Commonwealth Association of Legislative Counsel

THE LOOPHOLE

April 2025 (Issue No. 1 of 2025)

THE LOOPHOLE

Journal of the Commonwealth Association of Legislative Counsel

Issue No. 1 of 2025

Editor in Chief – Aleksander Hynnä

Editorial Board – Wendy Gordon, John Mark Keyes, Lucy Marsh-Smith, Yen Mascarenhas, Amelia Retter, Bilika Simamba

CALC Council

President – Johnson Okello, Kenya

Vice President – Michelle Daley, Caribbean

Secretary – Annette O'Callaghan, Australia

Treasurer – Adrian Hogarth, United Kingdom

Immediate Past President – Andy Beattie, Scotland, United Kingdom

Council Members –

Phil Chessum, United Kingdom

Albert Edwards, Jamaica

Ben Fraser, Western Australia, Australia

ʻAkanesi ʻEmeline Katoa, Tonga

Rehema Katuga, Tanzania

Jeanne Lee, Singapore

Neil Martin, Wales, United Kingdom

Heinrich Muller, South Africa

Kerri Sinclair, British Columbia, Canada

Editorial Policies

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 CALC's 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.

Submissions and other correspondence about *The Loophole* should be addressed to —

Aleksander Hynnä, Editor in Chief, *The Loophole*

E-mail: loophole.calc@gmail.com

Copyright

All rights are reserved. No part of this publication may be reproduced or transmitted without the permission of the holders of the copyrights. Unless otherwise stated, copyright is held by the authors of the published material. This restriction does not apply to transmission to CALC members or to reproduction for that purpose.

Disclaimer

The views expressed in the articles contained in this issue are those of the contributors alone and do not necessarily reflect those of the CALC Council.

Contents

Editor’s Notes 1

South Africa’s Participatory Democracy and Law-making: A Tale of the Unrelenting Standards of Public Involvement and her Best Friend the Constitutional Court, Who Keeps Reminding Parliament What a Terrible Boyfriend He Is 2

Telana Halley-Starkey 2

Processes and Practices to Protect Confidentiality and Privileges during the Co-Development of Legislation: British Columbia’s Approach 16

Kerri Sinclair 16

From Colonialism to Citizen Engagement: Reforming Legislative Processes in Nigeria and Ghana 20

Emmanuel K. Nartey 20

How Do You Solve a Problem Like a Typo? Some Pondering on Bill Corrective Powers in the Canadian Context 44

Charlie Feldman 44

How to Ensure Regulatory Completeness, with Classic Tools and Large Language Models 54

Manfred Kohler 54

Implementation of Meaningful Public Participation in the Regulation-Making Process: Government Regulation in Lieu of Act (PERPU) 74

Maria Priscyla Stephfanie Florencia Winoto and Riyani Shelawati 74

Book Review 85

Essentials for Drafting Clear Legal Rules 85

Editor’s Notes

Welcome to another edition of *The Loophole*, the journal of the Commonwealth Association of Legislative Counsel. In this edition, we present six articles that are based on presentations at recent CALC conferences as well as a book review.

Telana Halley-Starkey and Emmanuel Nartey gave presentations at the 2024 CALC Conference (in Trelawny, Jamaica) on public participation in the legislative process, and this edition opens with articles based on their presentations. Halley-Starkey reviews jurisprudence from the Constitutional Court of South Africa on the constitutional requirement to allow participation by the public in legislation. Nartey examines the continuing impact of colonialism on the legislative processes of Ghana and Nigeria and argues for the reintegration of pre-colonial governance models in those processes.

Next, Kerri Sinclair describes the co-development of legislation in British Columbia, Canada between the government and Indigenous Peoples. She sets out some of the measures adopted during the co-development process to protect privileges and confidentiality. An article from Charlie Feldman rounds out the quartet of articles from the CALC Conference of last year. He examines the authority of parliamentary law clerks in Canadian legislations to correct non-substantive errors.

