Commonwealth jurisdictions. The *Constitution of Rwanda*, even with its recent amendment in 2010, is a perfect example. Article 9, which deals with immunity of members of Parliament, has 6 distinct and unnumbered clauses covering a page and a half. Article 13, which is on the composition of the Senate, covers 3 pages and has 12 unnumbered clauses. This style of drafting makes it difficult to make references to the legal provisions.

The way in which amendments are drafted is even more chaotic. In several amending provisions, it is left to the reader to figure out where exactly in the principal law the amending text fits and whether it is a partial or complete substitution for the existing text. All the provisions of the recent constitutional amendment start with the expression "Article (number) of the Constitution of the

Republic of Rwanda of 04 June, 2003 as amended to date is amended as follows: " followed by new text, but not indicating whether the existing text is replaced.

Publication of Laws in the Official Gazette.

The task of the drafter ends when the bill has been adopted by Parliament. The publication of bills in the Official Gazette is managed by the office of the Prime Minister. Rwanda does not have a law governing the publication of Acts of Parliament. An Interpretation Act does not exist in Rwanda either.

The laws are published in the Official Gazette in the three official languages and can be accessed on the website of www.amategeko.net. There are no recent annual compilations or revision of laws available. It is therefore difficult to ascertain what the current law in a specific area is. With this state of affairs on the current legislative drafting process, it does not require a lot of imagination to understand the difficult state of the statute book in Rwanda.

Challenges

Historical Aspects

One of the effects of genocide against the Tutsi in 1994 was that many public officers were killed while others went into exile. The legal profession was not spared. Laws were drafted by people who had no training or any experience in the field. The translators themselves have no training in the languages, they just happen to understand and speak the languages, but they are not linguists. Someone had to do these jobs. This was probably the least of the challenges the Government faced. There were huge challenges that required more urgent attention, such as how to deal with the perpetrators and survivors of genocide, how to cope with so many orphans, widows and returning residents who were formerly refugees in different parts of the world. Security was still a huge issue as there were still pockets of killers who killed survivors, potential witnesses in cases of genocide, *interahamw*" or *génocidaires* from neighbouring Democratic Republic of Congo, and a multitude of other serious challenges.

Drafting and Translation Practice.

The legislative drafting practice in Rwanda is clearly different from the practice in many Commonwealth jurisdictions.

Drafting instructions usually come in the form of a draft bill, rather than in prose. It is difficult to understand the policy or the mischief behind the legislative proposal without having background documents and proper drafting instructions.

It is difficult enough to draft a bill in one language but translating a bill in two languages that are so different from each other in every sense, by someone who did not draft the original text, introduces more challenges. The translators are not experts in any of the three languages. They may be more conversant with the local language, but very few of them are able to express concepts in such a way that will convey the same meaning as in the original draft passed by Parliament. Drafting laws in one language and translating them in two other languages renders the law ambiguous and unreliable, especially since the translators lack linguistic and writing techniques.

Blending Civil Law with Common Law

In November, 2009, Rwanda became the 54th member of the Commonwealth. This membership has political, economic, social and legal consequences for Rwanda and its citizens. Membership in the Commonwealth opens a whole range of opportunities, but it also poses new challenges. Having fundamentally a civil law system and moving to a hybrid legal system of both civil law and common law poses the challenge of how to strike a balance between the two systems , maintain the best practices in civil law system and adapt common law good practices, for example legislative drafting practice used in the Commonwealth jurisdictions.

The impact of Rwanda's membership in the Commonwealth also presents a few challenges. Rwanda is a post-genocide country and is grappling with a scarcity of human resources with required skills in the public and private sectors. The Legislative Drafting Unit and elsewhere in Government Ministries and Office of the Prime Minister have insufficient, inexperienced and mostly untrained legislative drafters.

The adoption of a hybrid civil law and common law system requires legislative drafters and indeed lawyers who are knowledgeable in both legal traditions.

Other Challenges.

The absence of a centralized system of drafting laws poses a serious challenge to the process. There is no continuity in the practice and no consistency in the drafting style. The first person to draft a bill is not always the same person to see the bill through the legislative drafting process.

Until recently the languages used in Rwanda were Kinyarwanda and French. The policy today is that the language of instruction is English, but this process will take some time to be effective. Many public officials still struggle with the basics of the English language.

There are limited drafting tools, such as text books on legislative drafting.

Globalization requires Rwanda to join the rest of the world in addressing emerging areas such as climate change, terrorism, economic crime and cyber-crime.

A Ministerial Instruction[9] stipulates that all draft bills must appear in the three languages on the same pages. Translation of bills is done before the draft is submitted to the Cabinet and if the Cabinet makes any amendments, the draft bill will be translated further before it is published in the Official Gazette.

It is against this background that the statute book of Rwanda will undergo a fundamental change in the next few years.

Way Forward

Despite the challenges Rwanda is still facing in the process of drafting and translating laws, Rwanda has made bold steps to address these challenges.

We noted earlier that the Constitution provides that if there is any inconsistency in the three languages the language in which the law was adopted will prevail**.** So far, there has been no court case arising out of translations of different versions of the same law, but it is still a problem that needs to be addressed urgently.

Significant steps have already been taken and other steps are underway to address some of the challenges highlighted in this paper. These include the following.

Restructuring the Legislative Drafting Unit

Recently the Legislative Drafting Unit was restructured. Contracts of staff of that unit were terminated and all the posts were advertised. The advertisement attracted many applications from among former staff and from outside the Ministry of Justice such as university lecturers. Only the best candidates were recruited. But this is not enough. The Legislative Drafting Unit still needs to be professionalized. The whole process needs to be overhauled and the role of the legislative drafter and that of the translator should be clarified.

Training

The two-year old Institute of Legal Practice and Development, which is a post-graduate legal training institute, is mandated to train judges, prosecutors and legal practitioners in practical skills. The Institute started the post-graduate diploma in legal practice programme in July 2008. This programme is intended to equip trainees with practical skills they never learnt at law school. The Institute also offers short courses to judges, prosecutors and legal practitioners under the Continuing

[9] Ministerial Instructions of the Minister of Justice No. 01/11 of 14/11/2006 relating to the drafting of texts of laws.

Legal Education (CLE) Programme. But finding suitable trainers for these two programmes has been a serious challenge.

In the first year, the Institute relied mainly on international trainers with funding from development partners. Other trainers were *pro bono*. For instance the Canadian Judicial Training Centre provided two judges to teach the module on judgment. Other *pro bono* support came from law firms in the United Kingdom. For example, Allen & Overy has in the last 2 years sent volunteers for about three weeks each year to teach judges, prosecutors and lawyers in Rwanda. The most recent visit was in June 2010 when about 7 lawyers from that law firm taught commercial laws to judges, prosecutors and legal practitioners.

The training of legislative drafters and translators is an ongoing process. The Ministry of Justice has in the last 5 years sent its staff for training in legislative drafting. The training varies from a few weeks to a year. A few drafters are undertaking training in legislative drafting in the United Kingdom.

The Institute of Legal Practice and Development has developed a syllabus for a legislative drafting diploma. The training will be conducted in Rwanda and may be done in 9 months. The syllabus has been submitted to the Council for Higher Education in Rwanda for accreditation. We plan to start offering the course early next year. Since there are no trained legislative drafters in Rwanda, the Institute will rely on foreign trainers to teach this course and seeks to interested experts from CALC members to be trainers at the Institute. The programme consists of 17 modules and is designed in such a way that a module can be taught by one or two trainers each taking a week or two or taking a month for two modules. While this training is expected to equip drafters with modern drafting techniques, drafters will learn more by doing on the job. They will continue to improve their skills through trial and error and develop more consistency and clarity in their work.

Technical Assistance from the Commonwealth

Within a few months of becoming a member of the Commonwealth, Rwanda has been strategizing on how best to take advantage of the opportunities which come with that membership. When the Commonwealth Secretary General had a two-day working visit to Rwanda in January 2010, he informed journalists that Rwanda's progress in the last 16 years has been impressive and has prompted the Commonwealth to cooperate with the Rwanda Government in consolidating the developments of the country. He stated further that for Rwanda " to be able to come so far in such a short period of time and to be so determined to overcome the past, gives everyone and every society courage to do whatever they want to do."

The Commonwealth Secretary General also noted that other members of the Commonwealth would benefit from Rwanda's membership, for example in the

fight against corruption and promotion of gender equality. As you might know, Rwanda boasts of having the largest female representation in Parliament in the world.

There is no doubt that Rwanda will benefit from the experience of older members of the Commonwealth. One of the ways Rwanda can benefit from membership in the Commonwealth could be by way of attachment of some legislative drafters to Offices of Parliamentary Counsel in other Commonwealth jurisdictions. This would enable them to learn by working under experienced drafters.

But Rwanda also brings positive experiences to the Commonwealth group of nations. In his address in a ceremony of officially welcoming Rwanda to the Commonwealth at Marlborough House, President Kagame of Rwanda said:

> For us, joining the Commonwealth is an important milestone in our development journey. It means that we enter a unique and diverse family, with whom similar values and aspirations are shared, and which provides a wide range of opportunities, which will improve the lives of our people …."[10]

Conclusion

For anyone who has not visited Rwanda in recent times it is hard to visualize the transformation that has taken place in that country in the last 16 years. The pace of economic development is fast. It is little wonder that Rwanda has received several prestigious awards in the last two years, including an award from the World Bank for being the best reformer in doing business in 2009 and being the second best reformer in 2010. The challenges described in this paper are real but with the commitment of the government and the good will of friends and partners of Rwanda, a concerted effort of all the actors should address these challenges, especially through the training and attachment of legislative drafters so that the quality of the laws of Rwanda is improved.

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[10] President Kagame's speech at the Commonwealth Flagraising Ceremony in London, 8 March,2010, reported in *New Times* (Rwanda), No. 14194 of 9 March, 2010..

Free the Legislative Process of its Paper Chains: IT-inspired Redesign of The Legislative Procedure Cycle

Wim J.M. Voermans,[1] Welmoed Fokkema[2], Remco Van Wijk[3]

Abstract

Over the past decades legislatures have found ways and means to use IT technology to support legislative activity and improve access to legislative documents. Increasingly IT applications used for elements and parts of the legislative process are linked. This paper argues that it is now time we took the next step and redesigned the legislative process by tailoring it to the information needs of the 21st century. The rationale and set-up of most legislative processes is still paper-based. Different legislatures have used IT as a lever to redesign their legislative processes. This article gives examples of innovative technology EU-countries have introduced and touches upon IT-assisted architectures for legislative programming (preparation), legislative calendars, IT-assisted drafting systems, impact assessment, Internet-based consultation, IT-assisted review, new ways of amending legislation, electronic promulgation, codification and consolidation, electronic access to legislation and IT-based effect monitoring (including evaluation. The article finishes by giving a framework for a new 'paper-detached' legislative process.

[1] Wim Voermans is professor of Constitutional Law at Leiden University, Director of the Institute of Public Law of the Leiden Law School and Dean of the European Academy of Law and Legislation and vice-president of the International Association of Legislation.

[2] Welmoed Fokkema LL.M is a consultant at Thauris, the Netherlands.

[3] Remco van Wijk MSc is a researcher at Delft University of Technology and partner at Thauris, the Netherlands.

"A good compromise, a good piece of legislation, is like a good sentence; or a good piece of music. Everybody can recognize it. They say, 'Huh. It works. It makes sense."

Barack Obama[4]

1. Paper-based Legislative Processes and IT Support: An Uneasy Match

If you want to understand the rationale behind the set-up of legislative processes in most present-day jurisdictions, you will need to understand paper and paper printing processes. In the majority of Western parliamentary democracies, and indeed in most Commonwealth jurisdictions, democratic legislative procedures were developed in the 19th or the beginning of the 20th century. And for those countries that established their procedures later on, the existing procedures in other countries served as a model.

Legislative procedures and processes are deeply rooted in paper and, in turn, the paper underpinnings have shaped the procedures and the processes.[5] A common feature of most legislative procedures and processes is that a draft legislative text is produced at the request of the government or a member of Parliament. The first sketches of a legislative project may involve different (sequential) versions, but the final draft (in some countries the reserve of a parliamentary counsel) on which the initiators agree is printed, given a file number, and then transferred (tabled) – with or without consultation with advisory bodies or interest groups – to a parliamentary assembly (or legislative assembly), usually known as a "House". By this act, a draft pupates into a "bill" or a "proposal", depending on the sort of system one is in.

The House then scrutinizes and debates the bill/proposal, amends it and/or adopts or rejects parts of it. The proceedings and amendments are, in the form of written documents, added to the file of the bill/proposal under the same number. The draft/proposal may travel back and forth between two Houses or sequentially through them in order to be adopted. In some countries bills are debated in a single House. Finally, depending on the constitutional system, the proposal may need royal or presidential assent before it becomes law (an 'Act'). After this final stage, legislation is promulgated, almost always by way of publication in an official

[4] Interview "The Candidate", *New Yorker Magazine* 31 May 2004.

[5] See W. Voermans, P. Kolkman and R. van Kralingen, 'The Impact of Electronic Subways on Government Decision-Making Processes,' in: Peter Falconer, Colin Smith and C. William R. Webster (eds.), Managing Parliaments in the 21st Century, IOS Press/Ohmsha/IIAS, Amsterdam, Berlin, London, Tokyo, Washington DC, 2001, p. 51-57 and Ethan Katsh, Electronic Media and the Transformation of Law (1989).

Gazette or Bulletin (labels vary here). The proposal and adoption of legislation follow a single, sequential, paper-based route culminating in a written publication.

The strong paper base of legislative processes is demonstrated most clearly in drafts or bills that propose amendments to existing legislation. Because a precise and consolidated print of a single legislative text is the required outcome of most legislative processes, amending bills give detailed instructions on the parts and elements that need to be changed. Most of the time the general idea is that amendments are fitted or inserted into the existing text, creating a new single document.

As a rule, most jurisdictions do not repeal old acts as a whole and replace them with a new one in the event of minor amendments;[6] they simply give instructions to insert new elements into an existing text. This is a common enough practice, which departs from the premise that elected representatives are best suited to write and scrutinize legislation, even if this involves very technical subjects and difficult interest representation. It also departs from the idea that democracy is best served by direct involvement and hands-on control by members of Parliament about the text of legislation. This does, however, no longer always hold true in our present day and age. Legislation has become too complex and most elected representatives nowadays lack the legal skill and expertise to fully understand and thereby control the technicalities of legislation. To a lot of them bills consisting of many technical and dispersed amendments will be confusing and difficult to understand, which results in loss of control rather than the other way around.

Current amendment techniques are not helping the public to understand legislation either. Not only is it difficult to understand the text of amending bills, it is also often very difficult to keep track of the different documents legislative actors exchange during the different stages of the process. If we take an outsider's view to current ways of amending and enacting legislation in different sequences, you cannot help but notice that – due to its paper-based workflow – the whole process (especially the amending part) compromises on accessibility, understandability and readability of the texts; the process is not genuinly inclusive, but rather exclusive to interested outsidersI, it is truly complicated, cumbersome and error-prone.

A recent illustration is the UK bill amending the *Freedom of Information Act 2000*[7] removing provisions permitting Ministers to overrule decisions of the Information Commissioner and Information Tribunal and limiting the time allowed for public

[6] The Dutch Drafting Directives (see paragraph 2 of this contribution), for instance, only recommend to repeal the old act and replace it with a totally new one in case of substantial amendments. See Directive 224.

[7] Tabled 15 November 2010.

authorities to respond to requests involving consideration of the public interest. Section 3 reads as follows:

> **3 Time limits for compliance**
>
> (1) Section 10 of the Act is amended as follows.
>
> (2) In section 10(1) for the words "and (3)" there is substituted ", (3) and (3A)".
>
> (3) In section 10(3) for the words "need not comply with section 1(1)(a) or (b) until such time as is reasonable in the circumstances" there is substituted "must comply with section 1(1)(a) or (b) promptly and in any event not later than the fortieth working day following receipt.".
>
> (4) After section 10(3) there is inserted—
>
> > "(3A) In the case of a request which satisfies the conditions in subsection (3B), the public authority must comply with section 1(1)(a) or (b) promptly and in any event not later than the fiftieth working day following receipt; but this subsection does not affect the time by which any notice under section 17(1) must be given.".

This part of the text is gibberish or, maybe more appropriate, Double Dutch to any layperson. To be understood, it requires the original text of the *Freedom of Information Act 2000* and a good deal of legal expertise as well as some experience to read and really understand it, even if we take the supplementary material (explanatory memorandums etc.) into account. Processing information in this way does not contribute to the overall transparency of the legislative process or to its democratic intent. Most members of Parliament, we feel, will – maybe after some hesitation – have to admit that bills drafted like this are not helpful in exercising scrutiny and influence on legislation: the mandarin language keeps non-experts at arms length.

Information technology (IT) is pervasive in processes that use written text to convey meaning. It is used widely in the legislative process as well. Most of the documents exchanged in the legislative process nowadays are processed by IT systems, ranging from ordinary word processors to dedicated routing systems, document management systems, specialized databases and drafting systems. We will discuss some of these systems later on in this article, but before we do that we want to highlight one interesting and common feature.

Most of the IT-systems that support activities within the legislative process take the process itself for granted, or so it seems. Although the paper orientation of the

process is no longer a fact of life (bills can in theory be drafted and processed and Acts can be enacted and promulgated without ever touching the paper base), it remains largely undebated.[8] Even now in 2011 we still draft and circulate documents in cryptic language, meaning to amend legislation via an intermediate editor and consolidator, even though for more than a decade IT technology has enabled us to insert directly, indicate changes and – at the click of a mouse – to produce a consolidated text. Anyone who has ever worked with the track changes feature of a word processor knows this. Why then do we keep on amending the old-fashioned way? It is just one example of technology prompting reconsideration of the architecture of our paper-based legislative process.

IT technology has been used to support legislative activity and legislative processes as a whole for more than two decades now. But the architects who have come up with IT systems and technology to support legislative activity seem – for the most part – to have taken the existing processes and procedures for granted, as a fact of life. As when the first motorized cars were developed, a petrol engine was originally fitted onto a horse-drawn carriage without further thought. After a while the concept of a carriage was reconsidered and re-engineered to meet the new needs of motoring. Maybe the time has come to ask ourselves whether we need to redesign our legislative procedures as well in view of what IT techniques allow us to do.

2. IT Support for the Legislative Process: Taking Stock

Ever since the emergence of IT technology (as early as the 1960s)[9] scholars and practitioners have recognized the potential of these techniques to support and even improve the legislative process and, for that matter, legislative activity as a whole. However, putting these ideas into practice was slow going. In 1989 Robert Stoyles complained that IT remained an 'unfulfilled promise' for legislation.[10] Using IT

[8] As early as 1980 Ignace Snellen saw that this sequential process is also the dominant paradigm for policy- making in modern liberal democracies bringing with it all kinds of procedural path dependencies and framing the mind sets of the key players. I. Th. M. Snellen, "Planning en openbaar bestuur in de verzoringsstaat; een confrontatie van staatsrecht en beleidswetenschap (Planning and Public Administration in the welfare state; a confrontation between constitutional law and public administration)" in WRR Voorstudies en Achtergronden V22 (Studies of the Dutch Scientific Council for the Government); The Hague, 1980, at 66-74.

[9] One of the first systems we know of is the QWIK-DRAFT-system, introduced in 1974 in Virginia USA. See W. Voermans, *Sturen in de mist maar dan met radar*, (thesis on computer supported legislative drafting in the Netherlands), PhD-thesis, Tilburg University, Zwolle: Tjeenk Willink, 1995 at 12-13.

[10] R.L. Stoyles, "The Unfulfilled Promise: Use of Computers by and for Legislatures", (1989), 9 *Computer Law Journal* , no. l at 73-103.

(informatics) to support the drafting and enactment of legislation – *legimatics*[11] – is a discipline which, though very young, can claim a modest tradition.

Legimatics has basically produced two strategies concerning the use of IT in the legislative process: the information-oriented approach and the Artificial Intelligence (AI-) approach.[12]

In the information-oriented approach, legislative activity and processes are basically considered to be information processes and IT-Systems and techniques can be used to support the flow and processing of information in legislative processes.

In the AI-approach, the legislative process is perceived as a problem-solving process, requiring knowledge and reasoning. AI-systems try to mimic this reasoning in order to help actors in the legislative process to arrive at solutions for problems in legislation. Some AI-based systems do not as much try to support the legislative process itself, but rather try to let a computer 'reason' on the basis of a modelisation and representation of the knowledge expressed in the norms and provisions of legislation. We will not deal with these latter AI-based systems in this article, although they are interesting enough, first of all because very few of these systems have made it from the drawing board into the actual drafting offices or services and, secondly, because most of them are only indirectly related to the legislative process as such.

