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The Loophole is a journal for the publication of articles on drafting, legal, procedural and management issues relating to the preparation and enactment of legislation. It features articles presented at its bi-annual conferences. CALC members and others interested in legislative topics are also encouraged to submit articles for publication.

Submissions should be no more than 8,000 words (including footnotes) and be accompanied by an abstract of no more than 200 words. They should be formatted in MSWord or similar compatible word-processing software.

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Contents

Editor's Notes.....	1
A Case Study of the National Assembly of Pakistan during COVID-19	
Mohsin Abbas Syed.....	1
COVID-19 and the Parliament of Singapore	
Zhixiang Seow	16
Lawmaker – the new legislative drafting service of the UK and Scotland	
Matt Lynch	24
Drafting Agricultural Legislation	
Jessica Vapnek	40
Measure for Measure: Recent Canadian Experience with Parliamentary Review Provisions	
Charlie Feldman	57
Emerging from the shadows: sunset and review clauses – what is required to make them work?	
Dr. Maria Mousmouti and Andy Beattie.....	68
Book Review	
Thornton's Legislative Drafting, 6 th edition	82

Editor's Notes

This issue of the *Loophole* provides a taste of the rich fare offered by the CALC Conference last July. The articles included here not only address its most topical of topics (the COVID-19 Pandemic), they also survey the world of agricultural legislation, describe an innovative IT platform for drafting and publishing legislation and comment on the parliamentary review of legislation.

Much has been, and continues to be, written about legislative responses to the pandemic. The articles in this issue bring us perspectives from Pakistan (Mohsin Syed) and Singapore (Zhiang Seow) providing a critical perspective on how the primary legislative bodies in those countries continued to function throughout the pandemic.

Next, we have Matt Lynch's account of the development and implementation of Lawmaker – an IT application for drafting and publishing legislation enacted by the parliaments and governments of the United Kingdom and Scotland.

Jessica Vapnek's article on drafting agricultural legislation provides a conceptual framework for understanding this vast, complex and critical field of legislative activity.

The concluding articles in this issue consider provisions for reviewing legislation to assess its effectiveness and whether it continues to be needed. Charlie Feldman provides a Shakespearian inspired take on legislation in the Canadian Parliament, while Maria Mousmouti and Andy Beattie survey sunset and review clauses across a number of jurisdictions (UK, US, Canada and Australia).

The articles published here have also benefited from the authors' continued reflection on their topics since the July conference. Readers who attended it may notice some fine-tuning, which is yet another indication of the success of the conference.

The next issue of the *Loophole* will continue the publication of conference papers. Stay tuned for more.

John Mark Keyes
Ottawa,
October, 2022

A Case Study of the National Assembly of Pakistan during COVID-19

Mohsin Abbas Syed¹



Abstract

Legislatures around the world have been challenged by the COVID-19 pandemic. Questions have arisen about Parliaments' operation during the pandemic, their role in combating COVID-19 and oversight of the governments' response to the pandemic, and their relationship with the executive and other state actors. In Pakistan, working of legislatures is severely affected as the pandemic exposed weaknesses in bicameral Parliament's readiness to respond to and operate effectively during a crisis. COVID-19 has posed a serious threat to the continuity of parliamentary business as the legal framework allows only in-person presence of members for legislation, debate, and voting. This paper looks at the response of the National Assembly (the directly elected House of the Parliament of Pakistan) to the pandemic. It highlights the importance, rather necessity, of continued operations of the National Assembly during any crisis like COVID-19 pandemic. Ways and means to ensure business continuity of the National Assembly through maximum use of technology during COVID-19 like crisis are explored in the paper considering the constitutional and other legal limitations.

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Table of Contents

Introduction	2
Impact of pandemic on parliamentary working	2
Reaction to proportionality of risks	4
Reaction of National Assembly	5
Constitutional limitations on virtual session	7
Committees of National Assembly	10
Daily and travelling allowances	10
Commonwealth Parliamentary Association	11
Inter-Parliamentary Union	11
Conclusions	12
Proposals for reforms based on lessons learnt	13
Proposals for legal reforms	14

Introduction

The public health response to COVID-19 disease has mainly focused on vaccination and nonpharmaceutical interventions like frequent washing or sanitization of hands, social distancing, wearing of masks and avoidance of touching eyes, nose and mouth. By June 2022, 156 countries had taken measures against assembly of people, 112 countries declared a state of emergency, 62 countries have imposed limitations on freedom of expression and 61 countries have taken measures which adversely affected right to privacy.² This all is done to control the pandemic or on this pretext.

The principles of parliamentary oversight and scrutiny, democratic accountability, transparency, legitimacy at all stages in the legislative process, observance of the rule of law, evidence-based law-making, the principles of rational law-making, scientific literacy of law-makers, and respect for human rights and the constitutional order need to be considered by any legislature during any crisis. A legislature has to ensure that these principles remain true in any crisis and the executive may not lose the constitutional and democratic values in the process of managing the pandemic or any other similar crisis.

Impact of pandemic on parliamentary working

The social distancing requirements and limitations on public gatherings during COVID-19 made it difficult for legislatures to operate as they ran in contrast with the fundamental

² COVID-19 Civic Freedom Tracker, available at <https://www.icnl.org/COVID19tracker/> (last accessed on 25 June 2022).

institutional features of legislatures.³ The operation of a legislature is based on the assembly of many people together. Indeed, the idea of gathering or assembling is so fundamental to the identity of legislatures, that it is even reflected in their institutional names like *Assembly*, *Parliament* or *Congress*. Over 40 percent of legislatures around the world use terminology such as *Congress* or *Assembly* (or other variants that mean gathering) as their institutional names.⁴ *Parliament* indicates the additional fundamental trait of debating and deliberating.

In some countries, given the number of legislators and the size and architecture of the legislative building, it is simply unfeasible to convene the legislature while maintaining social distancing requirements. As in case of United Kingdom House of Commons, for example, it is rightly remarked:

few places are less suited to social distancing than a nineteenth century, wood-paneled debating chamber where lawmakers routinely squeeze onto overcrowded benches to secure a seat.⁵

In legislatures representing large geographic areas, such as the European Parliament, or federal legislatures in countries such as India, Australia, Canada, Russian Federation, the United States. and Pakistan, limitations on travel, flights and other forms of transportation create additional challenges.

Most of the legislatures of the world have mandatory quorum rules often embedded in their Constitutions that demand the presence of a certain number of legislators for the legislature to conduct business or vote. Some countries have special rules for legislatures in times of emergency, but still in many countries the usual quorum requirements continue to apply even during an emergency.⁶ A related challenge is that legislatures also traditionally demand actual attendance, in the sense of physical presence in the chamber, as a constitutive basis for representation of people.⁷ Even this concept makes it difficult to adopt remote deliberation and voting procedures in plenaries.

COVID-19 posed a dual challenge for the National and Provincial Assemblies in Pakistan. First, the measures taken to contain its spread made it difficult and even dangerous for an Assembly to operate. These Assemblies are large multi-member bodies whose operation requires assembling a large group of people together to deliberate and vote. In case of the National Assembly, it is a 342-member body. Gathering of all these members and secretariat

³ Bar-Siman-Tov, I, "[COVID-19 meets politics: the novel coronavirus as a novel challenge for legislatures](#)" (2020), 8 *The Theory and Practice of Legislation* 11.

⁴ Power, G, "[Global Parliamentary Report: The Changing Nature of Parliamentary Representation](#)" (2012), Inter-Parliamentary Union, United Nations Development Program.

⁵ Castle, S, "[For the Foreseeable Future, U.K. Parliament May Meet in Cyberspace](#)", *New York Times* (15 April 2020).

⁶ Law Library of Congress, "Continuity of Legislative Activities during Emergency Situations in Selected Countries", vol LL File No (2020) at 1.

⁷ Aronson, O, "Civil Litigation as Civic Participation: A Comment on Assy's Injustice in Person" (2018), 17 *Jerusalem Review of Legal Studies* 22 at 31.

staff in a closed environment of Assembly Chamber posed a grave threat to the legislators, parliamentary staff and their families. Second, the COVID-19 pandemic created a sense of emergency that empowers the executive branch and emboldens it to assert greater authority at the expense of these legislative bodies.

Constitutionally, the Senate, National and Provincial Assemblies are empowered to exercise original legislative authority in Pakistan⁸ and to make the respective governments accountable or responsible to them.⁹ The National Assembly and Provincial Assemblies also have the power of purse¹⁰ and may enact Money Bills.¹¹ These legislatures are masters of their own procedure and can make or amend rules of procedure governing their working and conduct of business.

Reaction to proportionality of risks

It was rightly pointed out in a toolkit of the Commonwealth Parliamentary Association:

Parliamentarians must also prioritize their own welfare alongside their duties.

Parliamentarians that fall ill are unable to effectively serve their local communities. It is therefore essential that priority be given to avoiding putting Parliamentarians or others at risk and to heed all of the advice that is being given.¹²

The impacts of COVID-19 on legislatures have not received sufficient attention and risk becoming casualties of the pandemic. This risk is not merely theoretical. An estimate in April 2020 suggested that two billion people lived in countries whose legislatures were shut or limited due to the pandemic.¹³ This, in turn, raised concerns not only for the wellbeing of legislatures, but also for the health of democracy itself.¹⁴ This phenomenon continued for almost two years in the developing world. This was based on the premise that legislators might be at greater risk than the rest of population for several reasons.¹⁵

The legislators tend to be in contact with many people and shake hands more often than others. Most legislators continued to work and interact with people even during pandemic when others were preferring to stay home. Normally, legislators are older than the median age of the overall population and have a higher proportion of males than the overall population. These two traits are associated with greater risk for severe complications and

⁸ [Constitution of the Islamic Republic of Pakistan](#), Arts. 141 and 142.

⁹ Ibid, Arts. 91 and 130.

¹⁰ Ibid, Arts. 80 and 120.

¹¹ Ibid, Arts. 73 and 115.

¹² Commonwealth Parliamentary Association, [COVID-19, Delivering Parliamentary Democracy, CPA Toolkit for Commonwealth Parliaments](#), April 2020.

¹³ Provost, P, Archer, N, and Namubiru, N, [“Alarm as 2 Billion People Have Parliaments Shut or Limited by COVID-19”](#), Open Democracy 50.50, April 2020)..

¹⁴ Birnbaum, M and McCoy, T, [“As Leaders Seize Powers to Fight Coronavirus, Fear Grows for Democracy”](#) *The Washington Post* (13 April 2020).

¹⁵ Bar-Siman-Tov, above n. 3.

death from COVID-19. More politicians were infected than other people and the politicians were over-represented in the number of people who have been diagnosed with COVID-19. Part of the explanation may be that politicians probably get tested for the disease much more than the rest of the population and get more media attention than rest of the people. In a nutshell, COVID-19 made normal parliamentary activity not only difficult, but also potentially dangerous.

While the health risk to legislators was real, legislatures in many cases overestimated this risk and responded by taking unjustified and irrational decisions about their continued operation (as well as other unjustified policy choices).¹⁶ As one behavioral scientist put it:

In situations of extreme uncertainty, our brains struggle to organize this confusing mass of partial and jumbled information into a coherent interpretation. And we make decisions as if that interpretation is true, without entertaining alternatives. This strategy can often serve us pretty well, but sometimes it leads to bad, and even disastrous, decision-making. The misinterpretation of the COVID-19 outbreak has the potential to have devastating consequences.¹⁷

In view of this, some legislatures have overemphasized the risk and danger to their continuous operations and may have been too quick to shut down causing irreparable harm to democratic governance.

Reaction of National Assembly

Parliamentary history of the National Assembly is available till June 2019¹⁸ and there is no run down on business continuity of the National Assembly during COVID-19 onslaught in Pakistan from March 2020. However, on 14 March 2020, the Speaker of the National Assembly cancelled all meetings of the Committees and Sub-Committees of the Assembly without assigning any reason and the working of the National Assembly totally stopped with that decision.¹⁹ This order was withdrawn on 07 July 2020.²⁰

On 26 March 2020, the Speaker of the National Assembly constituted a multi-party Parliamentary Committee on Coronavirus Disease (COVID-19)²¹ to review, monitor and oversee the response to the coronavirus. The committee only met on very few occasions during the height of crisis, and that too without any significant participation of opposition.²²

¹⁶ Ibid.

¹⁷ Chater, C, “Facing Up to the Uncertainties of COVID-19” (2020), 4 *Nature Human Behaviour* 439.

¹⁸ National Assembly of Pakistan, Parliamentary History, available at <https://na.gov.pk/en/content.php?id=75>.

¹⁹ National Assembly of Pakistan Secretariat, Circular No. F.72(1)/2020-Admin, available at https://na.gov.pk/uploads/documents/1584189925_428.pdf.

²⁰ National Assembly of Pakistan, Secretariat’s Press Release, available at <https://na.gov.pk/en/pressrelease.php?content=105>.

²¹ Notification No. F.16(1)/2020-P.C., available at https://na.gov.pk/uploads/1585996862_227.pdf.

²² National Assembly of Pakistan, Press Release, November 25, 2020, available at https://na.gov.pk/en/pressrelease_detail.php?id=4174.

It was not able to exercise due oversight on the measures taken by the executive during the pandemic. There is no mention of use of technology or virtual presence of attendees for the meetings of this committee, which should have set a course for the other parliamentary committees. From October 2020 to March 2021, the National Assembly only met 24 times, but most importantly there was no input regarding the government's measures to deal with the pandemic and procuring vaccines.²³ Regular sessions of the National Assembly were postponed and even standing committees were not allowed to meet on the pretext of being a restriction needed to address the pandemic. Even it failed to exercise oversight on vaccine procurement, though the matter was placed before the public accounts committee of the Assembly.²⁴

On 14 April 2020, the Speaker National Assembly constituted another Committee on Virtual Session of the National Assembly during pandemic Coronavirus Disease (COVID-19) to make recommendations for amendments to the Rules of Procedure and Conduct of Business in the National Assembly, 2007 for holding Virtual Sessions of the National Assembly during COVID-19.²⁵ Formal recommendations of the Committee are not publicly available, but the news reports suggest the Committee rejected the idea since it involved amendments in the Constitution.²⁶

Virtual meeting of the committees of the National Assembly was a specific omission in the terms of reference of this Committee. But as a matter of fact, the Standing Committees held a few virtual meetings, though without appropriate amendments in the Rules of Procedure and Conduct of Business in the National Assembly, 2007 and the law relating to salaries and allowances of the members of the National Assembly. During the height of COVID-19 until late 2021, more than 100 press releases of National Assembly's committees were published online, but none of these contain statements about use of technology for holding such meetings or participation of members via video link.²⁷ This is unlike the practice of the legislative committees in the developed countries.

The National Assembly did take some administrative preventive measures. Meetings of the parliamentary leaders in the Nation Assembly were held on 8 June 2020 and 22 June 2020 to deliberate on business continuity of the Assembly during the COVID-19 pandemic. The meetings mainly took decisions for smooth passage of the budget and restricting visitation in parliamentary lodges. The National Assembly also followed the general measures of

²³ Free and Fair Election Network (FAFEN), [Pakistan's Pandemic Governance Framework: FAFEN's Monitoring and Assessment of the Government's COVID-19 Response](#), April, 2021.

²⁴ Ibid, at 17.

²⁵ National Assembly of Pakistan Secretariat, Notification No. F.24(7)/2020-Legis, available at https://na.gov.pk/uploads/1586865352_918.pdf.

²⁶ Wasim, A, "Virtual parliament session seems unlikely", DAWN, 22 April 2020.

²⁷ National Assembly of Pakistan, Committee Meeting's Press Release, available at <https://na.gov.pk/en/pressrelease.php?content=103>.

rotation of parliamentary staff, social distancing in the chamber, hand wash, gloves and sanitizing, temperature checks and wearing of masks.

Any study on the impact of COVID-19 on the working and business continuity of the legislatures in Pakistan is not readily available on the websites of the National Assembly.²⁸ Only one COVID-19 specific law relating to prevention of hoarding in the federal capital was passed by the National Assembly in late 2021.²⁹ Even the measures already taken by the National Assembly were, apparently, not based on any documented study and analysis, which is also conspicuously missing from the compiled information of the Inter-Parliamentary Union, *Parliaments in a time of pandemic*.³⁰

Constitutional limitations on virtual sessions

In Pakistan, there are many constitutional limitations which need to be considered at the outset while searching for options to ensure continued operations of parliamentary activities in the times of COVID-19. These constitutional limitations are as to place, presence, sitting, meeting, attendance and quorum. The session summons order must specify the *place of meeting*.³¹ This word *place* has always been reckoned as physical place and has never been interpreted as virtual place. The National Assembly must have at least three sessions every year, and not more than 120 days shall intervene between the last *sitting* of the Assembly in one session and the date appointed for its first *sitting* in the next session. The Assembly is required to *meet* for not less than 130 working days in each year, but *working days* include any day on which there is a joint *sitting* and any period, not exceeding two days, for which the Assembly is adjourned.

The National Assembly may take a decision by a majority of the members *present* and voting.³² Similarly, some other provisions mandate presence for voting.³³ The word *meet* has also been used along with *time and place* for summoning a session of the National Assembly. This word *meet* or *meeting* is used in other places in the Constitution to denote physical presence for the meeting of the Assembly or a joint sitting of the Parliament.³⁴ It also contains provisions for the *attendance* of members, Houses of Parliament *assembled together*, and *absence*.³⁵ Virtual meeting, sitting, attendance, absence and presence in the context of the National Assembly have not yet been recognized or accepted.

²⁸ Search of National Assembly of Pakistan website on 26 June 2022: https://na.gov.pk/en/search_content.php.

²⁹ COVID-19 (Prevention of Hoarding) Act, 2021.

³⁰ Inter-Parliamentary Union, [Country compilation of parliamentary responses to the pandemic](#), last updated 16 October 2020.

³¹ [Constitution of the Islamic Republic of Pakistan](#), Art. 54.

³² Ibid, Art. 55

³³ Ibid, Art. 91.

³⁴ Ibid, Arts. 47, 53 and 91.

³⁵ Ibid, Arts. 53(3) and 56.

The quorum requirement is perhaps the most crucial one: one-fourth of the total membership of the Assembly.³⁶ Legislatures also traditionally demand actual attendance or physical presence in the chamber for exercise of their collective power. This makes it difficult to adopt remote deliberation and voting procedures.³⁷

In Georgia, the Parliament considered a bill in response to COVID-19 that would allow the Chairperson of the Parliament to decide to move all operations of the Parliament to an electronic format in cases of emergency.³⁸ Yet this initiative was not accepted, in part because the Constitution states that “Parliament shall meet upon the declaration of a state of emergency”, and there were interpretations of the word *meet* to mean only physical meeting.³⁹

Similarly, in Switzerland, the idea of adopting remote deliberation and voting in the federal Parliament was dropped due a constitutional requirement that states that the Councils are quorate if a majority of their members is present. This requirement was interpreted as requiring physical presence.⁴⁰

In the U.S., the constitutional provision stipulates that a majority of each House shall constitute a quorum to do business.⁴¹

The question of holding virtual session of Colombian Congress was decided by the Constitutional Court which prohibited the Congress from continuing to hold virtual sessions.⁴² The Court was of the view that virtual sessions were unconstitutional because the Constitution demands physical presence in the Congress. Even when no formal legal obstacles exist, online deliberation and remote voting may simply be unfeasible due to the lack of sufficient internet infrastructure.

In Kenya, the idea of remote attendance of members was dropped on the ground that most lawmakers have a problem with stable internet connection to sustain a sitting or continuous video link.

Legislatures tend to be quite traditional and customary, and therefore do not tend to be quick in adopting digital and technological alternatives to the traditional physical-presence and paper-based legislative process. In several countries (including highly developed countries),

³⁶ Ibid, Art. 55.

³⁷ European Parliament At a Glance, “[Remote Voting in the European Parliament and National Parliaments](#)”, 25 March 2020.

³⁸ Bar-Siman-Tov, above n. 3 .

³⁹ See [Constitution of Georgia](#), art. 44(3).

⁴⁰ [Federal Constitution of the Swiss Confederation](#), art. 159, para. 1.

⁴¹ [Constitution of the United States of America](#), art. I, section 5.

⁴² Slawson, DS, “[The Colombian Constitutional Law Requires Congressmen to Return Personally to the Chamber and Senate](#)”, *Europe & World News*, 10 July 2020.

studies suggest that elected representatives and legislative staff tend to be resistant to adopting new technologies.⁴³

The Pakistan Rules of Procedure and Conduct of Business in the National Assembly, 2007 regulate the procedure and conduct of business of the National Assembly and its Committees. These rules are made under Article 67 of the Constitution. The constitutional provisions relating to the National Assembly are further elaborated in the rules. The rules further provide for seating in the Assembly,⁴⁴ and signing the roll of members.⁴⁵ The members have to sit in such order as the Speaker may determine.⁴⁶ A member shall keep to his or her usual seat while speaking in the Assembly and shall not occupy a seat in the galleries nor while in the Chamber engage himself in conversation with any visitor in a gallery.⁴⁷ The member who has given notice of the question shall be in his seat to read the question when called by the Speaker and the Minister concerned shall give a reply immediately.⁴⁸ When the Speaker speaks, a member shall resume his or her seat and shall not leave the seat during the address of the Speaker.⁴⁹ The members may vote from their seats through automatic vote recorder.⁵⁰

These provisions also ensure physical presence of the member at the place of meeting of the Assembly. Members are required under the rules to rise in their seats for motion for removal of the Speaker or Deputy Speaker,⁵¹ for leave to discuss an adjournment motion,⁵² for voting on a constitutional amendment,⁵³ and for grant of leave to amend the rules.⁵⁴ The Speaker or a chairperson of a committee of the Assembly may issue a production order of a member in the custody of a law enforcement agency.⁵⁵ If any such production order is issued, the member has to be brought before the Sergeant-at-Arms and after the conclusion of the session or meeting the Sergeant-at-Arms shall handover the custody of the member to the authority from whose custody the member is brought to the Assembly. This clearly signifies the importance of physical presence during a sitting of the Assembly or meeting of a committee.

⁴³ Bar-Siman-Tov, above n. 3.

⁴⁴ Rules of Procedure and Conduct of Business in the National Assembly, 2007, rule 6.

⁴⁵ *Ibid*, rule 7.

⁴⁶ *Ibid*, rule 8.