The next two articles come from the recent Australasian PCC/CALC 2025 Regional Drafting Conference held in Perth, Western Australia. Manfred Kohler discusses regulatory completeness in legislation (namely, the presence of all elements necessary for the successful implementation and enforcement of a legislative scheme) and the existing tools available to legislative counsel to assess regulatory completeness, including current artificial intelligence platforms.

Stephfanie Winoto and Riyani Shelawati’s article is based on their presentation at the Perth conference. Their article returns to the topic of public participation in the law-making process, here in connection with the authority of the President of the Republic of Indonesia to make a regulation in an emergency that must then be approved by the House of Representatives.

Lastly, John Mark Keyes provides a review of *Essentials for Drafting Clear Legal Rules*, a new work by Bryan Garner and Joe Kimble, two leading authors in the field of legal drafting.

Many thanks to the authors for their contributions, to the editors for their work in reviewing them, and to you, the readers, for your interest in *The Loophole*. Please reach out to us at loophole.calc@gmail.com with any comments or questions. We would love to hear from you.

Aleksander Hynna
Ottawa, April 2025

South Africa's Participatory Democracy and Law-making: A Tale of the Unrelenting Standards of Public Involvement and her Best Friend the Constitutional Court, Who Keeps Reminding Parliament What a Terrible Boyfriend He Is

Telana Halley-Starkey[1]

Abstract

It has been thirty years since the dawn of the South African democracy and 18 years since the landmark South African Constitutional Court judgment of Doctors for Life v the Speaker of the National Assembly.[2] *This judgment emphasised that South Africa was founded on an open and democratic society in which governance was based on the will of the people. This principle is expressed through a number of provisions within the Constitution of the Republic of South Africa, 1996 ("the Constitution"), which places duties on the national and provincial legislatures to facilitate public involvement in the law-making process. The crux of this judgment was that the South African Parliament may have a broad discretion to determine how to best fulfill its constitutional obligation to facilitate public involvement in law-making, but the basic standard of that involvement is that Parliament must act reasonably.*

The Constitutional Court held that the duty to facilitate public involvement will require Parliament to provide citizens not only with meaningful opportunity to be heard in the making of laws that will govern them, but also the duty to take measures to ensure that people have the ability to take advantage of the opportunities, and the Constitution demands no less. Since this judgment, there have been various other Constitutional Court decisions involving Parliament and the

[1] BA and LLB (Rhodes), LLM (UCT). Legal Advisor (legislative drafter) to the Parliament of South Africa.

[2] *Doctors for Life v the Speaker of the National Assembly* 2006, (12) BCLR 1399 (CC) [*Doctors for Life*].

reasonableness of its facilitation of public involvement. Herein lies the central question this paper wishes to address: if law-making is a relationship between Parliament and public involvement, the Constitutional Court could be seen anecdotally as the best friend of public involvement, constantly reminding Parliament to be reasonable at all times when honouring its constitutional obligation to involve the public in law-making. However, as South Africa does not have a legislative guide that sets out what is expected of Parliament in terms of public participation, it relies heavily on jurisprudence, and over the years Parliament has been found to have strayed from that relationship on more than one occasion. This paper seeks to address the pitfalls of public involvement in law-making and considers whether it comes at a cost to the law-making process, through examining the various jurisprudence relating to public participation and law-making. Will Parliament finally become the model boyfriend that public involvement deserves, or is his girlfriend just too demanding?

Introduction

The Republic of South Africa's Constitution, 1996 ("the Constitution") begins with a preamble, and it's so moving that, at first glance, one would almost consider it romantic in nature:

> We, the people of South Africa, recognise the injustices of our past; honour those who suffered for justice and freedom in our land. We, therefore, through our freely elected representatives, adopt this Constitution as the supreme law of the Republic so as to lay the foundation for a democratic and open society in which government is <u>based on the will of the people</u> and every citizen is equally protected by law;" (own emphasis)