Most readers will be familiar with information-based IT systems that have been put into place to support legislative activity. We will deal with them very briefly here and without delving it the technical features and architecture of these systems, since this paper is directed towards an audience that understands legislative methods more readily than information technology.

There are basically *four classes* of information-based IT-applications used in present day legislative processes. First of all, there are the run-of-the-mill office applications (word processors – sometimes tuned to legislative needs – like LegisWrite in the EU,[13] spreadsheets and simple databases). There are many of these office applications around. We will not deal with them in any detail here for the sake of brevity, although they are worth studying. Their variety sometimes hampers

[11] W. Voermans & R. Van Kralingen, "Bringing IT-support for legislative drafting one step further: from drafting support to design assistance", in: M. Gawler (ed.), *Artificial Intelligence & the Law ICAIL-97*, 1997 at 49-53.

[12] Ibid. at 49-50.

[13] LegisWrite is a tool ensuring that documents distributed by the European Commission to the other Institutions are well presented and consistent. It is also incorporated into Word and is used for drafting (and translating) Commission's official legislative and non-legislative texts.

seamless document exchange and communication between legislative actors, and the same variety often implies extra work before legislative documents can be properly 'marked-up' and added to an accessible (web-based) legislative database.[14] New dedicated systems – integrating drafting and database storage of legislative texts while safeguarding the consistency of the legislative stock – try to cut costs here.[15]

A second class of information-oriented legislative IT systems consists of dedicated database applications, commonly used for storing, processing and accessing legislative documents or documents pertaining to legislation. Most jurisdictions nowadays have elaborate collections of legislation stored in publicly accessible databases. Most of the time these databases can be accessed via the Internet as well. The increase of web-based, government databases has mushroomed over the last decade. In the wake of the possibilities these legislative databases offer, citizens and businesses seem to have become increasingly hungry for information on legislation. They want to access legislation as soon as it is available: accessibility should be simple and the path to the right information straightforward.

This has had the noticeable side-effect in that governments are producing more and more information *on* legislation in order to allow citizens and businesses to understand the *message* of (new) legislation. Some official government websites nowadays contain summaries of legislation, flowcharts and schemes on how legislation works. Secondary information on legislation is put in place in order to shield it of from the often complex and technical primary source: the actual act or instrument as enacted. A most interesting trend: an increased demand for legislative information (citizens and businesses seem to have been awakened to what is possible) complemented by the production of additional information to allow interested parties to understand the message legislation expresses.

A third class of IT applications used in the legislative process are the so-called *legislative calendars* and *legislative progress monitors*. Electronic legislative calendars typically contain the legislative programme for the year to come (or the upcoming

[14] Web-based databases require a standardized mark-up language like XML (Extended Mark Up language). Were one to draft in XML already, no extra effort would have to be made at the end of the process. Even the exchange of legislative documents between legislative actors could benefit from the use of a standardized, common mark-up language. See e.g. T. Agnoloni, E. Francesconi, P. Spinosa, "Xmlegeseditor: an open-source visual xml editor for supporting legal national standards" in *Proceedings of the V Legislative XML Workshop*, European Press Academic Publishing 2007 at 239–251.

[15] E. Francesconi, D. Spinosa & D. Tiscorina, "A linguistic-ontological support for multilingual legislative drafting: the DALOS Project" in P. Casanovas, M.A. Biasiotti, E. Francesconi & M.T. Sagri (eds.), *Proceedings of LOAIT 2007*, 2nd *Workshop on Legal Ontologies and Artificial Intelligence Techniques,* 2007 at 103-112 and A. Boer, R. Winkels & F. Vitali, "Proposed XML Standards for Law: MetaLex and LKIF" in Lodder, A.R., Mommers, L. (eds.) *Legal Knowledge and Information Systems, JURIX 2007*: *The Twentieth Annual Conference*, IOS Press, Amsterdam, 2007 at 19–28.

parliamentary session), or the whole of the legislative programme of a cabinet for its upcoming term. Calendars have a prospective character: they inform us of upcoming events and debates on legislation and give interested parties the opportunity to time their input correctly. Legislative progress monitors provide information about the current status of a legislative document, the state of affairs or the progress of the passage of a bill. The UK progress monitor is a good example: http://www.parliament.uk/about/how/laws/passage-bill/.

Similar calendars and monitors exist at the EU level in Austria and other EU countries (regrettably not in the Netherlands, at least not an integrated one,). Many jurisdictions use both calendars and progress monitors to boost the transparency of the legislative process as a whole. Most calendars and progress monitors are not interactive. Citizens and businesses cannot comment on the website of the calendar or monitor on a legislative document. When evidence is taken, or views are invited, this is usually channeled via separate routes. Some jurisdictions combine progress monitors with live broadcasts of parliamentary commission or plenary sessions. Parts of the meetings of the EU Council of Ministers, for instance, are broadcast live.

Last on the menu of legislative IT applications are *dedicated drafting aids*. Again we will not deal with them in any detail here, but systems like these are set up as tool boxes for drafting legislation.[16] In the Netherlands the Legislative Design and Advisory system (LEDA) offers an example.[17] When drafting legislation in the Netherlands, civil servants (most of the time lawyers) are required by an order of the Prime Minister, to observe the Directives for drafting regulations. These Drafting Directives are an elaborate set of rules, best practices, models and illustrations of methods and techniques for legislative drafting. All in all there are 374 Directives on record, but in fact there are more than 400 to be observed.[18] The LEDA system alerts drafters during the drafting process and draws attention to a relevant directive. It operates more or less like a sophisticated legislative spell-check, but one that offers information in the form of model clauses to be considered, advice on structure, help for definitions and so on.

[16] See for sorts and sizes of systems like these Marie-Francine Moens, 'Improving Access To Legal Information: How Drafting Systems Help', in: *Information Technology and Lawyers*, Springer 2006, p. 119-136.

[17] See Voermans and Van Kralingen 1997.

[18] Some of them have been inserted in between existing Directives and therefore have titles like 124a, 124b etc.

There are Italian and Belgian prototype systems that operate more or less on the same footing.[19]

A very interesting Australian system was engineered by Tim Arnold-Moore. In the 1990s he devised the "ENACT" system, which is an integrated drafting environment for legislation that automatically generates the wording of amending legislation in the textual amendment style,[20] in short an automated consolidator. The unique feature of the system is that the drafter can make an amendment in the original text of an act or an instrument more or less in the way one can amend a text with track changes in a word processor. The ENACT system can generate a traditionally formatted amending bill or proposal, one that can be tabled in customary format in Parliament. Once a bill or proposal is adopted, ENACT can reverse the process and, on the basis of the amending bill, come up with an automatically generated consolidated act or instrument.

2.1. Trends in IT support during the last decade

If we try to discern common trends in the use of IT in legislative processes throughout the last decade or so, it is fair to conclude that IT has fulfilled part of its promise. The use of IT is ubiquitous in legislative processes, especially during the stages of inception, drafting and enacting, but also at the stage of implementation. Electronic planning (calendars), electronic consultation, e-messaging, IT-supported drafting and paper routing, as well as e-publication have become commonplace in most jurisdictions.

Although IT is used in the legislative process, it is quite hard to tell how it has affected the attitudes and behavior of the actors working within the legislative process. What is striking, however, is that legislative IT applications and systems aim to support distinct elements and stages in the legislative process. IT support is isolated; the different forms and systems are not linked. Although in most jurisdictions legislative processes are considered to be (or aim to be) integrated

[19] E.g. the Solon-system Stijn Debaene, Raf van Kuyck and Bea Van Buggenhout, *Legislative Technique as Basis of a Legislative Drafting System*, http://www.jurix.nl/pdf/j99-03.pdf,, and Stijn Debaene, Raf Van Kuyck & Bea Van Buggenhout, Legislative Technique as Basis of a Legislative Drafting System, *Information & Communications Technology Law*, 2000, vol. 9 , nr. 2, at 149-159. In Italy the system Lexedit was developed. See C. Biagioli, & P. Mercatali, Strumenti automatici per redattare testi legislativi: Lexedit2 in Ambiente di normazione, *Informatica e Diritto*, 1993, at 107–122.

[20] Timothy Arnold-Moore, "Automatic generation of amendment legislation" in *Proceedings of the 6th international conference on Artificial intelligence and law* ICAIL 1997 at 56-72.

cyclic processes,[21] IT support is only very rarely set up in an integrated way that would enhance the cyclic nature of the process.

Some jurisdictions have tried only at the stage of drafting to integrate IT technology, and even these systems are rare. Worldwide, there are hardly any legislative IT systems which integrate drafting aids, office and business management systems, legislative tool boxes and web and database technology. To our knowledge there are only a very few truly integrated drafting systems in service such as the LEGIS-system (Legislation Information System) in New South Wales, Australia. LEGIS is an integrated system for drafting, storing, tracking and publishing legislation. It is intended to be a cradle for the repository of New South Wales legislation. The system contains legislation in draft, passage and enacted form together with a comprehensive history of events. For management purposes, it can be used to track work at all stages and measure workloads and turnaround times. For public access purposes, the system has the capacity to generate all kinds of catalogues and tables relating to legislation. LEGIS drives the legislation website and tracks the online publication of individual instruments.[22]

3. IT Shaping the Legislative Process

In legislative processes IT serves mainly as an enabling technology, but sometimes it works as a deterministic technology as well. We saw this, for instance, in the way governments have begun to produce secondary information on legislation due to the widespread use of electronic legislative databases. Still, in other ways IT is reshaping legislative processes as we speak. It has facilitated and spurred the exchange of information in a way nobody could have imagined 20 years ago. As a result, the pace of the legislative process may have increased.

IT has also opened up the legislative process to 'outsiders'. The increased transparency of the process of legislation due to its 'web-presence' and an ensuing awareness of its volume, has undoubtedly contributed to more critical attitudes with regard to the complexity and volume of legislation and the administrative burden resulting from it.[23] Impact assessment – a current and common practice in many EU countries and at the EU level as well – is a way of preventing legislative

[21] W. Voermans, "A learning legislator?; Dutch attempts to prevent brain drains in the legislative process" in C. Moll c.a. (ed.), *Proceedings of the 7th Congress of the European Association of Legislation 31st May, 1st June 2006, The Hague*, The Netherlands Academy for Legislation, The Hague 2008 at 179-196.

[22] See Don Colagiuri, & Michael Rubacki, "The long march: pen and paper drafting to E-publishing law", *CALC conference Hong Kong* 2009. http://www.legislation.nsw.gov.au/The-Long-March.pdf.

[23] See W.J.M. Voermans, C. Moll, N. Florijn & P. van Lochem, "Codification and Consolidation in the European Union: A Means to Untie Red Tape" (2008), 29 *Statute Law Review* 65.

proliferation, but it is only practicable if good quality data is available. In this last respect it could be argued that impact assessment is more or less dependent on IT.

These are all indirect effects of IT on the present legislative processes. There are more direct ways in which IT has affected and shaped legislative processes as well. We will deal here with two examples only, but we think that if we were to analyze different jurisdictions the list would most probably be much longer.

The first example is that of electronic consolidation and promulgation – an example we stumbled upon when studying consolidation and codification practices throughout Europe in 2008.[24] The second example is one that involves the increasingly common practice of electronic consultation, but one using a Wiki, allowing the public to directly participate in the drafting of legislation.

3.1. Electronic Consolidation and Promulgation

Quite a few EU countries seem to have resorted to forms of *electronic consolidation* in past years. In most countries electronic publication in 2008 was perceived as a good practice, while in other countries, for example Belgium,[25] electronic promulgation at the time was already required by law. Other countries were to follow suit.[26]

Electronic promulgation promises to improve the accessibility and comprehensibility of legislation immensely. In particular, linking the processes of drafting, enactment, promulgation and consolidation – which is feasible in an electronic environment[27] – can improve the pace of consolidation, keep the legislative corpus up-to-date, be helpful for ready application, and, moreover, strengthen the accessibility and readability of legislation.

Many countries have not yet made the step towards mandatory electronic promulgation. This may be because the demand for consolidated electronic versions is supplied by private companies. For instance, in Hungary an estimated 90% of legal practitioners in 2007 used a database (and spin-off CD's) called Complex. Although not an official version, the texts from the database are highly valued because they are accurate and up-to-date. In Latvia and Bulgaria the task of consolidation also appears to be carried out well by the private sector. It is not only

[24] Ibid.

[25] Paragraphs 472-478 Program Law of 12 December 2002, as modified by par. 4 through 8 of the Law of 20 July 2005 containing various provisions. Belgium did not partake in the survey.

[26] Draft proposal for an Act on Electronic Promulgation. Dutch Ministry of the Interior and Kingdom Relations, April 2006.

[27] See T. Arnold-Moore, "Public access to legislation and the democratic process", *RegelMaat* (Dutch Journal for Legislative Studies) 2004, 5 at 161 ff.

businesses that stand in the way of governmental electronic promulgation. Budgetary restricitions obviously may play a role as well.

3.2 Authenticity and Legal Effects of (Electronic) Consolidation

By their very nature consolidated texts are not authentic in most jurisdictions and do not have the same legal effects as the source documents, basic acts and amendments. There are some exceptions to this general rule. Colagiuri and Rubacki demonstrate how different Australian states have decided to authorise the text as published online as authentic (New South Wales and Victoria) and note those that have requireded the in-house database of legislative content to be accessible on a website.[28] Canada has gone down this road as well.[29] Other countries use the system of authorised republication or reprint. These reprints are sometimes considered 'authentic', for instance in the Netherlands.

An interesting phenomenon (or problem) is the divergence of the texts of official acts and the consolidated document (whether or not official or authentic).[30] In order to solve problems with consolidated versions, some countries have specific legislation to protect those who have relied on consolidated texts.

In Malta, for example, article 11A, section 4, of the *State Law Revision Act* provides that, unless proof is brought to the contrary, the text of any law published on the official Internet site is deemed to be a true representation of the law, incorporating all amendments made up to the date indicated on the Internet site. This does not ward off all legal complications, of course.

Under Estonian law a procedure exists according to which a court may refuse to apply a consolidated text on the basis that it does not correspond to the original text of the legislation (or amendment made to it). If a court comes to this conclusion, it needs to notify the State Chancellery of the non-correspondence.[31]

3.3. The New Zealand Wiki-Police Act

In 2008 New Zealand conducted a very interesting experiment. In March 2006, the New Zealand Government agreed to a comprehensive review of the 1958 *Police Act*

[28] See Colagiuri & Rubacki above n. **Error! Bookmark not defined.** at13-14. See also Richard J. Matthews & Mary Alice Baish, *State-by-State Report on Authentication of Online Legal Resources* (Chicago: American Association of Law Libraries, 2007).

[29] See the *Legislation Revision and Consolidation Act*, RSC 1985, c. S-20, s. 31 (http://laws-lois.justice.gc.ca/eng/acts/S-20/page-7.html#h-12).

[30] The term consolidation is used differently in different jurisdictions. What the British call 'codification', for example, would more or less constitute 'consolidation' in other EU countries and vice versa.

[31] Paragraph 19 of the *State Gazette Act*.

and decided to rewrite it using both traditional and innovative forms of consultation. During the first stage of consultation, the public was invited to give their view on the general outline of a new *Police Act* framework. At the second stage the public was invited to participate directly in the draft of the new *Police Act*. To this end the review team had a wiki environment built.

The experiment was a success: the public responded enthusiastically to the project, there were a lot of visits (26,000), participants produced hundreds of constructive edits, ranging from single-word suggestions to lengthy paragraphs of commentary on a wide variety of topics.[32] By the end of 2007, the wiki environment produced an altogether decent bill that was then tabled before Parliament, processed along the usual channels, scrutinized, amended and then enacted and promulgated.

3.4. How does IT Affect the Legislative Process?

The examples show that IT is affecting and reshaping the legislative process in different, and more or less haphazard ways: sometimes as an unintended side effect and sometimes as a deliberate design. This process will undoubtedly continue to reshape the legislative process. However, now that we know of the potential of IT and see that the information age has set in, the big question is what kind of legislative procedures do we want to have in the future, what kind of rules? We asked ourselves this question in the Netherlands two years ago and as a result, the the Legis-project was started.

4. The Dutch Legis-project

The Legis-project NL is a 2009[33] initiative by the Dutch government that is aiming to *redesign* the legislative process by using electronic and IT services.[34] The project's primary aim is not only to support the current legislative process , but also to redesign both it and its outcome in light of the material and formal demands of the present day. Quite an ambition. To arrive at redesign, a two-step approach was chosen. A better understanding of the process and the functions it performs as a first step, and a second step to see whether and how the current process can be improved and simplified.

[32] See http://www.rcmp-grc.gc.ca/gazette/vol70n1/fea-ved1-eng.htm.

[33] *Kamerstukken* II 2009/10, 31731, nr. 6. (Dutch Parliamentary Papers of the House of Representatives of the Netherlands).

[34] http://www.vernieuwingrijksdienst.nl/onderwerpen/interdepartementale/beter-beleid-goede/wetgeving-legis.

4.1. First Step: Understanding the Current Situation (IST)

The first step in the Legis-project NL was to arrive at a shared understanding based on a clear and complete picture of the current legislative process. This objective was the basis for the IST Lawmaking Process Research (IST research) initiated by the Dutch Ministry of Justice 2009-2010.

The basic idea of the research was to analyze the legislative cycle from a *process perspective*. This entailed an analysis of the legislative process, the perspectives of the legislative actors on the process, the deliverables and products resulting from it as well as the IT support currently in use. There are different reasons for this approach, which may be perceived as elaborate.

The first is the large number of actors involved in the process and the different roles and responsibilities. This accounts for many lines of communication, many points where information is transferred, many sources of information (input) and many interdependencies. To have a complete picture of the process and a deeper understanding of it, it is essential to know how decisions are made and by whom. Moreover the process perspective leads to the identification and understanding of the different functions in the legislative cycle (draft, test, advice, check, decide, etc).

An additional reason for the process perspective is that, in the context of IT induced redesign, the points where IT can support the legislative process become more visible.

After the initial analysis, the legislative processes were modeled using Business Process Modeling Notation (BPMN). This language is an international standard for modeling business processes and services. It provides a graphical notation suitable for mapping very complexprocesses.[35] The legislative process is comprehensive and complex. We found out, for instance, that for one Act, more than 1500 activities are performed, divided into 60 sub-processes. Most of these activities are framed by mandatory procedures, either enshrined in (constitutional) law or in manuals and handbooks which are binding upon the legislative actors. The process of enacting delegated or statutory instruments is almost equally complex in the Netherlands, again due to the need to observe procedures. The BPMN models allowed us to get a better view of the whole of the process and to see the hierarchy between the actors, the different roles involved and the interdependencies.

[35] See S.A. White, *Introduction to BPMN*, 2004, http://www.bptrends.com/publicationfiles/07-04%20WP%20Intro%20to%20BPMN%20-%20White.pdf.

4.2. 'Should Be' versus 'Is'

To help us in our understanding, we compared the rules of the legislative procedure (the process as it should be) and the actual process itself. Divergence could, we felt, prove to be interesting. The comparison of the normative procedures (should) and process in practice (as is) led to interesting conclusions. It did indeed reveal that in some respects, the actual processes deviate from the procedures. Corners are cut, common practices emerge. The differences helped to serve as stepping stones for improvement.

4.3. The Road to 'Should'

The second part of the Legis-project NL undoubtedly will prove to be the most interesting and challenging part. How can we reshape the legislative process, keeping in mind the functions it performs (legal certainty, transparency, democratic legitimacy, etc.), the rules and safeguards that exist and the way it actually unfolds? The project has already come up with some specifications here.

A first problem that needed to be tackled was that of standardization. Dutch legislation is prepared by ministries and these ministries have different ways of working. The second big ambition is a more service-oriented legislative process (and enabling procedure), more transparent and outward looking. The project's motto is: 'from legislation as text towards legislation as a service.' The new legislative process should improve the service to three target groups: citizens and businesses, administrative agencies and legislators (the inner circle of actors directly involved preparing, drafting and enacting legislation). The overall aim of the project to improve services for citizens and businesses is to tailor legislation to their needs in a process that is open to participation and transparent from the very outset until the very end.

Services for administrative agencies involve their structural involvement in the whole of the legislative process, the standardization of definitions, mutual coordination of working and business processes and mutual learning loops. The inner circle service will be improved by an integrated system for drafting, storing, tracking and publishing legislation (much along the lines of the Australian Legis), standardization and better sharing of knowledge and services between the different ministries and other government agencies, improved coordination between legislative chain-partners.