⁴⁷ *Ibid*, rule 30.

⁴⁸ *Ibid*, rule 79(5).

⁴⁹ *Ibid*, rule 272.

⁵⁰ *Ibid*, rule 277.

⁵¹ *Ibid*, rule 12(5).

⁵² *Ibid*, rule 113(1).

⁵³ *Ibid*, rule 156.

⁵⁴ *Ibid*, rule 293(4).

⁵⁵ *Ibid*, rule 108.

Committees of the National Assembly

The parliamentary committees serve as eyes, ears, brain and limbs of the legislature. A legislature is as effective as its committees are and performance of a legislature is gauged on the basis of performance of its committees. Former US President Woodrow Wilson once rightly said “Congress in session is Congress on public exhibition, whilst Congress in its committee rooms is Congress at work.”⁵⁶ The legislative committee proceedings operate under less formal rules of procedure than those that govern the Assembly proceedings or floor of the House. Quorum is the most crucial issue for holding or continuing a legislative committee meeting by using the digital technology. The quorum to constitute a sitting of a committee is one fourth of the total membership of the committee.⁵⁷ This flexibility in the procedures of the committees is being used by holding a few virtual meetings though this may also require appropriate amendments in the rules of the National Assembly.

Daily and travelling allowances

For each day during any period of residence on duty, a member shall be entitled to receive a daily allowance and conveyance allowance.⁵⁸ If a member remains absent from sitting of the Assembly on three consecutive days without leave of the Assembly, the member is not entitled to daily or conveyance allowance for the days of his absence.⁵⁹ Further, for every journey performed for the purpose of attending a session or a meeting of a committee or for attending to any other business connected with his duties as member from his usual place of residence to the place where the session or meeting is held or other business is transacted and for the return journey from such place to his usual place of residence, a member shall be entitled to receive travelling allowance.⁶⁰ A member is also entitled to housing allowance for residence on duty and for short intervals during a session or between meetings of committees of the Assembly.⁶¹ All these provisions entitle a member for travelling, daily and housing allowances in case of his or her physical presence and concept of virtual presence or attending a meeting is alien to the *Members of Parliament (Salaries and Allowances) Act, 1974*.⁶²

⁵⁶ Gaines, BJ, Goodwin, M, Bates, SH and Sin, G, “[The study of legislative committees](#)” (2019), 25 *The Journal of Legislative Studies* 331.

⁵⁷ Rules of Procedure and Conduct of Business in the National Assembly, 2007, rule 217.

⁵⁸ *Members of Parliament (Salaries and Allowances) Act, 1974* (Act XXVII of 1974), section 4.

⁵⁹ *Ibid*, section 4A.

⁶⁰ *Ibid*, section 5.

⁶¹ *Ibid*, sections 9 and 7.

⁶² *Members of Parliament (Salaries and Allowances) Act, 1974* (Act XXVII of 1974). Available at https://na.gov.pk/uploads/documents/63036bacdbfcb_826.pdf

Commonwealth Parliamentary Association

During early April 2020, Commonwealth Parliamentary Association published a toolkit for Commonwealth Parliaments to ensure their business continuity during COVID-19 pandemic.⁶³ It contains four pillars for prevention of infection which are:

- (a) frequent washing of hands;
- (b) maintaining social distancing;
- (c) practicing respiratory hygiene through wearing of masks; and
- (d) avoiding touching of nose, eyes and mouth.⁶⁴

It strongly recommends legislatures remain operational, efficiently scrutinize all legislation and hold the respective executives accountable under all circumstances. The response of a legislature to the pandemic should be appropriate, proportionate and reasonable.⁶⁵ It argues for making the institution more transparent through live streaming of all public proceedings via online platforms and social media as an alternative to welcoming visitors.⁶⁶ The toolkit also highlights the importance and challenges of information technology⁶⁷ and recommends certain action points including virtual committees' meetings, online reports, appropriate technical facilities and amendments in the rules of procedures.⁶⁸

Inter-Parliamentary Union

Inter-Parliamentary Union (IPU) also launched a special initiative for legislatures in a time of pandemic.⁶⁹ It is one of the best sources of comparative measures taken by various legislatures for their business continuity during COVID-19. IPU has directly collected information from its members and, on the basis of that information, posed and answered some pertinent questions.⁷⁰ Some legislatures, like those of Brazil and Spain, modified laws and rules to allow remote working while the requirement of *quorum* and *present* are interpreted as physical presence.

Remote working in legislatures is posing huge technological and other challenges. In order to ensure security, legislatures need to understand where the traffic is going and where data is stored; if it is outside of the legislative or government cloud or outside of their jurisdiction, they need to consider all the security and legal implications before using any such tool.

⁶³ CPA Toolkit for Commonwealth Parliaments, above n. 12.

⁶⁴ Ibid, at 2-3.

⁶⁵ Ibid, at 5.

⁶⁶ Ibid, at 7.

⁶⁷ Ibid, at 8.

⁶⁸ Ibid, at 9, 16 and 17.

⁶⁹ Above n. 30.

⁷⁰ Inter-Parliamentary Union, [How to run a parliament during pandemic: Q and A](#), 1 April 2020.

Security of remote voting is one of the most crucial issues faced by legislatures like those of Brazil, the European Union and Spain. Availability of fast and reliable internet connections at both or multiple ends and requisite technically skilled staff and users are also prerequisites for proper use of technological solutions.

The legislatures in stable democracies, continued to operate throughout the pandemic, and continued to perform their lawmaking and oversight roles. Many of them have proven their resilience as well as their ability to adapt. But in the developing countries or emerging democracies, one can also witness weaknesses of legislatures, executive dominance, lack of legislative oversight, poor democratic input, populist rather than effective laws, ignorance of science and a general disregard for the proper constitutional order especially during the pandemic.

It is important for the legislatures to ensure adherence to the following principles in the time of crisis like COVID-19 pandemic:

- continuous legislative oversight and scrutiny over executive actions and proposed legislation;
- democratic accountability and transparency in the legislative process;
- ensuring executive's observance of the rule of law;
- evidence-based and rational law-making;
- scientific literacy of law-makers for proper and efficient use of technology to perform their assigned functions;
- proper separation of powers and no abdication of oversight and scrutiny function; and
- ensuring that the executive respects human rights and the constitutional order during the time of crisis.⁷¹

Business Re-engineering Conclusions

The business re-engineering by various legislatures in the world due to COVID-19 may be summed up to contain the following measures:⁷²

- reduction in the business of the legislature through curtailing the number of actual working days from 5 to 3 or 4 in a week and reduction in working hours;
- reduced agenda of a sitting focusing on the coronavirus and other necessary and urgent issues like legislation and budget, while postponing less immediate issues like local or personal issues and referred most of the issues to the concerned committees;
- finding various means to limit the number of members attending, while maintaining the minimal quorum rules and keeping the proportional representation according to

⁷¹ Ibid, at 9.

⁷² Above, n. 30.

the relative size of the political parties; legislatures have normally cut it to half or one-third: half of the members may attend a session during one week while the remaining half may attend the session during the next week with exception of Ministers and Parliamentary leaders who may attend the sittings throughout the session; this has been done on voluntary basis;

- modified seating arrangements of the members even by including additional space/lobbies as part of the chamber for plenaries.
- reduced number of visitors to the legislatures' building by live telecast of proceedings of sitting as well as hearings of their committees;
- rotated parliamentary staff on the basis of duty roster especially during the continuity of a session/ sitting;
- constituted special parliamentary committees or used committee of the whole house to consider administrative measures and changes in the rules of procedure/ laws to deal with coronavirus for its business continuity and to hold respective executives accountable for actions to control and prevent pandemic;
- work in plenaries has been drastically reduced, but parliamentary committees are meeting more frequently to perform the work of the respective legislatures;
- for committee meetings, most legislatures are using technology as the most viable option during pandemic with minimum personal presence of members, experts and witnesses in the meetings; committee hearing are being telecasted live on televisions or internet to avoid physical presence of media personnel and general public during the hearings;
- in few instances, legal modifications have been made for videoconferencing and other technological solutions to avoid or minimize the physical presence of members in a session of the legislature; but use of this option has also been criticized on its potential misuse being against democratic norms of expression, assembly and good parliamentary practices;
- quorum requirements have either been changed or the physical presence of members has been ensured to satisfy the requirements.

Proposals for reforms based on lessons learnt

The National Assembly may consider the following administrative actions or reforms to deal with any crisis like situation in future:

1. The measures being taken by the Assembly in relation to crisis must be published on the website of the Assembly.
2. A high-powered special committee of the Assembly may not only be constituted to perform scrutiny and oversight functions on executive's actions in relation to the crisis, but it actually holds executive accountable through frequent meetings and reporting to the Assembly.

3. The relevant standing committees may be tasked to frequently review measures being taken by the government in relation to the crisis like pandemic and expenditures incurred by the government in this regard.
4. Reduction in the number of sessions of the Assembly with properly planned sessions may be considered in coordination with the treasury and opposition keeping in view the constitutional limitations.
5. Parliamentary leaders in the Assembly may agree to a reduced agenda of a sitting focusing on the crisis like coronavirus and other necessary and urgent issues like important legislation and budget, while postponing less immediate issues or reference of such issues to the concerned committees of the Assembly.
6. Changes in seating arrangements may include lobbies and reduction in number of visitors including journalists to the Assembly promoted by live telecasting or webcasting of proceedings of plenary sitting as well as meetings of the committees.
7. Frequent tests of the members and parliamentary staff may be conducted but such test may be made mandatory before any plenary sitting ensuring timely detection of any infected person.

Proposals for legal reforms

Legal reforms have to be aligned to the strategic priorities of making committees effective and efficient, and optimum use of information and communication technology for improving overall effectiveness and efficiency of the Assembly and its committees.⁷³ Legal reforms may or may not be time bound. A sunset clause may be necessary for a measure which may only last till the prevalence of the pandemic like crisis but there may be measures which may even be considered as new normal for parliamentary functioning and practices. In the later cases, there is no need to insert sunset clause in the amendments of rules of procedure and/or laws relating to salaries and allowances of the members of the Assembly. The following legal reforms may be considered for ensuring continued and efficient working of the Assembly:

1. The Speaker may be able to expand the *chamber* and reduce the time allocation for question hour.
2. The notice and mode of asking and replying to questions, adjournment motions, privilege motions, call attention notices and resolutions may be reconsidered and amendments in the relevant rules may be incorporated allowing electronic communications.

⁷³ National Assembly of Pakistan, Strategic Plan 2019-23 available at https://na.gov.pk/uploads/1602495140_952.pdf.

3. If any matter requires attention of the whole House and virtual presence is considered a preferred option, the Assembly may consider turning itself into a special committee of the whole House and then the flexibility relating to committee meetings will apply to the meeting, including remote or electronic presence of members beyond quorum.
 4. For committee meetings, use of technology may be considered as the most viable option with minimum personal presence in the meeting. This may not only apply to members but also to officials and other persons required to attend the committee meeting. However, physical presence of the chairperson or person presiding with quorum (minimum members constituting quorum) and secretary of the committee may be made mandatory.
 5. Electronic communication of notices, agenda and briefs etc. may be made mandatory. Further, draft minutes and draft reports may be approved through email or any other electronic mode of communication. Electronic signatures may expressly be recognized in the rules allowing chairpersons and members to electronically send documents on which their signatures are required. Electronic signatures are legally valid signatures under section 7 of the *Electronic Transactions Ordinance, 2002*.
 6. The rules may also expressly recognize voice vote, vote by show of hands and confirmation of vote through email by a member of a committee virtually attending a meeting of the committee in which any decision is made.
 7. The rules may also be amended to empower chairman of a committee to pass electronic instructions to the secretary of the committee like summoning a meeting and approval of agenda, minutes, and report.
 8. Necessary consequential changes in the law relating to salaries and allowances of members may be considered to allow daily conveyance and travelling allowances to a member who joins a committee meeting or conducts other parliamentary business through video link, audio-visual mode, or video conferencing.
 9. An information technology allowance may be recognized and paid to the members for promotion of use of information technology by the members.
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COVID-19 and the Parliament of Singapore

Zhixiang Seow¹



Abstract

This Article examines the legal and practical measures taken by the Singapore Parliament to ensure that it remained capable of functioning during the COVID-19 pandemic. These measures included safe-distancing within the Parliament Chamber, masking and testing, and a constitutional amendment to enable Parliament to meet across multiple locations under continuity arrangements.

Table of Contents

Introduction	17
Safe distancing within Parliament Chamber.....	17
Legal impediments to remote proceedings.....	18
Continuity arrangements under Article 64A.....	20
Masking and testing.....	21
Conclusion.....	22

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Introduction

The COVID-19 pandemic was a grave challenge to the work of the Singapore Parliament. The gathering of Members of Parliament (MPs) in one place, so conducive for the cut and thrust of parliamentary debate, became an immediate danger to the continuity of government. At the same time, it was imperative for Parliament to sit during the pandemic. Legislation was needed to deal with the pandemic, and the Government had to be held to account. This article considers the practical and legal steps taken by Parliament to ensure that it remained capable of functioning during the pandemic.

Safe distancing within Parliament Chamber

On 25 March 2020, Singapore's legislative response to COVID-19 began with the *Infectious Diseases (COVID-19 — Stay Orders) Regulations 2020*.² On the same day, the Speaker announced safe distancing measures to be taken in Parliament.³ MPs were divided into 2 groups and spread out in the Chamber. Some MPs sat in the press and public galleries, while other MPs remained in the usual seats for MPs.⁴ Within each group, there was at least one seat's distance between any 2 MPs. No mixing between the 2 groups was allowed within the precincts of Parliament – separate lifts, parking spaces, eating areas and toilets were assigned to each group.

The safe distancing measures required an alternative way for voting. Normally, MPs could vote electronically using the voting equipment installed at their usual seats. But the safe distancing measures meant that some MPs were seated in the public galleries, with no access to electronic voting equipment. To overcome this problem, voting was done manually. The Clerk would do a roll call of MPs. When an MP's name was called, the MP would hold up a green card to vote "Aye", hold up a red card to vote "No", or hold up a yellow card to abstain. The Clerk would then announce the MP's vote or abstention, make a record, and move on to the next MP. At the end of the roll call, the Clerk would tally the votes and the Speaker would declare the result. Manual voting took considerably more time than electronic voting, which normally takes less than a minute. For example, the roll call and the tallying of votes on the second reading of the *Foreign Interference (Countermeasures) Bill*, on 4 October 2021, took about 7 minutes.⁵

² G.N. S 182/2020. The Regulations enabled stay orders to be made in respect of individuals who were or could be exposed to COVID-19.

³ *Singapore Parliamentary Debates, Official Report* (25 March 2020) vol 94, Measures in Parliament to Reduce Risk of Further Spread of COVID-19 (Announcement by Speaker).

⁴ There were some interesting seating arrangements – the Cabinet was split between both front benches and Ministers faced each other across the floor, and the Leader of the Opposition was seated next to the Deputy Prime Minister. But as far as one could tell this did not affect the proceedings.

⁵ Channel News Asia, "Vote on Foreign Interference (Countermeasures) Bill" <https://youtu.be/zbsrlOjESi8> (last accessed on 13 July 2022).

These measures were taken by the Speaker under the Standing Orders of Parliament, which gives the Speaker the power to allocate seats to MPs⁶ and to decide the manner in which divisions are taken.⁷ No further procedural innovations were required. MPs remained in the Parliament Chamber, and the normal procedure of Parliament could be applied.

Legal impediments to remote proceedings

As the risk posed by COVID-19 continued to escalate, further public health measures were implemented. On 7 April 2020, the *COVID-19 (Temporary Measures) Bill* passed through all its parliamentary stages, received the President's Assent, and came into force. On the same day, Singapore entered its first "circuit breaker", under which the public was to remain at home except for essential activities.

Against this background, questions naturally arose for Parliament. What if significant numbers of MPs became exposed to or infected with the virus? In the early days of COVID-19, when little was known about the virus and vaccines were not available, it would have been reckless for MPs to continue to meet in one place if that scenario came to pass. Would Parliament then have to stop sitting? Or could it sit remotely?

Constitutionally, the main impediment to remote sittings is Article 64(2) of the *Constitution of the Republic of Singapore*, which provides that: "The sessions of Parliament shall be held in such **places** ... as the President may, from time to time, by Proclamation in the *Gazette*, appoint." This would appear to exclude having a remote sitting of Parliament.

In addition, other provisions of the Constitution provide that the outcome of a vote generally is based on a majority of MPs "**present** and voting";⁸ that the quorum is based on MPs "**present**";⁹ and that MPs "**absent**" for 2 consecutive months without the Speaker's permission automatically lose their seats.¹⁰ By itself, "presence" could be read broadly, for example presence through remote communications technology. However, "presence" in the context of Parliament must be read with the Article 64(2) requirement for Parliament to sit at the place appointed by the President. Also, if a broad reading of "presence" is accepted, Parliament would have wide powers to allow remote participation without any constitutional safeguards. A parliamentary majority could, in theory, allow a Minister to attend Parliament remotely to avoid face-to-face scrutiny by the Opposition. All things considered, the better view is that "presence" for Parliament proceedings means presence at the place appointed by the President under Article 64(2). In other words, if an MP is absent from Parliament House,

⁶ Standing Order No. 52(a): "Members shall occupy seats allocated to them by the Speaker."

⁷ Standing Order No. 63(3): "... a division shall be taken in a manner to be decided by the Speaker".

⁸ [Constitution of the Republic of Singapore](#) (2020 Rev Ed), Article 57(1).

⁹ [Constitution of the Republic of Singapore](#) (2020 Rev Ed), Article 56.

¹⁰ [Constitution of the Republic of Singapore](#) (2020 Rev Ed), Article 46(2)(d).

the MP must seek the Speaker's permission for that absence, the MP cannot vote, and the MP cannot count towards a quorum. These are further impediments to remote proceedings.¹¹

Apart from the constitutional difficulties, aspects of Parliament's powers, immunities and privileges were also not obviously applicable, or easily applied, to an MP who takes part in proceedings remotely. For example, would Parliament's power to exclude strangers,¹² or the Speaker's power to remove strangers,¹³ extend to the remote location? Similarly, would the remote location come within the prohibition against serving or executing legal process in Parliament or its precincts while Parliament is sitting?¹⁴

It might have been possible to operate some kind of hybrid proceedings within these constraints. A small group of MPs could meet in Parliament House to form a quorum. Other MPs could be allowed, by resolution, to take part in questions and debates remotely. The finer points of Parliamentary privilege could be put aside. In this way, Parliament could continue to function, after a fashion. There is some support for this in Parliamentary practice. For the sitting of 25 April 2003, shortly after the outbreak of the Severe Acute Respiratory Syndrome (SARS) in Singapore, several MPs who were exposed to the SARS coronavirus were allowed, by resolution of Parliament, to address the House remotely from the Public Hearing Room in Parliament House and in one case from home.¹⁵ The resolution (correctly) did not purport to allow the MPs to vote. As the SARS outbreak was short-lived and over by May 2003, these arrangements did not have to be extended.

However, although hybrid proceedings are possible, they would suffer from serious disadvantages. Having a small number of MPs in Parliament House would mean that the absence of a few MPs could deprive the House of a quorum; and having a larger number of MPs in the House to buffer against this would defeat the point of hybrid proceedings. Also, the constitutional provisions relating to presence would apply to the remotely participating MPs. They would technically be absent and therefore would not be able to vote. They would also have to obtain the Speaker's permission to be absent even though they are taking part in

¹¹ The Victorian *Constitution Act 1975* has similar provisions to Singapore's (see sections 8(1), 32(1) and (2) and 40(1) and (2)) and it has been reported that the Parliament of Victoria received advice that it could make orders to allow MPs to take part in proceedings "remotely by means of audio-visual commission technology". However, the president of the Legislative Council took the view that this carried legal risk and that the meaning of "present" could be challenged in court: ABC News, "Calls grow for Victoria Parliament to move online as COVID-19 lockdown drags on, 13 September 2021 <<https://www.abc.net.au/news/2021-09-14/push-for-victorian-parliament-to-move-online-during-lockdown/100457880>> (last accessed on 27 September 2022).

¹² *Parliament (Privileges, Immunities and Powers) Act 1962*, section 18(a).

¹³ *Parliament (Privileges, Immunities and Powers) Act 1962*, section 28.

¹⁴ *Parliament (Privileges, Immunities and Powers) Act 1962*, section 11.

¹⁵ The resolution read: "That, notwithstanding Standing Order 45(1)1 which requires a Member to speak only from the seat allocated to him, Mr Khaw Boon Wan, Dr Balaji Sadasivan, Dr Ng Eng Hen and Dr Vivian Balakrishnan be allowed to address this House from the Public Hearing Room in Parliament House and that Dr Tan Cheng Bock be allowed to address this House from his home, via video, in respect of the business standing on the Order Paper for today." *Singapore Parliamentary Debates, Official Report* (25 April 2003) vol 76 (Mr Mah Bow Tan).

the proceedings. In effect they would be second class MPs. These disadvantages would have made hybrid proceedings quite unsatisfactory, especially if such proceedings had to be in place for an extended period.¹⁶

Continuity arrangements under Article 64A

Given the constraints of the existing law and the exigencies posed by the pandemic, on 4 May 2020 the Government introduced a constitutional amendment in Parliament, to insert a new Article 64A to create a mechanism for Parliament to operate under continuity arrangements.

The mechanism for continuity arrangements could be activated in 2 ways. One, Parliament could resolve that “it is or will be impossible, unsafe or inexpedient for Parliament to sit and meet in one place”. Two, the Speaker could present to Parliament a written notice by a majority of all MPs to the same effect. The second method would avoid Parliament having to meet when it is already impossible, etc. to do so. Each activation is valid for 6 months and can be cut short if Parliament so resolves. A transitional provision provided for the mechanism to be activated for the first 6 months after Article 64A comes into force. The limited duration of an activation means that MPs must regularly justify why they need to sit under continuity arrangements.

Once the mechanism is activated, if there is only one place appointed for Parliament to meet, the President must appoint at least one other place.¹⁷ In other words, there must be at least 2 places appointed for Parliament to meet. Continuity arrangements can then be made, by Parliament or by the Speaker, for Parliament to sit, meet and despatch business with MPs being present at 2 or more appointed places and in contemporaneous communication with one another. An MP who takes part in the proceedings of Parliament under continuity arrangements is taken to be present at those proceedings for the purposes of attendance, quorum and voting. Parliament’s privileges, immunities and powers are also extended in relation to all the appointed places from which continuity arrangements are held.