I once attended a guest lecture of one of the first Constitutional Court[3] judges, Albert "Albie" Sachs, who explained that when all the great minds of South Africa sat together and wrote the Constitution, it was suggested that in order for the post-Apartheid[4] South African people to buy into the Constitution, and the idea of constitutionalism, they (the people), needed to own the Constitution, they needed to believe that the Constitution was "theirs" so to speak, and hence the beginning of this poetry: "We, the people of South Africa…". It is with this understanding that I begin this paper, that the standard has been set in our Constitution. The standard being that in South Africa the government, and law-making in particular, is based on the will of the people. Our Constitution therefore reflects a democracy that is both representative and also participatory. Representative in the sense that it is based on the "will of the people", but also participatory considering that sections 59, 72 and 118 of

[3] This court is the highest court in the Republic of South Africa, was born of the country's first democratic Constitution in 1994. The Court consists of eleven judges who are appointed by the President from a list drawn up by the Judicial Service Commission.

[4] Apartheid was an ideology that was supported by the white minority ruling government of South Africa, which consisted of laws that governed the separate development of the South African people along racial lines between 1948 – 1993.

the Constitution all provide that the legislature must facilitate public involvement in their legislative processes.

After years of racial segregation, oppression and a government that contained features of a system that was "hostile to the basic principle of rulemaking",[5] in 1994 democratic South Africa was riding the wave of the romanticism that comes with any newly democratic country: peace flags waving, a listening constitution,[6] cries of "let freedom reign", a representative Parliament and judiciary that was pivotal in law-making by providing interpretation to this listening constitution.

Democratic South Africa, with its representative and participatory nature, is now 30 years old. Yet, Parliament, legislative authority of the national sphere of government as set out in section 43 of the Constitution,[7] has on more than occasion, been brought before the Constitutional Court to be criticised for its interpretation of its duty to provide for public involvement in law-making. This paper seeks to consider the various judgments relating to public participation and the guidelines set by the Constitutional Court with the aim to provide for a clear set of rules that Parliament should follow and the pitfalls in involving the public in law-making, considering that there is no legislation in South Africa that guides public involvement in law-making. I will consider the standard set by the Constitution, and in doing so analyse seven precedent-setting Constitutional Court judgments in an effort to show that Parliament is trying but does not always meet the benchmark set by the Constitutional Court.

The obligation and Parliament's relationship with the people of South Africa

It has been said that South Africa's discriminatory past set the scene for the robust democracy that is the legislative authority of South Africa. In this context, sections 59 and 72 of the Constitution impose a duty on the National Assembly and the National Council of Provinces to facilitate public involvement. Section 59(1)(a) of the Constitution provides that the National Assembly must facilitate public involvement in the legislative and other processes of the National Assembly and its committees. Similarly, section 72 (1)(a) of the

[5] L. Baxter, "Rulemaking and policy formation in South African Law Reform" (1993) 176 *Acta Juridica* at p 184.

The notion of "rulemaking" is an American administrative law concept. It involves a set of flexible procedures that a public body follows when it wishes to develop standards to bind the public. These "binding standards" must then be published together with a reasonable explanation of their purpose, while inviting the public to comment either in written or in oral form. Once these comments have been received, the public body analyses all comments and adopts the standard in response to those comments.

[6] This term is borrowed from a paper by M. Bishop, *"Vampire or Prince? The listening Constitution and Merafong Demarcation Forum & Others v President of South Africa and Others"* (2009) 2 *Constitutional Court Review* 313.

[7] **43. Legislative authority of the Republic**

In the Republic, the legislative authority

a. of the national sphere of government is vested in Parliament, as set out in section 44;

b. of the provincial sphere of government is vested in the provincial legislatures, as set out in section 104; and

c. of the local sphere of government is vested in the Municipal Councils, as set out in section 156.

Constitution stipulates that the National Council of Provinces must facilitate public involvement in the legislative and other processes of the Council and its committees. In measuring whether Parliament has met the obligation of facilitating public involvement, the Constitutional Court has provided us with guidelines through its rich jurisprudence.