The key concepts to the whole redesign operation are integration – an eye for the quality of legislation during every step in the legislative process - and recognition of the cyclic nature of modern legislative processes. The new process will be IT supported. Some of the plans draw on Internet consultation. An integrated impact assessment framework (including a document manager) is being set up, as well as a

legislative calendar and integrated progress monitors. All this plugs into an integrated legislative system supporting legislative drafting, storing, tracking and publication of legislation in web-based databases. The IT part is of course interesting, but what interests us here is the new set-up of the whole process. This process is in progress at the moment. It is controversial to some extent as well. Some argue that it is better to keep in place the checks and guarantees the old procedures offer; others argue that it is virtually impossible to succeed in really achieving a service-oriented legislative process if we stick to the old rules.

5. Conclusion: A Brave New World?

Legislative procedures all over the world have adapted to developments in societies, markets and technology. From an oral tradition, with very few written laws, we have come to a situation where almost all law is enacted in written legislation, most of the time electronically processed and published. Modern legislation is very dynamic and interactive – volatile in the eyes of some – and many IT tools are used to support legislative activity. This is changing our legislative processes from within, as we have seen.

Secondary information on legislation is booming, citizens are expecting more services from government, a quick delivery of legislation (electronic promulgation), good accessibility (including secondary information), less (avoidable) administrative burden (for example, re-use of information in the hands of government, electronic forms, etc.), increased transparency of the process (for example, progress monitors) and opportunities to have real input in legislation.

This is just the tip of the iceberg of the changes that present day legislative processes face. One can take the position – as some do in the Netherlands – that it is best to limit the changes to those from within. The current framework is working and there is no pressing need for redesign as of yet, one could argue. However, it is somewhat scary to let the engineers be the determining forces in something as important as the legislative process. In the Legis-project NL we saw that the realities of legislative process rules, on the one hand, and legislative practices themselves, on the other hand, are drifting apart in certain respects. The administration has, in this case, come up with its own approaches and practices developed within the legislative process. Is that something we want? Doesn't Parliament need to have a say in this?

These are serious questions. Questions we cannot answer right away. We can, however, see that legislative procedures many countries are not in tune with the demands on modern legislative processes. Whereas legislative processes nowadays require dynamic and integrated coordination between clients and framers – due to the increasingly cyclic nature of the legislative process – most procedures we know

are one-dimensional and sequential in nature (step-by-step from plan, to draft, to bill, to enactment, promulgation and subsequent implementation, evaluation and feedback) and do not fully accommodate the need communicate all the time with stakeholders and other relevant actors, during all phases of the process.

Existing legislative procedures are exclusive, rather than inclusive. They have 'slots' and parts that are not really transparent for outsiders. The procedure as a whole is often difficult to follow for those not involved, and some of the information used is difficult for outsiders to understand (technical memos, amending bills). Existing legislative procedures do not reach out to the wider audience (information is exchanged between the actors within the system, evidence is – as an exception – gathered from sources outside) and rely heavily on democratic representation and the presupposition of legally skilled parliamentarians. Furthermore, legislative information is not shared real time with outsiders and once promulgated legislation is not stored and presented in ways that help to access and readily understand the content. Much time and effort is still needed to implement it and allow implementing agencies to work with it properly. Due to the nature of current legislative procedure these agencies can most of the time only begin acting towards the very end of the process.

And last but not least, legislative procedure as it stands in most jurisdictions works like a conveyor belt. A bill on a certain topic is processed in relative isolation, enacted and then piled up on the legislative stock. The care for the organization of the legislative stock, the consistency of legislation is not institutionalized in most legislative systems we know of.[36] The end result is that the legislative corpus is by and large organized according to a logic that only really makes sense to the actor that proposed the new legislation (for example, along the lines of policy domains), not according to the logic of the the user (business, consumer, (financial) relationship with government, age, tax bracket, etc.). The management of the legislative stock is not very systematic in most jurisdictions. Large volumes of legislation cause typical problems in consistency, administrative burden and poor

[36] In the Dalos project an attempt was made to ensure that legal drafters and decision makers in the EU would get better control over the legal language at national and European level and, by doing so, improve consistency between domestic and EU legislation (a big problem in the EU). The project aimed at providing the drafters and law-makers with linguistic and knowledge-management tools to be used during legislative processes, in particular thelegislative drafting phase, in order to improve the coherence of legislative texts. Moreover, tools were developed to ensure that once the text was delivered ontological knowledge engrained in it facilitates retrieval for European citizens and contributes to the interpretation and implementation of the legislation itself and ensuing legal documents. See http://www.dalosproject.eu/index.php?option=com_content&task=view&id=15&Itemid=31 for the Dalos website. See also L. Mommers, W. Voermans, W. Koelewijn, & H. Kielman, "Understanding the law: improving legal knowledge dissemination by translating the contents of formal sources of law" (2009), 17 *Artificial Intelligence and Law* 51.

accessibility.[37] Different jurisdictions resort to simplification projects every decade or so, but rarely is the management of the legislative stock an integrated part of the legislative procedure.

What kind of legislative procedure is warranted in present day information-democracies? What kind of rulebook do we need for that? And how would it be differentfrom existing procedures? Of course the legislative procedure of the future needs to safeguard constitutional and democratic principles, like legal certainty, careful consideration (duty to take care, or principle of due carefulness), and democratic decision making. New ways of processing legislation should by no means lead away from the original functions and guarantees of the procedure.

But built on that bedrock, innovation is in order. What would this look like? We see six feasible innovations.

First, all new legislative procedures should be set up in a way that better reflects the *cyclic nature* of the legislative process. This would entail

- more attention to the life-cycle maintenance of legislation, for example, sunset clauses and mandatory evaluation as integrated parts of the legislative process,
- use of electronic consultation as an integrated part of the process, not only during the first stages of preparation, but for the duration,
- open dialogue and coordination with the implementing and enforcing bodies,
- orchestrated entry into force,
- systematic monitors on effects and side effects, visibility of the effects to the public and an answerable government.

Secondly, new legislative procedures should be more *inclusive*. Citizens, institutions and businesses (clients) should be more involved in the agenda-setting part of legislation, be it in a formal way (citizens initiative) or a less formal way (drop boxes or legislative users' groups). When possible co-drafting with target groups or stakeholders needs to be considered and, time permitting, Wiki-drafting. Wide electronic consultation is, as we already indicated, essential for the new legislative processes. Inclusiveness also requires that impact assessments (for example, on financial, economic, social or environmental effects) should be part of the process and, in general, allow for challenges to the evidence base of legislation.

[37] See Voermans, Florijn, Moll & Van Lochem, above n. **Error! Bookmark not defined.**.

Governments should grant open access to non-confidential data used during the legislative process and be responsive to challenges. Clients need to be able to plug in and have input during the parliamentary debate as well and in more direct ways than merely via 'their' MPs. In short: new legislative processes need to promote *participant electronic drafting*.

Thirdly, in that same vein, legislative processes of the future should also provide for increased *transparency*. A duty to set up and communicate legislative programmes would prove helpful as well as the introduction of process progress monitors allowing the public to monitor the progress of a legislative processes before, during and after the parliamentary debate. Transparency also requires that bill-drafters provide simple fact sheets accompanying the bill, that parliamentary hearings be broadcast live via the Internet, that progress monitors be fully documented and allow for comments.

Fourthly, processes of the future need to promote *efficiency* as well. That means working in uniform drafting and document formats, for instance, placing time limits on actions and debates in the legislative process and common commencement dates for the entry into force.

Fifthly, the legislative processes will also need to accommodate the overall *accessibility* of legislation. Drafts should be set up in such a way that they are consistent and in harmony with other laws, organized in a way that is client-friendly (using ontologies), accessible for different groups (this may involve the production of secondary information) and readily understandable (no more amending bills, but just consolidated texts with a graphical indication of the changes). This requires 'embedded' drafting, meaning that even at the stage of the draft of bills due attention should be paid to the place of the bill in the total registry, consistency with other legislation and a keen eye for the total corpus of the law. Legislative ceilings and integrated page and number counts could, as part of the process, be ways to systematically monitor and manage the volume of legislation.

And last but not least, new legislative processes should be *outreaching*. They should promote responsiveness to input from stakeholders, reviewers, consulted parties and others. Attitudes are important in this respect, and they cannot be changed by processes. Decision-makers should be outward-looking and sensitive to the needs of the groups the legislation is aimed at. Legislative solutions should be tailored to the situation of the clients (client-oriented). This means that experiments (try-outs of a few months) and debates on the results of experiments should be set up, that stakeholders should be invited not only to give their opinion, but that, as future clients, they are actively called upon to come up with alternatives and best practices that would work best. In an outreaching legislative process, a citizen's summary of legislation as well as other secondary legislation should be mandatory and

electronic promulgation should be required. Of course, electronic versions should be handled and recognized as authentic.

The verb 'should' features a dozen times in the last paragraphs. This is not surprising since we were thinking through the effects of the new demands on modern legislative processes. These new demands in turn are the effect of changed practices and attitudes as regards legislative processes, spurred on or kicked off by new technology (who knows),. We were simply thinking them through to see what the contours of a modern legislative process, freed from its paper base, could look like. A stepping stone for thought in which technology no longer determines the process, but in which process commands technology. As it should be…

Implementing Legislation Systems – Considerations and Options

Ed Hicks[1]

Abstract:

This article is intended to help legislative drafting offices that are considering the implementation of a new information management system for drafting, publishing (on paper and on the Internet) and consolidating their legislation (legislation systems). It provides guidance on what is available and on choosing the most appropriate system for a particular jurisdiction.

Introduction

One of the most significant challenges facing legislative drafting offices is how to find and implement an information management system – a *legislation system* – that allows them to meet their law-drafting and publishing obligations in a cost effective manner. A wide range of options are available. This article surveys these options and provides guidance on how to choose and implement the one that is best for a particular office.

This article is particularly focused on the needs of smaller jurisdictions with limited resources. It accordingly approaches its subject from a very basic perspective and provides information that may seem overly simplistic or self-evident to some

[1] Legislative Counsel, Justice Canada, and independent consultant on legislation systems. Mr. Hicks has worked on legislation system projects in numerous jurisdictions, and has made presentations about legislation systems at 8 national or international conferences. All the advice and opinions in this document are his and should not be attributed to Justice Canada. He can be contacted at hicks.ed@gmail.com.

readers. However, it also deals with more complex aspects and should also interest readers from more technologically resourced jurisdictions.

This article is based on a more extensive presentation given at the CALC Conference in Hyderabad in February 2010. Additional details about this subject can be found in that presentation.

Legislation Systems in the Marketplace

Commercially Marketed Systems

There seem to be surprisingly few legislation system vendors — only six that I am aware of that actively market their systems in the Commonwealth or the USA.[2] I recommend that you visit their websites and the websites of jurisdictions where their systems are installed, and form your own impressions about them. You will find that they are all quite different, and you will probably find unique things you like (and a few you don't like) in each of them.

One noticeable thing about these vendors is that at least four sell systems that cost more than $1M (US). It does not mean that they will not develop less expensive systems or sell, for example, just a drafting environment, but the costs for their entire systems are above $1M. This is pricey territory for many jurisdictions. This level of cost is not unreasonable because it costs a lot to develop, market, customize and support such systems. However, for jurisdictions that have no hope of getting that amount of funding, the choices in terms of already developed systems are much more limited.

A corollary of this is that developing appropriate requests for proposals (RFPs) for less expensive systems is all the more important, particularly because you are more likely to get bids from people who have never developed a legislation system before. You might also get bids from some of these "$1M+" vendors, but I would expect such bids to be for systems that are quite different from the systems they

[2] The vendors are

- IrosoftInc, 3100 Côte-Vertu, Suite 510, Montreal, Quebec, Canada H4R 2J8 (www.irosoft.com/en/home.htm);
- Propylon Inc, Suite 201, Technology Business Centre, 2029 Becker Drive, Lawrence, KS 66047, USA (www.propylon.com)
- SAIC, Annapolis Exchange Pkwy, Suite 200, Annapolis, MD 21401, USA (www.teratext.com/products/teratext-for-legislation.asp),
- Elkera Pty Limited, Suite 701, 10 Help Street, Chatswood, NSW 2067, Australia (www.elkera.com),
- Xcential Group, LLC, 841 Second Street, Encinitas, CA 92024, USA (www.xcential.com);
- Lexum 4200 St Laurent Blvd, Suite 910, Montreal, QC Canada H2W 2R2 (http://oyezoyez.ca/oyezoyez-web/?lang=en; http://lexum.ca/en/index.html).

I have worked with three of these vendors: Irosoft, SAIC and Lexum.

currently market. The advantage is that these vendors know a lot about legislation systems, and that is important.

Some Interesting Non-commercial Systems

There are many other legislation systems that have been built in many other jurisdictions. Some of them are very advanced and interesting, but as far as I know, none of them is marketed commercially — they have been "purpose-built" for the jurisdictions in which they exist, often by government staff. I will just list some of them here (my apologies to the many I have left out), because it is worthwhile looking at their websites to see various ways in which they accomplish similar things in different ways, or unique features that they have.

- **United Kingdom** (http://www.legislation.gov.uk) — This is probably the most extensive and expensive legislation system in the world. It is based on SGML, the "parent" of XML. It is a very impressive system. One of the many things I find interesting about it is the way that it deals with non-textual amendments — the clearest way that I have seen in any system. For an example, see the annotation "Modifications etc. (not altering text)" at the end of s. 8 of the Highways Act 1980 (http://www.legislation.gov.uk/ukpga/1980/66/part/I).
- **Ontario**, Canada (http://www.e-laws.gov.on.ca/index.html) — Like many jurisdictions, Ontario developed their system over a number of years, and it is now quite sophisticated. It is updated quickly. It provides official copies, point-in-time (they call it "period-in-time") and most interestingly, provisions not yet in force (integrated into their consolidation and shaded). For an example (at the time this was written), see s. 35 at the following link: http://www.e-laws.gov.on.ca/html/statutes/english/elaws_statutes_90h08_e.htm
- **Manitoba**, Canada (http://web2.gov.mb.ca/laws/index.php) — This site responds very quickly. One of the interesting aspects of this site is the "Just the hits" view of a document that you can choose after you do a search. It is similar to what Canada's site provides if you choose "View - Hits in context" in the search menu. Another interesting aspect is totally hidden — the site was created primarily by one person (a legislative counsel) using free software and a lot of personal time!.
- **New South Wales**, Australia (http://www.legislation.nsw.gov.au/) — This is a nice "clean" site (that is, it is visually uncluttered, and straightforward to use and understand). It provides historical versions of consolidated laws and an extensive collection of historical statutes and statutory instruments, and most legislation is "authorized" (official). Two of the

interesting features that I will point out are the table-of-contents-with-text view (ToC on the left, full text on the right) and the ability to subscribe to notifications of statutory instruments.

Commonwealth versus US Systems

There are significant differences between systems designed for Commonwealth (parliamentary-style) jurisdictions and jurisdictions in the USA. I realized this after several visits with my counterparts in the US House of Representatives and Senate.

I won't go into the differences in detail here (and I certainly don't know them all anyway), but suffice it to say that the major processes in the US model, including policy development, drafting, introduction, amendment and publishing, seem to me to be more complex and less structured than in the Commonwealth model. For example, drafting may be done by many people outside the legislative counsel office, including members and lobbyists, and any member can introduce a bill at almost any time — even one handwritten — so the system needs to be able to deal quickly with bills in many formats. One result is that, in many US jurisdictions, there are thousands of bills introduced each year, and just keeping track of the bills is a major function of a US legislation system. This function is so simple in Commonwealth jurisdictions that only a few of them have included it in their legislation systems.

In contrast, the component of a Commonwealth legislation system that, at least from a public perspective, is the most useful, visible and important (and perhaps the most expensive) is the consolidation module, which is something that few US jurisdictions have, at least not in the sense that it exists in Commonwealth jurisdictions. I know of only one US jurisdiction that has an electronic consolidation (usually called a "code") with point-in-time capabilities, whereas there are quite a few of them in the Commonwealth and some of them are very sophisticated.

Another important difference is that the Commonwealth systems are almost always initiated, funded and managed by or through the legislative counsel office, whereas the US ones are usually initiated, funded and managed by or through the legislature. I would expect that this would reduce the inter-organizational issues that typically arise in Commonwealth jurisdictions, and I'm sure it helps a lot in terms of funding.

The point of this explanation is that a system developed for use in a US jurisdiction might need significant modifications to adapt it for use in a Commonwealth jurisdiction. On the other hand, it may be more flexible and may provide features of particular interest to you.

Some Advice in regard to Vendors and Specifications

It is important to recognize that designing and implementing legislation systems is a highly specialized area of expertise, and that there are only a small number of vendors who have any experience in it. Just as with most specializations, experience is very valuable. However, in a vendor, it can also be limiting because each vendor usually has essentially one system it sells, and a purchaser has to make adaptations to that system and also has to accept its limitations — or pay a large premium to redevelop it.

The following points set out some of my personal comments and advice in regard to dealing with vendors of legislation systems and certain specifications of those systems:

- In my view, the two most important things about any vendor are ***experience*** and ***trust***. The experience needs to be in actually implementing a legislation system as similar to what you want as possible. The trust needs to come from a combination of factors including the vendor's reputation and likely longevity.
- Get demonstrations of existing systems and see what aspects you like of each one (this is now feasible over the Internet, so it is neither difficult nor expensive.) While all the systems that exist do a lot of the same things, they are all quite different from each other. Consider what aspects are most important to you, not just technically but in terms of customization, support, long-term maintenance, etc. A legislation system should last at least 10 years without major changes — an important factor in terms of amortizing and justifying its cost.
- Be very careful of thinking that you can adequately inform a vendor — even an experienced one — of your needs. The flip side is, do not expect that a vendor — even an experienced one — will understand all of what you specify as your needs. There are many differences among jurisdictions, and lots of room for misunderstandings, which increases the risk of cost and time overruns.
- Look at requests for proposals (RFPs) from other jurisdictions (most will probably provide them to you), but ***do not*** copy another jurisdiction's RFP. Even if they fully understood what their requirements meant, the chance of you misunderstanding them is high, and their requirements are likely to differ from yours in significant ways. You really need to understand what you put into (and leave out of) your own RFP.
- Unless you have at least several million dollars to spend on a legislation system, recognize that you are unlikely to get all of the features and

functions that you would like. I will be emphasizing this elsewhere, but repeating it doesn't hurt: follow the KISS principle — Keep It Simple Stupid (for an explanation, see http://en.wikipedia.org/wiki/Keep_it_simple_stupid).

- Keep drafting and publishing functions separate from administrative functions such as version control and document tracking, even to the extent of asking for separate pricing. The administrative functions can often be either left aside to reduce costs, or handled more easily, less expensively and more compatibly with other systems your government has by using one or more separate systems and just creating an electronic linkage with the legislation system.
- Recognize that there will be hundreds — in more complex systems, thousands — of decisions that you will have to make in the process of implementing a legislation system. Some will be easy, but some are likely to be contentious. Be prepared to spend a considerable amount of your own staff's time in making these decisions, and be prepared to adapt some of your existing practices to the system or spend a considerable amount of money adapting the system to your practices. In particular, expect to have to resolve inconsistencies in both your current practices and your existing data. (You are likely to be surprised at how many there are!)
- Despite all of these caveats, look for ways in which, for little cost, you can improve your current practices and the ongoing value of your data by implementing new ways of doing things.

  For example, say that your current practice is to make historical notes in statutes at the end of sections that provide amendment history in the format "1995, c. 32, s. 26". Theoretically, this can be made into a hyperlink that will take the user to that amendment, but in practical terms, few jurisdictions will spend the money to convert such old legislation to load it into the new system. (Congratulations to New South Wales for doing so!) Even for new legislation, the creation of these sorts of hyperlinks involves some significant costs.

  Now assume that section 26 in the above example amended paragraph 37(3)(d) of the target statute, and that section 37 has 4 subsections. You can make the reference data more valuable at little cost (virtually nil for amendments made in the future) by merely adding to the historical note to make it like this: "1995, c. 32, s. 26 → 37(3)(d)". A reader then knows that the amendment only relates to paragraph (d) of subsection (3), and only has to look it up if that paragraph is of concern to him or her.

And while you're at it, you can simplify the citation further by removing the punctuation like this: "1995 c32 s26 → 37(3)(d)". "Punctuation-less citation" has been fairly widely used in case law for a long time, and it is being used more in legislation. (See the *Australian Guide to Legal Citation, Third Edition*, at http://mulr.law.unimelb.edu.au/go/aglc, and historical notes in Alberta (Canada) statutes at http://www.qp.alberta.ca/Laws_Online.cfm.)