Continuity arrangements do not allow for Parliament to operate remotely, not even in a hybrid format. They only allow Parliament to sit across several appointed places with MPs in contemporaneous communication with each other. An MP must still be present at one of the appointed places. During the second reading of the constitutional amendment, the Leader of the House explained that the Government had considered the possibility of remote proceedings but decided that there was no need to go so far, for 2 reasons. First, Singapore is

¹⁶ In this regard, it has been reported that the remote participation arrangements of the Australian House of Representatives, which disallow MPs from voting remotely, disadvantages minor parties and independents, who cannot make pairing arrangements. Knaus, C, “Australian parliament’s remote arrangements causing voting disadvantages for minor parties, report says”, The Guardian (1 September 2021) <<https://www.theguardian.com/australia-news/2021/sep/01/australian-parliaments-remote-arrangements-causing-voting-disadvantages-for-minor-parties-report-says>> (last accessed on 13 July 2022).

¹⁷ As with most other functions of the President, this will be done on the advice of the Cabinet or responsible Minister.

a small country, and it would be easy for MPs to get to an alternative sitting place. This is unlike larger countries where MPs in far flung constituencies might find it difficult or dangerous to reach the seat of the legislature in a pandemic. Second, the Government “also wanted Members to be physically and fully present to apply our minds together to the important business of the Parliament”. Although the Leader did not put it in so many words, there was evidently some concern with whether MPs can properly and securely take part in Parliamentary proceedings from remote locations.

The constitutional amendment was introduced on a certificate of urgency and passed the next day, on 5 May 2020. The vote was unanimous. The amendment came into force on 20 May 2020. On 22 May 2020, the President appointed 4 other places (in addition to Parliament House) at which Parliament may sit.

Parliament sat under continuity arrangements for the opening of the 1st Session of the 14th Parliament on 24 August 2020. For that sitting, MPs were split between 2 appointed places, Parliament House and Old Parliament House (the seat of the former Legislative Assembly) and linked by videoconferencing. The proceedings for that day were purely formal, consisting of the uncontested election of the Speaker, the taking of oaths by MPs, and the President’s Speech. There were no debates or questions, and the proceedings went smoothly.

Fortunately, Parliament has not had to sit under continuity arrangements since then, and the initial activation of Article 64A has since lapsed. If Parliament ever has to transact contentious business under continuity arrangements, more detailed arrangements would have to be worked out. For example: how would MPs “catch the eye” of the Speaker if they are not at the same appointed place? Is it still possible to interrupt the MP who has the floor, when MPs are split across different appointed places? How would the Speaker maintain order across all appointed places? How would divisions be taken? In all likelihood, addressing these and other aspects of conducting Parliamentary proceedings over 2 or more appointed places will blunt the cut and thrust of debate. But that is the unavoidable price for ensuring the survival and continued functioning of Parliament during exigencies.

Masking and testing

Apart from putting distance between MPs through safe distancing and continuity arrangements, the Speaker also imposed masking and self-testing requirements on MPs. From 4 May 2020, MPs were required to wear masks in the Chamber unless they were speaking.¹⁸ (Mask-wearing was also required by law for the public at this time.) Self-testing before entering the Chamber was required later on, from 13 September 2021, after rapid antigen tests became more widely available.¹⁹

¹⁸ MPs also spoke from designated rostrums enclosed by glass partitions.

¹⁹ Facebook post by Speaker Tan Chuan Jin, 13 September 2021.

These undoubtedly prudent measures by the Speaker raise an interesting legal question: can an MP be excluded from Parliament for refusing to comply with the Speaker's requirements to mask up and self-test before coming into Parliament?

The starting point must be that an MP has a duty to attend Parliament. This is implied by the rule in Article 46(2)(d), that MPs lose their seats if they are absent without the Speaker's permission for 2 consecutive sitting months. The UK takes a similar view. There the Speaker of the House of Commons has ruled, in response to a point of order about the introduction of vaccine passports, that: "What I would say, as the Speaker of this House, is that there is nothing stopping a Member from coming in here. You have the right to come to this House unless this House otherwise says so."²⁰

As the Commons Speaker indicated, Parliament, and only Parliament, can exclude an MP from attending Parliament. In Singapore's case, Parliament did not specifically resolve to require MPs to mask up or self-test before they can attend Parliament. Any exclusion of an MP for failing to comply with the masking and testing requirements imposed by the Speaker must therefore be based on the existing law and practice of Parliament, and the most relevant power is probably the Speaker's power to order an MP to withdraw from Parliament for grossly disorderly conduct. In the face of the COVID-19 pandemic, it would be reasonable for the Speaker to take the general view that an MP is endangering other MPs, and therefore grossly disorderly, if the MP enters or attempts to enter the Parliament Chamber without masking or self-testing. At the same time, the view is not beyond argument – a recalcitrant MP might argue that they are vaccinated, or recently recovered from COVID-19, and therefore not a risk to their colleagues. Fortunately, the issue never came to a head. MPs were evidently masked during sittings, and the Speaker has not taken any MP to task for failing to self-test. In these matters, goodwill and common sense is perhaps more important than the legal niceties.

Conclusion

By a mix of good planning and good fortune, the Parliament of Singapore was able to continue sitting without interruption through the worst months of the COVID-19 pandemic. Law-making carried on at pace: 42 Acts were enacted in 2020, and 39 Acts in 2021. These included the *COVID-19 (Temporary Measures) Act 2020*, which was amended 7 times in those 2 years, as well as a record of 4 Budgets in 2020. The pandemic appears to have abated somewhat, and the safe-distancing arrangements in the Parliament Chamber were lifted on 4 April 2022,²¹ with MPs generally resuming their usual seats.²² The mask

²⁰ United Kingdom, House of Commons, Hansard, vol. 699, 20 July 2021.

²¹ *Singapore Parliamentary Debates, Official Report* (4 April 2022) vol 95 (Announcement by Speaker).

²² There remains a segment of the galleries for MPs who are close contacts of COVID cases. In addition to Cabinet Ministers occupying seats facing each other, Opposition and Nominated MPs now occupy seats on both sides of the House, blurring the traditional distinction between Government and non-Government benches.

requirement will no doubt be lifted in the fullness of time. What remains is the confidence that Parliament as an institution can continue to function even in difficult times.

Lawmaker – the new legislative drafting service of the UK and Scotland

Matt Lynch¹



Abstract

This paper introduces Lawmaker, an information technology (IT) service that enables users to draft and manage legislation. This service is broad in scope, being used for primary and secondary legislation in the UK and in Scotland, and with user groups across the executive and legislative branches of government. As well as explaining more about what Lawmaker does, the paper also sketches its history and some of the things learned along the way.

Table of Contents

Introduction – a brief history	25
General principles	26
Partnership and process	28
Overview of Lawmaker	29
Dashboard and documents.....	29
The Editor.....	31
“Inline” amendments and auto-application of amendments.....	35

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What have we learned?	36
Similar doesn't mean same.....	36
Technology refresh vs. digital transformation.....	36
Partnerships are rewarding but tricky	37
XML Editors are not word processors.....	37
Parliaments are still wedded to paper processes.....	38
What next?.....	38

Introduction – a brief history

The National Archives are responsible for providing Lawmaker to its users.² Lawmaker came about for a number of reasons.

A number of years ago, the United Kingdom Parliament and the UK Office of the Parliamentary Counsel, started looking at options to replace the software they used to draft legislation and related documents. At the time they used a FrameMaker-based solution that had been built specifically for them. Adobe FrameMaker is document authoring and design application, particularly designed for working with large and complex documents. They were particularly interested in the possibility of tools that would enable the generation of parliamentary amendments from tracked changes in a bill and the auto-application of amendments to a bill, something their current tools couldn't achieve.

At roughly the same time, the Scottish Parliament and the Scottish Parliamentary Counsel Office were also engaged in a review of the Microsoft Word-based software they used to draft bills and amendments. This software had been in use since 1999 when the current Scottish Parliament was established and was showing its age. It had limited functionality and was increasingly difficult to support because it relied on depreciated technologies.

Finally, the United Kingdom National Archives, who were responsible for providing users across government with tools to draft secondary legislation, were considering how they could move away from their Word-based template for drafting statutory instruments to a more sustainable long-term platform.

These three strands could have continued independently and generated three new projects to develop or purchase information technology (IT) systems but instead we took a different path. From some early conversations between myself and a few others from The National Archives and the UK Parliament, we started to hatch a plan to do something different,

² See <https://www.nationalarchives.gov.uk/>. The National Archives are also responsible for providing www.legislation.gov.uk and the publishing system that publishes all enacted legislation in the UK (including from devolved nations) online and in print.

something more ambitious. In the end this took a long time to get off the ground, as ambitious plans often do, but I think it has been worth it.

We started with a relatively obvious presumption: that the needs of users in the different jurisdictions within the UK, and in relation to primary and secondary legislation, are very similar. So if we can solve the problems faced by one user group, for example UK parliamentary counsel drafting bills, then we should at least be close to solving them for similar groups, for example government solicitors drafting statutory instruments. Thus, we believed we could achieve economies of scale by building one system rather than three.

But we were also interested in the wider context. The software that was in use to draft legislation consisted of a set of digital tools to support an essentially paper-based process. The fundamental product was the printed bill or amendment paper; the software was a means to producing that. However, when you looked at how legislation was consumed, it was predominantly consumed online. In the UK we already had a very successful service, legislation.gov.uk, which made legislation from the UK and devolved nations available to the public. Usage of that service far outstripped those who looked at the printed copy. Equally, the parliaments themselves published bills and amendment papers on their websites enabling the public and special interest groups to engage with the legislative process.

So, in developing new tools, we wanted to look beyond just the paper output and start thinking of legislation as essentially a digital product. To that end we decided to look at legislation as structured data that could be manipulated and presented in a number of different ways for different purposes – the printed artefact would then just be one output from that data rather than the primary target. Given the predominance of online consumption of legislation we became interested in the web browser as the medium for creating legislation as well as consuming it.

General principles

From initial discussions and investigations, we developed some principles to shape the sort of system we wanted to achieve.

- **A system that users access via a web browser.** At the time we started on this project, the first wave of online applications were becoming popular. Things like Google Docs and Google Sheets were proving that you could do real business applications within a web browser. Developing a system that was accessible purely from the browser was very attractive in a context like this where users were based in a number of different organisations with different setups and IT policies. It would avoid the need to deploy an application on individual users' computers and enable us to provide a service that could be easily updated or changed at any time. The fact that legislation was increasingly consumed via the browser added additional weight to our choice.

- **A system that is intuitive and easy to use.** Everyone in the public sector is scarred by using systems that are hard to learn and hard to use. Our research highlighted that drafters and parliamentary users were dissatisfied with many aspects of the systems they were currently using. We didn't want to repeat the same mistakes. We wanted a system that, so far as possible, “spoke the same language” as the users themselves and that avoided the need to acquire additional IT knowledge. Legislation is complex enough without that added layer. The service we wanted to build needed to actively help users achieve what they wanted and not place arbitrary blockers in their way. It also needed to be flexible to cope with the fact that much of parliamentary procedure and process is open to change, either for a particular instance or over time.
- **A system based on XML and open standards.** We wanted this system to treat legislation as data as well as documents, so we adopted eXtensible Mark-up Language as the key technology to represent all legislative documents. This is a tried and tested technology so far as legislation is concerned, being used in systems across the world. However, instead of adopting the existing XML standard that had been developed in the UK — the Crown Legislation Mark-up Language (CLML) — we decided to adopt the international open standard for legislation, called Akoma Ntoso or LegalDocML.³ By encoding legislation in a recognised open standard, we wanted to ensure its long-term survival and interoperability with other systems in the future. We also hoped that we might more readily tap into (and encourage) the existing pool of expertise with this standard to help us build and maintain our system in the future.
- **A single, shared system for all users.** Building on the inherent similarities between user groups and the need to foster collaboration throughout the end-to-end legislative process, it was important that Lawmaker be a single system enabling users from different organisations to interact with one another. While we knew security and access permissions would be important, our strong belief was that the full benefits of a new system would only be realised if a single system was shared between executive and legislative branches of government. The system also needed to reflect the fact that often multiple users would work on a single legislative document.
- **A system hosted in the cloud.** Traditional drafting tools were software applications installed on desktop personal computers (PCs). As mentioned, we wanted the new system to be accessed via a web browser so users in the different organisations wouldn't need to install anything on their computers, and we wouldn't need to worry about the complexity of managing locally installed software across those different organisations. But that meant the system needed to

³ See OASIS OPEN website: https://www.oasis-open.org/committees/tc_home.php?wg_abbrev=legaldocml and <http://www.akomantoso.org/>.

be hosted somewhere. In the past that would normally have been in a data centre owned by the organisation providing the software. However, as we were a multi-partner project spanning legislatures and executives, there was no obvious “home” for this system. Furthermore, governments and parliaments in the UK were moving to a “cloud first” policy which presumed that new systems should be hosted in the cloud, that is, on remote servers on the internet provided by a commercial supplier. So, from the outset, we determined that Lawmaker had to be in the cloud.

Partnership and process

To deliver Lawmaker, we started out as a loose grouping of interested parties doing user research and building prototypes. An interesting feature of how we proceeded was that we did not start out writing formal specifications and business plans. Instead, we spent considerable time exploring different aspects of the service we wanted to build. In particular, we worked with user interface experts to design “wireframes” — outline designs of how the system might look and behave — which we then toured around different potential user groups to get feedback and to build support and enthusiasm for the overall project. We also worked on a number of prototypes exploring specific technical challenges, as well as the shape and functionality of the overall application. The outputs of those activities plus numerous requirement-gathering workshops then fed into the more formal documentation such as business cases and procurement tenders.

As our requirements and plans firmed up, we moved into more formal governance arrangements, establishing the Legislative Drafting, Amending and Publishing Programme as a partnership of organisations that committed, via a Memorandum of Understanding, to fund and build the service that is now known as Lawmaker. The current partners are:

- The House of Lords and the House of Commons,
- The UK Government’s Office of the Parliamentary Counsel,
- The Scottish Parliament,
- The Scottish Government’s Parliamentary Counsel Office, and
- The National Archives.

From the initial phase of the project, we knew there was no “off-the-shelf” system we could purchase that would meet our needs. Equally, we didn’t have the internal expertise to build such a system ourselves. We therefore procured a specialist supplier, Leidos Australia, to build it for us. However – and this is an important qualification – we didn’t hand over a set of requirements and then wait a few years for delivery. Instead, we established a “virtual” project team staffed by myself and others drawn from the partner organisations that worked closely with the supplier on a day-to-day basis to develop the new system using an agile, iterative approach. This resulted in early versions of the system being in use from July 2019, with new versions being released every few months bringing a range of new features and improvements to existing ones. It allowed us to act on user feedback and adjust Lawmaker

to meet user needs in a way that a traditional approach would not have. The approach also allowed us to break up what was a colossal challenge into more manageable chunks, delivering functionality to different user groups at different times. Here’s an overview of some key releases:

Date	Version	Description of release
Jul 2019	v1.0	Drafting and managing Scottish bills
Jan 2020	v2.0	Drafting SI/SSIs
May 2020	v3.0	Drafting Scottish Amendments
Jun 2020	v4.0	Drafting UK bills and managing Scottish Amendments
Nov 2020	v6.0	Drafting and managing UK amendments
Jul 2021	v9.0	“Ping pong” process in UK Parliament
Dec 2021	v11.0	Productivity enhancements and key features
Feb 2022	v11.2	Inline amending and auto-application

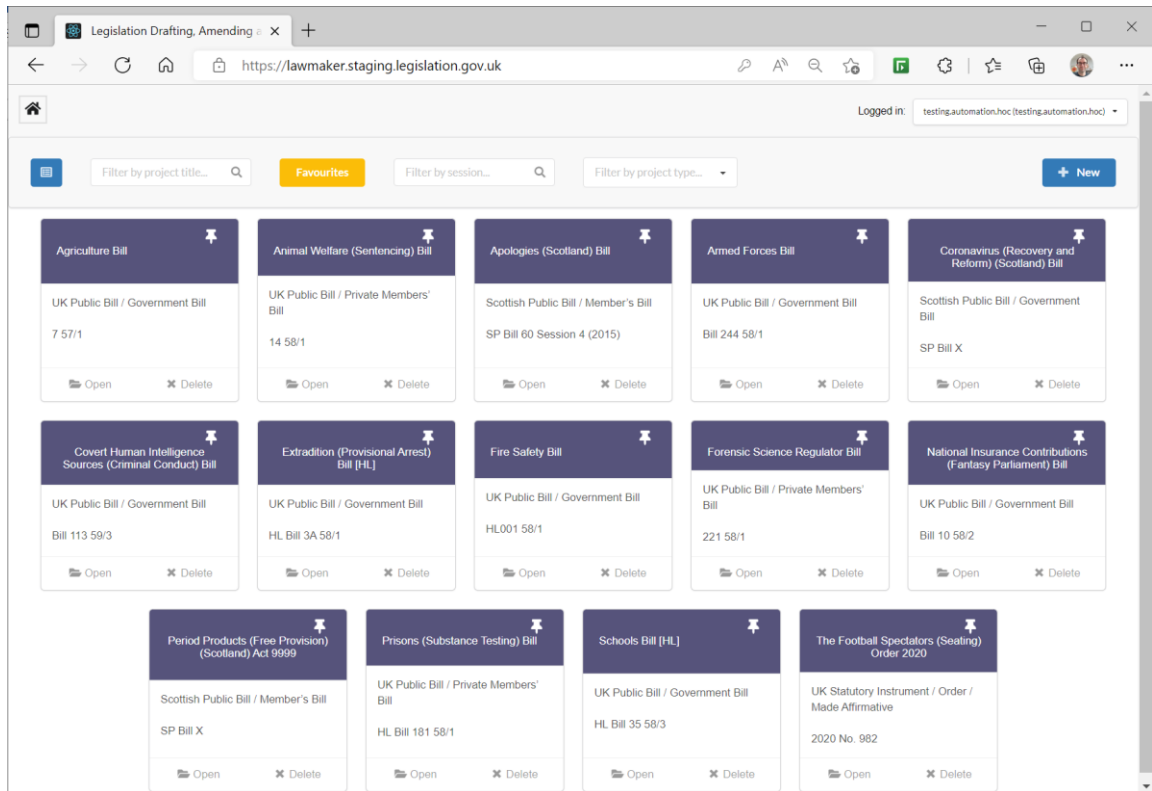
Overview of Lawmaker

What follows is a very brief outline of some of Lawmaker’s features. You can also watch a short demo online.⁴

Dashboard and documents

Users log in and view a dashboard giving them an overview of all the legislative projects available to them. They can filter this and view it in different ways. Each project corresponds to a bill or a statutory instrument. A user can only see the projects that they have permission to see; they won’t, for example, be able to see a project created by a user outside their organisation. The following screenshot illustrates how the dashboard looks to a user, with each “tile” representing a project and a set of filters and controls across the top of the screen.

⁴ At <https://www.youtube.com/watch?v=WBmwiHY4Q-Q>.



By clicking on one of the projects on the dashboard, users can then enter the “project view” to work with all the different document versions within that project. Depending on the context, that may be different versions representing a bill as it goes through different parliamentary stages (for example, the As Introduced version and the As Amended at Committee version) or it may be different versions of a draft piece of legislation before it is published or submitted to parliament. Equally, users may choose to work on a number of separate documents, which they will then later combine into a larger document. For bill projects, users can also work up draft amendments, manage amendments that have been tabled or debated and produce official amendment lists for publication.

Lawmaker is a single shared system but has tight controls on access to ensure the necessary separation between the different organisations that use it. No documents are visible from one organisation to another unless they have been specifically shared with another organisation. Once bills or statutory instruments are ready for publication, Lawmaker integrates with other systems, such as the UK Parliaments legislation management system or The National Archives legislation publication system, to facilitate the onward transmission of legislation.

The following screenshot shows the project view for an example project. Editable versions are shown in the left-hand column and read-only significant versions (documents that have been shared or published) are shown in the right-hand column.

The screenshot shows a web application interface for a legislative drafting service. The browser address bar shows the URL: <https://lawmaker.staging.legislation.gov.uk/project/4024e102-d6ac-4f37-8a38...>. The page title is "National Insurance Contributions (Fantasy Parliament) Bill". The user is logged in as "testing.automation.hoc (testing.automation.hoc)".

The interface has a top navigation bar with tabs: "Project", "Amendment Workspace", "Amendment Manager", and "Official Lists". Below this, the project name "National Insurance Contributions (Fantasy Parliament) Bill" is displayed, along with the subtitle "UK Public Bill, Government Bill".

On the right side of the header, there are buttons for "+ New" and "Upload Document".

The main content area is divided into two columns. The left column shows a list of document versions, grouped by document type. The right column shows a list of document versions, grouped by document type.