Doctors for Life International v Speaker of the National Assembly and Others 2006 (6) SA 416 (CC)

This application involved a challenge relating to the constitutionality of the *Choice on Termination of Pregnancy Amendment Act, 2004* (Act No. 38 of 2004), the *Sterilisation Amendment, 2005* (Act No. 3 of 2005), the *Traditional Health Practitioners Act, 2004* (Act No. 35 of 2004) and the *Dental Technicians Amendment Act, 2004* (Act No. 24 of 2004). Parliament had enacted these four health statutes (collectively called by the Constitutional Court the "health legislation") and the applicant, Doctors for Life International, a non-profit company, claimed that Parliament in passing the health legislation failed to invite written submissions and conduct public hearings and therefore failed its duty to facilitate public involvement in the legislative processes.[8] The issue that the Constitutional Court grappled with was the nature and scope of the constitutional obligation of a legislative organ of state to facilitate pubic involvement in its legislative processes and the consequence of the failure to comply with that obligation.

The legislative authority consists of two Houses, the National Assembly and the National Council of Provinces. Section 42(4) of the Constitution defines the role of the National Council of Provinces and provides that it represents the provinces of South Africa in order to ensure that provincial interests are taken into account in the national sphere of government. This is done by providing for participation in the national legislative process and by providing a national forum for public considerations of issues affecting each of the nine provinces of South Africa. The National Council of Provinces performs a function similar to that of the National Assembly but from the point of view of provinces.[9]

The National Council of Provinces therefore took a view that public hearings should be held on at least some aspects of the Bills and held in some of the provinces. However, as the health legislation affected provinces directly and generated great public interest at the National Council of Provinces, the Constitutional Court had to consider whether those hearings and proceedings satisfied the duty to facilitate public involvement.[10]

There are two important principles established by the Court in this judgment, the first being that the Constitution demands that the public must be afforded a meaningful chance of participating in the legislative process.[11] Drawing on the judgment of *Minister of Health and*

[8] *Doctors for Life* at para 2.

[9] *Doctors for Life* at para 79.

[10] *Doctors for Life* at para 164.

[11] *Doctors for Life* at para 145.

Another v New Clicks South Africa (Pty) Ltd and Others,[12] the Constitutional Court held that "reasonableness" is the standard to be applied in determining whether Parliament discharged its obligation to afford the public a meaningful chance to participate in the legislative process. The Constitutional Court held that a reasonable opportunity must be provided and the public should know the issues at hand in order to have an adequate say.[13] The second principle that the Constitutional Court determined was that the "reasonableness" of Parliament's conduct would depend on the circumstances and facts at issue.[14] The Constitutional Court therefore provided a guideline that could be considered when determining whether Parliament's conduct was reasonable in as far as facilitating meaningful public involvement. This guideline included:

(1) the rules Parliament adopted for this purpose – what Parliament itself deems reasonable;

(2) the nature and importance of the legislation in question (its impact on the public); and

(3) any need for its urgent adoption (time and expense).[15]

However, when it came to the time or urgent adoption of the legislation, the Court noted that the timetable used to meet a deadline should be subordinate to the rights guaranteed in the Constitution.[16] The Court further noted that saving money and time in itself does not justify an inadequate opportunity for public involvement.[17] Determining what was reasonable required the Court to strike a balance between respecting the Legislature's autonomy and the citizenry's right to participate in public affairs.[18]

More so, the Constitutional Court considered both the representative and participatory nature of democratic South Africa, which was founded on the principles of transparency, responsiveness and accountability and therefore gave the public an opportunity to participate in the law-making process.[19] However, although the Constitution imposes a special duty on the legislature, it presupposes that the legislature will have considerable discretion in determining how best to achieve this balanced relationship between the participatory and representative aspects of democracy.[20]

[12] *Minister of Health and Another v New Clicks South Africa (Pty) Ltd and Others,* (2006) (2) SA 311 (CC).

[13] *Doctors for Life* at para 194.

[14] *Doctors for Life* at para 126.

[15] *Doctors for Life* at para 194.

[16] *Doctors for Life* at paras 70-71.

[17] *Doctors for Life* at paras 70-71.

[18] *Doctors for Life* at paras 70-71.