- Be very cautious about requiring automated replication of complex things like tables of amendments, tables of concordance and indexes. While useful and even necessary, these sorts of things are difficult and expensive to automate (partly because each jurisdiction seems to do them differently), and it would probably be better to spend the money on other things. However, these things can often be semi-automated as a separate application using a simple database program.
- Be careful about requiring a particular technology as opposed to a particular functionality. For example, as much as I believe in using content-oriented XML markup for legislation, I know that systems that use it are complex and expensive, and that you may be able to get the functionality you want without it. However, if you have bilingual legislation that is printed side-by-side on the same page, or that has to match page-by-page in separate language prints as in the European Parliament, it may be worthwhile insisting on content-oriented XML.
- You may have heard that the relatively new word processors like LibreOffice Writer[3] and Microsoft Office 2007 and 2010 use XML as their native format. This is true, but that is "their" XML and it is format-oriented instead of content-oriented. This may or may not be of importance to you, but you should at least be aware of it.

  Note: In format-oriented XML, basically all paragraphs have the same "name" (usually <p>) and then have one or more attributes associated with each <p> that specify how a paragraph is formatted. In content-oriented XML, most paragraphs have meaningful names such as <heading1>, <section> and <subsection>, and each one is automatically formatted based on its name, and perhaps its context (for example, a section might be automatically formatted differently if it is within an amendment). More importantly, content-oriented XML provides for inherent structural control over the order of occurrence of paragraphs, but format-oriented XML does

[3] Produced by The Document Foundation to replace OpenOffice.org Writer after it was discontinued.

not. There are ways to overcome at least some of these sorts of limitations of format-oriented XML, but I will not belabour the point here. What I am trying to do is to make you aware that there are different "flavours" of XML, and that they may affect various aspects of a legislation system.

- You may have heard of Google docs, which includes a word processor. Internally, it uses HTML, but it can save in Word, OpenOffice.org and other formats. It is not yet ready for consideration as an efficient drafting tool for legislation. I think it will be some years before there is any possibility that it might be able to be considered for legislation.

One Size does not Fit All

The idea that a legislation system can be designed to suit a "generic" jurisdiction is, to a fair degree, a fallacy. Despite the use of the parliamentary model throughout the Commonwealth, it is amazing how every jurisdiction has its unique features. Whether it is a reflection of individualism or something else, it makes legislation systems more expensive than they otherwise would be.

For example, in Canada the legislation of each of the 14 jurisdictions (federal, provincial and territorial) is formatted differently from the others, and in some it is structured somewhat differently and even named differently. For example, in about half the jurisdictions, the item represented by "5(a)" is called a "paragraph", whereas in the other half it is called a "clause", and the structural element two steps lower in the hierarchy (usually labeled something like "5(a)(i)(A)") is called the reverse. Also, in most Canadian jurisdictions, one refers to "paragraph 5(a)" or "clause 5(a)", but in a few one refers to "section 5(a)" (as do most lawyers regardless of a jurisdiction's official terminology). And of course, while proposed legislation is a bill, sections are called "clauses". No wonder legislation is confusing to "outsiders"!

A major problem for automating the consolidation process is how amendments are written, and how complex and inconsistent the amending wording can be. From an automation perspective, it is even worse when tables are used to set out amendments, and amendments that amend portions of tables themselves are yet more difficult. This is a significant problem within almost any jurisdiction, but is far more of a problem when one considers multiple jurisdictions. From a system perspective, it is also an expensive thing to modify, in part because it takes a lot of time just to document all the possibilities that exist, let alone what drafters might be inspired to write in the future. However, it can be worthwhile.

In Justice Canada, prior to implementation of the new system, there were 10 people working on consolidation and the work was typically six months out-of-date; now there are four people, and the work is typically about two weeks out-of-date.

Another problem is the use of non-textual amendments — that is, amendments that state a new interpretation of an existing provision but do not actually amend the text itself. These seem to be quite common in most jurisdictions. Here are three examples from Canadian statutes:

> (5) Subsection (3) [which replaces subsection 127(10.2) of the *Income Tax Act*] applies to taxation years that end after 2002 except that, for taxation years that immediately follow taxation years that ended before 2003, the reference in the formula in subsection 127(10.2) of the Act, as enacted by subsection (3), to "$5,000,000" is to be read as a reference to "$4,000,000" and the reference to "$300,000" in the description of A is to be read as a reference to "$200,000".
>
> (3) In applying subsection 125(5) of the Act to a corporation for a 2009 or 2010 taxation year of the corporation that began before 2009, subparagraph 125(5)(a)(i) of the Act is to be read as follows:
>
> > (i) the amount that would have been its business limit determined under subsection (3) or (4) for the first such taxation year ending in the calendar year if the reference to $400,000 in subsection (3), as it applied in respect of that first such taxation year, had been read in the same manner as it is read in respect of the particular taxation year ending in the calendar year, and
>
> 15. Subsections 10(12) and 23(3) of the *Employment Insurance Act* … apply to a claimant for any benefit period that begins on or after the day on which this Act receives royal assent.

A particular difficulty in dealing with non-textual amendments is that they may be made as regulations but apply to statutes. As an example of one that I have worked with, consider section 142 of the *First Nations Fiscal and Statistical Management Act*, SC 2005 c9 (http://laws.justice.gc.ca/PDF/Statute/F/F-11.67.pdf):

> 142. The Governor in Council may make regulations
>
> …
>
> (b) adapting or restricting any provision of this Act or of any regulation made under this Act for the purposes of paragraph 74(b).

Yes, Henry VIII's legacy lives on! The regulations (currently in the process of being enacted — they have been published for comment) make many adaptations that essentially create a different version of the enabling Act, but there is no indication of this in the consolidated version of the Act, other than the existence of the enabling power. In this case, the non-textual amendments (adaptations) are at least

in regulations made under the Act, and are therefore reasonably discoverable, but this is not the case with many non-textual amendments.

Note: When there is difficulty in getting low-priority bills before Parliament or in resolving many complex issues in the time allowed for drafting bills, this approach seems likely to become more common. For an extensive review of the use of this technique, see *The Use of "Henry VIII Clauses" in Queensland Legislation* (1997) at the following website:

http://www.parliament.qld.gov.au/view/committees/documents/SLC/reports/HenryVIII.PDF.

When non-textual amendments are not part of the consolidated laws, they are usually very difficult to find — especially if, as is often the case, you don't know you need to look for them! That's why no one should use the government version of taxation statutes other than to check the most recent changes — you need the ones put out by commercial publishers because they have all this and many other sorts of related information in them. (Of course, even with all that information, mere mortals still can't understand them, but that's a different problem!)

The point is, when you do produce electronic consolidations for your website, you will need to decide how to deal with non-textual amendments. There are various possibilities, but the most important thing is to ensure that they are accessible to users. You might get some help from Ireland's *Restatement Guide* (http://www.attorneygeneral.ie/slru/restatements.html).

More problematic with respect to developing a system that does not need a lot of customization is the seemingly universal desire in each jurisdiction for minimal change to the way things are currently done. Thus, any existing legislation system — and particularly a comprehensive one — will have to be customized to a significant degree. This means extra costs both up-front and for ongoing maintenance.

Therefore, if you can find a vendor who has implemented a legislation system before, and that system largely suits your needs, you need to give serious consideration to working with that vendor. Experience in many jurisdictions has shown that starting from scratch with a vendor that has never implemented a legislation system is a recipe for long delays and large cost overruns. Such projects have ended up costing three to five times the original estimates, and in the process have pared down the original requirements. The legislative process, especially drafting, seems relatively simple, but in fact there are many complexities, and it is extremely difficult for a "naïve" vendor to imagine the costs of figuring out, let alone resolving, these complexities.

In my experience, many of the complexities — and often the most difficult ones to resolve — are "small-p political" issues, particularly inter-organizational issues among the various entities responsible for different parts of the legislative process. One reason for this is that the implementation of a legislation system raises issues that are either new (such as reducing the need for, or status of, some existing functions, or eliminating them entirely) or dormant (they have been issues in the past but either were left unresolved or were "resolved" unsatisfactorily to at least one party). The lack of a rational resolution of such issues is often a major factor in generating cost overruns and failing to achieve the savings that are possible if people and organizations cooperate reasonably.

Also, there are usually many complexities within the drafting office. Some staff will welcome a new system, others may resist it. At the extreme, some people may actually see their jobs disappear — after all, one of the justifications for the costs of the system is that there will be cost savings elsewhere. Before deciding on a system, it is important to develop a change-management strategy, which should include a clear explanation of the rationale for the system and an outline of what is to change during and after its implementation. Giving staff opportunities for input with respect to the system can be a good way to get them involved and make them feel that they have some "ownership" of it, but you have to be careful that it does not get out of hand and turn into more of a problem than a solution.

Your Ability to Deal with a Legislation System

Early in the process of considering a legislation system, you should give considerable thought to the question "What are our organization's capabilities to deal with a system?" Some of the things you should consider are the following:

- How much reliance are you willing and/or forced to place on the vendor? Take into account everything from the detailed system definition to keeping the system operating properly, including adapting it to new technologies.
- Are there local staff or consultants with enough knowledge to deal with both the vendor and the system? While you will have to rely on the vendor for most aspects of the system, you should have some local staff or consultants who are competent to oversee your interests.
- Who on your side is going to be the ultimate decision-maker, and what are the timeframes within which decisions will be made? As already mentioned, there will be hundreds, even thousands, of decisions to be made, and they need to be made quickly or you can expect that the vendor

will want extra compensation. Lack of timely decisions is a leading factor in prolonging work and increasing costs.

- Do you have a "key person" on staff without whom the ongoing success of the system would be in trouble? If so, what can you do to mitigate the risk of that person becoming unavailable?
- Who on your side will be doing the testing of everything that is delivered, and certifying compliance or reporting compliance issues? A lot of the testing will require spending time actually using the software and doing a detailed assessment of what works, what doesn't work, and what should work differently (which may cost more money if you want it changed). This is a very important and time-consuming job, so ensure that you have staff available for it because your vendor will almost certainly want to have contractual commitments for response times.
- What will your implementation schedule be? In particular, what are the initial and ongoing training and support needs, how and by whom will they be provided, and what will the costs be? Implementation and initial training are usually best done during a lull in the legislative agenda, but that can also be a time when staff take vacations.
- How will conversion of your data be managed, and in particular what are the detailed parameters for the quality of the conversion? Who on your side is responsible for checking it, and how? There are more detailed comments on conversion in other parts of this document. Be aware, and beware, that conversion can cost a lot and lead to a lot of disputes. You will undoubtedly think that the quality of your data is better than it is from a conversion perspective. The problems are almost nil in terms of the text — they are primarily in the formatting, including the construction of tables.

Keep in mind that a new legislation system should last for at least 10 years without very much change being required beyond routine maintenance. While you will probably want to make some enhancements over the years, that should not be a big consideration in the initial acquisition because it is just too difficult to evaluate, and projects tend to "run out of steam" after a few years.

Choosing a Vendor

There are two basic approaches to choosing a vendor: research the market and choose the one you think is best, or write a request for proposals (RFP) and choose the "best" response. I wish that it were easier to do the former, but most likely you will have to proceed via an RFP. However, an RFP can be oriented more toward

certain solutions than others — and in fact it usually should be, because otherwise it means you haven't been clear enough about what you want and the proposals you get are likely to be too varied to adequately or fairly compare one against another. In the worst case (the one that always scares me), if your criteria are too vague, you may have to choose the lowest qualifying bidder and that bidder may actually be far from optimal.

Writing an RFP for a legislation system is a complex task. There are many details, and a lot of explanation is needed because the language used in legislation is highly specialized and is often confusing, with various jurisdictions using the same term for different things or different terms for the same thing. (For example, the terms "consolidation", "revision", "restatement" and "codification" seem to refer to similar but not the same things, and the same word doesn't mean the same thing in all jurisdictions.) Also, very few legislative counsel have any experience in writing RFPs, and few have any real idea of what they want, let alone what they could or should have, in terms of system functionality.

After several years of preliminary work, and with several very knowledgeable people involved, it took about 6 months to write the RFP for the Justice Canada legislation system, and another several months to go through the evaluation process and select the winning bid. One of the bids was of the "scary" type — it was only 25% to 30% of the cost of the other two bids (though we did not know that until the end of the evaluation), and the bidder had no experience with legislation systems although they claimed to be able to do everything required. After we had eliminated them on various grounds, our contracting people told us that they were notorious for submitting bids for all kinds of systems that they had no experience to be able to work on, and they had never won any.

This raises another very important aspect of an RFP: the evaluation criteria. It takes a lot of time to develop clear and fair — to both you and the bidders — evaluation criteria. You have to be very careful about what you specify as mandatory, highly important and less important requirements, how you evaluate and allocate partial credit for items that are not "all or nothing", and whether you give any weight to things that are optional but nice-to-have (some governments don't allow this). Mandatory requirements might seem nice and easy, but if you're not careful, you can eliminate a well-qualified bidder just on account of a poorly chosen mandatory requirement.

Part of your requirements will be the system ones: the functionality of the vendor's system and how it fits your work environment. (For current purposes, let's include training in system requirements.) Another part will relate to the vendor as such: the vendor's experience, reputation, stability, proximity, support and references. A third part will be the vendor's pricing, including maintenance costs and what you

get as part of maintenance. Vendors usually charge 15%-20% for maintenance, but the big question is, what is that a percentage of? In particular, is it a percentage of the total system cost including customization, or something less? All these things also have to be part of the evaluation criteria.

There is one requirement of a legislation system that seems to always be underestimated, usually by both the purchaser and the vendor: data conversion. It doesn't matter what system you now have or what system you are moving to, your data will need to be converted. Even if you are using Microsoft Word and you are going to continue using it as your drafting tool in the new system, you need to do data conversion, if for no other reason than to clean up your current data and make it as consistent as feasible. This is particularly true when moving from the old proprietary Word format (.doc) to the new Office Open XML format (.docx). Data conversion needs to be done well, and you will probably be unpleasantly surprised by the costs.

Vendors will need to know as much as possible about your existing data before they can estimate the costs of data conversion. Therefore, make as much data as possible available to them, and explain whatever you know about its structure, formatting rules, known inconsistencies and whatever else might be helpful. You don't want to hide any problems — openness will be of benefit to everyone.

Vendors need at least 4 weeks, and preferably 6 to 8 weeks, to respond to an RFP for a legislation system. The better your RFP is, the faster a vendor can respond and the fewer questions vendors will have.

You should expect the whole RFP process, from the start of preparing for it to the signing of a contract, to take at least 6 months, and probably closer to a year.

Sharing Alternatives

It is entirely feasible — and in fact makes a lot of sense — for two or more jurisdictions with similar needs to get together to acquire all or part of a legislation system that suits those needs. This section describes several ways in which such "system sharing" can be done. Each sharing jurisdiction will have to make more compromises and more changes to their formatting than they otherwise would, but this may actually be a good thing. Probably, you can each still have distinct styles, so long as they can be redefined at the system level (that is, for drafting, paper-oriented printing and web publishing).

Development Sharing

The most obvious approach to sharing system costs is to share development costs, including the development of specifications for the system. The old saying about

"two heads are better than one" can be applicable in this sort of situation. However, it involves a longer and more complex relationship than the alternatives (particularly in terms of decision-making), and the parties are likely to have to make more changes to their current way of doing things than if they were developing their own systems. Thus, the risk of it getting bogged down and failing is probably fairly high, so it would be advisable to approach it in a step-by-step fashion.

System Sharing

System sharing refers to one or more jurisdictions adopting a system that has been (or is going to be) acquired by another jurisdiction (the "originating jurisdiction"). This avoids many of the problems that can arise in development sharing, but can be advantageous to all parties. The basic idea is that the originating jurisdiction implements a system, and the other (sharing) jurisdictions use all or part of it after the necessary customizations have been made for the sharing jurisdictions. For example, a drafting system could be adapted and run at the sharing jurisdiction's site, but the main servers for consolidation and web delivery (and perhaps the staff to do consolidation) could be run at the originating jurisdiction's site, using the same software.

When I worked for Irosoft (refer to the heading "Commercially Marketed Systems"), I proposed this sort of system sharing to several provinces in Canada (after getting the consent of the proposed originating jurisdiction), but that was just at the start of the recession in 2008 and nothing came of it.

PPP (Public-Private Partnerships)

Public-private partnerships in publishing case law have a long history (not all of it necessarily appropriate, at least by today's ethical standards). I am not aware of any similar partnership in publishing legislation. However, given appropriate restrictions and processes, there seems to be no reason why that could not happen, and it could be a very practical solution for both sides. In fact, I had such a partnership almost arranged 15 years ago, but it did not go ahead for reasons that had nothing to do with any issues of propriety or security.

In the past, the obvious partners have been legal publishers. Typically, they consolidate and publish all or part of a jurisdiction's legislation anyway, and they do it faster and better (for example, with lots of cross-reference links) than most governments do. The problem is that users have to pay for their services, largely because of the "value-added" content that goes with it. However, if a government partnered with a legal publisher, the publisher could make a version of their database available without charge, without the value-added material, and make the

whole site look like the government wants. This could be done at a small additional cost to the publisher, so that the publisher could charge the government a reasonable markup and the government could still pay far less than if it operated the system itself.

Today, there is a new type of publisher in this arena that may make governments more amenable to considering a PPP of this nature — the various Legal Information Institutes or LIIs. They started with the LII at Cornell University in Ithaca, New York, but are now found in many countries. Notable ones in the Commonwealth are AustLII (Australasian LII) in Australia and CANLII (Canadian LII) in Canada, but there are many more. Many of them are now loosely organized as the "free access to law movement" and their resources can be accessed through WorldLII (http://www.worldlii.org/).

Obviously, practical issues need to be sorted out, such as drafting tools, security, responsibilities, liabilities and data ownership, but in my opinion that should not be overly difficult. I think the main impediment is the usual culprit — resistance to change. Once you get over that, the rest is just work.

Be Prepared to Make some Change

Speaking of resistance to change … be prepared to deal with it whenever you implement a legislation system. In fact, you may be the main problem in this regard!

There isn't a thing that humans have created that can't be improved. Would you agree with that statement? Assuming you do, then it follows that the way you currently produce legislation can be improved. That goes for the process, the formatting, the publishing — every aspect.

Now that we've gotten over that hurdle, it should logically follow that it would be useful to look at the existing ways that you do things in your office and consider how they can be improved. You don't have to do that all on your own, and in fact to some degree you can't — you don't know enough about the options. So get some help. And be open to new ideas, especially when they clear up problems that you know exist or that you discover exist (sometimes you are so close to the problem, so accustomed to dealing with it, that you can't see it or you don't see it as a problem).

I am not talking about radical changes (though you may decide to get radical!). I am talking about relatively small changes in formatting, and sometimes in structure, wording and processes. Probably what I'm talking about most is standardization. Inconsistency is the enemy of systems.

To correct the grammar in Apple Inc's old slogan: ***Think differently!***

Legislation System Needs

The legislation system needs of any legislative drafting office are very similar, and can be broken down into five processes: drafting, printing, consolidation, Internet publishing and conversion. There are other features that are "nice-to-have" and that I will lump into a sixth process: management. I will briefly expand on each process:

1 ***Drafting*** — Legislative counsel today generally do their own drafting directly on their computers. Their use of secretarial assistance for drafting is mainly to convert and style, or enter from paper, *pro forma* data in tables and schedules (for example, fee schedules, property descriptions and intergovernmental agreements). However, for legislative counsel to make their work efficient, they need to have a very helpful drafting environment, where almost everything they need to do is standardized, simple-to-use and automated to the extent feasible. The drafting environment should also include "drafting intelligence" — features that avoid structural errors, and that, when certain changes are made, can automatically adjust related items. An important adjunct to the drafting environment is access to an up-to-date consolidation of legislation, which is described further in process 3.

2 ***Printing*** — We are still a long way from a fully electronic legislative process, so throughout that process there is a need to print legislation on paper, usually in several different formats. For example, bills are printed in a draft format until introduction in the legislature, then have special front pages added, then after enactment have these pages removed and a different first page created for printing as individual statutes, and may have yet another first page created for printing in the annual bound volumes. Regulations often have a somewhat different format from bills, and other documents that are often prepared in drafting offices, such as orders, rules and proclamations, often have quite different formats. Printing in an official Gazette often requires further formatting modifications, at least in headers and footers.

   For efficiency and to avoid introducing errors, all these formatting jobs need to be automated to the extent feasible, with simple option choices appropriate for each situation. Automation is greatly assisted by — even requires — standardization of numerous aspects of the page layout and the drafting environment.

   Today, most "printing" from the drafting environment should be done to a PDF file rather than directly to a printer, allowing verification of the result

electronically rather than wasting paper because of corrections that still need to be made.

3 ***Consolidation*** — Consolidation is the process of updating the entire database of legislation by adding new laws to the database and by applying amendments that have been made to laws already in the database. The consolidated database is also typically referred to as "the consolidation"; there is usually one for statutes and one for regulations, with more sophisticated systems having the ability to show all regulations made under a given statute and to search either consolidation separately or both consolidations at once.