Left Column (Editable versions):

- AAC** (green header)
 - AAC (green header)
 - Last modified: 16 May 2022, 14:08:12 - hardingb.hoc - HoC
- AAC 2** (green header)
 - AAC 2 (green header)
 - Last modified: 16 May 2022, 17:29:29 - hardingb.hoc - HoC
 - Published: 16 May 2022, 18:45:50 - newmansb.hoc - HoC
 - Duplicated: 16 May 2022, 17:32:24 - hardingb.hoc - HoC
 - Auto-backup: 16 May 2022, 17:32:24 - hardingb.hoc - HoC

Right Column (Read-only significant versions):

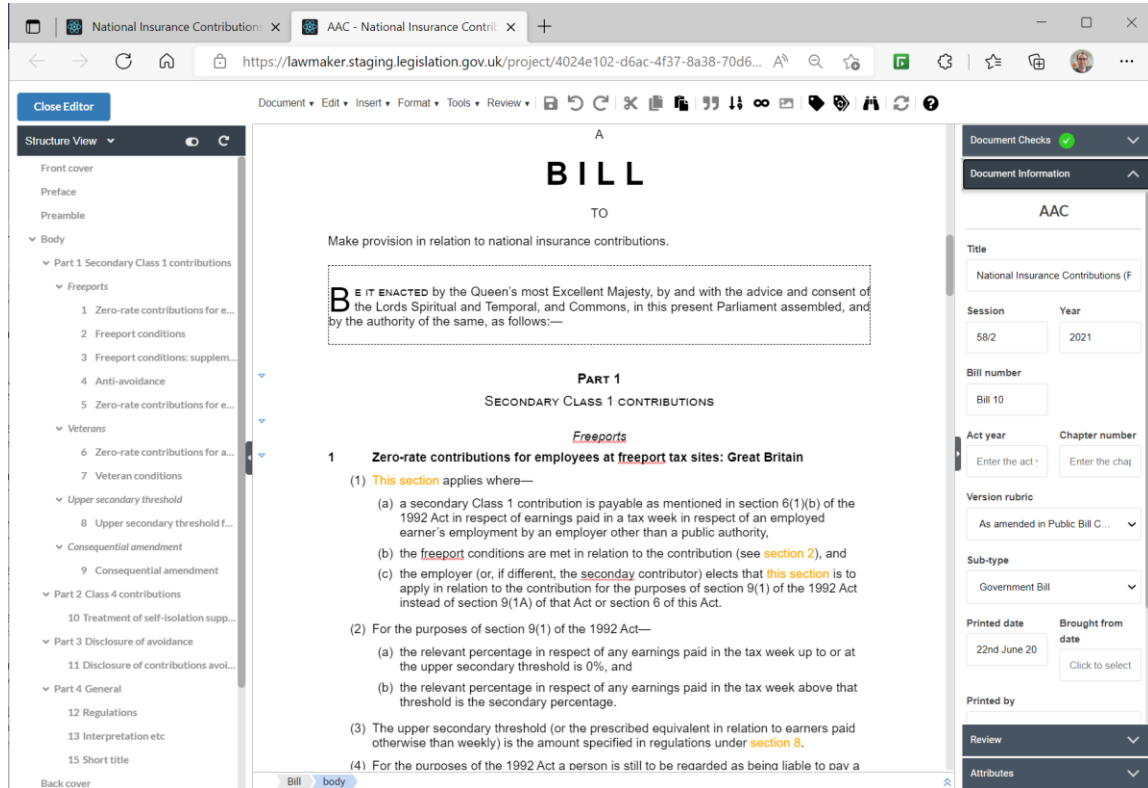
Document Type	Version	Author	Role	Actions
Submitted to TNA	18 May 2022, 12:03:58	wrightmp.hol	HoL	Actions
Published	17 May 2022, 10:22:41	wrightmp.hol	HoL	Actions
Published	16 May 2022, 18:45:51	newmansb.hoc	HoC	Actions
Published	16 May 2022, 10:17:54	hardingb.hoc	HoC	Actions
Shared Final for Hand in	16 May 2022, 10:01:35	Paul Morgan OPC	OPC	Actions

The Editor

A key component of Lawmaker is the Editor. At its heart, Lawmaker is a tool for authoring and editing legislation. In line with our focus on legislation as data, we adopted an XML editor rather than a word-processor. But we then heavily customised that editor to make it intuitive and as easy to use as possible for legislative drafting.⁵

⁵ The component used is Oxygen Web Author: https://www.oxygenxml.com/xml_web_author.html.

The following screenshot shows an example Bill in the Editor, with the structure/outline view in the left-hand panel, the Bill content in the middle, and key document metadata in the right-hand panel. Menus and a toolbar across the top provide access to a range of specific authoring and editing features.



For example, users build up the legislation they are drafting by selecting the provision they want to insert. When the user presses Enter, a list of valid provisions to insert are shown and, when selected, the provision is inserted at a valid location. Everything is named where possible using terms already known to the users. The logic for what provisions can be inserted at which locations is customised for each document type.

The following screenshot shows the menu used in the Editor to select which provisions to insert. The content of that menu is determined based on the cursor location. In this example the cursor is at the end of paragraph (b) of subsection (2):

(2) For the purposes of section 9(1) of the 1992 Act—

(a) the relevant percentage in respect of any earnings paid in the tax week up to or at the upper secondary threshold is 0%, and

(b) the relevant percentage in respect of any earnings paid in the tax week above that threshold is the secondary percentage.

(3) The upper secondary threshold (or the prescribed amount otherwise than weekly) is the amount specified in section 9(1) of the 1992 Act.

(4) For the purposes of the 1992 Act a person is treated as making a secondary Class 1 contribution even if the amount of that contribution is less than **this section**.

(5) The Treasury may by regulations make provision for the purposes of section 9(1) of the 1992 Act as to how the provisions of this section be treated as applying in relation to contributions payable in relation to contributions payable in a given tax year only when—

(a) that tax year has ended, and

(b) all contributions payable in respect of a person are taken into account.

(6) Regulations under **subsection (5)** may modify the provisions of this section and **(d)** for the purposes of cases to which the provisions of this section apply.

- Paragraph (a)
- Closing words
- Sub-paragraph (i)
- Definition
- Step
- Heading
- Subsection (1)
- Section (After)
- Section (Before)
- Cross heading
- Part

For some tasks there is further help to guide the user to the correct result, for example, in selecting subjects and sub-subjects for a statutory instrument.

Update subjects, subsubjects and extents

Subject	Extent	Subsubject(s)	
SPORTS GROUNDS AND SPORTING EVENTS	ENGLAND		✕ ✎
AGRICULTURE	ENGLAND AND WALES	CEREALS MARKETING	✕ ✎

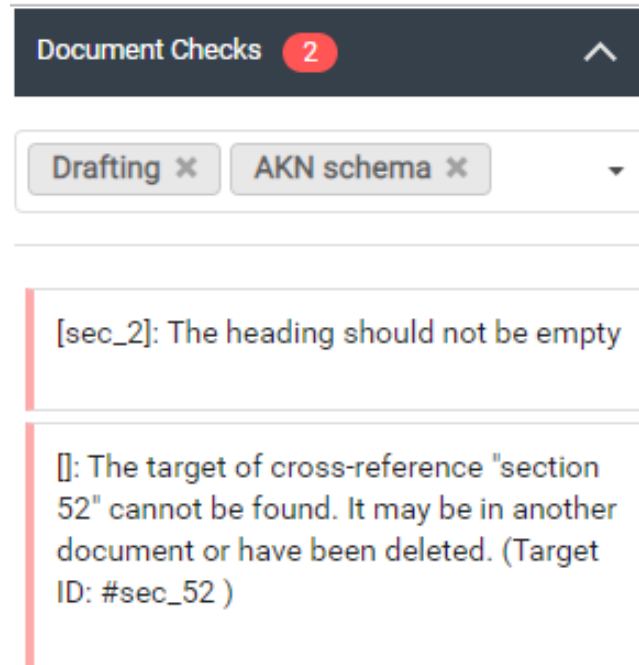
Add Subject

Save

Cancel

Documents are constantly validated in real time to identify other issues. We are constantly refining and extending the validation rules to pick up more potential issues and implement specific business rules that particular organisations may have.

The following screenshot shows the Document Checks panel within the Editor. This displays any validation issues to the user as they edit the document so they can fix them as they go along.



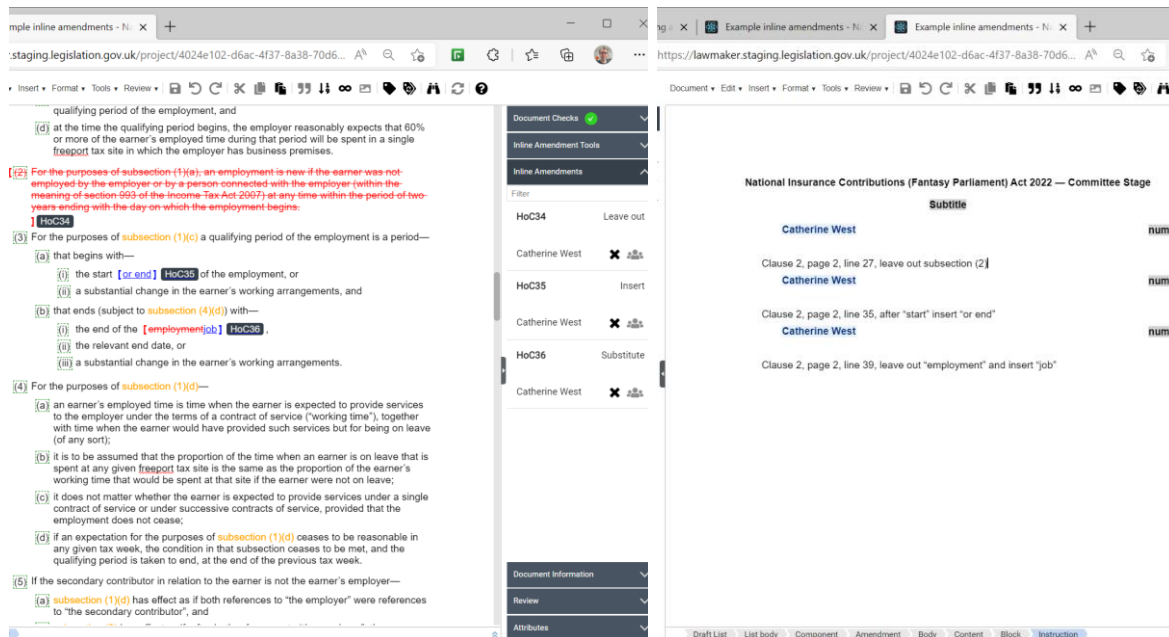
While we expect legislation to be drafted within Lawmaker, it can often be useful to bring in content from elsewhere. So we developed a smart paste feature that allows users to copy text from other sources, such as legislation.gov.uk or an email, and paste it directly into Lawmaker where it is automatically transformed into structured XML. This relies heavily on conventions around numbering format (for example, that subsections will start with an Arabic numeral in parentheses) and structure (for example, that a section can only be subdivided into subsections) to create the correct structure from plain text. Users can then further modify the output in the Editor to correct any areas where the feature didn't get it quite right.

For users drafting large and complex documents, the Editor contains a number of features to help. For example, the feature for copying provisions between documents allows users to selectively merge provisions from one or more documents into a single document, intelligently overwriting any existing version of the provisions. This feature is partly inspired by the “git” version management approach used in software development.

“Inline” amendments and auto-application of amendments

A key feature that Lawmaker introduces is the ability to create parliamentary amendments by editing a copy of the bill. Users can create a copy of a published Bill and then edit that copy using a process much like tracked changes in Microsoft Word. Each change they make is treated as an individual parliamentary amendment. For example, a user can make an insertion, a deletion or a substitution of text or of a whole provision. Lawmaker then generates the “traditional” amendments (expressed as instructions to change the Bill by reference to clause, page and line numbers) for each change according to the relevant rules for the parliamentary chamber concerned. We’ve been careful here to retain a close link between the changes made to the bill and the “traditional” amendments so there is more-or-less a one-to-one correspondence between a change to the copy of the bill and a traditional amendment. This allows, to a greater degree, the user to switch between the two types and to maintain control over the final output. For the moment, all the official amendment processes, for example, tabling and publication rely on the traditional form of the amendment.

The following screenshot shows, on the left-hand side, the Bill with amendments shown “inline” and, on the right-hand side, the “traditional” amendments generated from the inline version.



Lawmaker also has the ability to interpret traditional amendments and apply them directly to a bill, thus speeding up the process of producing an amended version after a parliamentary debate and reducing the risk of error. A key challenge has been recognising the limits of what can be reliably automated and when some user intervention is still required. Lawmaker flags each case where it can't apply a particular amendment (and so the amendment will

need to be manually applied by the user) and also highlights circumstances where it has applied amendments, but user review may be required (for example, when two amendments insert provisions at the same place in the Bill).

What have we learned?

In this section I highlight a few key lessons from developing Lawmaker.

Similar doesn't mean same

As mentioned, we undertook this whole enterprise presuming there was sufficient similarity between the different jurisdictions and user groups to make sense to build one system for all. I stand by that presumption but the more you get into the weeds in something like this, the more you realise that the differences do matter and accommodating them while still building a coherent system is tricky. Obviously, if there was more scope for harmonisation between the different groups it would have made it easier but often you simply don't have the time to wait (or the influence!) to achieve that kind of harmonisation so you need to work with what you have.

In my experience, every legislative jurisdiction has its own unique culture and, for a service like Lawmaker or its equivalent to be successful, you need to understand that culture and how the culture influences process. That culture can stem from things like

- the power dynamics in the particular jurisdiction between the executive and the legislature,
- the volume of legislation that is normally handled in a given period,
- the difference between unicameral and bicameral parliaments,
- the tendency of government to have a majority in parliament or not and the prevalence of coalition governments or minority government.

Many suppliers of legislative software have built their systems for one particular jurisdiction or for similar jurisdictions that have a shared culture; those systems won't immediately be a good fit for a different jurisdiction with a different culture.

Technology refresh vs. digital transformation

It is difficult to do both a “technology refresh” where you are motivated by the need to replace an aging system and, at the same time, a “digital transformation” where you are trying to replace existing processes with a new, digital approach.

The first often pushes you towards a like-for-like replacement since users want continuity with the minimum of disruption. Digital transformation, however, requires you to look at the underlying processes and re-imagine them for a digital age. While that should lead to gains in productivity, accessibility and efficiency in the longer term, it can be much more disruptive in the short term and requires much more careful change management.

At different times, and by different people, Lawmaker has been seen as both a technology refresh project and a digital transformation and that has made expectations difficult to manage. With hindsight, we should have perhaps started out with a clearer focus from the beginning.

Partnerships are rewarding but tricky

Delivering Lawmaker as a partnership between multiple organisations on the parliament and government side gave us access to more expertise, resources and funds than would have been available if one organisation had gone it alone. But it also made it a lot more complex. It continues to be a tricky balancing act to try and meet the needs of such a diverse group of users.

We almost failed initially because we tried to please everyone all the time. That made it almost impossible to deliver anything. Things improved greatly when we revised our approach and adopted a more agile delivery plan which saw early releases only deliver features for one or two user groups at a time. That enabled us to target a manageable set of features (initially for the more “straightforward” jurisdiction, Scotland) and enabled the user groups that were most keen to adopt a new system to start using it and giving feedback ahead of those groups that were more reticent. For this phased approach to work, however, we needed the trust and commitment of all partners since it meant that some partners would need to wait longer to see a return on their investment. Getting that trust and commitment was probably only possible because of the initial work we’d done through wireframes, prototypes and user engagement but we also relied on independent reviews from time to time to help ensure we were taking the best approach.

XML Editors are not word processors

The modern crop of XML Editors, such as Oxygen Web Author that is used in Lawmaker, attempt to give users a “What You See Is What You Get”-type experience much like a word processor. The actual XML is more-or-less hidden from the user and instead the user sees the text content formatted according to rules based on the underlying XML (using Cascading Style Sheets (CSS), the same technology that drives the formatting of web pages).

On one hand, this makes the experience more natural and intuitive for users because they are seeing something on screen which is similar to the eventual print output and similar to what they are used to with a word processor.

However, what we’ve found is that obscuring the fact that you are working with XML can lead to problems, especially around user expectations. In summary, if you make something look like a word processor, users will expect it to work like a word processor, but an XML editor isn’t a word processor. A word processing document has an essentially linear

structure (a series of paragraphs) which is quite different from the nested, hierarchical structure of XML, and this is reflected in the way an XML editor behaves.

This led us to adjust the introductory training for Lawmaker. We added a short and simple module introducing the basic concepts in XML and how they are applied to legislation in Lawmaker. We've found that by giving users a better mental model of how Lawmaker operates in this regard, they are better able to take advantage of Lawmaker's features and less likely to get frustrated trying to do things that they would normally do in a word processor that are not possible in Lawmaker.⁶

Parliaments are still wedded to paper processes

While we set out to move out of the paper age and into the digital age, we are still wedded to parliamentary processes that were designed for paper. In particular, the parliamentary amendment process, which in the UK and Scotland relies on a referencing system tied to page and line numbers. We have spent a lot of time (and therefore money) developing tools to get round that and help users interact with that process in a digital way (for example, through “inline” amendments) but fundamentally, until we move away from a continued reliance on a page and line referencing system, the digital transformation we can achieve is limited. A more radical approach would be to re-imagine the amendment process from the ground up as a digital process that delivers the democratic and scrutinising functions that it is intended to.

What next?

Although Lawmaker has already been many years in the making, it still feels like we are at the start of a journey. While we have users in all partner organisations actively using it, there are still a number of users we need to roll out Lawmaker to. At the moment, existing software is still in use in some places and a key aim is to see the complete retirement of existing tools and adoption of Lawmaker across the board. Once fully rolled out, there should be around 2500 users across the UK.

Users would still like Lawmaker to do a lot more things than it already does so we will continue to develop it to meet user needs. A key ongoing role within the Lawmaker service team is the product manager who manages the feedback coming in from users and prioritises future development in light of that feedback.

We've always seen Lawmaker as a platform that can be built further upon. Its ability to provide high-quality legislative data throughout the legislative lifecycle should open up a number of possibilities, whether that is, for example, in terms of producing new legislative

⁶ You can see the slide deck here: https://docs.google.com/presentation/d/e/2PACX-1vTiT0CQKUovki04xYosAhbNy4ld_TSYHloLFrom6kboZ0suJwZPxZPF93RPIrA2ZcA9K3yYIM9Ka6DM/pub?start=false&loop=false&delayms=10000.

products for members of parliament or the public or facilitating initiatives relating to “Rules as Code”.

We’d also like to see Lawmaker expand its coverage to deliver the best return for the investment that has been made in it. Hopefully, we will see other UK jurisdictions join the Lawmaker partnership in future so that we can have a common approach across the UK. Reuse of Lawmaker assets is also something we’re keen to explore and promote. That could be in terms of applying the technologies within Lawmaker to solve different problems or sharing what we’ve done with others in the hope that it may help them in their journey to transform the legislative process.

Drafting Agricultural Legislation

Jessica Vapnek¹



Abstract

Agricultural legislation” is an umbrella term that covers a broad range of topics, including food, veterinary matters, plant protection, seeds, forestry, fisheries, water, and land. Agricultural legislation also intersects with other discrete subject areas, including environment, health, and trade. Because of these interconnections the borderlines – where agriculture begins and these related topics end – are debatable.

How different countries view agriculture varies significantly. In the developed world, agriculture is mostly a commercial enterprise, and “agricultural law” is considered largely to apply to the business of agriculture, including agricultural finance, supply chains, marketing, insurance (crop, drought, pest), real estate, intellectual property, biotechnology, engineering, and hydrology.

The last few decades have seen an intellectual shift within the academic community, away from a focus on “agriculture as a business” toward agriculture as the engine that produces food for humanity. Under this conception, agriculture is important because it produces the food that we eat; agricultural laws are therefore understood to cover all aspects of the

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production and distribution of food, including the regulatory functions of local, subnational, and national governments.

Because agricultural law and legislation cover so many distinct subject areas, this article provides a conceptual framework to organize this rich and complex subject.

Table of Contents

Introduction	41
What Is Agricultural Legislation?	41
Categories of Agricultural Legislation	44
Legislation Regulating Agricultural Inputs	47
Legislation Regulating Natural Resources.....	48
Legislation Establishing Sanitary and Phytosanitary Measures	51
Legislation on Agricultural Institutions	54
Conclusion.....	55

Introduction

A conceptual and organizational challenge confronts those drafting agricultural legislation: agriculture is a nexus for so many diverse subject areas that policy makers and drafters alike need a road map to understand it. For this reason, this article begins with different countries' conceptions of agricultural law, hints at the staggering variety of types of agricultural laws, points out the fuzzy borderlines between agriculture and other related topics and finally offers my own four organizational categories as a way out of this sometimes-confusing subject area.

What Is Agricultural Legislation?

"Agricultural legislation" is an umbrella term that covers a broad range of topics, including food, veterinary matters, plant protection, seeds, forestry, fisheries, water and land. Agricultural legislation also intersects with other discrete subject areas, including environment, health and trade. It is because of these interconnections that the borderlines – i.e., where agriculture begins and these related topics end – are debatable.

How different countries view agriculture varies significantly. In the United States, agriculture is mostly a commercial enterprise, and so the term "agricultural law" is considered largely to apply to the business of agriculture.² Relevant sub-topics of

² Schneider, SA, "What is Agricultural Law?" *Agricultural Law Update* (Jan. 2009) at 1, <https://agrillifecdn.tamu.edu/texasaglaw/files/2014/09/This-article-by-Susan-A.-Schneider.pdf>.

agricultural law in the American context therefore include contracts, insurance and subsidies. And in those few U.S. law schools that offer courses on agriculture, an agricultural law survey course will usually cover agricultural finance, supply chains, marketing, insurance (crop, drought, pest) and real estate.³ More recently, the increasing modernization and sophistication of the agricultural sector have implicated other legal issues, such as intellectual property, biotechnology, engineering and hydrology.

The last few decades have seen an intellectual shift within the U.S. academic community away from a focus on “agriculture as a business” toward agriculture as the engine that produces food for humanity.⁴ In 1990, Neil Hamilton identified “the fundamental nature of the production of food to human existence” as one of the primary reasons supporting the study of agricultural law.⁵ Presumably for this reason, the L.L.M. in Agricultural Law at Vermont Law School was renamed the L.L.M. in Food and Agricultural Law in 2014.⁶ Under this conception, agriculture is important because it produces the food that we eat; agricultural laws are therefore understood to cover all aspects of the production and distribution of food, including the regulatory functions of local, state and federal governments.

Environmental law plays a heightened role under this new view of agricultural law, given the environmental impacts of agricultural practices in general and of agricultural water and land uses in particular. In addition, because agriculture has important public health impacts on agricultural workers and consumers (due to the use/overuse/misuse of agricultural inputs such as fertilizers and pesticides and the consumption of food with residues), there is also a close nexus with public health law.

Anecdotal evidence suggests that today’s law students – like many other U.S. consumers – are increasingly interested in food issues and concerned about food labelling, animal welfare, organic agriculture and the risks of climate change adversely affecting agricultural production and food security.⁷ Thus, the study of agriculture and food law in the United

³ For example, the syllabus for agricultural law at Texas A&M includes Texas Real Property or Land Use Law and Water Law as core courses, as well as recommended courses such as Business Associations, Contract Drafting, Real Estate Drafting, Secured Transactions and Wills and Estates. *Agricultural Law*, TEXAS A&M UNIVERSITY SCHOOL OF LAW (Jan. 21, 2019, 5:15 PM), <https://law.tamu.edu/prospective/paths-to-success/guide-to-practice-areas/agriculture-law>.