[19] *Doctors for Life* at para 138.

[20] *Doctors for Life* at para 122.

Matatiele Municipality and Others v President of the RSA and Others 2007 (1) BCLR 47 (CC)

In *Matatiele Municipality and Others v President of the RSA and Others,*[21] the Constitutional Court was faced with having to determine the constitutionality of the *Constitution Twelfth Amendment Act of 2005* and the *Cross-boundary Municipalities Laws Repeal and Related Act, 2005* (Act No. 23 of 2005), which aimed to abolish cross-boundary municipalities and alter provincial boundary lines. Once again Parliament was found lacking in terms of public participation by the Constitutional Court. The Constitutional Court had to determine whether there was sufficient public involvement by the provincial legislatures and whether the decision to relocate the Matatiele local municipality, which originally formed part of the KwaZulu Natal province, into the Eastern Cape province, and to create new municipal boundaries was rational. The Constitutional Court was tasked with considering whether the provincial legislatures of KwaZulu Natal and the Eastern Cape complied with section 118(1)(a) of the Constitution, which provided that provincial legislatures must facilitate public involvement in the legislative and other processes of the legislature and its committee. The main issue was the failure by the KwaZulu-Natal legislature to hold public hearings or invite written representations. This brings us to an important principle raised by the Constitutional Court in finding that the legislature was lacking in public participation. The Court held that the purpose of permitting public participation in law-making is to afford the public an opportunity to influence the decisions of lawmakers, and therefore this requires law-makers to consider the representations made and thereafter make an informed decision. The three principles set by the Constitutional Court can be summarised as ensuring that the legislature:

(i) provides opportunities for the public to be involved in meaningful ways;

(ii) listens to the public's concerns, values, and preference; and

(iii) considers these in shaping their decisions and policies.[22]

The Constitutional Court concluded that should these principles not be adhered to, public participation would have no meaning.[23] Furthermore, the Constitutional Court rejected the argument that the public need not participate in the legislative process as its elected representatives are speaking on the public's behalf, and held that by this argument our democracy is only a representative democracy, and this is not the nature of our democracy, which is both representative and participatory.[24] The Constitutional Court emphasised that the

[21] *Matatiele Municipality and Others v President of the RSA and Others,* 2007 (1) BCLR 47 (CC) at para 56-60 [*Matatiele*].

[22] *Matatiele* at para 97.

[23] *Matatiele* at para 97.

[24] *Matatiele* at para 56.

> more discrete and identifiable the potentially affected section of the population, the more intense the possible effect on their interests, the more reasonable it would be to expect the legislature to be astute to ensure that the potentially affected section of the population is given a reasonable opportunity to have its say.[25]

Land Access Movement of South Africa v Chairperson of the National Council of Provinces 2016 (5) SA 635 (CC)

The Constitutional Court here once again came to the aid of public involvement, in declaring that Parliament yet again failed its obligation to facilitate public involvement in the amendment to the *Restitution of Land Rights Amendment Act, 2014* (Act No 15 of 2014). In this matter, Parliament had taken various steps in the National Assembly to facilitate public consultation in the enactment of the Bill. The Court found that these steps were constitutionally compliant.[26] However, once the legislation was approved at the National Assembly, when the Bill was referred to the National Council of Provinces, the timetable for the processing of the legislation was less than one calendar month. The views and opinions expressed by the public at the provincial hearings did not filter through for proper consideration when the provincial mandates were being decided upon, and therefore deprived the process of the potential to achieve its purpose.[27]

The Court in the *Land Access Movement of South Africa* judgment re-emphasised the standard of reasonableness as laid down in *Doctors for Life.* The reasonableness of Parliament's conduct depends on the particular circumstances and facts at issue.[28] However, the Court held that, when determining whether Parliament's conduct was reasonable, deference would need to be paid to what Parliament considered appropriate in the circumstances, as the power to determine how participation in the legislative process will be facilitated rests on Parliament.[29] Although Parliament has the power to determine how to participate in the legislative process, the Court did provide three factors that would act as a guide in the determination of reasonableness of the process and especially with regard to urgency and an impending timeline, the Court held that the following factors should be considered:

(i) whether there is a real urgency, and not merely assumed urgency;

(ii) the time truly required to complete the process; and

(iii) the magnitude of the right at issue.[30]

[25] *Matatiele* at para 68.