It should be obvious that having an up-to-date consolidation is highly important to all users of legislation, including the public, lawyers, judges and the government itself. After all, everyone is deemed to know the law, but how can one reasonably know it if it is not available? A consolidation that is out-of-date is not fully available. Given that laws are one of the most important products of government, and that today it is easy and inexpensive for governments to make their consolidated laws available in a timely fashion, there is no excuse for governments to neglect doing so.

However, an up-to-date consolidation also has a significant downside: how do you find the way the law read prior to the latest updates? Our legal system is almost always dealing with the way the law was in the past — sometimes, many years in the past — which is not necessarily the way it is today. In most jurisdictions, the only way to determine how a law read in the past is to go back to the paper books, and that can be a real chore! The availability of annual (as-enacted) statutes online is a help, but as-enacted regulations are often harder to access.

The solution for this problem is a "***point-in-time***" legislation system — one that, as part of the consolidation system, maintains a complete history of all legislation and enables online users to search and request a copy of the version that was current as of a given date. There are different ways to implement this, but the important thing is to have the facility.

There is also another side to the legislation timeline: the future. An important aspect of consolidation is access to amendments that have been enacted but have not yet come into force. Being aware of such "not-yet-in-force" amendments is often important for the public, and is crucial for legislative counsel. Without easy access to this information, they could make a new amendment that conflicts with one that is not yet in force, but may

come into force and result in a significant legal problem. Only a few systems, commercial or not, provide this feature.

A related need in consolidations, but one that is also rarely implemented, is some form of linkage to non-textual amendments. More detail on this is presented above under the heading "One Size does not Fit All", so I will not deal with it further here.

4 ***Internet publishing*** — A consolidation of legislation is a valuable product, but to achieve its potential it needs to be easily available and searchable by whoever needs it. Today, that means that it has to be published on the Internet, and that it has to be searchable via an efficient search engine. There are many issues with respect to format, presentation and searching of websites, and this is not the place to raise them other than to say that a legislation website needs special attention by people with a lot of experience in the options available. Generic search engines just don't provide the features that are important to users of legislation.

Perhaps the key thing to keep in mind about your legislation website is this: your legislation website — including how well or poorly it functions — is your government's "image" to all users of your legislation, so it should present as good an image as is feasible for you to provide.

5 ***Conversion*** — Conversion is the process of changing the "markup" (sometimes colloquially called the "format" or "coding") of your data from the markup it is currently in to another markup. For example, moving from WordPerfect markup to Microsoft Word 2003 markup is a conversion, as is moving from either of those markups to an XML markup.

Whatever markup you currently use, it is virtually certain that you will have to perform a conversion of some nature to move to a new system. Just moving from your existing Word format to a new system developed with Word (even the same version) will require conversion in order to standardize your markup (including your styles) and clean up numerous problems that you probably don't even know exist.

The target markup for the more capable legislation systems being developed today is XML (Extensible Markup Language). The importance of XML is that it is an international standard that is open, flexible and, most importantly, vendor-independent. The legislation of Canada, Quebec, New Brunswick, Bermuda, Tasmania, England, the European Union, the US Congress and many other jurisdictions is now processed primarily in XML (or its "parent", SGML).

However, there are many ways in which XML can be implemented, and this is another thing that needs special attention by people with a lot of experience in the options available and how best to apply them to legislation. For example, it took several years to finalize the specifications for the XML markup used by Justice Canada. One of the main issues is the use of content-oriented XML versus format-oriented XML. Content-oriented markup is more powerful in many ways, but tends to be more expensive to implement and may be less flexible.

Conversion can be an expensive process, but if the conversion is done to XML, another conversion should not have to be done for the foreseeable future. It is very clear that XML is the markup that is being adopted by governments and businesses around the world. The costs of conversion depend a lot on the willingness of the client to accept a certain amount of discrepancy (generally from a formatting perspective rather than a content perspective) and to do some of the verification.

Note for the technically inclined: Microsoft Word 2007 and 2010 use an XML markup internally; it is called "Office Open XML" (OOXML). In addition, they are able to convert documents in the Open Document Format (ODF), the other industry-standard XML markup for word processing and other office documents. However, both of these standards are for format-oriented XML markup, which is very different from content-oriented markup. Word can also be modified to handle content-oriented XML markup such as that used by most legislation systems, but this is more limited and requires more extensive development than if a true XML editor is used. Thus, one has to be careful about what "flavor" of XML one is talking about with respect to both OOXML and ODF, and the degree of its utility for legislation systems.

6 ***Management*** — This is a catch-all category for features that you may consider nice-to-have but not essential. They can often be provided by customization of other software that you might already have, such as Microsoft SharePoint. You really need to look at their cost-benefits, especially for smaller offices. I will mention three such features: file management, workflow and reporting.

File management is primarily version control of your drafting files. There are various ways to implement this, and various levels of detail, but basically the idea is that all versions of your file are automatically saved, and you can always go back to any version to get whatever you may want from it. In most such systems, you are not even allowed to delete a version. The system also controls who has access to your files and what they can do with them.

At Justice Canada, the original intention (included in the RFP) was to implement such a system, but a combination of staff resistance and cost resulted in it not being done, so files are still managed according to a simple set of rules that legislative counsel are supposed to follow themselves. In over five years of use, problems have been rare, and as far as I am aware, none have been serious.

Workflow is a much more sophisticated feature. Generally, it is designed to ensure that all the necessary steps in a file's lifecycle are followed, and are done by the authorized people. It can be quite sophisticated, including such nice things as automatically adding or removing the correct front matter, headers and footers, end matter and other content as a file moves from one stage to another. Your processes need to be carefully defined, and if you later decide to change something, it will usually take time and cost money. Workflow is more valuable in jurisdictions where the drafting office is also the office that manages the changes to bills in the legislature and the printing of bills and/or statutory instruments in the Gazette.

Reporting provides various statistics and queries for management purposes. The sorts of things often wanted include what files are assigned to whom, what stage they are at, what priority they have, and when they are expected to be completed. More general statistics are also commonly desired, such as how many files are drafted in a year, how many pages were in them, and so on. (I question the utility of such statistics, but that's a different issue.) Reporting on website use might also be in this category, but at least in rudimentary form it is often provided as part of the Internet publishing function.

Considerations in Deciding on a System

Numerous considerations are involved in making a decision on implementing a new legislation system, and it can seem very complicated. I think it can be simplified a lot, but for now I will outline the main considerations that, based on my experience, I think are most relevant.

1 ***Costs*** — Probably the number one consideration for most jurisdictions is the costs of implementing a system. There is a broad range of purchase and contracting costs, ranging from a low in the $100,000 US area to a high of $2M US or more (these are detailed below). There are also costs for the internal resources necessary to support and manage the project, particularly if the contractor is inexperienced (not something I advise you to risk!). If a request for proposals (RFP) is involved, there are more costs for that, including the delay involved in the RFP process (for a high-end

system, typically a year or more to adequately define the requirements, get the RFP out, evaluate bids and get a contract in place).

Costs must also be looked at from the other side: the costs of NOT implementing a new system. Many jurisdictions need a new legislation system; the main questions that remain are how soon will a new system be implemented, and what will be its functionality? Inefficiencies in current operations, difficulties in recruiting and retaining staff, informatics problems, and of course inadequate access to the law are some of the important offsetting costs to be considered on this side.

Other aspects of costs that can be highly important in the government context are when and how the costs are incurred and paid. "When" relates to fiscal years, and the ability to spread costs out over several years. For example, it is usually feasible to spread the capital costs of a legislation system out over at least 3 fiscal years, even if it is only roughly a year-long project — start with some of the up-front costs at the end of one year, pay for work-in-progress the next fiscal year, and pay for completion the following year. "How" relates primarily to capital costs versus operating costs: a "buy versus rent" scenario, renting being another way to spread costs over numerous fiscal years.

2 ***Costs in context*** — It is important to keep in mind the context of the costs for legislation systems. Almost always, the costs are thought of as being for the legislative counsel office, the Queen's Printer or both. Both are (with no offence) typically "backwaters" in terms of government funding and priorities. This is strangely perverse because, at least with respect to the drafting and publication of laws, both of those organizations effectively represent and work for the legislature. What is the main business of the legislature? Making laws! Thus, the process of making those laws easily accessible to the public, including keeping them updated and providing historical (point-in-time) and future-oriented access, is an extension of the business of the legislature. How much does it cost to run the legislature each year? In most jurisdictions, many millions. Is it not reasonable to pay a tiny fraction more to make the legislature's most important product easily accessible to its constituents? If it would help from a budgetary perspective, the website could even be part of the legislature's website rather than the executive's website.

3 ***Savings*** — Savings from implementing legislation systems certainly exist, but they are often difficult to quantify, particularly in small jurisdictions. In my 18 years working in this field, I have never claimed that such systems would increase the productivity of legislative counsel to a degree

that would be able to be evaluated: most of their time is spent thinking, so even if the mechanical aspect of their computer use is improved dramatically, it would only make a 5%-10% difference in their productivity.

A similar percentage should be gained from better research tools provided by the legislation system. A 10+% productivity improvement is worthwhile, but for a small number of legislative counsel, it is not a lot in financial terms (though still probably $100,000 per year even for small offices). In my view, there is more value in non-financial terms, such as the ease of research and the reduction in frustration for legislative counsel through the automation of many tasks: in other words, in the improvement in their working conditions.

Other parts of the process, including the printing and website operation, may achieve a higher percentage of savings, but still not dramatic. But again, other facets of those operations will show more value in terms of process efficiency, timeliness, and easy electronic access to data that is currently inaccessible or accessible only with difficulty.

I have long regarded the main savings from implementing legislation systems to be productivity savings to the government itself and the economy as a whole. That is why I stress that they are not primarily drafting or publishing systems, but rather are access to the law systems. However, because the savings are dispersed as opposed to showing up in particular departmental budgets, this can be a difficult sell. Nevertheless, it is clear that those savings are real. Here is a summary of these sorts of savings that I think is a useful example.

Assume that a jurisdiction has 1,000 members of the bar (including lawyers in private law firms, government and corporations). A low estimate of their average time costs would be $200/hour. If the jurisdiction delivered its laws in a manner that made them more current and more efficient to search, such that on average there was a saving of 30 minutes per month per lawyer, that would be a productivity improvement in the jurisdiction's economy of 500 hours/month * $200/hour = $100,000 per month, with probably $15,000 to $20,000 of it in government (staff lawyers plus private-sector lawyers doing work for the government). And lawyers are far from the only users of a jurisdiction's legislation: judges, legal researchers, librarians, many non-lawyer government employees, business people and the general population are also users of it. So it is apparent that an efficient means of accessing a jurisdiction's legislation is an economic benefit to that jurisdiction, and that the productivity value to the jurisdiction's economy is significant, not unreasonably estimated at $150,000 per month based on the above scenario.

Even if this estimate were 5 times too high (thus only $30,000 per month), there would still be a savings of $360,000 per year — certainly enough to justify the investment in a good legislation system that should last for at least 10 years without major changes.

Adjust these figures to your own jurisdiction however you like — you'll still come up with a pretty convincing cost-benefit rationale for a legislation system, without even getting to the other rationales set out in what follows.

4 ***Service to the public*** — Governments seem to always be trying to find ways in which they can demonstrate their provision of good service to the public. Providing easy Internet-based accessibility to frequently updated laws of the jurisdiction is one such service that can be rendered with very low cost in relation to any other service, largely because it is entirely self-service: put up a good (and free) website, and publicize it. Experience with the Canadian website over 15 years shows that supplementary costs are low (after taking other savings such as staff reductions into account).

Statistics from the Canadian website also show that there are about half a million visits a month (average about 17,000 visits per day), with about half being "unique" visitors (that is, different from each other) and about 50,000 (10%) visiting more than once in the same month. Total "hits", or accesses to pages, is roughly 400,000 per day (over 12 million per month). It is one of the most visited sites in the entire Canadian government.

5 ***Government image*** — In addition to users of the legislation service in your jurisdiction, there are numerous external users in other jurisdictions. There is a value in improving the image of your jurisdiction as one in which to do business, and having a rapidly updated and easily searchable Internet site for your laws would contribute to improving that image. Of course, your government's image amongst its own users would also be enhanced.

6 ***Workplace concerns*** — Introducing a new system almost always raises numerous concerns in the workplace, ranging from ease of use to loss of jobs. I would be very surprised if there were any loss of legislative drafting jobs on account of a new legislation system being implemented — my impression is that there is too much to be done by the people now employed in the process, and a new legislation system is unlikely to reduce that workload enough to cause loss of even one job: people will be working more efficiently, but the main effect will be in a better ability to serve their clients, particularly the legislature. There may be some job reduction in related areas, most notably the Queen's Printer operations —

that depends very much on the impact of the new system on existing business practices. I would be surprised if significant usability issues arose. Any new system should, overall, be better than what you now have. There will be some implementation hurdles to overcome, but they should be dealt with through training and other support mechanisms.

7 ***Interaction with other systems and processes ("interoperability")*** — There are numerous systems and processes that need to interact with each other, or to "interoperate", during the process of drafting and publishing legislation, and they usually reside in different responsibility centres. When designing a legislation system, these systems and processes can also usefully be viewed in two categories: current ones and future ones (what you would ***like*** to have).

Current systems and processes that interoperate include: the printing of bills and statutory instruments for the legislature, the executive council (Cabinet) office, the official Gazette and the annual volumes; the consolidation of data (now generally done manually by electronic cut-and-paste, with no point-in-time historical data maintained); the uploading of data to the website; and interaction with departments during the drafting process.

The latter of these deserves special attention. The drafting of legislation is a team effort that usually involves at least 3 parties — the legislative counsel, a legal advisor with detailed knowledge of the relevant law, and specialist staff of the department or other body responsible for the legislation (often referred to as "policy people" or "instructing officers"). The ideal situation is to have all parties work closely together from the outset of a new legislative initiative, but for many reasons this rarely happens, and interactions among them often happen by exchanging drafts rather than by personal meetings. Drafts may originate outside the legislative counsel office, but need to be readily incorporated into that office's drafting system, including complex tables and forms. This means that the drafts being exchanged need to be usable across departments with as little trouble as possible, without forcing everyone into using the same software. There are different ways in which this can be achieved, and which way is best for a given jurisdiction needs to be considered early in the development process.

Future systems and processes are, in my view, much more interesting and valuable, but will be much more expensive or even not feasible to implement without careful planning at the outset to enable their implementation. My favourite future item is what I call "references": links from the legislation to external references (sources of information) that are helpful with respect to that legislation. For example, there could be a series

of links associated with a section of legislation: one to a departmental website that explains the section, one to a court case dealing with the section, and one to an internal legal opinion respecting the section. The latter would not be seen except by authorized users, and for further security might only be a reference to the paper document rather than an electronic "hyperlink".

The point is that the legislation database can become a vastly richer and more valuable resource than it is today, and can deliver much more value for money. This feature also acts as a form of "corporate memory", capturing specialized knowledge that nowadays disappears when the people who have it leave their jobs: a huge problem already with the growing wave of retiring baby boomers.

8 ***Website linking and delivery issues*** — In my experience, most jurisdictions do not give a lot of thought to website linking issues respecting their legislation databases. For example, most legislation websites have no ability to create a link to an individual section of legislation, as opposed to the whole statute or regulation; this can be very frustrating for both government departments and users outside government who want to make precise links.

Associated with this is the inability of many legislation websites to deliver anything but entire statutes or regulations instead of much more efficient small chunks (such as all sections under a heading). Delivering an entire large law instead of just the relevant sections is very inefficient, and with many systems requires that the user perform another local search (usually with very rudimentary capabilities) once the law has been delivered. Even more fundamentally, some legislation websites have little or no protection against broken links, which is very frustrating for users who make references to them. These sorts of issues need to be addressed during the creation of a legislation system.

9 ***How long will it take?*** — After a contract has been signed, actually implementing a legislation system can be expected to take from 6 months to 3 years, depending on the system chosen, the budget available per year, the expertise available in your government, the availability of key people, the speed of decision-making, etc. In my experience, budgetary issues and the speed of the decision-making process are the two most important factors. Things go far smoother if the necessary budgets are committed at the outset, and if you are well-prepared for decision-making.

10 ***Changes*** — What changes will be made in conjunction with the implementation of a new legislation system? In my experience, not many,

and for the most part, minor things that primarily affect the *way* things are done, not *what* is done or *who* does it. It is rare to find a legislative counsel who resists the implementation of a better system than what you have — most really welcome it. The main sorts of changes that I recommend considering are all oriented to simplifying formats and processes.

For example, one thing that most jurisdictions have already done is moving sidenotes from the margin to above the section or subsection, a change that simplifies overall processing. Another simplification, especially for regulations, is to standardize the formatting of tables. Perhaps my most radical recommendation for simplification is with respect to forms: get rid of them! Make them administrative matters instead of legislative matters. Newfoundland did this — see the *Regulatory Reform Act*, SNL1996 R-10.1 — and I have drafted an example bill to enable it on a global basis. If you don't want to get rid of forms, then at least simplify them and, as much as possible, standardize their presentation and have them designed by a professional forms designer.

11 ***Data Conversion*** — When implementing any new system, conversion of the existing data should be considered a requirement even if you are going to use the same drafting software you currently use. As good as you may think your current data is, I have never seen legislation data that does not need a lot of cleanup. The question is, what is the extent of that conversion? This will depend on how much you want to enrich your drafting and Internet delivery environments, in other words, how "intelligent" you want to make them.

To make the move to an XML-based system (possibly still using Word) would require more complex data conversion, and that is the most difficult thing to estimate in terms of both the timeframe and the cost. A lot depends on the degree of verification required (not so much as to content, but as to format), and who does it (you or the contractor). Main body text (sections, subsections, etc.) is not the problem — that converts quickly and easily. It is the irregular material such as tables, forms, images and the content of many schedules that requires the most work. Many samples would have to be tested before an estimate could be made.

Be aware that your legislation probably contains a number of aberrations in such things as structure and numbering. Sometimes, these can cause real problems, as with a particular regulation in Canada — if you look up the *Transportation of Dangerous Goods Regulations* on the laws website, you get the following notice:

> The Transportation of Dangerous Goods Regulations, SOR/2001-286, as published in the Canada Gazette Part II is not compatible with our system and will not be included with this publication. Please refer to the following Internet site: http://www.tc.gc.ca/tdg/clear/tofc.htm

This is because its structure is so different from all other laws that it was not feasible to integrate it into the XML database.

Different numbering schemes can also cause havoc in terms of both the automation of numbering in the drafting environment and the formatting of sections. For example, in Canada the *Food and Drug Regulations* use a unique and lengthy numbering scheme that contains section numbers such as "B.02.022.1.". In many jurisdictions, rules of courts and civil procedure rules are numbered and formatted quite differently than the jurisdiction's other legislation.

12 ***Bilingualism*** — For jurisdictions whose legislation is bilingual (or multilingual), there are many advantages to an XML-based system. You can process bilingual legislation with a lesser system, but the efficiencies in an XML environment become compelling in the case of bilingual legislation. It is truly worth a lot of extra expense at the outset to save a lot more down the road.

However, if you can't afford an XML-based system, then a bilingual environment built on a word processor (probably either Microsoft Word or LibreOffice) can be developed, though it is very "messy" if you want to print the languages aligned, either side-by-side or with the same content on the same numbered page in two documents (as is done in the European Parliament — for 23 languages!). Tables, forms and images also become significant challenges that usually need manual intervention for printing in side-by-side format. Before you give up on an XML-based system, though, consider a hosted or shared environment, explained next.

13 ***Hosted or shared environment*** — Small jurisdictions are unlikely to be able, individually, to afford a high-end legislation system, or even a mid-range one. To make it feasible for small jurisdictions to benefit from a legislation system, it can be implemented on a hosted or shared basis. This would probably best be done with the drafting and publishing environments at the local (jurisdiction) level, and the consolidation and website functions either hosted by the contractor or shared with one or more other jurisdictions (one of which would be the host). This would enable costs to be spread out or split and has a number of other potential advantages in terms of centralizing support and administrative expertise

and thus lowering the related costs. Other options are described above under the heading "Sharing Alternatives".

14 ***RFP or not?*** — Having worked in government for 27 years, I am well aware of the RFP (Request for Proposals) process, and the difficulties of avoiding it. However, I am also aware that, at least in some jurisdictions, it *can* be avoided if there is sufficient justification, and I think that a case for such justification can be made for a legislation system. It would probably avoid about a year of delay and many tens of thousands of dollars, which could better be used to pay for the system itself. More to the point, you will know much better what you are actually going to get, and you can probably negotiate a better price because the vendor's costs and risks are both lower (no RFP to respond to, and better knowledge of what the client wants so that the risk factor in cost estimates can be lowered).