⁴ For a review of these intellectual developments, see Hamilton, ND, “The Role of the Law in Shaping the Future of American Agriculture”, 38 DRAKE L. REV. 573 (1989), available at <https://nationalaglawcenter.org/publication/hamilton-the-role-of-the-law-in-shaping-the-future-of-american-agriculture-38-drake-l-rev-573-587-1989/>

Hamilton, ND, “The Study of Agricultural Law in the United States: Education, Organization and Practice”, 43 ARK L. REV. 503 (1990), available at http://nationalaglawcenter.org/wp-content/uploads/2013/06/hamilton_study.pdf

⁶ *Vermont Law School Offers New Master’s Degrees in Food and Agriculture Law, Policy*, October 10, 2014, <https://www.vermontlaw.edu/news-and-events/newsroom/press-release/vermont-law-school-offers-new-masters-degrees-food-and>

⁷ See, for example, *Safe and sustainable: UCLA launches Food Law and Policy Clinic*, Feb. 21, 2017: “Law students in California are increasingly interested in working as activists, organizers and change agents in the

States now encompasses everything from public health to “environmental protection and stewardship, economics and markets, consumer protection, social justice and equity, and climate change.”⁸

The U.S. resurgence of interest in the broader – or even ubiquitous – reach of agriculture and agricultural laws and their connections to food production must be a source of amusement among many of the world’s developing countries, because most of these countries never lost sight of the importance of agriculture: they could not – as agriculture employs the vast majority of their citizens and generates a large percentage of their income. For example, in India (a developing middle-income country), agriculture accounts for 50% of employment and 18% of GDP.⁹ Similarly, in Ghana, agriculture contributes 54% of the GDP and 40% of export earnings.¹⁰ In China, the numbers are 27% of the work force¹¹ and 7.7% of GDP.¹²

Mention “citrus certification”¹³ or “pest-free area”¹⁴ to someone in the United States and you may get a blank stare (except in scientific circles). But if you mention “cocoa” to a random stranger in Abidjan or “tilapia” to a taxi driver in Bangkok, you might get a torrent of words on the importance of disease control, price subsidies and export facilitation. This is because between those working in agriculture (subsistence or otherwise) and those aware of the importance of the country’s agriculture to both food security and the economy, you have covered nearly 100% of the population in most countries around the world.

food law and social justice realms” (quoting Roberts, MT)), <https://www.universityofcalifornia.edu/news/safe-and-sustainable-ucla-launches-food-law-and-policy-clinic>; see also *Yale Law School Clinics Help Launch Legal Food Hub*: “the idea began several years ago just as the [Environmental Protection] Clinic began taking on more food projects to meet rising student interest”, <https://law.yale.edu/yls-today/news/yale-law-school-clinics-help-launch-legal-food-hub>.

⁸ Food and Agricultural Specialization, VERMONT LAW SCHOOL (June 10, 2022), <https://www.vermontlaw.edu/academics/specializations/food-agriculture-law>.

⁹ India Ministry of Finance, “Climate, Climate Change, and Agriculture” in ECONOMIC SURVEY 2017-18, at 83, available at http://mofapp.nic.in:8080/economicsurvey/pdf/082-101_Chapter_06_ENGLISH_Vol_01_2017-18.pdf.

¹⁰ FAO, “Ghana at a Glance” (June 10, 2022, 8:30 AM), <https://www.fao.org/ghana/fao-in-ghana/ghana-at-a-glance/en/>.

¹¹ “Distribution of the workforce across economic sectors in China from 2007 to 2017”, STATISTA (June 10, 2022, 8:31 AM), <https://www.statista.com/statistics/270327/distribution-of-the-workforce-across-economic-sectors-in-china/>.

¹² World Bank, “Agriculture, forestry, and fishing, value added (% of GDP) – China” (June 10, 2022, 8:33 AM), <https://data.worldbank.org/indicator/NV.AGR.TOTL.ZS?locations=CN>.

¹³ These are disease control programs regulating the distribution and sale of planting materials that have been “certified” free from diseases and pests. Vapnek, J, “Legislatively Establishing a Health Certification Programme for Citrus”, FAO Legal Papers Online No. 81 (1999), available at <http://www.fao.org/3/a-bb114e.pdf>.

¹⁴ Meaning “an area in which a specific pest does not occur as demonstrated by scientific evidence and in which, where appropriate, this condition is being officially maintained.” “Requirements for the establishment of pest free areas”, International Standard for Phytosanitary Measures No. 4 (1995) [subsequently referred to as ISPM No. 4], available at https://www.ippc.int/static/media/files/publication/en/2017/05/ISPM_04_1995_En_2017-05-23_PostCPM12_InkAm.pdf.

Since the bulk of my professional experience in agricultural law was under the auspices of the United Nations Food and Agriculture Organization (FAO) – specifically, with the unit that provides legislative support to member countries, the Development Law Service of the FAO Legal Office – the topics addressed in this article reflect this broader conception of agricultural law: It is not simply the business of agriculture but rather the full spectrum of topics implicated in the production of food. The next sections examine in more detail the subjects covered every year in my presentation on “Agricultural Legislation.”

Categories of Agricultural Legislation

At the outset, I invited readers to mentally place agricultural law topics into several broad categories. Decisions about what categories to use and which topics to include in each category could generate a long discussion exceeding the scope and word limits of this article. Nonetheless I would underline one point: As you apply these categories and mental divisions, I urge you not to be bound by how national governments traditionally organize their work or their legislation. Simply asking, “What is all of the legislation implemented by the Ministry of Agriculture?” will not answer the question, “What is the agricultural legislation in this country?” In some countries food is regulated by the Ministry of Health, while in others it is regulated by the Ministry of Agriculture, and in most countries, in fact, it is regulated by both. Legislation on water might be assigned to the Ministry of Water Resources (if there is one) or to the Ministry of Environment. Food exports may come under the auspices of the Ministry of Agriculture or the Ministry of Commerce, or both. Food exports may also be regulated by an independent food or agricultural health authority or even, as I saw in one country, the Standards Board.

Each government makes its own choices, although sometimes those choices are vestiges of past decisions or political systems. Most former British colonies organize their legislation around the same broad categories used by Britain; the same is true of the relationship between former French colonies and France. As just one example, former British colonies – including the United States – separate pesticides legislation from plant protection legislation, whereas former French colonies generally regulate both in one piece of legislation called the “plant protection law.”¹⁵

Such different approaches to allocating regulatory authority derive not only from a country’s particular political history; they also stem from present-day political forces and compromises arising within – and sometimes from outside – the country. Let me give an example of each. To succeed in an inter-ministerial turf battle, a particular minister may decide to make a power play and shepherd legislation through Parliament, arrogating

¹⁵ See, for example, *Loi n° 14/PR/95 relative à la protection des végétaux* (Chad), available at <http://www.fao.org/faolex/results/details/en/c/LEX-FAOC004040/>: “The objectives of this law are protection of plants based on phytosanitary measures, integrated pest control, and the regulation of pesticides” (*author’s translation*).

authority to their own ministry;¹⁶ if successful, this can lead to a particular subject area being regulated by a ministry that may not seem to be the logical or even qualified authority for the job. At other times, a particularly forceful donor might use direct leverage – such as a conditional promise to fund laboratories and training – to influence ministers’ and even legislators’ choices.¹⁷ This too can result in an allocation of regulatory authority to what may at times seem like an odd choice of government ministry or department.

Some of these assignments of government authority occur because most intergovernmental organizations interact with just one ministry at a national level: FAO with the Ministry of Agriculture; the World Health Organization (WHO) with the Ministry of Health; the International Labour Organisation with the Ministry of Labor; and so forth. We can imagine a scenario in a particular country where the ministry that truly has the capabilities and resources to regulate food is not the Ministry of Health but rather the Ministry of Agriculture, yet the international organization’s or donor’s counterparts may be located in the under-resourced ministry. This is one reason legislation could end up assigning enforcement authority to a ministry that may not objectively be the best choice. And this is one more reason that looking only at laws implemented by the Ministry of Agriculture will not necessarily capture all the pertinent agricultural laws in the country.

Quixotic allocations of regulatory authority can also cause overlapping responsibilities. As just one example, Pakistan’s Punjab state government documented overlapping regulatory functions within the agriculture department. Not only does the department handle activities outside of its mandated responsibilities (such as packing sugar), but its four directorates often conflict with each other and can sometimes even negate each other. Two different departments within the agricultural division have over 1,000 people assessing crop size twice a year, which often creates confusion (or equally counterproductive rivalries) between the two.¹⁸ I saw many examples in my travels where legislation enacted at different times and for different reasons assigned duplicative powers to more than one ministry or agency.¹⁹

¹⁶ In my early days as an international legislative consultant, I went to a country in the Caucasus where a project had been approved to assist the country in passing a new food law. It took some time for me to realize that in fact the country did not need a new food law. The draft food law, which I was being asked to review, had been prepared by one ministry as a power play to wrest control of food regulation away from another ministry, which was doing just as well (or as badly) as the would-be new regulating ministry would have done.

¹⁷ On one overseas trip, I travelled with a team to a Central African country which had been promised a massive loan from a development bank if it passed legislation regulating animal health, veterinary drugs and the veterinary profession. This was the fastest I ever saw draft legislation prepared by a joint international-national team and enacted by a national legislature.

¹⁸ “Overlapping functions in govt departments”, Dawn (June 10, 2022), <https://www.dawn.com/news/602696>.

¹⁹ See, for example, Vapnek, J and Williams, AR, “Regulating the Packaged Water Industry in Africa: Challenges and Recommendations”, 20 U. DENV. WATER L. REV. 217, 254 (2017): “The regulatory institutions in Sierra Leone perform their roles in parallel, which has resulted in burdensome and duplicative inspections (and inspection fees) for packaged water producers.”.

Ill-conceived or overlapping legislative assignments do not manifest only in developing countries. The United States is also a product of its colonial and political history and has experienced some of the same kinds of turf battles among government departments seen in many developing countries. The patchwork of responsibilities allocated between the US Department of Agriculture and Food and Drug Administration is just one example, and recent proposals to change these responsibilities confirm that fragmentation.²⁰

So, to sum up, my categories are my own and may not always accord with those one might see in a government organigram. The four categories that I use in thinking about agricultural law are:

- Legislation regulating agricultural inputs (for example, seeds, pesticides, fertilizers)
- Legislation regulating natural resources (for example, land, water, fisheries, forests, genetic resources)
- Legislation establishing sanitary and phytosanitary measures (i.e., measures covering animal health, plant health and food safety)
- Legislation regulating agricultural institutions (for example, to facilitate commodity marketing, to give new powers to an agency or institution or to streamline regulatory authority).

These categories will cover most agricultural legislation topics. Some might find my choices imperfect, but in my defense, practical experience gained over many years helped inform those categories and topics. I hope the next sections persuade you that the classifications make sense. But first I offer a quick overview of the agricultural production process so that we share the same understanding of some common terms.

Agricultural products go through several steps before they reach the consumer. They originate in *production*, which consists of rearing livestock or cultivating crops, slaughtering the animals or harvesting the plants when they become mature and processing the meat or plant materials into products. *Commercialization* is the next step, as the items are packaged, labelled, advertised and stored before they proceed to market. Prior to sale, the goods move toward market through different means of transport (air, sea, road or rail) and may be exported into international trade. *Regulation* is the framework of rules and controls that apply to each step of the process; it includes activities such as inspection, licensing, quarantine or other movement restrictions, seizure, destruction and compensation. The laws governing agriculture will usually assign legal responsibility to a ministry, unit or agency which acts as the designated competent authority, and the entire legal regime exists within a framework of obligations set by treaties or other international or regional agreements. As we

²⁰ Tobin, T, "Food Safety in One Basket? Fixing A Fragmented Food Safety System", Forbes (Oct. 10, 2018), outlining proposed reassignment of food safety responsibilities from the FDA to the USDA, even though currently FDA regulates 80% of the country's food supply to USDA's 20%, available at <https://www.forbes.com/sites/tommytobin/2018/10/10/foodsafety/#61db55d1956e>.

examine the four categories referenced above, the confusing array of terms may acquire more meaning if we think of them as part of a process involving the production, commercialization and regulation of agricultural products on their journey to consumers.

Legislation Regulating Agricultural Inputs

“Agricultural inputs” are substances used in agricultural production, such as seeds, pesticides, fertilizers, animal feeds and veterinary drugs. Regulation of these items is important because agricultural producers may have trouble selling their products (and especially exporting them) if they do not have good access to high quality seeds and other inputs. Producers will also run into difficulties if they do not manage or use inputs properly, which may lead to excessive pesticide or veterinary drug residues on products for human or animal consumption. For these and other reasons, legislation must govern the entire life cycle of agricultural inputs – from importation, manufacture, labelling and storage to transport, sale and use.

Seeds

The basic purpose of seed legislation is to regulate seed quality. Farmers need to be confident that the seeds they buy are of the variety and quality sought and advertised or they risk losing not only the money spent on the seeds but also their crops and even their livelihoods.²¹ Thus seed legislation will either establish a new entity to exercise regulatory authority or may assign responsibility to an existing unit (such as a department within the ministry of agriculture) to implement and enforce the regulatory regime. The seed legislation might also establish a board or committee to govern the seed sector and to oversee implementation of the country’s agricultural policy (or seed policy, if it has one). The legislation will likely provide for the appointment (or assignment) of inspectors and laboratory analysts and will establish procedures for inspections and laboratory analysis.

Seed laws protect farmers from fraud while also protecting sellers when the seeds’ failure to germinate is not the seller’s fault. To this end, seed laws regulate the production, processing, testing, packing, storage and sale of seeds. Because access to high quality seed can maximize production (thereby feeding more people on less land and with less water), seed laws and regulations establish standards for the germination rate (*high*), varietal purity (*high*), percentage of weed seeds (*low*), humidity (*low*) and presence of seed-borne diseases (*low*) of seeds offered for sale. In addition to establishing these standards for seeds, the legislation will usually outline requirements for seed labels.

²¹ Esbo, Al-Jibouri, HA, Delouche, JC, H. Potts, H, and Thomson, JR, “Seed Legislation, Cereal Seed Technology”, FAO Agr. Dev. Paper No. 98 (FAO: Rome, 1975), at 203, available at <https://ir.library.msstate.edu/bitstream/handle/11668/13535/A-13.pdf?sequence=1&isAllowed=y>.

Fertilizers and Pesticides

Legislation regulating pesticides and fertilizers (which in some countries is combined) establishes standards and procedures for the production, import/export, packaging, labelling, storage and sale of these potentially hazardous products. Generally, the legislation will require importers and manufacturers to obtain a license to work with these substances, while the persons who actually apply certain substances to crops have to wear protective clothing and gear. In many countries, each individual fertilizer or pesticide product must be registered to be legally sold in the country. As with seed legislation, pesticide and fertilizer legislation will designate a ministry, department or agency to take the lead in implementation. Unlike seeds, pesticides are governed by a robust international legal framework, much of which is obligatory for countries that have signed the various international conventions.²²

Because misuse of fertilizers and pesticides can lead to negative environmental impacts on land and water, most legislation regulates the use and disposal of these products along with their containers. Additional provisions cover disposal of obsolete pesticides; national legislation should follow international guidance in this area.²³ To avoid harm to human health, the legislation will likely prohibit reusing containers or transporting fertilizers and pesticides in the same vehicles as food or other products intended for human consumption. Many countries regulate advertising of pesticides, and countries with low literacy rates may add specific requirements for labels and packages, such as inserts in local language or non-word pictograms.

Animal Feed and Veterinary Drugs

Legislation on animal feed is intended to protect animal health – and human health – by regulating the manufacture and import of materials used in animal feed as well as the feed itself. Medicated animal feeds will often be specially regulated to ensure that residues do not remain in animal products intended for human consumption. These same concerns underlie veterinary drugs legislation, in particular the provisions establishing withdrawal periods (the time after administration of a drug before an animal may be slaughtered for food). Like the other types of legislation on agricultural inputs, legislation on animal feed and on veterinary drugs almost always establishes requirements for packaging, labelling, storage and sale.

Legislation Regulating Natural Resources

The broad category of legislation regulating natural resources covers land, water, forests and forest products, fisheries and fishery products and animal and plant genetic resources. It includes legislation formalizing land rights, establishing a system to allocate water

²² See “A Quick Guide on International Chemical Conventions”, https://www.chemsafetypro.com/Topics/Convention/international_chemical_conventions.html.

²³ See, for example, FAO, “Prevention and Disposal of Obsolete Pesticides”, available at <http://www.fao.org/agriculture/crops/obsolete-pesticides/what-now/guides/en/>.

abstraction licenses, protecting fisheries from depletion or pollution and regulating the utilization of national plant and animal genetic resources while also protecting them for present and future use.

Land

Land legislation creates the institutional framework for administration of land rights, which is essential to stability and identity in many countries. In much of the world, “land holds symbolic and practical importance as an economic resource central to livelihoods; it is also a source of social legitimacy, a reflection of power in society, a basis of cultural identity, and a symbol of belonging to a community.”²⁴ For these reasons, land legislation necessarily addresses land ownership (state vs. private) as well as the rights and responsibilities of land holders. Some countries specifically address access to land for vulnerable groups as well as the recognition of customary rights and land rights for indigenous peoples.

Water

The term “water law” can be difficult to pinpoint, as it may refer to the vast legal framework for international or regional management of shared water resources (such as rivers and lakes), or it may mean allocation of water rights at a national or sub-national level. In fact, as a simple matter of language, it means both – and it includes a third area of interest: drinking water. This article refers to the allocation of water rights in national-level legislation. In this area of water law, a government will use legislation to establish a system to decide (or to enshrine in legislation what has already been decided in a constitution) who has water rights and how they are allocated. As a general matter, this type of legislation creates a system of licenses to give users permission to abstract²⁵ water in certain quantities. The legislation usually includes detailed procedures for applying for a license (and for having the license suspended or revoked). Provisions governing water pollution and discharge of effluents into water sources may be included in the water law, or these issues may be addressed in environmental legislation.

Fisheries

National laws governing fisheries must conform to international obligations under a variety of international treaties and conventions that the country may have signed.²⁶ Depending on the local system, the national legislation may cover subsistence fishing, commercial fishing or both. Fisheries legislation covers the control and monitoring of fisheries and aquaculture,

²⁴ Vapnek, J, Fofie, A and Boaz, P, “Resolving Disputes and Improving Security in Post-Conflict Settings: An Example from Liberia”, *Arbitration* 83:3 (2017), at 288-89, available at <https://www.ciarb.org/media/1380/august-2017.pdf>.

²⁵ This technical term, often seen in agricultural laws, has the same meaning as to “take” water from the water source.

²⁶ Among many others, these include the Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing, the Straddling Fish Stocks Agreement and the Convention on Fishing and Conservation of the Living Resources of the High Seas.

including inspections. As with land resources, many countries have enacted, or are considering recognizing, community ownership of fishery resources and formalizing stakeholder participation in the management of fisheries. Other provisions might address protection of endangered fish species and habitats, as well as vessel registration and inspection. Fishery products may be regulated in a country's fisheries legislation or in its food law.

Forestry

Forestry law increasingly establishes community management, whereby local populations living near forests are granted legal rights to use forest resources and are assigned legal obligations to manage and protect them. Forestry legislation generally regulates collection of timber, honey, mushrooms and other forest products, while also preserving the forests themselves. Many forest laws also cover protection of wildlife in forests, compensation for damage to wildlife and prevention of wildfires. Forestry law intersects closely with environmental law as it addresses, among other things, conservation of forests and forest species.

Plant Genetic Resources

National laws on plant genetic resources for food and agriculture (PGRFA) are usually enacted after a country signs the International Treaty on Plant Genetic Resources for Food and Agriculture. The treaty's objectives are the "conservation and sustainable use of all plant genetic resources for food and agriculture and the fair and equitable sharing of the benefits arising out of their use . . . for sustainable agriculture and food security."²⁷ Signatory countries are obliged to conform their national legislation to the treaty, which requires them to strengthen national systems for conservation and sustainable use of PGRFA and to realize farmers' rights through whichever approach they choose.²⁸

Synergy

An important theme running through this category of legislation is that most natural resources provide more than one societal benefit. Forests do not exist just to provide wood or forest products; they are also resources in themselves – for example as watersheds, for recreational activities or for tourism. Similarly, water bodies do not have value only because their water can be allocated to different consumptive uses (such as irrigation, food production and domestic needs): some water resources must be kept whole and unpolluted to foster tourism, preserve fisheries and protect biodiversity. Consequently, there must be limits on consumption to avoid over-salination or exhaustion of lakes, rivers and

²⁷ International Treaty on Plant Genetic Resources for Food and Agriculture, available at <http://www.fao.org/3/a-i0510e.pdf>.

²⁸ Bioversity International, *National Implementation of the International Treaty on Plant Genetic Resources for Food and Agriculture Learning Module* (G. Moore & E. Goldberg, eds.) (2010), available at <http://treatylearningmodule.bioversityinternational.org/>.

groundwater. Whichever natural resource is at issue, legislation in this category will protect the resource itself while also taking into account these larger concerns.

Legislation Establishing Sanitary and Phytosanitary²⁹ Measures

The next category of legislation consists of sanitary and phytosanitary (SPS) measures, meaning measures to protect human, animal and plant life and health against the risks associated with plant pests and animal diseases. Among other benefits, SPS measures permit national governments to act quickly in response to infestations or outbreaks, which is essential to containing and mitigating their harm. SPS measures also enable governments to declare pest-free or disease-free zones to facilitate exports of plants, animals or their products from those areas.

The main international instrument covering this category of agricultural law is the World Trade Organization (WTO) Agreement on the Application of Sanitary and Phytosanitary Measures (the SPS Agreement), which aims to promote free trade by ensuring that a country's SPS measures are transparent and risk-based and not simply a cover for protectionism. The SPS Agreement identifies three international organizations that are the source of international standards: the FAO/WHO Codex Alimentarius Commission for food; the International Plant Protection Convention for plants; and the World Organization for Animal Health (WOAH)³⁰ for veterinary matters. WTO members are encouraged to use the applicable international standards for SPS measures, although countries are permitted to apply stricter measures where they are based on science or appropriate risk assessment.³¹

Food Safety Legislation

Food safety legislation controls enterprises involved in every aspect of the production process: rearing, handling, manufacturing, preparing, transporting, storing, processing, packaging, labelling, importing and exporting food. Some detailed regulations establish the maximum permitted levels of pesticide or other chemical residues in food products to ensure that they are safe for human consumption, while others elaborate detailed requirements for food containers and food labels. Most countries also regulate advertising of food products. As noted, the Codex Alimentarius Commission develops and issues official international standards for foods, food products and various aspects of food production. Under the SPS Agreement, all WTO member countries developing national food safety laws and regulations are required to rely on those standards where they exist.