[26] *Land Access Movement of South Africa v Chairperson, NCOP,* 2016 (5) SA 635 (CC) at para 15 [*Land Access Movement*].

[27] *Land Access Movement* at para 31.

[28] *Land Access Movement* at para 60.

[29] *Land Access Movement* at para 60.

[30] *Land Access Movement* at para 70.

The Court determined that a notice period for public participation that was less than seven days[31] was unreasonable because it is highly likely that such a short notice period would deprive people affected by the Bill of an opportunity to reasonably prepare and adequately participate.[32]

South Africa Veterinary Association v Speaker of the National Assembly and Others [2018] ZACC 49

In the matter of *South African Veterinary Association v Speaker of the National Assembly and Others,*[33] the Constitutional Court had to consider section 16 of the *Medicines and Related Substances Amendment Act, 2015* (Act No. 14 of 2015). The effect of section 16 was that, just as all the other professionals listed in that section, veterinarians would also be required to obtain a licence to compound and dispense medicines. The word "veterinarian" was not part of section 16 when the Amendment Bill was introduced in Parliament and was only added after comments were received from the public that suggested that veterinarians should also be required to obtain such a licence. The South African Veterinary Association challenged the Amendment Act on the basis that further public consultations should have followed after the insertion of the word "veterinarian" into section 16, as this was a new concept added to the Amendment Act, and in respect of which no public consultations have been done.[34] The South African Veterinary Association argued that the inclusion of the word "veterinarian" in section 16 materially altered the way that veterinarians would be able to compound and dispense medicines. They further argued that a number of consequential amendments were required as the veterinarian profession was not yet included in the principal Act.[35]

In 2016, Parliament had come a long way since the *Doctors for Life* judgment in 2006. It recognised the importance of public involvement in law-making and regularly involved the public in its processes. To this end, in terms of the *Medicine and Related Substances Amendment Act, 2015* (Act No. 15 of 2015), the National Assembly attempted to fulfil its obligation under paragraph 59(1)(a) of the Constitution and held public hearings for the majority of the Amendment Bill; however, it failed to hold further hearings after the insertion of the word "veterinarian".[36] Furthermore, when the legislation was referred to the National Council of Provinces, the Department of Health briefed the Select Committee about the contents of the legislation but failed to mention the insertion of the word "veterinarian". The failure to notify the applicant in the matter and other similar

[31] The Court considered *Moutse Demarcation Forum and Others v President of the RSA and Others*, 2011 (11) BCLR 1158 (CC), where it was held that the public should be given enough opportunity to prepare for hearings (see paragraph 61 of the judgment).

[32] *Land Access Movement* at para 77.

[33] *South African Veterinary Association v Speaker of the National Assembly and Others*, [2018] ZACC 49 [*South African Veterinary*].

[34] *South African Veterinary* at paras 25, 26, 29 and 32.

[35] *South African Veterinary.*

[36] *South African Veterinary* at para 36.

organisations representing the interests of veterinarians, such as the South African Veterinary Council, undermined the purpose of facilitating public participation.[37]

The Constitutional Court thus accepted that the amendments "had the effect of bringing an entire profession under the control of an Act that never applied to it" and therefore could not consider the amendment as technical or semantic. Therefore, the Court held that the failure by Parliament to facilitate further public involvement after the inclusion of the word "veterinarian" rendered the section constitutionally invalid and the amendment constituted a material amendment that would have lasting effects on the professional operations of veterinarians.[38] The attempts to facilitate public participation could not be considered reasonable because it failed to ensure that the most directly affected group participated in the law-making process, and furthermore the National Council of Provinces, through the provincial legislatures, failed to properly facilitate public participation due to the exceptionally short notice periods that they gave before the public hearings.