15 ***Features*** — There are a great many features that a legislation system might have, and each one has costs and benefits associated with it. You can contract for a minimal version of a system for $X, but to get the "full-blown" version the price might well be $3X or more. The people on the purchasing side (primarily legislative counsel) almost always want all the features that they can imagine — until they see the price! It is extremely difficult for anyone without a good knowledge of various legislation systems to have any appreciation for the variety of options available, the many ways they might be implemented, and the pros and cons (including costs) of each option.

A long (but far from complete) list of features is presented in Appendix A of the presentation given at the CALC Conference in Hyderabad in February 2010.

Simplifying the Decision

Assuming that you do not have a recently developed legislation system, your question probably is, "What is the best legislation system that I can possibly afford to acquire?" Whatever system you acquire will be used for many years (probably at least 10; more if it is an XML-based system), so it is highly worthwhile to get the best that you can — the per year costs over the system's lifetime will be relatively low, and its value will be high in comparison.

As already indicated, there are various ways that costs can be spread out over 3 or more years. Therefore, what I suggest is this:

- Consider the options set out below and the ballpark figures for their costs.

- Consider the value of the benefits of each option, and reduce their costs accordingly (including whatever value you are willing to accord to the productivity improvements to your government and economy as described above under the heading "Considerations in Deciding on a System"). This will give you a better idea of their "real" costs, because you will be comparing values instead of merely expenditures.
- Divide the resulting costs by 2 or 3 for options 1 and 2, and by 3 or 4 for options 3 to 5. This will give you a reasonable approximation of the real cost per year to your treasury, given some form of spreading of the costs for options 1 and 2 over 2 or 3 fiscal years and options 3 to5 over 3 or 4 fiscal years.
- I think the result will be a figure that is much more affordable per year, and that will be a small cost considering the value of your law-making process and the value of easy access to the laws of your jurisdiction.

Options and Budgets

The following 5 options provide a broad range of choices for legislation systems. Cost estimates are in US dollars, and can usually be spread over 2 to 4 fiscal years, depending on various factors. Costs are vendor charges and do not include internal costs (primarily staff time). Annual maintenance and support costs would generally be in the industry-standard range of 15%-20% of the software licence costs. Travel and related expenses would be additional costs.

Please note that the first 3 options do ***not*** contemplate bilingual drafting, publishing, consolidation and website operation. There are many additional expenses and other considerations involved in producing and dealing with bilingual legislation, and they would have to be assessed for each jurisdiction, but the cost benefits from a legislation system are significantly greater in a bilingual environment.

1 Update your existing drafting system (no consolidation, no website improvements).

This is the least expensive option, but also the least extensive. It would give you a very efficient drafting system built on the latest version of either Microsoft Word or LibreOffice. Data conversion needs and costs would have to be assessed — a lot would depend on the existing use of styles (that is, how extensively, consistently and correctly styles are used) and what changes are to be made in your use of styles. This option would do nothing to improve either the existing manual consolidation system or the existing website. Training requirements and costs would be minimal.

Cost ballpark:	$60,000 - $120,000
Timeframe:	6 months - 1 year, depending primarily on the response time to questions, the decision-making time, and data conversion issues.

2 Update your existing drafting system plus implement consolidation aids and website improvements.

This option would be the same as option 1, with the addition of aids for and improvements in consolidation (particularly oriented toward improving timeliness) and (potentially) with improvements to your website (this would depend a lot on the capabilities of your existing website, and whether it is replaced by a better one). More development and training time would be needed than for option 1.

Cost ballpark:	$120,000 - $200,000
Timeframe:	1 - 1.5 years, depending primarily on the response time to questions, the decision-making time, and data conversion issues.

3 Develop a word-processor-based drafting system that can deal with "enriched" XML data, plus implement consolidation aids and website improvements.

This option would be an extension of option 2, with much more of a future-oriented objective, namely, moving your database from the format-oriented word processor markup to as much of an XML content-oriented markup as is feasible to implement. This would be much better than option A or B in terms of future savings and particularly the ability to build a better website. It would "future-proof" your data reasonably well, and would provide a long-term stable platform for developing future extensions and refinements. Conversion of existing data would be necessary, and costs would have to be estimated after an examination of the data; these conversion costs would represent a significant portion of the overall costs, but would result in long-term savings, vendor independence and the ability to have a much better website.

Cost ballpark:	$250,000 to $400,000 plus data conversion expenses
Timeframe:	1 - 2 years, depending on the extent of the XML work and the cost of the data conversion

4 Implement an XML-based drafting and printing environment, and have the consolidation and website functions hosted by the contractor or shared with another jurisdiction.

This option may be the optimal solution for small jurisdictions, particularly ones with bilingual legislation. The drafting and printing environments would allow the legislative counsel to continue to work much as they do now (but in a more efficient environment), and the specialized work of consolidation and website operation would be taken care of by outside specialists. Costs should be significantly less than for implementing a full XML system, yet you would get virtually all the benefits of it. Data conversion would be necessary. Note that there are numerous differences in the structures of each jurisdiction's legislation, necessitating the development of a customized software system for each jurisdiction. Savings would come from not having to acquire the software licences and the servers, and other benefits would accrue because of the much greater depth of knowledge and specialization of the consolidation and website operators.

Cost ballpark:	$300,000 - $500,000 plus data conversion expenses and annual consolidation and website charges
Timeframe:	1.5 - 3 years, depending on the extent of the adaptations and the cost of the data conversion

5 Implement a full XML-based system.

This option is the high-end offering, providing the best and longest-lasting solution to your legislation system needs. Its efficacy and value are proven in a number of jurisdictions where such systems are operating.

Cost ballpark:	$1,000,000 - $3,000,000 plus data conversion expenses

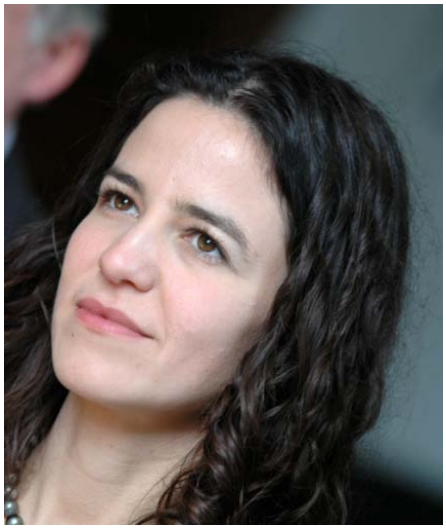
Timeframe:	1.5 - 3 years, depending on the extent of the adaptations and the cost of the data conversion

Conclusion

If you have a need to implement a new legislation system, in whole or in part, I hope that this document will help you. I think that the five options set out above present an accurate representation of the range of solutions that exist.

Incorporating Core Crimes under the Rome Statute into Domestic Legislation – Temporal Jurisdiction

Anna Kotzeva, Natasha Vicary and Manuel Ventura[1]



Abstract:

Implementing the Statute of the International Criminal Court ("Rome Statute") into domestic law has been approached in many jurisdictions using the standard model of transposition. As the Rome Statute contains definitions of serious international crimes, including crimes against humanity, war crimes and genocide, once transposed, those definitions become part of the domestic legal order. The nullum crimen sine lege principle indicates that the national incorporation of those crimes should be prospective. This has been interpreted to mean that domestic jurisdiction should be granted from the commencement date of the implementing legislation or, at the earliest, the date of the State's accession to the Rome Statue. This article argues that such an approach is inadequate due to the earlier criminalisation of the core crimes under treaty and, in particular, customary international law. As a consequence, earlier commencement dates are appropriate for each of the core crimes and do not breach the nullum crimen principle.

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[1] The authors are members of the Peace and Justice Initiative (www.peaceandjusticeinitiative.org), a not for profit NGO, comprising international criminal law professionals assisting the effective domestic implementation of the Rome Statute. Anna Kotzeva has been a prosecutor at the International Criminal Tribunal for the Former Yugoslavia and has practiced as a barrister in London, specializing in asylum and human rights law. Natasha Vicary has interned at the International Criminal Tribunal for the former Yugoslavia in Trial Chamber II and has worked as a federal prosecutor in Melbourne. Manuel Ventura has taught international law and international relations at the undergraduate and postgraduate level at Macquarie University and the University of New South Wales is currently a law clerk to Chief Justice Mogoeng Mogoeng of the Constitutional Court of South Africa. The authors would like to thank Ruti Rous, Ewa Kozakiewicz and James Foster for their valuable contributions to this paper.

Applying the Principle of Legality to Domestic Prosecutions

The starting point for implementing the core crimes in the Statute of the International Court (the "Rome Statute")[2] into domestic law is the principle of legality, which is part of the legal order of all states subscribing to the rule of law.[3] The principle of legality, or the rule against retroactivity, requires that prosecution and punishment be based on clear provisions of law in force at the time the crime was committed. A defendant cannot be punished for acts which were not prohibited by law at the time committed. The principle of legality is enshrined in Article 22 of the Rome Statute as well as all major human rights conventions.[4]

The Universal Declaration of Human Rights, at Article 11(2), states, *inter alia*, that

> (n)o one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed.[5]

The reference to criminalisation under international law is relevant, as it recognises that States may prosecute on the basis of international criminal law, even when those provisions have not been incorporated into national law at the time the crimes were committed.[6]

The International Covenant on Civil and Political Rights (ICCPR) goes further, stating in Article 15(2),

> (n)othing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed,

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[2] 17 July 19998, U.N. Doc. A/CONF.183/9: http://untreaty.un.org/cod/icc/statute/romefra.htm.

[3] Indeed, recent jurisprudence suggests that it has now attained the status of a jus cogens norm: Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, Case No. STL-11-01/I/AC/R76bis, 16 February 2011, at [76].

[4] International Covenant on Civil and Political Rights, Article 15; European Convention on Human Rights, Article 7; American Convention on Human Rights, Article 9. See also Universal Declaration of Human Rights, Article 11(2), African Charter on Human and Peoples' Rights, Article 7(2).

[5] The second sentence of Art.11(2) gives expression to the *nullum poena sine lege* principle. See also Article 23 of the Rome Statute.

[6] Schabas, W, "The International Criminal Court, A Commentary on the Rome Statute", Oxford University Press, 2010, at 407. See also Prosecutor v. Norman, Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment) – Dissenting Opinion of Judge Robertson, Case No. SCSL-04-14-AR72(E), 31 May 2004, at [13]: "In every case, the question is whether the defendant, at the time of conduct which was not clearly outlawed by national law in the place of its commission, could have ascertained through competent legal advice that it was contrary to international criminal law." For the application of the nullum crimen principle and customary international law in international prosecutions, see ICTY jurisprudence: Prosecutor v. Blaškić, Appeal Judgement, Case No. IT-95-14-A, 29 July 2004, at [141]; Prosecutor v. Kordić and Čerkez Appeal Judgement, Case No. IT-95-14/2-A, 17 December 2004, at [44]; Prosecutor v. Milutinović et al., Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction – Joint Criminal Enterprise, Case No. IT-99-37-AR72, 21 May 2003, at [9], [34-44]; Prosecutor v. Tadić, Trial Judgement, Case No. IT-94-1-T, 7 May 1997, at [577].

was criminal according to the general principles of law recognised by the community of nations.

Therefore, according to the ICCPR, a leading international human rights instrument, retroactive domestic prosecutions based on crimes found only in customary international law do not contradict the principle of legality. This principle has been incorporated into the constitutions of various countries[7] and has been confirmed in the jurisprudence of various regional and national courts.[8]

Article 22 of the Rome Statute recognises the existence of criminality beyond the scope of the statute. Although under Articles 11(2) and 22(1) the jurisdiction of the International Criminal Court ("ICC") is prospective only from the date the Rome Statute entered into force for a particular State,[9] Article 22(2) explicitly provides that "(t)his article shall not affect the characterisation of any conduct as criminal under international law independently of this Statute". Therefore, a person cannot be prosecuted before the ICC for conduct constituting a crime under treaty or customary international law when that conduct predates the entry into force of the Rome Statute for the relevant State. An exception is found in Article 11(2) which allows a declaration to be made pursuant to Article 12(3), which provides the ICC with jurisdiction over crimes which predate the entry into force for the relevant State. However, this procedure is limited by the date of entry into force of the Rome Statute as a whole, which is 1 July 2002. In other words, under the ICC model, the court cannot investigate and prosecute international crimes that occurred prior to 1 July 2002.[10]

Notwithstanding these provisions, core international crimes, which have been criminalised generally under customary international law or treaties, could be

[7] Albania: Kushtetuta e Shqipërisë (1998), Article 29(1) (only with respect to war crimes and crimes against humanity); Bangladesh: Bangladesh Shongbidhan (1972), Article 47(3); Canada: Constitution Act (1982), Section 11(g); Cape Verde: Constituição da República de Cabo Verde (1998) as amended 2010, Article 32(7); Croatia: Ustav Republike Hrvatske (1990) as amended 2010, Article 31; Poland: Konstytucja Rzeczypospolitej Polskiej (1997), Article 42(1); Rwanda: Constitution de la République du Rwanda (2003), Article 20; the Seychelles: Constitution of the Republic of Seychelles (1993) as amended 2011, Article 19(4) (only with respect to genocide and crimes against humanity); South Africa: Constitution of the Republic of South Africa (1996) as amended 2009, Section 35(3)(l).

[8] European Court of Human Rights: Kolk and Kislyiy v. Estonia (Admissibility), Decision of 17 January 2006, Reports and Judgments and Decisions 2006-I; High Court of Australia: Polyukhovich v. Commonwealth (1991) 172 CLR 501, at [572]-[576]; Supreme Court of Canada: R v. Finta [1994] 1 SCR 701, at [343]; Community Court of Justice, Economic Community of West Africa States: Habré c. Sénégal (Arrêt No. ECW/CCJ/JUD/06/10), 18 November 2010, at [58]; Constitutional Court of Slovenia: Decree on Military Courts Case (Case No. U-I-6/93), Judgment of 1 April 1994, at Section B-I, at [18]-[20].

[9] Under Article 126(1) the date of entry into force of the Rome Statute for the first 60 States that joined was 1 July 2002. For subsequent States, Article 126(2) provides that the Rome Statute enters into force for them on the 60th day following the deposit of their instrument of ratification, acceptance, approval or accession.

[10] See Articles 11(1), 24(1), Rome Statute. This also includes referrals to the ICC by the UN Security Council pursuant to Article 13(b), Rome Statute.

prosecuted at the national level without the same temporal restrictions as the ICC.[11] The following sections detail how international law provides a basis for jurisdiction over core international crimes at the national level, and how to implement this extended temporal jurisdiction, together with the possible consequences if the issue is left to be resolved by the courts.

Indvidual Criminal Responsibility for Core Crimes under Customary International Law

The crimes contained in the Rome Statute were not created through the adoption of that treaty as they already existed under customary law, other treaties or both.[12] Therefore, domestic law may adopt an earlier temporal jurisdiction as applicable to each core international crime. The restriction on the temporal jurisdiction of the ICC[13] does not affect the temporal jurisdiction which States can adopt in their national legislation on the basis of the relevant customary and treaty law. Importantly, Statutes of Limitations are not applicable to war crimes, crimes against humanity or genocide.[14] Therefore, earlier commencement dates are likely to contribute significantly to reducing impunity for these crimes.

Genocide

Genocide is defined in the 1948 Genocide Convention[15] and the definition is replicated in the Rome Statute.[16] Upon signing the Genocide Convention, State parties took on the obligation "to prevent and punish" this crime and to "enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the Convention and, in particular, to provide effective penalties".[17] States have therefore been under a continuing obligation, since ratifying the convention, to criminalise genocide domestically. Further, the

[11] As noted earlier, Article 15(2) ICCPR explicitly permits the domestic retroactive prosecution of international crimes. Also see the jurisprudence confirming this principle in fn. 8 above.

[12] Former President of the ICC, Judge Philippe Kirsch, who chaired the later stages of the Rome Conference has stated that there was 'general agreement that the definitions of crimes in the ICC Statute were to reflect existing customary international law, and not to create new law.' See Kirsch, P, 'Foreword', in Dörmann, K, "Elements of War Crimes under the Rome Statute of the International Criminal Court" (Cambridge: CUP, 2003), at xiii.

[13] Article 22(1), Rome Statute.

[14] See the Convention on the Non-applicability of Statutory Limitations to War Crimes and Crimes Against Humanity (1968); Jean-Marie Henckaerts and Louise Doswald-Beck "Customary International Humanitarian Law" (Cambridge: CUP, 2003), Vol. I, Rules, at Rule 160.

[15] Article II, Convention on the Prevention and Punishment of the Crime of Genocide. Convention adopted on 9 December 1948, entered into force on 12 January 1951.

[16] Article 6, Rome Statute.

[17] Article V, Genocide Convention.

ratification of the Genocide Convention is almost universal,[18] the prohibition of genocide has evolved into a norm of customary international law[19] and it has the heightened status of *jus cogens*.[20] On this basis, domestic legislation seeking to implement the Rome Statute and criminalise genocide can make this crime punishable from a date much earlier than the date of the Rome Statute coming into force.

An appropriate commencement date for the criminalisation of genocide is 1948 when the Convention was adopted. Importantly, recognition of genocide as an international crime by the UN General Assembly actually preceded adoption of the Genocide Convention.[21] By 1951, the International Court of Justice ("ICJ"), in its decision on *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, confirmed that the principles of the Genocide Convention were part of customary international law and thus binding on States that were not parties to the treaty.[22] It is beyond any doubt that genocide had crystallised into an offence carrying individual criminal responsibility, at customary international law, by the time the Statute of the International Criminal Tribunal for the Former Yugoslavia ("ICTY")[23] was adopted. Therefore, 1991 would be another appropriate, albeit rather conservative, commencement date. Using either commencement date, domestic law would be brought into alignment with international criminal law and the principle of legality would be respected.

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[18] 140 states have ratified or acceded to the Genocide Convention. In 1949-1950 alone 52 states signed and/or ratified the Convention.

[19] *Reservations to the Convention on the Prevention and Punishment of Genocide* (Advisory Opinion) [1951] ICJ Rep 15, at [23]; Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), 3 May 1993, UN Doc S/25704, at [45]; *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia-Herzegovina v. Yugoslavia)* (Preliminary Objections) [1996] ICJ Rep 595, at [31].

[20] Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda) (Jurisdiction of the Court and Admissibility of the Application) [2006] ICJ Rep 6, at [64]; Prosecutor v. Kupreškič et al., Trial Judgement, Case No. IT-95-16-T, 14 January 2000, at [520]. See also Barcelona Traction, Light and Power Company, Limited (New Application: 1962) (Belgium v. Spain), Second Phase, [1970] ICJ Rep 3, at [33], [34].

[21] General Assembly Resolution 96(I) (1946). A number of post-World War II judgments also made reference to the criminal nature of genocide: *Trial of Ulrich Greifelt and Others* (Case No. 73), 10 October 1947 - 10 March 1948 (United States Military Tribunal, Nuremberg), United Nations War Crimes Commission - Law Reports of Trials of War Criminals, Vol. II, at 6-12, 36-42; *Trial of Hauptsturmführer Amon Leopold Goeth* (Case No. 37), 27-31 August 1946 and 2-5 September 1946 (Supreme National Tribunal of Poland, Cracow), United Nations War Crimes Commission - Law Reports of Trials of War Criminals, Vol. VII, at 7-9; *Trial of Obersturmbannführer Rudolf Franz Ferdinand Hoess* (Case No. 38), 11-29 March 1947 (Supreme National Tribunal of Poland), United Nations War Crimes Commission - Law Reports of Trials of War Criminals, Vol. VII, at 24-26.

[22] See Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (Advisory Opinion) [1951] ICJ Rep 15, at [21] and Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), 3 May 1993, UN Doc S/25704, at [45].

[23] See Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), 3 May 1993, UN Doc S/25704, at [45].

War Crimes

The provisions relating to war crimes, namely serious violations of international humanitarian law, which are set out in Article 8 of the Rome Statute, are contained in a number of treaties and customary international law. The relevant treaties and sources of custom, pre-dating the coming into force of the Rome Statute, are:

(a) In relation to serious violations of the laws and customs of war applicable in international armed conflicts: the four Geneva Conventions 1949[24] and Additional Protocol I of 1977 thereto,[25] containing the grave breaches regime;

(b) In relation to other serious violations of the laws and customs of war applicable in international armed conflicts: the 1899 Hague Declaration; the 1907 Regulations annexed to the Hague Convention No. IV; the 1925 Geneva Protocol; the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict and its protocols; the 1989 Convention on the Rights of the Child; the 1994 Convention on the Safety of United Nations and Associated Personnel; and the Statute of the International Criminal Tribunal for the former Yugoslavia; and

(c) In relation to serious violations of the laws and customs of war applicable in non-international armed conflicts: Article 3 common to the four Geneva Conventions of 1949; the Additional Protocol II of 1977 thereto;[26] the 1999 Optional Protocol to the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict; the 1989 Convention on the Rights of the Child; the 1994 Convention on the Safety of United Nations and Associated Personnel; the Statutes of the International Criminal Tribunals for Rwanda and the former Yugoslavia; and the Statute of the Special Court for Sierra Leone.