²⁹ phyto = plant; sanitary = health; phytosanitary = having to do with plant health.

³⁰ In June 2022, the World Organization for Animal Health, which until then had retained its French acronym OIE, announced that it was formally adopted the acronym "WOAH." See <https://www.woah.org/en/home/>.

³¹ See Understanding the WTO Agreement on Sanitary and Phytosanitary Measures, https://www.wto.org/english/tratop_e/sps_e/spsund_e.htm.

Plant Protection Legislation

Plant protection legislation is designed to prevent and limit harm from plant diseases and pests.³² These laws usually create or designate a competent national authority (which may be a ministry, a unit of a ministry or an independent agency) that exercises specific functions in its role as the nominated National Plant Protection Organization or NPPO³³ under the International Plant Protection Convention (IPPC). National legislation empowers the NPPO to designate official laboratories, analysts and inspectors; conduct surveillance to monitor the appearance or spread of plant pests and diseases; interact with other regional and international plant protection organizations; restrict the movement of people, animals and plants during an outbreak; and take other actions to protect the country's plant resources. A regulation or schedule accompanying the principal legislation generally lists the diseases and pests in the country that may require specific control measures.

Plant protection legislation also regulates the importation and exportation of plants and plant products. An important power of the NPPO is its ability to seize and destroy infected or infested plants and plant products on importation (or within the country, in case of an outbreak); the legislation usually authorizes the payment of compensation to the importer or owner in such circumstances. The IPPC Secretariat, housed at FAO headquarters in Rome, has issued numerous International Standards for Phytosanitary Measures³⁴ (and other guidance) –essential resources for national governments to draw upon as they develop their national phytosanitary legislative frameworks.

Another key power of the NPPO is to declare areas of low pest prevalence or pest-free areas. In brief, where a country has eliminated a pest from a certain area or reduced its prevalence to a certain level, the NPPO can declare the area one of low pest prevalence or pest free.³⁵ This streamlines and facilitates the export of plants or plant products certified as coming from that area, because they will be presumed free from a particular pest and so require less or no inspection at their destination.

Veterinary Legislation

Veterinary legislation refers to legal instruments aimed at protecting animal life and health. It covers a variety of subject areas, including disease surveillance, inspections, vaccinations,

³² Recall that in most civil law systems, "plant protection" legislation combines phytosanitary provisions with provisions regulating pesticide products. See above n.15 and the accompanying text.

³³ See FAO, "Operation of a National Plant Protection Organization: A guide to understanding the principal requirements for operating an organization to protect national plant resources from pests" (2015), available at https://www.ippc.int/static/media/files/publication/en/2018/06/Operation_of_an_NPPO_Guide_Operations_P_R3Final_WEB.pdf.

³⁴ IPPC, *Adopted Standards*, <https://www.ippc.int/en/core-activities/standards-setting/ispm/>.

³⁵ ISPM No. 4, above n. 14: pest free areas require establishment and then maintenance of (1) systems to establish freedom from a pest; (2) phytosanitary measures to maintain freedom; and (3) checks to verify that freedom from the pest has been maintained.

sanitary control measures, animal identification and movement and even the veterinary profession. Other instruments cover animal production, including registration of farms and procedures for animal breeding. The next steps in the production chain – slaughter and related processes – are often addressed separately, and sometimes in conjunction with food safety legislation.

Every piece of veterinary legislation will establish or designate a governmental unit, usually the authority for veterinary services, to take charge of these functions and be the interlocutor with WOA, in the same way that the NPPO is the interlocutor with FAO for plant protection matters. The designated veterinary unit is known as the Veterinary Authority (VA) in WOA parlance.

Just as phytosanitary legislation did for plants, animal health legislation outlines sanitary measures to prevent and control animal diseases. The legislation addresses the various steps involved in importing and exporting animals and animal products, including veterinary certification, import licenses, export permits and inspections. Animal welfare cuts across all the preceding subject areas; for that reason, it is often regulated in a freestanding piece of legislation (if it is addressed at all: in many countries, it is not).

Like the NPPO for plants and plant products, the VA has the power to seize and destroy animals and animal products, upon import or within the territory, in case of disease outbreak. Compensation – and especially communication about the importance of compensation – is essential in this context, particularly in countries with low education levels where small producers may quickly sell or slaughter their stock upon news of an outbreak for fear of losing their livelihood. To address this risk (which spreads the disease faster), the government should use legislation to establish the compensation system, or at least its outlines, in advance of any outbreak and conduct broad public awareness-raising activities.³⁶

As with plant protection legislation, veterinary legislation generally lists specific diseases and the sanitary measures associated with each one; subsidiary legislation may set out detailed emergency plans for specific diseases. Separate legislation usually regulates the practice of the veterinary profession and the powers of veterinary paraprofessionals (for example, veterinary technicians or nurses). Regulation of veterinary practice is a key point of contention in many developing countries where the relatively few veterinarians practice mainly in the capital city or other urban areas, leaving vast rural areas dependent on paraprofessionals for animal health services. And yet, paradoxically, it is often in these same circumstances that veterinarians will fight most vigorously against any new or amended legislation that would allow non-veterinarians to carry out certain activities, even those with

³⁶ See Vapnek, J, “Institutional and Legal Measures to Combat African Swine Fever”, FAO Legal Papers Online No. 3 (1999), available at <http://www.fao.org/3/a-bb036e.pdf>.

low skill requirements such as vaccination.³⁷ Veterinary legislation should address this issue head on, establishing and regulating categories of paraprofessionals and expressly allowing delegation of official tasks to non-governmental veterinarians and laboratories. The government's ability to call on private veterinarians and clinics, for example, is particularly important in case of a disease outbreak.

Legislation on animal feeds and legislation on veterinary drugs are also types of veterinary legislation, although I earlier placed them in the "agricultural inputs" category and discussed them in that section.³⁸

Legislation on Agricultural Institutions

The fourth category of agricultural legislation covers agricultural institutions and includes laws that address agricultural finance, agricultural insurance and agricultural taxation. Legislation in this area also encompasses laws governing the creation and management of agricultural cooperatives as well as laws establishing commodity boards for specific agricultural products. The purpose of these boards is usually to shift some policy making responsibility to the private sector, which conducts marketing and agricultural research with respect to a particular commodity and conveys its recommendations to the government. By drawing on the expertise of the producers of specific commodities, and by educating those producers, commodity boards support local production while also fostering compliance with international trade rules.

Another important type of legislation in this category establishes certification systems for product quality. In these systems, the government requires all enterprises in a given sector – such as citrus nurseries or cattle farms – to be registered and subject to a quality control and certification regime. The legislation may go even further, imposing marking or labelling rules for individual plants, animals or products to help trace back diseases and facilitate remedial action in case of outbreaks. These certification systems can also have a beneficial effect on trade, because consumers tend to buy more of – and pay more for – products whose provenance and "healthfulness" are certified.³⁹

The last area of legislation relevant to agricultural institutions consists of provisions regulating the ministry of agriculture, the VA or the NPPO. In some countries, these important agricultural institutions may lack certain powers and so new or amended

³⁷ The same phenomenon can be observed in the medical and legal professions – and not just in developing countries: lawyers resist allowing non-lawyers to conduct certain activities, doctors the same vis-à-vis nurses. Whether reasonable or unreasonable, this resistance may derive from a fear of diluting the honor and prestige of the profession, concern about losing income or both.

³⁸ As I noted earlier, the categories of agricultural legislation, and what goes into each one, are purely a matter of conceptual convenience and there is much to argue about.

³⁹ See, for example., Junhee Cha, Jung-Nam Chun, and Youn Yeo-Chang, *Consumer Willingness to Pay Price Premium for Certified Wood Products in South Korea*, J. Korean Forestry Soc. 98:2 (2009), at 210 (80% of consumers surveyed in Seoul were willing to pay more for certified wood products), available at <https://pdfs.semanticscholar.org/81d6/50f39904e68cf0dd93bcd719e77ad8438a5f.pdf>.

legislation is needed. As just one example, existing legislation may not empower the VA or the NPPO to seize and destroy infected materials or to impose quarantine measures in case of an animal or plant disease outbreak. The power to award compensation, as discussed above, may also be lacking. Legislation may also be needed to streamline or rationalize overlapping government functions where two or more ministries, agencies or government units are exercising the same power in the agriculture sector. The resulting duplicative inspection regimes can put a brake on development and discourage investment: in addition to being ineffective and even counterproductive, redundant systems of control can invite corruption, as producers attempt to evade burdensome bureaucracies.⁴⁰ Finally, as noted earlier, governments may want to amend their legislation to allow government agricultural institutions to rely on private entities for some governmental functions, such as surveillance and animal vaccination.

Conclusion

This article might give the impression that agricultural legislation is fairly straightforward, and to a great extent it is. This is one of the advantages of legislation based on science: there is less to debate. Nonetheless, problems can arise in crafting agricultural legislation. Some, I hinted at earlier in this article; others, I mention briefly here.

One potentially controversial issue is the need to balance conflicting demands on natural resources. Water legislation cannot only allocate water to competing uses; it must also take account of the need to preserve the water resource itself for tourism, for transportation or as a watershed. Another area of complexity in many countries is the conflict between customary rights and the formal legal system. As an example, customary land law might require a widow to be evicted from the family home, but this could conflict with a country's recent constitution, if it embraces modern human rights principles. Many other interests may need balancing, including protecting rare species vs. abstracting water for irrigation, or the right to farm vs. the neighbors' right to peaceful enjoyment of their property. Resolving these conflicts will never be easy, but success is more likely where legislation is the product of a collaborative process.

The ideal is to set up a format where the legislative proposals arise from a lively interplay and exchange between the legal and the technical experts.⁴¹ The process should be

⁴⁰ It may not be as blatant or egregious as, "I'll give you a wad of cash if you ignore my sick cows or non-segregated seedlings." It might simply be, "Great to see you, Joe Inspector, here's a gift of a crate of oranges (so you'll get out of my hair quickly and I can get back to work)."

⁴¹ One of the most productive (and intellectually satisfying) workshops I ever participated in was in the early 2000s under the auspices of FAO and CARICOM (the Caribbean Community). FAO invited one lawyer and one plant protection expert from each CARICOM member country, and we sat in a large conference room (at a hotel in Port of Spain) for several days going through each provision of a draft model plant protection law, discussing, arguing and eventually reaching a meeting of the minds on a multitude of issues. This format allowed for an interplay between lawyers and non-lawyers, between national and international lawyers, between national and international plant protection experts and between lawyers and technical

participatory – allowing for genuine involvement of all implicated stakeholders – both to accommodate the multiple interests at stake and to ensure that those who will be affected by the new legislation are involved, consulted and on board. This may require national consultations, rural radio programming and publication of drafts or synopses of legislation in newspapers and other media. Any delays in enactment, and any expenses incurred in carrying out the consultations, will pay dividends in compliance, support and even advocacy on the part of those who will be affected by the new legislation. These consultations should include both government and private stakeholders, since government officials, as well as businesses and individual citizens, can stymie implementation if they lack a sense of ownership of the new legislation and did not participate in its development. Following all these steps should help ensure that the agricultural legislation embodies international standards, reflects the scientific consensus and is appropriately tailored to the national context.

experts from different countries but all from the same region. The amount of ground covered in just a few days was staggering.

Measure for Measure: Recent Canadian Experience with Parliamentary Review Provisions

Charlie Feldman¹



Abstract

Numerous Canadian federal statutes enact a requirement for the review of certain provisions by a parliamentary committee. In this work, the author provides an update on research into the regularity with which these provisions achieve their aims. It also presents recent parliamentary developments in which review practices appear to diverge from their associated statutory requirements.

Table of Contents

Introduction	58
Medical Assistance in Dying: A Comedy of Errors?	58
Background	59
Developments	60
Discussion	61
Justice Committee Reviews: All's Well that Ends Well?	62
Protection of Communities and Exploited Persons Act	63
Victims Bill of Rights	64
Conclusion: The Taming of the Statute?	66

¹ The views expressed in this article are those of the author and not necessarily those of any employer.

Introduction

We have strict statutes and most biting laws,
The needful bits and curbs to headstrong weeds,
Which for this fourteen years we have let slip,
Even like an o'ergrown lion in a cave
That goes not out to prey.

– Shakespeare (*Measure for Measure*, Act 1, Scene 3)

The Parliament of Canada routinely enacts legislative provisions that foresee the review of an enactment (or portions of one) by a committee of the Senate, the House of Commons, or of both Houses of Parliament.² A colleague once quipped – nodding to Shakespeare – these were meant for “The Taming of the Statute” but the rarity with which reviews were completed meant they were really “Much Ado about Nothing”. Indeed, their seeming goal – namely, statutory reviews being undertaken by parliamentary committees – appeared to be unrealized in many cases, though no official statistics could be found in this regard.

Out of pure curiosity, I surveyed parliamentary review provisions in the Canadian federal corpus in 2021 for an article published in early 2022 under the title “Much Ado about Parliamentary Review”.³ Whether to call the findings a tragedy or a comedy is something best left to the reader. That work found that 51 parliamentary review provisions were enacted between 2001 and 2021, of which 31 could be read as intending for review to have occurred at the time of writing. However, only 17 of those provisions had resulted in any report of review and in the cases where the statute placed a deadline for the report on a review, that deadline was only clearly met in two instances.⁴

Unfortunately, as these things sometimes go, by the time the piece appeared in print the data was already slightly out of date and more recent developments deserve consideration. This work – prepared for the 2022 CALC Conference – builds on that previous research. It describes two recent developments in the Canadian context regarding parliamentary review provisions, which may be thought of as measures for measuring legislation.⁵

Medical Assistance in Dying: A Comedy of Errors?

The story of Canada’s parliamentary review provisions regarding medical assistance in dying is itself replete with Shakespearian drama. Two provisions, both alike in dignity, in

² As an example, see section 16 of the *Canada Emergency Student Benefit Act*, S.C. 2020, c. 7:

No later than September 30, 2021, a comprehensive review of the provisions and operation of this Act is to be undertaken and completed by a committee of the Senate, of the House of Commons or of both Houses of Parliament that may be designated or established by the Senate or the House of Commons, or by both Houses of Parliament, as the case may be, for that purpose.

³ (2022), 16 *Canadian Journal of Parliamentary and Political Law* 105.

⁴ For methodology and caveats, see *ibid*.

⁵ *Measure for Measure* is a Shakespeare play and it seemed only right that work following on “Much Ado about Parliamentary Review” should continue the theme.

the statute book set our scene. Yet, these star-crossed provisions about end-of-life have taken a most tortuous path, one that merits exploration.

Background

Legislation enacted in 2016 to respond to the Supreme Court of Canada's landmark ruling regarding medical assistance in dying⁶ contained the following parliamentary review provision:

10 (1) At the start of the fifth year after the day on which this Act receives royal assent, the provisions enacted by this Act are to be referred to the committee of the Senate, of the House of Commons or of both Houses of Parliament that may be designated or established for the purpose of reviewing the provisions.

(2) The committee to which the provisions are referred is to review them and the state of palliative care in Canada and submit a report to the House or Houses of Parliament of which it is a committee, including a statement setting out any changes to the provisions that the committee recommends.⁷

The Act received royal assent on June 17, 2016. "At the start of the fifth year after the day on which this act receives royal assent" would presumably mean the start of 2021.

As indicated in a government background paper, "It was expected that this review would start in the summer of 2020. However, the COVID-19 pandemic disrupted parliamentary activities and has delayed this review".⁸ While the review could have occurred once parliamentary activities resumed,⁹ it was reported that there was a political impasse.¹⁰

However, around the same time as the 2016 review was seemingly stalled, the Government of Canada was pursuing amendments to the medical assistance in dying regime in response to litigation.¹¹

As introduced first in February 2020, Bill C-7 proposed amendments to the medical assistance in dying scheme; it neither contained a new parliamentary review provision nor amended the 2016 review provision. Bill C-7 died with prorogation of the 43rd Parliament,

⁶ *Carter v Canada* 2015 SCC 5.

⁷ *An Act to amend the Criminal Code and to make related amendments to other Acts* (medical assistance in dying), SC 2016, c. 3, s. 10.

⁸ Government of Canada, Legislative Background, Bill C-7: Government of Canada's Legislative Response to the Superior Court of Québec *Truchon* Decision at 4. Online: <https://www.justice.gc.ca/eng/csj-sjc/pl/ad-am/c7/c7-eng.pdf>.

⁹ For some discussion see Rota, A "The Story of the Virtual Parliament" (2021), 44 Canadian Parliamentary Review

¹⁰ Bryden, J, "Senate wrangling over co-chair holds up parliamentary review of assisted dying law" CTV News, June 27, 2021: <https://www.ctvnews.ca/politics/senate-wrangling-over-co-chair-holds-up-parliamentary-review-of-assisted-dying-law-1.5403655>.

¹¹ *Ibid.*

1st Session and was reintroduced in October 2020 (also as Bill C-7), without amending the review provisions.

Amendments made by the Senate to the subsequent Bill C-7 enacted an additional review provision that began as follows:

5. (1) A comprehensive review of the provisions of the *Criminal Code* relating to medical assistance in dying and their application, including but not limited to issues relating to mature minors, advance requests, mental illness, the state of palliative care in Canada and the protection of Canadians with disabilities must be undertaken by a Joint Committee of both Houses of Parliament.¹²

In addition to providing details about the joint committee – including in relation to its composition – the review provision required that “The Committee must commence its review within 30 days after the day on which this Act receives royal assent” and that its report of the review must be tabled “no later than one year after the day on which it commenced the review”.¹³ The bill as amended received royal assent on March 17, 2021.

The joint committee was struck and held three meetings before it ceased to meet.¹⁴ Its ability to meet virtually had ceased with the expiry of certain House orders and the committee itself ceased to exist by virtue of the dissolution of the 43rd Parliament on August 15, 2021.

At the start of 2022 (when my previous article was published), the 2016 statutory review had not been undertaken and the 2021 review had not progressed, and had seemingly been thwarted by dissolution.

Developments

In the spring of 2022, the Senate and House of Commons each adopted motions to strike a joint committee to study medical assistance that included the following:

(a) pursuant to subsection 5(1) of *An Act to amend the Criminal Code (medical assistance in dying)*, a special joint committee of the Senate and the House of Commons be appointed to review the provisions of the Criminal Code relating to medical assistance in dying and their application, including but not limited to issues relating to mature minors, advance requests, mental illness, the state of palliative care in Canada and the protection of Canadians with disabilities;¹⁵

The reference to “pursuant to subsection 5(1)” would appear to mean that the committee being struck is for the purpose of the statutory review enacted by C-7. Yet, the statute itself

¹² *An Act to amend the Criminal Code (medical assistance in dying)*, SC 2021, c. 2, ss. 5(1).

¹³ *Ibid.*

¹⁴ See [Meetings of the Special Joint Committee on Medical Assistance in Dying](#). Resolutions striking the committee were adopted by the House of Commons on April 16, 2021 and the Senate on April 20, 2021.

¹⁵ *Journals of the House of Commons*, 44-1, Wednesday, March 30, 2022.

states in subsection 5(4) that “The Committee must commence its review within 30 days after the day on which this Act receives royal assent”. Given that C-7’s royal assent was in March 2021, a question arises as to whether a motion in spring 2022 is truly the review contemplated by the statute when every condition of the statute related to the review committee cannot be fulfilled (that is, a committee struck in 2022 cannot begin its work in 2021 as required by the law).

Further, the motion also stated that “(j) pursuant to subsection 5(5) of the act, the committee submit a final report of its review, including a statement of any recommended changes, to Parliament no later than Thursday, June 23, 2022”. Subsection 5(5) stated “The Committee must submit a report of its review — including a statement of any recommended changes — to Parliament no later than one year after the day on which it commenced the review.” It is not immediately clear how the period between March 2022 and June 2022 would be “pursuant” to a provision that requires work to be completed within a year of 30 days after March 17, 2021.

Conceptually, there is a disconnect between the Act’s text and what the Senate and House of Commons ultimately agreed to do. If they wanted to strike a joint committee to study an issue, they can do so (and have done so) without statutory authority. However, in this case they chose to say they were acting “pursuant” to a statute but at the time they appeared to re-interpret or re-imagine the statute particularly as concerned its timing constraints.

As it happened, the joint committee’s mandate was later amended by further decisions of the two Houses to specify that:

(e) notwithstanding paragraph (j) of the order made Wednesday, March 30, 2022, the deadline for the Special Joint Committee on Medical Assistance in Dying to submit to Parliament a final report of its review, including a statement of any recommended changes, be no later than Monday, October 17, 2022, provided that an interim report on mental illness as a sole underlying condition be presented to the House no later than Thursday, June 23, 2022,¹⁶

In the end, the committee did table an interim report on June 22, 2022 entitled “Medical Assistance in Dying and Mental Disorder as The Sole Underlying Condition: An Interim Report”.

Discussion

At the time of this writing in summer 2022, there are two separate medical assistance in dying review provisions, both of which nominally wished for final reports to have been tabled but only one of which has resulted in a report, and an “interim” one at that.

¹⁶ See Journals, House of Commons, May 2, 2022.

While there may be a joint committee reviewing medical assistance in dying “pursuant to” the 2021 statute, the 2016 provision’s goal has not been realized at all. Indeed, it should be recognized that the review scopes are not co-extensive. That is, the 2016 review provision requires a review of “the provision enacted by this Act” but the legislation amended not only the *Criminal Code*. Its bill-summary stated:

This enactment also makes related amendments to other Acts to ensure that recourse to medical assistance in dying does not result in the loss of a pension under the Pension Act or benefits under the Canadian Forces Members and Veterans Re-establishment and Compensation Act. It amends the Corrections and Conditional Release Act to ensure that no investigation need be conducted under section 19 of that Act in the case of an inmate who receives medical assistance in dying.

These three other statutes do not appear to be part of the joint committee’s consideration. These statutes would need to be considered in order for the current review to cover what was legislated in 2016, except doing this – if applied strictly – would also require the joint committee to consider those provisions of the *Criminal Code* as enacted in 2016 before they were amended in 2021. This is arguably an absurd result, as the committee would be reviewing legislation Parliament already opted to replace.

All told, it is curious that the 2016 provision was not amended in 2021 to provide clarity on the review(s) that Parliament intended to occur once it was modifying the legislative scheme. It is unclear why the 2022 motions would reference the 2021 statute as authority when this was not necessary (and the statute could not strictly apply). Nonetheless, the 2022 motions underscore an important point: Houses of Parliament can establish committees to do reviews of what they want when they want. The issue is not one of powers, but rather the parliamentary desire to undertake particular reviews.

Justice Committee Reviews: All’s Well that Ends Well?

The previous work on parliamentary reviews found that reviews had not yet occurred for the *Protection of Communities and Exploited Persons Act*¹⁷ and the *Canadian Victims Bill of Rights Act*.¹⁸ On February 8, 2022, the House of Commons Standing Committee on Justice and Human Rights (JUST) adopted the following motion (as recommended by its Subcommittee on Agenda and Procedure):

1. That the committee undertake a comprehensive review of the provisions and operation of the *Protection of Communities and Exploited Persons Act*, which received Royal Assent on November 6, 2014, as mandated in section 45 [of] the Act; that, due to the sensitive nature of the study, the committee provides adequate mental health support to the witnesses; that the committee hold at least six meetings on this topic;

¹⁷ SC 2014, c. 25.

¹⁸ SC 2015, c. 13, s. 2.

that a report be tabled in the House of Commons; and that the committee request the government table a comprehensive response to the report.

2. That, pursuant to Standing Order 108(2), the committee undertake a study of the government's obligations to victims of crime, including the vacant position of the federal Ombudsman of Victims of Crime and the review of the Canadian Victims Bill of Rights; that the committee hold at least six meetings on this topic; that a report be tabled in the House of Commons; and the committee request the government table a comprehensive response to the report.¹⁹

Each of these reviews will be discussed in turn below.

Protection of Communities and Exploited Persons Act

The parliamentary review provision of the *Protection of Communities and Exploited Persons Act* reads as follows:

45.1 (1) Within five years after this section comes into force, a comprehensive review of the provisions and operation of this Act shall be undertaken by such committee of the House of Commons as may be designated or established by the House for that purpose.

(2) The committee referred to in subsection (1) shall, within a year after a review is undertaken pursuant to that subsection or within such further time as the House may authorize, submit a report on the review to the Speaker of the House, including a statement of any changes the committee recommends.²⁰

The review provision came into force with royal assent of 2014, c. 25 on November 6, 2014. Accordingly, a review should have been undertaken by November 6, 2019, with a report by November 6, 2020. Exceptionally, this provision requires that the report be provided to the Speaker of the House of Commons.²¹

The adoption of a committee motion to review this Act is a notable development, particularly when considered against the statute's text. That is, the statute calls for a review to be undertaken "by such committee of the House of Commons as may be designated or established by the House for that purpose". While the subject-matter might well fall within the mandate of the committee, there is a presumption that the House would not desire a different committee to undertake the review or perhaps to create a specialized committee just for that purpose.

¹⁹ Proceedings of the Standing Committee of the House of Commons (Canada) on Justice and Human Rights, February 8, 2022.

²⁰ 2014, c. 25, s. 45.1.

²¹ The procedural validity of this provision is questionable as parliamentary committees are generally understood to report only to their respective Houses.

The report of the review – tabled in the House on June 22, 2022 – does not reference the statutory review.²² Indeed, it specifies that the committee was acting pursuant to its mandate under the Standing Orders of the House and not any special statutory mandate. Further, the motion adopted called for the report to be tabled, though the statute required the report to be given to the Speaker.

At the end of the day, the review occurred; however, it did not occur pursuant to the statute or in conformity with its terms (particularly in respect of timing). Further, the review should have – nominally – included a review of the review provision itself. With no recommendation from the JUST that the review provision be repealed or amended to start the review clock anew – and with the Shakespearian context in mind – is all well that ends well?

Victims Bill of Rights

The statute that enacted the *Canadian Victims Bill of Rights* states simply that “a committee of Parliament is to be designated or established for the purpose of reviewing the Canadian Victims Bill of Rights” five years after it comes into force.²³ There is no requirement for review or reporting and the committee should have been designated on July 22, 2020.

While the 2022 motion above is the focus for developments, it is relevant to note that the JUST started a review on the *Canadian Victims Bill of Rights* upon adoption of a motion on June 3, 2021:

That, pursuant to Standing Order 108(2), the committee undertake a study of the Canadian Victims Bill of Rights and hear from groups and individuals on how victims of crime can be better supported; that the committee dedicate its meetings of Thursday, June 3, Tuesday, June 8, and Thursday, June 10, 2021, to hearing witnesses; that, at the meeting of Thursday, June 3, officials from the Department of Justice and the Department of Public Safety and Emergency Preparedness be invited to appear for the first hour, and representatives of the Office of the Federal Ombudsman for Victims of Crime be invited for the second hour; and that, with regards to the witnesses for the meetings of Tuesday, June 8, and Thursday, June 10, the recognized parties submit their list of suggested witnesses to the clerk no later than the end of the day on Wednesday, June 2, 2021, provided that the Liberals and Conservatives can submit four each and the Bloc Québécois and the New Democratic Party can submit two each.²⁴

²² Preventing Harm in the Canadian Sex Industry: A Review of the Protection of Communities and Exploited Persons Act, JUST-7, 44-1.

²³ *Victims Bill of Rights Act*, SC 2015, c 13, s.2.1

²⁴ Minutes of Proceedings, Standing Committee on Justice and Human Rights, 43-2, Meeting 37, June 3, 2021.

At the first meeting of the review, the Federal Ombudsman for Victims of Crime was asked about the delay in getting the review off the ground. She replied, “I have discussed it with the minister, and he's well aware that it's due and he expects the House leaders to work together to set the review”.²⁵ The JUST only completed two meetings on this study before dissolution of the 43rd Parliament.

The JUST motion from 2022²⁶ (in the new Parliament) is notable because it differs significantly from both the 2021 motion and the statute. In particular, the 2022 motion calls for it to consider the statute alongside other matters (such a vacant positions) and to report (whereas the statute is silent on reporting). Further, the 2022 motion ignored the 2021 actions undertaken by the JUST. To that end, on March 29, 2022 (after the 2022 motion discussed above), the JUST agreed to consider the evidence it received in the previous session.²⁷ It's unclear why it did not initially seek to build on its 2021 work in 2022 rather than (at first glance) embarking on a new study.

Though the above is straightforward enough – and the JUST will presumably hold more meetings in the future on the *Canadian Victims Bill of Rights* – there are some unique questions about bicameralism to be noted. On a few occasions, various senators noted the lack of review by a joint committee of both Houses – such as one remarking (on May 18, 2022) that “we have been waiting for a thorough legislative review of the bill for two years now”.²⁸ In answering a more general question on June 23, 2022, the Government Representative in the Senate noted that “On March 29, 2022, the Standing Committee on Justice and Human Rights began its study of the Canadian Victims Bill of Rights”.²⁹

While nothing stops the Senate from tasking its own committee with the review, there is an awkwardness in that a report from the JUST (a committee of the House of Commons) on the review will not be tabled in the Senate for it to discuss and debate. Of course, nothing stops the Senate from starting its own committee study – though one might question whether it would be duplicative and what might be made of dueling reports. Setting aside these important questions, this matter is simply raised here to note that one house is not automatically aware of the actions of the other, let alone the independent actions of its committees.

At the end of the day, the review undertaken by the JUST is arguably not a review under the *Victims Bill of Rights Act* because the review undertaken by the JUST is arguably not a

²⁵ Evidence, Standing Committee on Justice and Human Rights, 43-2, Meeting 37, June 3, 2021.

²⁶ Above n. 19.

²⁷ Proceedings of the Standing Committee on Justice and Human Rights, [date, page?]:

2. That the evidence and documents gathered by the committee during the 2nd Session of the 43rd Parliament on the study of the Canadian Victims Bill of Rights, namely, at the meetings of June 3, 2021, and June 8, 2021, be considered by the committee for the study on the government's obligations to victims of crime.

²⁸ Debates of the Senate, 44-1, May 18, 2022.

²⁹ Debates of the Senate, 44-1, June 23, 2022.

review under that Act because section 2.1 requires that a committee of Parliament “be designated or established” for that purpose and it is not clear that one committee of one House has the power to designate itself on behalf of Parliament as a whole.. Moreover, strictly speaking, the JUST’s review is of “government’s obligations to victims of crime, including the review of the Canadian Victims Bill of Rights” and thus arguably distinct from the review contemplated by the statute. For example, some of the obligations in the Canadian Victims Bill of Rights are not matters for government exclusively. In particular, consider section 13, which states that “Every victim has the right to request testimonial aids when appearing as a witness in proceedings relating to the offence.” Reviewing this provision’s operation requires considering the actions of judicial actors who are independent from government.

Conclusion: The Taming of the Statute?

The previous work spoke primarily to statutory provisions not resulting in reviews and reports on them. The above developments speak to reviews occurring, but with perhaps tenuous ties to the wording of the statute. Certainly, it will be for parliamentarians to decide whether any review it undertakes is sufficient for its purposes, even if it is not necessarily the same review Parliament envisaged when enacting the review provision. Although statutory revisions and consolidations occurred routinely (notably in 1886, 1906, 1927, 1952, 1970, and 1985), the practice of routinely cleaning the statute book has fallen by the wayside. If the statute book were routinely purged of spent and obsolete provisions, it would be easy to identify the reviews that parliamentarians considered outstanding. As it stands, however, the likely future is for these review provisions to remain in the statute book indefinitely, with no clear indication whether parliamentarians consider them completed or outstanding.

As a final note, my article published early in 2022³⁰ was mentioned at a parliamentary committee, whose chair indicated her hope that the committee would study parliamentary reviews later in the current session.³¹ In the ensuing discussion, a witness from the Department of Justice was asked as follows:

The Chair: Ms. Davis-Ermuth, can you please give us a response also as to why previous reviews have not taken place? What is the reason? What is the system that has been set up? What is happening? If you can please include that in your response, I would appreciate that.

Ms. Davis-Ermuth: Will do.

Though at the time of this writing a response has not been provided, the reply will presumably provide great insight on how the growing list of incomplete parliamentary

³⁰ Above n. 3.

³¹ Evidence, Senate Standing Committee on Legal and Constitutional Affairs, June 13, 2022. <https://sencanada.ca/en/Content/Sen/Committee/441/LCJC/55600-E>.

reviews might be viewed within government. Certainly, it is premature to speculate on what any committee study in this area may reveal.

Monitoring whether these provisions continue to be added to the statute book alongside whether reviews occur in consequence remains important in assessing the effectiveness of post-legislative scrutiny mechanisms in Canadian federal legislation. Alas, whether everything for Parliament is ‘As You Like It’ is something that can only be revealed in time.

Emerging from the shadows: sunset and review clauses – what is required to make them work?

Dr. Maria Mousmouti¹ and Andy Beattie²



Abstract

Sunset clauses set an expiration date on a particular law or set of provisions. The expiration can be automatic or subject to a positive or negative authorisation by the legislature.

In theory, sunset clauses have the potential to provide safeguards for democracy and human rights, especially in the context of emergency legislation, which is often adopted in circumstances of uncertainty and with extensive time pressure. Practice shows however that the effectiveness of sunset and review clauses is dependent upon a number of conditions including: (a) the quality of their drafting; and (b) the conditions associated with a meaningful parliamentary review.

The main question that this paper aims to address is what is required in order to draft an effective sunset clause, with a particular focus on the drafting dilemmas they raise and potential solutions that can enhance their effectiveness, promote legal certainty and offer effective safeguards in relation to both emergency and routine legislation.

In the first part of this article, Dr. Mousmouti looks at the theory and practice of sunset and review clauses across multiple jurisdictions and reflects on drafting dilemmas using examples as case studies. In the second part, Mr. Beattie reflects on many years of drafting sunset and review clauses to offer practical insight on how a legislative drafter considers and drafts the provisions needed in a variety of situations.

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Table of Contents

Part 1	
The origins and function of sunset clauses.....	69
Common challenges in the use of sunset clauses in practice.....	71
Opaque reference to what expires.....	71
Unclear /complex formulation of expiry dates.....	73
Vague requirements for substantive review	75
Part 2	
A practitioners' response.....	76
Conclusion - key elements of effective sunset clauses.....	80

Part 1

The origins and function of sunset and review clauses

Sunset clauses are ‘strange creatures’ of the legal system. While mainstream legislative practice dictates that legislation remains in force until explicitly repealed, sunset clauses set an expiration date on a particular law or set of provisions which is either automatic or subject to a review.³

The key idea behind sunset clauses is that specific situations that might need to be regulated are of temporary nature and do not require ‘permanent’ legislative solutions. For example, relief measures adopted to respond to natural disasters such as earthquakes, tsunamis or other emergencies are, by definition, temporary and have a predefined duration. Because the exact duration for which measures will be necessary cannot always be determined with precision, a requirement for review prior to expiry or extension allows decision makers to intervene at a specific point in time.

This simple (but smart) idea was then transferred into sectors where rapid developments quickly rendered legislation outdated, where there was little certainty or insufficient evidence to determine what needed to be regulated. Especially when there were important concerns with regard to potential adverse effects on fundamental rights, sunsets combined with review clauses were a solution that offered the possibility to legislators to revisit assumptions, provisions and their impact at a later stage in order to make decisions based on evidence within a specific timeframe.

³ Kouroutakis, A., *The Constitutional Value of Sunset Clauses: An Historical and Normative Analysis* (2016, Routledge).

A more recent, and niche area, where sunset clauses are used is experimental legislation and the effort to ‘test’ legislative solutions for a specific period of time or in a specific territory or population group before deciding whether or how to legislate in a more permanent way.⁴

Sunset clauses resurfaced during the COVID pandemic with the main function to ensure the temporary nature of restrictive measures. However, sunset clauses are also used in other areas like terrorism legislation, tax law or contract law, even in the context of Brexit.⁵

Several advantages are associated with the use of sunset and review clauses.⁶ They are a mechanism to keep the statute book ‘healthy’, reduce spending, increase the level of government services, reduce red tape and monitor regulatory burden. They are a way to deliver clearer laws, maintain the alignment of legislation with policy and ensure that legislation is monitored throughout its lifecycle. They are a mechanism to appraise the responsiveness of legislation to the regulated problems and enhance its effectiveness and quality. They are also seen as safeguards for the potential abuse of emergency powers.⁷

Concerns are also raised, especially in relation to legal certainty,⁸ their potential to facilitate political manoeuvring and bargaining and the extent to which they are the “spoonful of sugar”⁹ required to push ‘bad’ or controversial legislation through Parliament.

In theory, sunset clauses have the potential to provide safeguards for democracy and human rights and improve the quality of legislation. Practice shows however that the effectiveness of sunset and review clauses is dependent upon the quality of their drafting and a meaningful parliamentary review on contentious issues. This paper will attempt to address some common challenges observed in the use of sunset clauses in practice and will propose some simple solutions for their effective use.

⁴ Ranchordás, S., “Sunset Clauses and Experimental Regulations: Blessing or Curse for Legal Certainty?” (2015) 36:1 *Statute Law Review* 28–45.

⁵ Molloy, S., Mousmouti, M. and De Vrieze, F., *Sunset Clauses and Post-Legislative Scrutiny: Bridging the Gap between Potential and Reality* (Westminster Foundation for Democracy, PLS Series, February 2022) <<https://www.wfd.org/what-we-do/resources/sunset-clauses-and-post-legislative-scrutiny-bridging-gap-between-potential>>.

⁶ Mousmouti, M., *Designing Effective Legislation* (2019, Edward Elgar Pub); Xanthaki, H., “Sunset clauses: a contribution to legislative quality”, in Ranchordás, S. and Roznai, Y. (eds.), *Time, Law, and Change: An Interdisciplinary Study* (2020, Hart Publishing: Oxford, UK). See also Molloy, Mousmouti and De Vrieze *ibid*.

⁷ Molloy, S., “Coronavirus and parliament: A brief history of sunset clauses”, *Prospect Magazine* (28 April 2020); Molloy, S., “Covid-19, Emergency Legislation and Sunset Clauses”, *UK Constitutional Law Association Blog* (8 April 2020).

⁸ Mousmouti, *above n 6*; Molloy, Mousmouti and De Vrieze, *above n. 5*.

⁹ McGarrity, N., Gulati, R. and Williams, G., “[Sunset Clauses in Australian Anti-Terror Laws](#)” (2012) 33 *Adelaide Law Review* 307.

Common challenges in the use of sunset and review clauses in practice

A good sunset clause,¹⁰ because of its exceptional nature and impact on legal certainty, needs to meet a very high level of clarity, specificity and unambiguity. In fact, a sunset clause needs to communicate effectively three key regulatory messages:

- what expires;
- when it expires; and
- what procedures are required for the provision to expire or be extended.

These key regulatory messages need to be accessible and unambiguous for all audiences affected by legislation, so that they can align their behaviors with them. In other words, both lay, professional and expert users need to understand the rights and obligations that legislation confers or imposes on them.

In principle, these three messages do not appear to be particularly challenging to tackle. How difficult can it be to enumerate what expires, set an expiration date and prescribe specific review procedures? Surprisingly however practice shows that some of the challenges associated with the effectiveness of sunset clauses are linked to these three issues and relate specifically to the opaque description of what is due to expire; the complex formulation of expiry dates; and the vague requirements for substantive review. The next sections will examine each of these in turn.

Opaque reference to what expires

The Act, provisions or sections that are due to expire are the main regulatory message of sunset clauses. This information is important in order for the sunset clause to produce effects but also from the perspective of legal certainty, as provisions will automatically disappear from the statute book after the expiry date. Uncertainty with regard to expiry can have important implications both for the subjects of legislation and the legal order.

A sunset clause can apply to the entire Act or regulations or just a segment of them, in which case these need to be determined with precision. For example, section 89 of the *Coronavirus Act 2020* (UK) concerns the entire Act, while section 9 of the *Coronavirus (Scotland) (No. 2) Act 2020* (UK) concerns only Part 1 of the Act. The *Anti-terrorism Act*, SC 2001, c 41 (Canada) names the specific sections that cease to exist. The reference to parts, sections or subsections that expire must be as straightforward as possible without unnecessary complications. In this part of the sunset clause no level of ambiguity is permissible, in order to safeguard legal certainty. A clear enumeration of the specific section/s of the Act that expire should be a clear way of addressing this issue.

There are several examples however that show how this can be drafted in a confusing and complex manner.

¹⁰ On the concept of good legislation, see Mousmouti, above n. 6.

The USA *Patriot Act* provides:

Except as provided in subsection (b), this title and the amendments made by this title (other than sections 203(a), 203(c), 205, 208, 210, 211, 213, 216, 219, 221, and 222, and the amendments made by those sections) shall cease to have effect on December 31, 2005.¹¹

This section starts with an exception before referring to the title and its amendments that are due to expire. In between it lists in detail all sections that are exempt from the sunset. Different regulatory sub-messages are intertwined, mixed, convoluted and presented as one, resulting in a very confusing provision. While the emphasis should be on what expires (as the key message) and then attention can turn to secondary messages (for example, amendments or exceptions), the focus is placed on what does not expire and the reference to amendments makes the provision even more confusing. The final result is a provision that leaves the reader confused and with no certainty on the key issue of this section.

Section 25 of the *Terrorism Act 2006* (UK) on the “Expiry or renewal of extended maximum detention period” (which has been repealed since 2012) offers another example of how key messages can be hidden or lost within too much information or detail. Section 25 reads as follows:

- 25 (1) This section applies to any time which—
 - (a) is more than one year after the commencement of section 23; and
 - (b) does not fall within a period in relation to which this section is disappplied by an order under subsection (2).
- (2) The Secretary of State may by order made by statutory instrument disapply this section in relation to any period of not more than one year beginning with the coming into force of the order.
- (3) Schedule 8 to the *Terrorism Act 2000* (c. 11) has effect in relation to any further extension under paragraph 36 of that Schedule for a period beginning at a time to which this section applies—
 - (a) as if in sub-paragraph (3)(b) of that paragraph, for “28 days” there were substituted “14 days”; and
 - (b) as if that paragraph and paragraph 37 of that Schedule had effect with the further consequential modifications set out in subsection (4).
- (4) The further consequential modifications are—
 - (a) the substitution of the words “a judicial authority” for paragraphs (a) and (b) of sub-paragraph (1A) of paragraph 36;

¹¹ *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA Patriot Act) Act of 2001*, 18 USC 1, section 224.

- (b) the omission of sub-paragraphs (1B) and (7) of that paragraph;
 - (c) the omission of the words “or senior judge” wherever occurring in sub-paragraphs (3AA) and (5) of that paragraph and in paragraph 37(2); and
 - (d) the omission of the words from “but” onwards in paragraph 36(4).
- (5) Where at a time to which this section applies—
- (a) a person is being detained by virtue of a further extension under paragraph 36 of Schedule 8 to the Terrorism Act 2000,
 - (b) his further detention was authorised (at a time to which this section did not apply) for a period ending more than 14 days after the relevant time, and
 - (c) that 14 days has expired,
- the person with custody of that individual must release him immediately.
- (6) The Secretary of State must not make an order containing (with or without other provision) any provision disapplying this section in relation to any period unless a draft of the order has been laid before Parliament and approved by a resolution of each House.
- (7) In this section “the relevant time” has the same meaning as in paragraph 36 of Schedule 8 to the Terrorism Act 2000.

The heading of the section refers to extended maximum detention period as the subject to expiry. One would expect the content of the provision to unpack the elements which are key to the message codified in the heading. Yet the content of the provision offers very little information on that, or at least not in a direct way. Subsection (1) indicates the time of expiry and subsection (2) the procedure. Subsection (3) is a quiz as it makes a reference to Schedule 8 ... *that has effect in relation to any further extension under paragraph 36 of that Schedule for a period beginning at a time to which this section applies...* but it is still unclear whether this touches upon the heart of the regulated issue. Subsection (4) refers to consequential modifications and so on. Once again, the reader is left baffled with too much information and detail on issues which are peripheral to what the heading promises to deliver, namely the expiry or renewal of extended maximum detention period.