Many of the above mentioned treaties obligate signatory States to enact necessary legislation to make the particular crimes punishable domestically. For example, signatories to the four Geneva Conventions of 1949 are obliged

[24] Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field; Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea; Geneva Convention (III) relative to the Treatment of Prisoners of War; Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War, all adopted on 12 August 1949, entered into force on 21 October 1950.

[25] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts ("AP I"), adopted 8 June 1977, entered into force 7 December 1978.

[26] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts ("AP II"), adopted 8 June 1977, entered into force 7 December 1978.

> to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches [and] to search for persons alleged to have committed, or to have ordered to be committed, ... grave breaches, and [shall] bring such persons, regardless of their nationality, before its own courts [or] in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made a prima facie case.[27]

This principle is known as *aut dedere aut judicare*, meaning that the State is required either to prosecute persons responsible or to extradite them to a country that will.

Aside from the obligations associated with being a signatory, the grave breaches provisions and other war crimes provisions of the four Geneva Conventions have attained the status of customary international law.[28] While individual criminal responsibility for each of the separate war crimes may not have been envisaged at the time they became rules of customary international law, it is again beyond doubt that by the time of the adoption of the ICTY Statute, the war crimes it contained had crystallised into customary law offences carrying individual criminal responsibility.

For States that did not incorporate those war crimes into their domestic legislation at an earlier date and are only now incorporating them as part of the implementation of the Rome Statute, jurisdiction can be given to national courts from at least 1991. The principle of *nullum crimen sine lege* is satisfied, as these crimes were clearly prosecutable as international crimes from that date. This date is not linked to the obligation undertaken by State parties to the Geneva Conventions to criminalise war crimes domestically from the date of ratification. However, the pre-existing duty to criminalise, and failure to do so, provides a sound policy basis for the earlier commencement date.

Additionally, since the Nuremberg Charter specified certain war crimes that overlap with those subsequently included in the grave breaches regime of the Geneva Conventions of 1949, there are grounds to believe that at least some of them constituted war crimes at customary international law by 1945.[29] These

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[27] Geneva Convention I, Article 49; Geneva Convention II, Article 50; Geneva Convention III, Article 129; Geneva Convention IV, Article 146.

[28] See Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), 3 May 1993, UN Doc S/25704, at [37]-[40].

[29] See Henckaerts, J, "The Grave Breaches Regime as Customary International Law" 7(4) *Journal of International Criminal Justice* 683-701 at 689-690 (2009).

include the killing and deporting of civilians or causing them great suffering or treating them inhumanely,[30] the killing of prisoners of war or treating them inhumanely or causing them great suffering,[31] and the appropriation and extensive destruction of property not justified by military necessity.[32] For such war crimes, a commencement date of 1945 is *prima facie* permissible.

It is only for those war crimes considered to have been first included in the Rome Statute that an appropriate commencement date would be 1998, unless the crime was criminalised earlier under customary international law.[33]

To trace the definitions of war crimes as found in Article 8 of the ICC Statute and their sources in international humanitarian law, be it custom or treaty, a useful comparative table has been compiled by the International Committee of Red Cross.[34]

Crimes Against Humanity

Crimes against humanity are acts such as murder, extermination, imprisonment and deportation, committed as part of a widespread or systematic attack directed against a civilian population.[35] Prior to the Rome Statute, the national suppression of such crimes was governed by customary international law, since there is no autonomous crimes-against-humanity treaty, although some specific crimes, such as apartheid,[36] slavery,[37] torture[38] and forced disappearance of persons[39] are contained in treaties.

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[30] See the overlap between Geneva Convention IV, Article 147 and the Charter of the International Military Tribunal, Article 6(c). See also Article 8(2)(a)(i)-(iii) and 8(2)(a)(iv), Rome Statute.

[31] See the overlap between Geneva Convention III, Article 130 and the Charter of the International Military Tribunal, Article 6(c). See also Article 8(2)(a)(i)-(iii), Rome Statute.

[32] See the overlap between Geneva Convention I, Article 50; Geneva Convention II, Article 51; Geneva Convention IV, Article 147 and the Charter of the International Military Tribunal, Article 6(c). See also Article 8(2)(a)(iv), Rome Statute.

[33] An example of such an instance is the crime of the enlistment and use of children soldiers. This war crime was first included in the Rome Statute (Articles 8(2)(b)(xxvi), 8(2)(e)(vii)) in 1998, but had nonetheless crystallised under customary international law by at least 1996: *Prosecutor v. Norman*, Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment), Case No. SCSL-2004-14-AR72(E), 31 May 2004.

[34] http://www.icrc.org/eng/assets/files/other/en_-_war_crimes_comparative_table.pdf (accessed December 2011).

[35] See also Charter of the International Military Tribunal, Article 6(c); Statute of the International Criminal Tribunal for the Former Yugoslavia, Article 5; Statute of the International Criminal Tribunal for Rwanda, Article 3; Statute of the International Criminal Court, Article 7.

[36] Convention on the Suppression and Punishment of the Crime of Apartheid (Apartheid Convention), adopted 30 November 1973.

[37] Slavery Convention 1926, Supplementary Convention on the Abolition of Slavery 1956, Convention Concerning Forced or Compulsory Labour 1930 and Convention Concerning the Abolition of Forced Labour 1957. The offence under the Nuremberg Charter, Tokyo Charter, ICTY and ICTR Statutes is “enslavement”.

[38] UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted 10 December 1984, in force 26 June 1987.

Crimes against humanity have been prosecuted in various forums over the last century, starting with the Nuremberg and Tokyo Tribunals, then in Leipzig pursuant to Control Council Law No.10, under which domestic prosecutions of Nazi war criminals took place, then Adolf Eichman[40] in Jerusalem and Klaus Barbie[41] and Paul Touvier[42] in France for acts committed during World War II. Since then, the International Criminal Tribunals for the Former Yugoslavia and Rwanda have found numerous offenders guilty of crimes against humanity. As with genocide and grave breaches of the Geneva Conventions, there exists an obligation to investigate and prosecute crimes against humanity.[43]

Choosing a commencement date for crimes against humanity depends on the date that such crimes can be shown to have crystallised into offences carrying individual criminal responsibility, pursuant to customary international law. Although crimes against humanity were envisaged at Versailles,[44] the Nuremberg Tribunal was the first international tribunal to adjudge crimes against humanity, but its use was tentative[45] and there has been much debate as to whether the Nuremberg Charter was creating new law[46] or merely recognising existing law.[47] By the time the ICTY

[39] International Convention for the Protection of All Persons from Enforced Disappearance 2006.

[40] Attorney-General of the Government of Israel v. Adolf Eichmann (Trial Judgment, District Court of Jerusalem, 1961) 36 *International Law Reports* 5.

[41] Féderation National des Déportées et Internés Résistants et Patriots and Others v Barbie (French Cour de Cassation 1985), 78 International Law Reports 124; (French Cour de Cassation, 1988), 100 International Law Reports 330.

[42] Court of Assizes of the Department of the Yvelines, 20 April 1994 (entire versions are unpublished).

[43] Bassiouni, C, "Crimes Against Humanity in International Criminal Law" (2nd ed, Martinus Nijhoff, Dordrecht 1999) at 224; Orentlicher, "Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime" (1991) *Yale Law Journal*, vol 100, 2537-2615, 2593-2594; *Almonacid-Arellano et al v. Chile*, Judgment of 26 September 2006, IACtHR Series C, No 154 (2006), at [114] [duty to investigate, identify, and punish those persons responsible for crimes against humanity]; *Miguel Castro-Castro Prison v. Peru*, Judgment of 25 November 2006, IACtHR Series C, No 160 (2006), at [404] [prohibition on the commission of crimes against humanity is a norm of *jus cogens*, and therefore the State has the obligation not to leave these crimes unpunished and must ensure effective protection and punishment of perpetrators]; *La Cantuta v. Peru* (Merits), Judgment of 29 November 2006, Reparations and Costs, IACtHR Series C, No 162 (2006) at [110] [duty to investigate is particularly intense and significant in cases of crimes against humanity], cited in Kleffner, "Complementarity in the Rome Statute and National Criminal Jurisdictions", Oxford University Press, 2008, at 19. Contra: Scharf, "The Letter of the Law: The Scope of the International Legal Obligation to Prosecute Human Rights Crimes" (1996) 59 *Law and Contemporary Problems* 41, at 56-59.

[44] See Commission on the Responsibilities of the Authors of the War on the Enforcement of Penalties, 14 *American Journal of International Law* 95 (1920).

[45] There were only two convictions for crimes against humanity alone.

[46] See, for example, *International Military Tribunal for the Far East: Dissentient Judgment of Justice R.B. Pal*, Sanyal (1953); and Kelsen, H, "Will the Judgment in the Nuremberg Tribunal Constitute a Precedent in International Law?" 1 *International Law Quarterly* 153 (1947).

Statute was adopted there was no doubt that crimes against humanity had become offences carrying individual criminal responsibility at customary international law.[48] Therefore, a very conservative commencement date can reflect the date of the ICTY Statute, 1991, *at the latest*.

It is also open to enact legislation criminalising crimes against humanity prior to 1991 as there is ample jurisprudence that supports its existence as a customary crime prior to this date.

Outside the context of World War II, the earliest domestic prosecution of crimes against humanity that has been subject to judicial scrutiny by a human rights court can be found in the European Court of Human Rights (ECHR)'s *Kolk and Kislyiy* judgment, where it upheld an Estonian prosecution of crimes against humanity that took place in 1949.[49] The ECHR confirmed the existence of crimes against humanity in 1956 in the *Korbely* judgment, but rejected Hungary's prosecution on other grounds.[50] Similarly, the Extraordinary Chambers in the Courts of Cambodia has jurisdiction over crimes against humanity that took place between 1975 and 1979.[51] Therefore, based on these sources,[52] national legislation can be enacted that criminalises crimes against humanity retroactively to 1949, although this too would be conservative, since the first prosecutions for crimes against humanity were for events that took place during World War II. Therefore, a date that stretches back to 1939 would also be *prima facie* permissible.

[47] This is supported by general principles of law recognized by the community of nations, as evidenced by, for example, the "Martens clause" of the 1899 and 1907 Hague Conventions, referring to the "laws of humanity"; the Joint Declaration of 28 May 1915, condemning "crimes against humanity and civilization"; and the 1919 report of the Commission on the Responsibility of the Authors of War, advocating individual criminal responsibility for violations of the "laws of humanity." See also Jackson, R, "Nuremberg in Retrospect", American Bar Association Journal 816 (1949).

[48] Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), 3 May 1993, UN Doc S/25704, at [34], [35], [47] and [48].

[49] Kolk and Kislyiy v. Estonia (Admissibility), European Court of Human Rights, 17 January 2006, Reports of Judgments and Decisions 2006-I.

[50] Korbely v. Hungary (Judgment), European Court of Human Rights, 19 September 2008, Reports of Judgments and Decisions 2008.

[51] Article 5, Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia.

[52] See also the Canadian *Crimes Against Humanity and War Crimes Act* 2000, c. 24, section 6(5):

> For greater certainty, the offence of crime against humanity was part of customary international law or was criminal according to the general principles of law recognized by the community of nations before the coming into force of either of the following:
>
> (a) the Agreement for the prosecution and punishment of the major war criminals of the European Axis, signed at London on August 8, 1945; and
>
> (b) the Proclamation by the Supreme Commander for the Allied Powers, dated January 19, 1946.

However, complex issues arise where the alleged crimes took place in the absence of armed conflict. This is because crimes against humanity as originally stipulated at Nuremberg, required a nexus to armed conflict.[53] In the absence of armed conflict, no crimes against humanity could take place.[54] Over time, this requirement progressively disappeared and was definitively severed in the *Tadić*[55] decision of the ICTY. However, the exact date of this severance prior to *Tadić* remains subject to academic debate.

The earliest adjudicated date for this severance comes from the jurisprudence of the Extraordinary Chambers in the Courts of Cambodia, which held that it had occurred by 1975.[56] Prior to this, the ECHR has opined that this requirement "may no longer have been relevant by 1956"[57] while Professor Cassese believed the severance took place in the late 1960s.[58] Therefore, although crimes against humanity can be prosecuted retroactively back to 1939, any such prosecution would have to include an armed conflict nexus in its definition. This nexus could be removed for crimes that took place from 1975 onwards.

Matching individual crimes against humanity and war crimes against respective customary international law to establish the earliest possible commencement date may not find favour with legislators, largely due to its complexity. The remainder of this article will consider how this practical issue can and has been resolved in practice and the consequences should the issue of temporal jurisdiction be left to the courts to resolve.

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[53] See Article 6(c), Charter of the International Military Tribunal. See also Article 5(c), Charter of the International Military Tribunal for the Far East.

[54] Indeed, for this reason the Nuremberg Tribunal refused to adjudge events that took place prior to 1939 as constituting crimes against humanity. See *United States of America et al. v. Göring et al.*, Judgment, in *Trial of the Major War Criminals before the International Military Tribunal – Volume 1: Official Documents* (Nuremberg: International Military Tribunal, 1947), at 254-255.

[55] *Prosecutor v. Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94-1-AR72, 2 October 1995, at [140]-[141].

[56] See *Kaing*, Trial Judgment, Case No. 001/18-07-2007/ECCC/TC – E188, 26 July 2010, para. 249. This finding has since been affirmed: *Nuon et al.*, Decision on Co-Prosecutors' Request to Exclude Armed Conflict Nexus Requirement from the Definition of Crimes Against Humanity, Case No. 002/19-09-2007/ECCC/TC – E95/8, 26 October 2011, at [33].

[57] *Korbely v. Hungary (Judgment)*, European Court of Human Rights, 19 September 2008, *Reports of Judgments and Decisions* 2008, para. 82. Unfortunately, this issue was not considered in *Kolk and Kislyiy v. Estonia (Admissibility)*, European Court of Human Rights, 17 January 2006, *Reports of Judgments and Decisions* 2006-I, where the prosecution of crimes against humanity which occurred in 1949 were considered.

[58] Cassese, A, "Balancing the Prosecution of Crimes Against Humanity and Non-Retroactivity of Criminal Law: The *Kolk and Kislyiy v. Estonia* Case before the ECHR", 4(2) *Journal of International Criminal Justice* 410-418 at 413.

Temporal Jurisdiction in National Implementing Legislation – Two Models

The discussion above has traced the origins of the core international crimes prescribed in the Rome Statute and has identified that national implementing legislation can vest temporal jurisdiction over the crimes of genocide, crimes against humanity and war crimes earlier than the adoption of the Rome Statute, without breaching the *nullem crimen sine lege* principle. Many, if not the majority, of States parties have left the issue unaddressed in their implementing legislation. Temporal jurisdiction in such situations is likely to be governed by the commencement date of the legislation, post-dating the Rome Statute and creating an impunity gap.

There are two models of legislative implementation which will ensure accountability for serious crimes and ensure consistency with the *nullum crimen* principle.

Model I: By Reference to Custom and Treaty

Canada, as the first country to enact implementing legislation, has dealt with the issue of temporal jurisdiction by specifying that at the time and in the place of its commission each core international crime must constitute a crime

> according to customary international law or conventional international law or by virtue of its being criminal according to the general principles of law recognized by the community of nations.[59]

Thus, the matching exercise between the particular type of crime and the date on which it was criminalised under treaty or custom can be done in the context of particular cases.

To avoid doubt, there is a specific provision confirming that war crimes, crimes against humanity and genocide are, as of 17 July 1998, crimes according to customary international law and "this does not limit or prejudice in any way the application of existing or developing rules of international law."[60] Earlier commencement dates are therefore permissible.

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[59] Sections 4 and 6 of the Canadian *Crimes Against Humanity and War Crimes Act*, SC 2000, c. 24.

[60] Sections 4(4) and 6(4) of the Canadian *Crimes Against Humanity and War Crimes Act*, 2000. For crimes committed outside Canada there is a further interpretative rule, under s.6(5):

> For greater certainty, the offence of crime against humanity was part of customary international law or was criminal according to the general principles of law recognized by the community of nations before the coming into force of either of the following:
>
> (a) the Agreement for the prosecution and punishment of the major war criminals of the European Axis, signed at London on August 8, 1945; and

Model II: Adopting Particular Commencement Dates

A second approach involves specifying a particular commencement date. This necessitates a determination of when the core international crime crystallised into customary international law offences with individual criminal responsibility. The problem with this approach, however, is that it may reflect a political compromise, rather than an accurate legal assessment. An accurate legal assessment is imperative for the achievement of meaningful accountability.

The approach of the United Kingdom (UK) demonstrates the availability of earlier commencement dates and the positive influence of civil society. UK courts were initially given jurisdiction under the *International Criminal Court Act* 2001 to try crimes committed *after* the introduction of the Act.[61] Thus perpetrators of core international crimes, including genocide, in the recent non-international armed conflicts in the former Yugoslavia and Rwanda could not be prosecuted in the UK. In the latter case, they could not be returned to face judicial proceedings in Rwanda either, as their deportation was prevented on human rights grounds. A campaign to extend temporal jurisdiction was taken up by civil society, spearheaded by the Aegis Trust, which recommended that the following commencement dates be adopted:

(a) 1948 for genocide, based on the Genocide Convention;

(b) 1991 for crimes against humanity, based on the year that the Statute of the International Criminal Tribunal for the former Yugoslavia was adopted, recognising that crimes against humanity are "beyond doubt part of customary law";

(c) 1949 for all war crimes contained in the Geneva Conventions of 1949 and other dates for specific war crimes as they became international crimes, for example, 1907 for certain crimes under the Hague Conventions, 1977 for the Additional Protocols, 1998 for those crimes considered to have been first recognised in the Rome Statute.[62]

(b) the Proclamation by the Supreme Commander for the Allied Powers, dated January 19, 1946.

[61] Section 70(3) of the UK *International Criminal Court Act* 2001. Under the UK *Geneva Conventions Act* 1957 the UK courts already had jurisdiction regarding some crimes committed in international armed conflicts since 1957.

[62] House of Lords and House of Commons Joint Committee on Human Rights, "Closing the Impunity Gap: UK law on genocide (and related crimes) and redress for torture victims", Twenty–fourth Report of Session, 2008–09, http://www.publications.parliament.uk/pa/jt200809/jtselect/jtrights/153/153.pdf (accessed February 2011).

The campaign was partially successful. The Secretary of State for Justice announced that the government "should seek to cover the categories of crime [sic] of genocide, war crimes and crimes against humanity from 1 January 1991" on the basis that it was the "date from which the International Criminal Tribunal for the former Yugoslavia had jurisdiction to try offences under the tribunal's statute adopted by the United Nations Security Council."[63] The amending legislation, the *Coroners and Justice Act* 2009, made provision for retrospective application of genocide, crimes against humanity and war crimes.[64] It marks 1 January 1991 as the commencement date, noting that the retroactivity provisions do not apply unless, at the time the act constituting that crime was committed, it amounted to a criminal offence under international law.

Although the compromise reflects a relatively conservative approach to ascertaining criminalisation of the core international crimes under customary international law,[65] it is a clear improvement on the initial position, which only granted jurisdiction over offences committed after the implementation of the Act. The role of civil society in this instance was invaluable.

Judicial Approaches When Temporal Jurisdiction not Clarified in Implementing Legislation

Where implementing legislation of the Rome Statute stipulates a commencement date, without giving appropriate retrospective effect to the core crimes, it is worth investigating alternative ways of incorporating the core international crimes into the national legal order. Customary international law may have an important role to play, subject to the particular constitutional restrictions and other legal provisions of the relevant State party.

There appears to be a divergence in approach to incorporation of customary international law between civil law and common law countries, with the former being more likely to accept its direct application into the domestic legal order and to give effect to such law over domestic legal provisions. Direct application of customary international law in respect of core international crimes has been utilised

[63] Hansard, 7 July 2009: Column 39WS, http://www.publications.parliament.uk/pa/cm200809/cmhansrd/cm090707/wmstext/90707m0001.htm (accessed February 2011).

[64] Section 65A.