The lack of clarity with regard to what is due to expire is not a secondary matter. Any legislative provision that fails to communicate a clear message is of dubitable quality. But a sunset clause that leaves ambiguity on this particular issue is a provision that might compromise fundamental rights and allow room for interpretation, manipulation and uncertainty, especially when the expiry is automatic and not linked to a review.

Unclear /complex formulation of expiry dates

The second key message of a sunset clause is *when* provisions are due to expire. Again, this does not seem like a particularly complicated matter to legislate. Indicating a specific date

on which provisions expire would be the simplest way of conveying a clear message that everyone can understand without leaving any room for doubt. For example, the *Coronavirus (Scotland) (No. 2) Act 2020* (UK) provides:

9 Expiry

(1) Part 1 expires on 30 September 2020.

If a specific date cannot be identified as the benchmark for expiry, then some sort of formula has to be integrated in legislation. This means that some formulas or benchmarks have to be used and the key question is what kind of benchmarks are used and how easy are these to decipher. For example, the *Anti-terrorism Act* (Canada) reads:

83.32 (1) Sections 83.28, 83.29 and 83.3 cease to apply *at the end of the fifteenth sitting day of Parliament after December 31, 2006* unless, before the end of that day, the application of those sections is extended by a resolution – the text of which is established under subsection (2) – passed by both Houses of Parliament in accordance with the rules set out in subsection (3).¹²

This provision names a date (December 31, 2006) but only to indicate this as the starting date for calculating the “fifteenth sitting day of Parliament”. This raises two main questions:

- Firstly, who can calculate with reasonable certainty the fifteenth sitting day of Parliament, unless they are well versed in the internal procedures of the parliament? When do sitting days start? Are weekends included? Are all weekdays included? When is the fifteenth sitting day? Why are sitting days such an important benchmark for identifying the date for the review?
- Secondly, given that a date has already been identified in the Act, why can’t the legislator ‘do the maths’ and give to the users of legislation the information that is relevant to them rather than lay out a formula that is incomprehensible to most?

What is even more confusing is that there is no obvious reason why the sunseting date needs to be set out in such a complicated manner. The legislator could indicate a date in January or February (when the 15th sitting day of Parliament is likely to be) or, if that is not possible, could chose a benchmark that would be easier to work out. After all, what is important is to determine a clear deadline for the review.

In an equally opaque manner, the *Terrorism Act 2006* (UK) under section 25 refers to expiry as:

any time which –

(a) is more than one year after the commencement of section 23; and

¹² *Anti-terrorism Act*, SC 2001, c 41 (Canada), subsection 83.32(1) (emphasis added).

- (b) does not fall within a period in relation to which this section is disapplied by an order under subsection (2).

Commencement is a more accessible way of calculating an expiry date, although someone might wonder if this is different from the day on which the Act is adopted. However, the formulation “more than one year”, instead of 12 months or 1 year, is unnecessarily vague and does not aid understanding. In this example as well, reading the provision leaves the reader with doubts as to whether they have understood well or if their calculations are accurate. The aim of a good provision is to answer questions and eliminate doubts rather than raise them.

COVID regulations that did not refer to specific dates used less complex benchmarks for calculating the expiry date. The *Coronavirus Act 2020* (UK) reads:

89 Expiry

- (1) This Act expires at the end of the period of 2 years beginning with the day on which it is passed, subject to subsection (2) and section 90.

In this case, the day on which an Act is passed is a more reasonable point of reference, given that this can be figured out without too much effort and with information that is available in the public domain.

Again, the lack of clarity with regard to the expiry dates is not a secondary matter. Expiry dates cannot be a mystery, should not be complicated and should be unambiguous. A clear and specific date would be the most straightforward way to address this matter. However, if a specific date is not possible for any reason, and some formula needs to be introduced in legislation, it is important to ensure that the formula is as simple as possible, and that the points of reference can be understood not only by experts but also by any interested party.

Vague requirements for substantive review

The conditions under which certain provisions will expire or will be renewed is the third message of a sunset clause. As already mentioned, the prerequisite to review provisions before they expire is a “checkpoint” to ensure that necessity is revisited or that adverse effects are examined in order to adopt corrective measures.

In practice, review requirements associated with sunsets are very vague in relation to what is required for their extension. The decision to extend the duration of the provisions can be made without an explicit link to a thorough review, other than the need for approval by the Houses of Parliament. The *Anti-terrorism Act* (Canada) requires “a resolution... passed by both Houses of Parliament”.¹³ The *Terrorism Act 2006* (UK) refers to “[a]n order of the Secretary of State made by statutory instrument ...which needs to have been laid before

¹³ *Anti-terrorism Act* SC 2001, c 41 (Canada), subsection 83.32(1).

Parliament and approved by a resolution of each House”.¹⁴ The [Coronavirus Act 2020](#) (UK) requires “the motion to be debated and voted on by the House of Commons”.¹⁵

These provisions describe the type of decision and the authority to adopt it but do not set any substantive requirements for a review process that will examine contentious points, the effectiveness or the working of the measures under review or any other controversial matter. This severs the link between the reasons for introducing the review clause and the actual review, especially given that the composition of the government or the legislature might be different. In this sense, review clauses that identify the specific topics that need to be revisited during the review can help ensure continuity in decision making, direct attention to the points of tension and ensure that substantive scrutiny will be exercised. On the contrary, by placing emphasis on procedure rather than substance, the rationale of sunsets and review clauses is compromised.

Part 2

A practitioners’ response

It was a real delight that my first contribution to the CALC community as CALC President was to present to members at the CALC Conference on a substantive legislative drafting matter. Drafting is of course the glue that binds us all together.

It is certainly true that sunset clauses are not a new phenomenon, but they have had a moment recently with the deluge of emergency legislation needed to respond to the COVID-19 pandemic, and it looks as if that moment will not be a fleeting one.

The first time a legislative sunset cast a shadow on my own drafting career happened not long after I joined the Scottish Government’s legislative drafting office¹⁶ when the Scottish Parliament was established in 1999.

There is a road bridge which spans the River Clyde in the west of Scotland. It is called the Erskine Bridge. Some of you may have had the joy of crossing it on a trip to the bonnie, bonnie banks of Loch Lomond. The bridge had a moment in the international spotlight fairly recently when the Greenpeace Rainbow Warrior ship squeezed under it by only a very few inches at lowest tide on its way to the COP26 climate summit held in Glasgow in November 2021.

The sunset over the Erskine Bridge that resonates for me is not however the one casting golden hour light over the green and often rain-soaked Scottish hills that lie behind it.

¹⁴ *Terrorism Act 2006* (UK), section 25(2) and (6).

¹⁵ *Coronavirus Act 2020* (UK), section 98(3).

¹⁶ Then the Scottish Executive’s Office of the Scottish Parliamentary Counsel (formed on 20 May 1999 from parliamentary counsel previously working in the Lord Advocate’s Department).

Instead, it is the sunset clause which is contained in the Act of Parliament passed in 1968¹⁷ which authorised the charging of tolls for cars passing over the then newly constructed bridge. That clause provided for the Act to expire at extendable intervals of 5 years.

For some reason, possibly connected to the transfer of responsibilities for transport between the UK and Scottish Governments on devolution, the sunset clause was overlooked in early September 2001 and the Act expired without anyone noticing, including as it turns out the 26,000 or so motorists who continued to be charged to cross the bridge every day despite the lawfulness for those charges having evaporated into the sunset.

It fell to me to draft emergency legislation which, metaphorically at least, reversed the direction of the sun by pulling it back up over the *Erskine Bridge Tolls Act 1968* and restoring the lawfully authority for charging of tolls.¹⁸ One lesson learned from this whole exercise is that not only is the undertaking of post-legislative review often a wise course of action in relation to any legislative sun setting, it is also sensible not to entirely forget before darkness falls that the sun does always set.

Before getting into some of my subsequent brushes with sunset clauses I will first respond to Maria's well thought out observations on the accessibility, or in some cases lack of accessibility, of drafting approaches adopted for some sunset clauses. Although I do take some heart from her acclaim for one of the most recent Scottish examples,¹⁹ I certainly can't take credit for drafting it myself.

Drafting sunset clauses, like drafting nearly all other legislative provisions, can be highly complex. Drafters need to ensure that the legislative mechanism will work as intended in every scenario, taking into account the multitude of statutory and interpretive rules on transitions, savings and repeals that come into play whenever a law is commenced or expires. These are very often some of the most fiendishly tricky provisions to get right.

For example, I remember spending what seemed an interminable amount of time ensuring that the *Erskine Bridge Tolls Bill* was crafted in a way that avoided retrospectively criminalising any drivers who thought they had dodged a toll but had not in fact broken the law because the charging regime was not lawfully in force when they crossed the bridge. And then even more time to make sure that redirecting the sun to come back up over the horizon did not nullify the lawfulness of the Ministerial decision to suspend the charging of tolls from the moment at which the oversight was spotted to the time when the emergency legislation came into force (as failing to do so would retrospectively criminalise those who had passed over the bridge for free during that period).

There is no doubt that setting out a clear date on which the sun will set on a provision is probably best for the reader in most cases, whether the parliamentarian scrutinising the Bill

¹⁷ *Erskine Bridge Tolls Act 1968* (UK, c.4).

¹⁸ [Erskine Bridge Tolls Act 2001 \(asp 12\)](#).

¹⁹ [Coronavirus \(Scotland\) Act 2020 \(asp 7\), section 12](#).

or more importantly anyone affected by or seeking to operate the resulting law. If it is possible to simply set a date or even a time (avoiding midnight of course) then a drafter would, I hope, always opt for the clearest option available. A combination of the complexity of commencement, transitional and savings regime, the procedural rules governing the timing of the approval and enactment of legislation and sometimes the practical or political imperatives surrounding the need to legislate will often together play a part in taking that option away from a drafter seeking precise, effective law for every circumstance.

More generally, the existence of an expiry mechanism will also nearly always cause a drafter to ponder over the drafting approach taken to the provisions to which the sunset will apply, which in some cases may be the whole Act. A significant impact of a sunset clause (whether capable of extension or not) is that it creates transient law and a drafter will need to give some thought to how the new temporary law is to merge and be presented within the existing permanent statute book. How best to do so will depend on a number of things, including how transient the provision is likely to be (e.g. is there mechanism for the provisions to become permanent or is the sunset irreversible), the length of time for which any temporary effect may apply, how the temporary provision may be displayed in the online statute book (taking into account the editorial approach of publishers) and the current state of any provisions being amended. Quite often, the approach taken for a temporary provision would not be the same as that for a permanent one. As ever, the drafter must weigh up all the options, consider the context and engage in some crystal ball gazing before settling on the drafting approach which will produce the best law.

I don't doubt that there are some far from ideal examples of actual sunset provisions out there on the statute book. I may even be responsible for some of them. But for reasons far beyond solidarity with fellow legislative counsel I do always urge a degree of understanding to anyone judging drafting standards from the balcony. I've not yet met a legislative drafter who does not always strive to produce clear law (time constraints permitting) and, these days, who is also not keen to learn from users of legislation on how drafting can be improved.

Since my first encounter with sunsets and the Erskine Bridge, I have over the past couple of decades come across many variations of sunset clauses and reviews. My experience is that they were initially perhaps most common in relation to situations where parliamentary time allowed full scrutiny for legislation which related to circumstances considered temporal (whether a state of heightened terrorism, public health threats or a one-off event like the Commonwealth Games). More recently, there are increasing examples of sunset clauses being proposed where the scrutiny process is, or is at least perceived to be, expedited for one reason or another.

The recent glut of legislation needed to deal with coronavirus has drawn much more attention to sunsetting. It is of course a perfect example of legislation that ticks both boxes as legislators in every jurisdiction sought to tackle the pandemic by way of legislation that

had to be devised, drafted and scrutinised at break-neck pace. Time, or lack of it, is nearly always one of a drafter's biggest foes. I am immensely proud of the herculean effort made by my PCO Scotland team to get emergency coronavirus legislation into great shape in the very limited time available, but no-one would claim that the exceptionally intensive working involved was the ideal environment in which to create very well-drafted law.

One more recent development worthy of some reflection is the increasing role that sunset clauses may be having in what is sometimes described as 'consensus gathering' politics. My own experience is mostly framed in Scotland where the Scottish Parliament's proportionate electoral system means that a single party parliamentary majority is a rare thing. It has happened only once in 6 sessions and even then produced a slim majority of only one member. Consensus gathering is arguably even more critical in the minority or coalition style situations which proportional systems produce since, as every drafter knows, Bills are made to pass as razors are made to sell.

Consensus politics, and compromise, is generally a good thing for legislative quality. But I would recommend always raising a cautious eyebrow at sight of a proposal to include a sunset clause where the situation to be regulated is not temporary, nor an emergency, nor even particularly innovative but a sunset is still sought solely because the policy being implemented is controversial or simply disliked.

Where the Bill concerned is going through a full parliamentary scrutiny process, introducing a sunset clause to help obtain support needed to secure Parliamentary passage might well be viewed as inconsistent with best legislative practice if it would allow a future Parliament, even perhaps of a different persuasion, to allow the law to revert to its previous state without having to undertake the full scrutiny processes needed to change it in the first place. Where a sunset is proposed in this sort of scenario it is of even more pressing importance to consider putting an appropriate review mechanism in place to ensure that equivalent scrutiny is given before the law changes back.

Overall, sunset clauses can offer a useful option for legislators faced with a pressing need to change legislation quickly or seeking to introduce an innovative new law, particularly if the sunset is linked to a post-legislative review, but sunset clauses are not universally a good thing. As my Erskine Bridge case demonstrates, there may be times where emergency legislation is made when adding a subsequent post-legislative review process would be almost entirely pointless.

On that note, I conclude by emphasising my personal view that the need and desirability for a legislative sunset, and the best way to express it, is always best considered on a case by case basis to ensure that each piece of legislation is designed to meet its own unique circumstance.

Previous CALC conferences have been entirely devoted to exploring whether legislative drafting is more an art or a science. Nearly all of us have a view on that, but I strongly believe that creativity and independence of thought need to be directed to each individual

situation which the drafter must cater for. The minds of legislative drafters are best used when fully focussed on the unique circumstance in which a provision is being drafted. Being able to do this well is our unique talent, our super power, and one which we should all treasure even if those we work with don't always see things the same way.

So if sunsets do keep proliferating as anticipated, and I expect that they might even if not absolutely always for the right reasons, it is without doubt invaluable to have comprehensive research and analysis of the type undertaken by Maria to inform their development and to guide legislative drafters towards making sure that they are always drafted to be as clear and accessible as is possible in the precise circumstances with which the drafter is confronted.

Conclusion - key elements of effective sunset clauses

To conclude, sunset clauses are not a panacea for all the vices of legislation. Caution is advised when considering whether to include a sunset clause or expiration provision in a Bill or a provision for mandatory review. It is important to question the necessity for sunset clauses especially when the situation to be regulated is neither temporary, nor an emergency, nor innovative but simply the result of consensus politics or controversial policies.

Drafting sunset clauses is a highly complex task in the effort to ensure that the legislative mechanism will work in every scenario. Some key elements of an effective sunset clause include:

- A clear and unambiguous definition of the subject of sunseting;
- A clear sunseting date or an easy-to-figure-out formula to calculate the expiry date;
- Where appropriate, an explicit requirement for a review and the subject of review.

The drafter of a sunset clause will also need to consider the best way in which the temporary law will be merged and presented within the existing statute book.

A review clause that accompanies a sunset clause needs to identify with precision what is subject to review, especially if specific concerns led to the decision of introducing a sunset. The subject of review can be the degree of attainment of the objectives of the Act, the necessity for measures in question, implementation, costs, or anything else. The lack of focus of the review can leave room for a superficial review that ignores or avoids controversial topics.

Additional topics that can add to the effectiveness of a sunset review include:

- The definition of the authority to conduct the review – an effective review clause would determine the body responsible to conduct it based on considerations as to which body is best placed to collect implementation data and to offer a comprehensive and objective assessment of the working or specific aspects of the Act.

- Procedure for the review or expiry – the expiry or extension of clauses due to expire often require the observance of a specific procedure. It is important to consider the active involvement of the legislature in the decisions around the expiry of legislation as a way to add to the objectivity and the democratic deliberation around sunset clauses.

Overall, sunset clauses can offer a useful option for legislators faced with a pressing need to change legislation quickly or seeking to introduce an innovative new law. However, the need and desirability for a legislative sunset, and the best way to express it, is always best considered by the legislative drafter on a case-by-case basis to ensure that each piece of legislation is designed to meet its own unique circumstance.

Book Review

Thornton's Legislative Drafting, 6th edition

By Helen Xantaki, published by Bloomsbury Professional, 2022

Reviewed by John Mark Keyes¹

The 6th edition of a legal text is in itself a tribute to its durability and usefulness. In the over 50 years since G.C. Thornton published his 1st edition in 1970, his book has stood the test of time and admirably fulfilled the aim he stated in the preface to that edition:

... to provide a practical guide for the use of the legislative draftsman, particularly for the lawyer who comes fresh to the task of adding a modest trickle to the “viscous sea of verbiage” which according to one writer the law is comprised of.²

Under the direction of Professor Xantaki, the 5th and now 6th editions (which she modestly describes herself as having “edited”) have continued to pursue Thornton’s original objective of providing practical guidance to those engaged in drafting legislation.

The structure of the 6th edition is much the same as previous editions. It first deals with drafting generally: the basic components of legislation (*words*), how they are strung together in sentences (*syntax*) and the elusive concept of *style*. It then contains an interlude on Interpretation Acts before turning to drafting processes. Finally, it sets out what is perhaps its most frequently consulted advice on drafting and arranging particular types of provisions.

To this structure, Professor Xantaki has added bookends.

At the beginning is a new chapter entitled “Legislation as a tool for regulation”. It encapsulates the main elements of her work on ensuring the quality and effectiveness of legislation.³

At the other end, are new chapters on the transposition of EU legislation and on pre- and post-legislative scrutiny.

The first of these signals an intent to reach European audiences, despite the irony of discussing drafting in English – the language of the one member to have withdrawn from the EU. However, given that English is still commonly used in the operations of the EU and the overwhelmingly most common second language of its members, this chapter may well have an enduring audience beyond Ireland.

The final chapter continues the discussion of quality and effectiveness in the first chapter by suggesting methodologies for ensuring them. The methodologies focus on communicating the substantive content of legislation. Quality and effectiveness in terms of the content is something with which drafters in the Westminster tradition have not principally been

¹ Sessional Professor, University of Ottawa.

² Thornton, GC, *Legislative Drafting*, (London: Butterworths, 1970) at v-vi.

³ Xantaki, H, *Drafting Legislation: Art and Technology of Rules for Regulation* (Oxford: Hart Publishing, 2014).

concerned. Drafting has been recognized as a distinct discipline demanding a certain distance from the policy-making that produces the content of legislation. The overwhelming predominance of drafting matters addressed in the 6th edition confirms the wisdom of this separation of roles. Indeed, it repeats verbatim Thornton's discussion of the role of the drafter in the 3rd edition: "Drafters are not and should not be primarily responsible for the development of policy, although they do have important responsibilities in that area." This passage goes on to describe these responsibilities:

... the proper role is more creative than that of a mere wordsmith. The drafter has skills not normally possessed by policy-makers. The drafter is an architect of social structures, an expert in the design of frameworks of collaboration for all kinds of purposes, a specialist in the high art of speaking to the future, knowing when and how to try and bind and when not to try at all.⁴

Although the 6th edition also largely maintains the text of earlier editions, it contains some notable changes.

The discussion of style and gender in chapter 4 now acknowledges non-binary gender and comes down firmly in favour of the singular "they".⁵

A further notable change involves the arrangement of legislative provisions. This is an aspect of legislative drafting giving rise to numerous debates and variations in drafting practice around the world. Where should short titles, interpretation provisions and commencement provisions go (beginning or end)? Should administrative bodies be established before or after the provisions they administer? Should transitional provisions be included with the substantive provisions they relate to, or should they be at the end of amending Acts?

The 6th edition notes the shift from reading paper versions of legislation to reading or downloading electronic online versions. There is no doubt this has changed the way people read and use legislative texts. There is also no doubt far more people are reading legislation than ever before, and most of them are not members of the legal profession. How should this affect the arrangement of legislative provisions?

The 6th edition moves short titles, interpretation provisions and commencement provisions out of the category of preliminary provisions and includes them with the final provisions. The rationale given is that

It allows the user to focus on the main message communicated by the legislature, and promises greater comprehensibility of what is expected by the user. This facilitates

⁴ Thornton, GC, *Legislative Drafting*, 3rd ed. (London: Butterworths, 1996) at 125; Xantaki, H, *Thornton's Legislative Drafting*, 6th ed. (London: Bloomsbury Professional, 2022) at 155.

⁵ *Ibid.* at 89-92.

greater implementation, which nurtures legislative effectiveness and regulatory efficacy.⁶

However, this rationale seems rooted in paper-based reading. Electronic versions generally have tables of contents with hyperlinks to the related provisions. They also have word-search functionality. Users do not have to read through pages to find what they are looking for. Arguably, what is more important is the standardization of an arrangement within a jurisdiction. Just as there is no real difference between driving on the left or right side of the road, there is no real difference between definitions at the beginning or the end. What is most important is that they always appear in the same place (and that vehicles always drive on the same side of the road).

In the preface to the 6th edition, Professor Xantaki acknowledges the ambiguity inherent in drafting practice and its relativity:

There are rules that apply to [drafting] but these do not enjoy an absolute predictable link between action and result (nomoteleia). ... There is no certainty in anything to do with legislative drafting.

The lack of an absolute link between a drafting choice and its effect makes drafting a relative discipline. And its teachings are equally relative: time and place play a critical role in what works and how.⁷

She here recognizes the challenge and irony of her task in preparing this edition and writing about legislative drafting. It is a discipline devoted to creating rules, but it struggles with rules for itself. There is much about legislative drafting that clearly ensures its effectiveness in helping achieve policy objectives, but there is also much that is debatable in this regard. The indisputable merit of *Thornton's Legislative Drafting* is that it fuels this debate.

⁶ Ibid. at 238.

⁷ Ibid. at vii.