[65] As we have seen, crimes against humanity, for example, were already criminalised in the Nuremburg Charter.

in a number of civil law countries including[66] Hungary,[67] Argentina,[68] Germany,[69] Estonia,[70] Latvia,[71] Bosnia and Herzegovina,[72] Sweden,[73] and Slovenia.[74]

In Hungary, the Constitutional Court found that customary international law was directly applicable in the Hungarian legal order. In particular, war crimes and crimes against humanity were "undoubtedly part of customary international law" and constituted part of the general principles of law recognised by the community of nations and were therefore held to be directly applicable in Hungary.[75]

In Argentina, since the late 1990s, courts have relied on customary international law to find that kidnapping, torture, and murders committed during the military regime in the late 1970s and early 1980s, amounted to crimes against humanity, prosecutable in the national legal order. The effect of this automatic incorporation of customary international law was that the crimes were not statute barred.

Common law countries, however, are likely to adhere to the dualist approach, requiring domestic implementation of customary international law, before being given effect in the national legal system. *R v. Jones and Others* provides an

[66] Citations in this section are from Yasmin Naqvi and Vessela Terzieva, "The Peace and Justice Initiative Position Paper on the Application of the International Criminal Court Act (25 June 2010) (Uganda) to Crimes Committed prior to Its Entry into Force by the War Crimes Division of the High Court of Uganda", 2010.

[67] *Decision No 53/1993, On War Crimes and Crimes against Humanity*, Hungary, Constitutional Court, 13 October 1993, cited in Ferdinandusse, W, "Direct Application of International Criminal Law in National Courts", TMC Asser Press, The Hague, 2006, at 77. The case concerned the prosecution of crimes committed in 1956 during the invasion of the Soviet Union, including use of lethal force against demonstrating civilians and extrajudicial execution of dissidents.

[68] *See* Argentina, Federal Court of Buenos Aires, *In re Massera s/ Excepciones*, 9 September 1999; Argentina, Federal Chamber of Appeals, *Incidente de Apelacion de Julio Simon*, 9 November 2001; Argentina, Supreme Court, *Aranciba Clavel, Enrique Lautaro s/ homicidio calificado y association ilícita y otros*, 24 August 2004; Judgment, *Menéndez Luciano Benjamín et al,* Oral Tribunal for Federal Crimes No 1, File 40/M/2008, 24 July 2008.

[69] See *K.-H. W. v Germany*, Application No. 37201/97, European Court of Human Rights, Judgment, 22 March 2001, at [17], [18].

[70] Constitutional Review Chamber of the Supreme Court, 21 December 1994 (III-4/A-10/94), Riigi Teataja (State Gazette) I 1995, 2, at 34, and Judgment of Criminal Review Chamber of the Supreme Court, 21 March 2000 (3-1-1-31-00), Riigi Teataja (State Gazette) III 2000 11, at 118, cited in H. Vallikivi, "Domestic Applicability of Customary International Law In Estonia", *Juridica International* VII/2002, at 33, 36.

[71] See *Kononov v. Latvia*, Application No 36376/04, European Court of Human Rights, Grand Chamber, 17 May 2010, at [15]-[20], [32], [33]. This conviction was overturned on appeal but on an evidentiary basis.

[72] *Boban Simic,* Case No. X-KRZ-05/04, First instance panel Judgment of 11 July 2006, at [51]-[61]; Appellate Panel Judgment of 7 August 2007, at [42]-[48].

[73] *Prosecutor v. Jackie Arklöv*, Stockholm District Court, Case No. B 4084-04, Judgment of 18 December 2006, at 54, cited in M. Klamberg, "International Criminal Law in Swedish Courts: the Principle of Legality in the *Arklöv* Case", 9(2) *International Criminal Law Review* 395-409 (2009).

[74] Slovenia, Regional Court, *Case No. I I ps 119/97*, decision of 24 September 1997.

[75] Decision No 53/1993, On War Crimes and Crimes against Humanity, Hungary, Constitutional Court, 13 October 1993, cited in W. Ferdinandusse, Direct Application of International Criminal Law in National Courts, TMC Asser Press, The Hague, 2006, at 77.

illustration.[76] In that case, the House of Lords (as it then was) considered whether the crime of aggression, if established under customary international law, was a crime recognised by or forming part of the domestic criminal law of England and Wales.[77] Lord Bingham of Cornhill accepted the general principle that the "law of nations" (customary international law) is part of the law of England and Wales, as established by "old and high authority",[78] and that "a crime recognised in customary international law may be assimilated into the domestic criminal law of this country".[79] However, this assimilation does not follow automatically and he agreed that "the power to create crimes should now be regarded as reserved exclusively to Parliament, by Statute".[80] Thus, in order to give domestic effect to crimes established under customary international law, legislation to that end must be enacted.[81]

It is possible that a different conclusion could have been reached had the case not involved the crime of aggression, which at the time was undefined under the Rome Statute[82] and, since it did not comprise a crime by a State, was often precluded by the "political question" or "Act of State" doctrines of judicial self-restraint.[83] The fact that the other core crimes, unlike aggression, had already been given effect in domestic implementing legislation may also have affected the outcome.[84]

However, even in the case of genocide, the courts of another common law country, Australia, have maintained the dualist approach described above. Thus, in *Nulyarimma v. Thompson*, the Full Court of the Federal Court of Australia refused to recognise genocide as an offence known to Australian law in the absence of

[76] House of Lords, Opinions of the Lords of Appeal for Judgment in the Cause *R v. Jones, R v. Milligan, R v. Olditch, R v. Pritchard, R v. Richards*, 29 March 2006, [2006] UKHL 16.

[77] House of Lords, Opinions of the Lords of Appeal for Judgment in the Cause *R v. Jones, R v. Milligan, R v. Olditch, R v. Pritchard, R v. Richards*, 29 March 2006, [2006] UKHL 16. The case concerned prosecutions for criminal damage to military installations. The defendants argued that their conduct was a legitimate action against the UK's participation in the war in Iraq and sought to rely on the defence of using reasonable force under section 3 of the *Criminal Law Act* 1967 in order to prevent the crime of aggression.

[78] House of Lords, Opinions of the Lords of Appeal for Judgment in the Cause *R v. Jones, R v. Milligan, R v. Olditch, R v. Pritchard, R v. Richards*, at [11], citing *Triquet v. Bath* (1764) 3 Burr 1478, at 1481; *Blackstone's Commentaries*, Bk IV, Chap 5, at 67; *Duke of Brunswick v. King of Hanover* (1844) 6 Beav 1, at 51-52; *Emperor of Austria v. Day* (1861) 2 Giff 628, at 678; *Chung Chi Cheung v. The King* [1939] AC 160, at 167-168; *Trendtex Trading Corporation v. Central Bank of Nigeria* [1977] QB 529, at 554; *J H Rayner (Mincing Lane) Ltd v. Department of Trade and Industry* [1989] Ch 72, at 207.

[79] *Ibid.*, at [23], per Lord Bingham of Cornhill.

[80] Ibid.

[81] *Ibid.*, at [28], per Lord Bingham of Cornhill.

[82] The definition of aggression for the purposes of Article 5 of the Rome Statute was adopted at the ICC Review Conference in Kampala, Uganda, on 11 June 2010: Resolution RC/Res.6, The Crime of Aggression.

[83] House of Lords, Opinions of the Lords of Appeal for Judgment in the Cause *R v. Jones, R v. Milligan, R v. Olditch, R v. Pritchard, R v. Richards* at [30], per Lord Bingham of Cornhill and [65]-[67], per Lord Hoffmann.

[84] *Ibid.*, at [28], per Lord Bingham of Cornhill.

legislation criminalising and incorporating it into the Australian legal system, notwithstanding its *jus cogens* status at international law.[85]

Thus, it appears that on the current state of the jurisprudence in common law countries, there is little role which courts can play in redressing the impunity gap if implementing legislation fails to specify appropriate commencement dates for core international crimes. This can be contrasted with the more lenient "internationalist" approach in certain civil law countries, where core international crimes can be incorporated into the domestic legal order via direct application of customary international law.

Promoting the Correct Approach to Temporal Jurisdiction

Finally, in order to foster the correct approach to temporal jurisdiction over core international crimes in national legislation, several avenues ought to be pursued.

First, the matter must be comprehensively addressed in existing and new guides on the implementation of the Rome Statute, which currently fail to engage the issue.

Further, expert international criminal law advice ought to be made available to legislative counsel and policy advisors during the implementation process. The Peace and Justice Initiative is one such non-profit expert organisation, which actively provides advice on international criminal law issues relating to the domestic incorporation of core international crimes. It also conducts capacity building projects, such as legislative drafting courses focusing on ICC Statute implementation. We hope that in cooperation with national legislative counsel we can play a part in extending the net of justice to the full extent allowed by the *nullum crimen* principle, so that no impunity gap remains.

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[85] *Nulyarimma v. Thompson*, Full Court of the Federal Court of Australia, [1999] FCA 1192,at [32], [57]; but see [186] (in dissent).

Book Review: Ian McLeod, *Principles of Legislative and Regulatory Drafting*

Tonye Clinton Jaja[1]

Ian McLeod, *Principles of Legislative and Regulatory Drafting* (Oxford: Hart Publishing Limited, 2009, ISBN 978-1-84113-772-8)

> "A book is a monument to a man, in a very real sense his embodiment, foe it is wrung from his sweat and tears, and impelled by the seed of his intellect."[2]
>
> "A good book is better than a thousand teachers"-Anon

As the above quotations highlight, one of the advantages of books compared to teachers is that a good book can transmit knowledge in clearer terms without the inhibitions and barriers of language and accent.

In this regard, Professor Ian McLeod's book is much welcome. I first met him when he was a Lecturer and I was attending the Commonwealth Summer Course in Legislative Drafting at the Institute of Advanced Legal Studies, University of London during June 2008. During his lecture, I could barely understand anything

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[1] Secretary, Legislative Drafting Law Clinic, Institute of Advanced Legal Studies, University of London; PhD student, Institute of Advanced Legal Studies, University of London. Chairman, Arbitration Tribunal, London Borough of Southwark. The views in this article are personal opinions and do not represent the views of the Institute of Advanced Legal Studies. As always, all views and errors expressed herein are entirely my responsibility. The author can be contacted at Tonye.Jaja@postgrad.sas.ac.uk.

[2] Miers, Earl Scheneck, quoted in Drewry, John E, Book Reviewing, Boston: The Writer, Inc. 1945, at16 in E.C.Gerhart, *Quote it Completely*! (New York, U.S.A.:William S.Hein & Co.Inc, 1980 at102.

that he said due to his accent which I found too heavy for my uninitiated ear. It was my first week of living in London and my first time of listening to an accent like his. Though he spoke in English, it sounded like Greek to my ears. I joined the rest of the class to laugh when they laughed and pretended to take notes when they did. I thank God that Professor McLeod had produced lecture materials for that class otherwise I would have left that lecture completely lost.

It is in the light of the above and for other reasons that I commend Professor McLeod's recent book as an excellent contribution to the field of legislative drafting, an often neglected, less researched and less published area of law.

In this review, I shall apply McLeod's primary objective in writing his book as the sole criterion as follows:

> The book provides an invaluable introduction for those engaged in legislative and regulatory drafting, while also being useful to anyone who is interested in the creation and interpretation of legislative and regulatory texts...It explains how drafters can convert legislative policy into a ***form which has the desired effect in the most direct and accessible way***"[bold and italics mine].

The bold and italicised words above will serve as the key criterion. The overall question I seek to answer is: does McLeod's book present information on legislative drafting in a "form which has the desired effect in the most direct and accessible way".

This book review will apply a two-step approach, the first step is a review of the overall structure of the book and the second is a review of its contents through a chapter by chapter review.

Structure

The first question is whether the overall structure of McLeod's book is presented in "a form which has the desired effect in the most direct and accessible way". The answer is yes. McLeod covers the core aspects of legislative drafting that are recognised by the leading authors in the field of legislative drafting the world over, from the classic treatise on legislative drafting by Thornton to the latest one by Salembier.

McLeod's book is divided into 10 chapters: chapter one - drafting and communication-clarity in written language; chapter two - principles of interpretation; chapter three - Drafting Instructions; Chapter four - Constitutional considerations and the protection of Human Rights; Chapter five - General Principles of Drafting such as Gender-Neutral drafting and plain language drafting; chapter six-Powers and Duties; chapter seven - Licensing and

Registration; chapter eight - Statutory Corporations; chapter nine - Penal Provisions and chapter ten - Subordinate Legislation.

From a cursory reading of the table of contents of the major textbooks on legislative drafting, any diligent reader will find that the majority of the core themes in McLeod's book are the same in these established textbooks. One example that adequately illustrates this point is with respect to McLeod's discussion of the Principles of interpretation-chapter two (2). This theme is discussed by the leading textbooks on legislative drafting namely Thornton,[3] A.Seidman, R.B.Seidman and N.Abeyesekere,[4] C.Stefanou and H.Xanthaki[5] and Salembier.[6]

A minor quibble with the structural arrangement of McLeod's book is that the discussion of the philosophy of drafting or the conceptual framework underlying legislative drafting in common law system such as the U.K.is not set out in the opening chapter, but is instead discussed in chapter five-general principles of drafting, under the heading: "Is Drafting an Art or a Science?". This criticism is based on the fact that it is now an emerging tradition in legislative drafting and in the study of law to proceed by defining the underlying philosophy or concept that guides legislative drafters, or the goals (or hierarchy) that legislative drafters' seek to achieve in drafting legislation. It is also based on the modern[7] and prevailing view in legislative drafting, that legislative drafting is not done in a vacuum and amongst the set of goals there is a hierarchy of goals that should guide the drafter.

Another gap is that there is no discussion of drafting of tax or finance legislation, which is a very important form of legislation. Considering its pervasive impact on the majority of citizen and government, it is unlikely that a legislative drafter will not be required or called upon to draft finance or tax legislation. This is in contrast to other books on legislative drafting that provide a chapter on drafting taxation legislation.[8]

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[3] See G.C.Thornton, *Legislative Drafting*, 4th ed. (London: Butterworths, 1996) at 112-122 deals with Interpretation of statutes.

[4] See A.Seidman, R.B.Seidman and N.Abeyesekere, *Legislative Drafting for Democratic Social Change* (The Hague, Netherlands: Kluwer Law International, 2001) chapter 12, pp.303-317 discusses Internal Aids to Interpretation of statutes.

[5] See C.Stefanou and H.Xathaki (eds) *Drafting Legislation-A Modern Approach* (Aldershot, England: Ashgate Publishing Limited, 2008) chapter seven, pp.91-106 deal with Retrospectivityy in the Drafting and Interpretation of Legislation.

[6] See P.Salembier, *Legal and Legislative Drafting* (Markham: LexisNexis Canada Inc., 2009) chapter 10, at.373-406.

[7] See generally H.Xanthaki, On Transferability of Legislative Solutions: The Functionality Test in C.Stefanou and H.Xanthak (eds) Drafting Legislation-A Modern Approach (Aldershot,Ashgate Publishing Limited, 2008) pp.1-18.

[8] See R,Rose, Drafting Taxation Legislation in C.Stefanou and H.Xanthaki (eds) Manual in Legislative Drafting (London: Department for International Development, 2005) pp.113-118.

Contents

Having completed the analysis of the structure of McLeod's book, the contents are discussed below chapter by chapter.

Chapter one discusses Drafting and Communication. In this chapter, it is significant that McLeod has discussed three key goals or objectives in drafting legislation namely: clarity; precision and unambiguity. He has also rightly acknowledged the difficulty of providing an objective definition of these words in the field of legislative drafting due to the problem he lists as "identifying Potential Readerships" of legislation."[9] He rightly identifies the six types of potential audience or readers of legislation as "the client"; "the courts"; "the members of the legal profession"; "public officials"; "members of other professions (such as accountants, architects, dentists, doctors and surveyors) and "members of the public".

Although McLeod has rightly identified the key elements of effective legislation as clarity, precision, and unambiguity, he does not inform the reader whether these goals are co-terminous or should be placed in a hierarchical order.

Furthermore, in the event of a conflict between these goals McLeod's book does not inform the reader which of the goals or the audience is paramount in drafting legislation.

The need for an understanding of the hierarchy of drafting goals and objective is now recognised in legislative drafting. Even the *Renton Report on Preparation of Legislation,* which is cited by McLeod (2009:17), adopted this approach when it stated: "in the event of a conflict, certainty of law should not be sacrificed for clarity or simplicity."

Chapter two discusses the principles of interpretation and their relevance to legislative drafting. Generally, this is beneficial to readers considering that it applies the "watershed decision" in *Pepper v Hart*[10] to illustrate the modern view that English courts adopt in referring to parliamentary materials such as *Hansard* when interpreting legislation. However, McLeod's book does not provide the most current view of English law or the Commonwealth on this subject considering that it does not examine cases decided after 1993.

Chapter three, which deals with Drafting Instructions, is a very significant contribution to legislative drafting considering that it analyses the most current

[9] McLeod (2009:5).

[10] [1992] UKHL 3.

drafting practice and requirement for "impact assessment" as stipulated by the *Legislative and Regulatory Reform Act* 2006 (McLeod 2009:36). In discussing the "Ethical Dimension of Drafting", this chapter also makes a major contribution considering that it goes beyond English law by citing the Zimbabwean case of *R v Ndhlovu*[11] to illustrate the ethical dilemmas encountered by legislative drafters in the commonwealth and beyond.

Chapter four discusses a major element of drafting that is of paramount importance to all legislative drafters irrespective of their jurisdictions or level of development, namely constitutional considerations and the protection of Human Rights. McLeod succinctly illustrates the relevant principles of drafting by reference to decisions and judgments of the European Court of Human Rights in such cases as *Myles v Director of Public Prosecution*.[12] This is an outstanding contribution considering that other textbooks such as Thornton on the subject do not provide such up-to-date analysis.

Chapter five, which examines general principles of drafting, contains a significant contribution making the valid point that in reality legislative drafting is both a science and an art. Based on this, he further argues that is a waste of time to dwell on the debate on whether legislative drafting is an Art or a Science. He goes further to explain relevant drafting principles such as gender-neutral drafting and other techniques of drafting such as the use of definitions.

Chapter six is significant for defining and distinguishing between powers and duties with regards to judicial review and the justiciability of powers and duties respectively. Understanding this distinction is important to prevent legislative drafters from drafting ineffective legislation that contains provisions that confer unenforceable powers or unjusticiable duties, which is a problem that characterises majority of legislation in transitional countries. For example, many national constitutions contain a list of socio-economic rights and duties of the Government, however these rights are not enforceable, making one wonder why the legislative drafters included these provisions in the constitution in the first instance.

Chapter seven dwells on the most important aspect of drafting, namely the drafting of regulations with specific reference to drafting licensing and registration regulation. In this context, the word regulation is in contradistinction to legislation, which is generally considered as an Act of Parliament. This is a very problematic area of legislative drafting addressed by very few books on drafting legislation.

[11] [1968] 4SA 515.

[12] [2004] EWHC 594 (Admin), [2004]2 All ER 902.

Another challenge of drafting regulation is that it is generally undertaken by drafters who are not legislative drafters in legislative drafting offices in the strict sense of the word. This is so considering that the power to issue such "certificates, concessions, consent, licence, permission and permits" often reside with government ministries, departments, agencies (MDAs) and other officials and institutions other than Parliament or the Cabinet, which is often the supervisory ministry of the legislative drafting office in the majority of common law jurisdictions. Besides, McLeod's book, out of the five major textbooks on legislative drafting reviewed by this author, only Stefanou and Xanthaki (2005: 93) include a chapter on Licensing and Registration. McLeod's book is also beneficial considering that it includes a section on enforcement under this chapter.

Chapters eight and nine explain statutory corporations and penal provisions respectively. They are brief and succinct and McLeod applies a plethora of case law to illustrate the relevant principles of legislative drafting. The standard scale of fines is an important contribution of chapter eight and applies the relevant rules that apply as stipulated in the relevant legislation namely the *Criminal Justice Act* 1982 and 1991 respectively.

Chapter ten is also an important contribution of this book considering that it sets out the drafting principles that apply to the drafting of subordinate legislation or regulation. Although, previous authors have treated this same subject, McLeod brings a fresh perspective by signposting it and demonstrating the link between subordinate legislation and the drafting goal of precision under the heading "The Drafters Responsibilities" (McLeod 2009: 162). Using the drafting goal of precision as a focal point, he explains how to draft subordinate legislation to prevent it from being declared illegal upon challenge in courts of law on grounds of *ultra vires*. He provides a list of case law that adequately illustrates his point.

Finally, one of the most significant contributions of McLeod's book is the inclusion of Appendix 3 - The Better Regulation Executive's Code of Practice on Guidance on Regulation. This is a useful precedent for drafting regulation as it "sets out the golden rules for guidance on legislation which will have significant effect on business and the third sector" such as charities and non-governmental organisations.

In conclusion, McLeod's book is an invaluable resource to drafters, lawyers, researchers and all whose work brings them in contact with drafting of legislation and regulation.