Therefore, the Court set yet another principle to improve on the standard of public participation in that:

(i) where content is added to a Bill based on inputs from the public, only content that is new (substantive changes) — that extends the subject matter of the Bill — has to be advertised; and

(ii) the insertion of a word that materially affects a specific group of people is exactly the situation for which the constitutional obligation of public participation has been created.[39]

Mogale and Others v Speaker of the National Assembly and Others [2023] ZACC 14

The applicants in the matter, Ms Mogale, the Land Access Movement of South Africa and two others, applied to the Constitutional Court challenging the constitutionality of the *Traditional and Khoi-San Leadership Act, 2019* (Act No. 3 of 2019) ("TAKLA"), on the basis that Parliament and the provincial legislatures failed to facilitate public involvement in the passing of the legislation. The TAKLA sought to amend various aspects of the *Traditional Leadership and Governance Framework Act, 2003* (Act No. 41 of 2003).

The TAKLA was introduced to the National Assembly on the 21 September 2015, and up until 2019, Parliament held various public participation processes across the nine provinces. The Court was tasked with analysing the processes that took place and whether the constitutional standards for public participation were met. Drawing on the precedent set in *Doctors for Life*¸ the Constitutional Court had to consider whether the action by Parliament was reasonable. In doing so the Court considered what Parliament

[37] *South African Veterinary* at para 42.

[38] *South African Veterinary* at para 45.

[39] *South African Veterinary* at para 46.

itself determined as reasonable, and therefore considered the Legislative Sector's Framework and Practical Guide. The features of this guide included pre-hearing workshops, developing effective communication, ensuring communities are mobilised and meetings are convened, ensuring transport to hearings and providing for seven-days' notice of hearings.[40] It is important to stress that this Framework and Practical Guide is not the Framework that governs Public Participation at Parliament, but rather a guideline set by the Legislative Sector which facilitates communication between Parliament and the nine provincial legislatures. Parliament does, however, have a public participation model, but this was not referred to by the Court. It could be argued that the Court erred in its assessment of the public participation and the standards set by Parliament by referring to the incorrect codification of public participation. In any event, in its analysis the Constitutional Court held that Parliament failed to comply with its obligation to facilitate reasonable public involvement, i.e., failure to provide proper notice of the hearing, failure to explain the purpose of the hearing, inaccessibility of venues, and inadequate pre-hearing education.[41]

Secondly, the Court had to address the significance of the legislation. It was understood that the TAKLA replaced the failings of the *Traditional Leadership and Governance Framework Act* and regulated a complex and controversial area of South African Society (traditional communities and traditional leadership, against a background of colonial and oppressive regulation). There is a fair amount of sensitivity around this subject matter in South Africa.[42]

Thirdly, when assessing time constraints and expense, the Court held that there was no evidence that there was pressure on Parliament to pass the TAKLA. Furthermore, the Court held that there were no claims from Parliament regarding the lack of resources.[43]

Lastly, in considering the relationship between the National Council of Provinces and the nine provincial legislatures, the Court held that the obligation to facilitate public involvement rests independently on both the National Council of Provinces in terms of section 72 of the Constitution and the nine provincial legislatures under section 118 of the Constitution.[44] However, the Court held that it was important to note that the National Council of Provinces could only fulfil its duty to facilitate public involvement through public hearings held by the provincial legislatures if those proceedings were attended by members of the National Council of Provinces or those members had access to the reports of those proceedings in order to engage with the responses from the public.[45]

For these reasons the Court held that Parliament failed to facilitate public involvement before passing the TAKLA and therefore the legislation was adopted in a manner that

[40] *Mogale and Others v Speaker of the National Assembly and Others* [2023] ZACC 14 at para 39 [*Mogale*].

[41] *Mogale* at paras 61-67.

[42] *Mogale* at para 41.

[43] *Mogale* at para 50.

[44] *Mogale* at para 51.

[45] *South African Veterinary* at para 52.

contradicts the Constitution. It is therefore argued that the most important principle garnered from this judgment is:

(i) the Courts will assess every stage of the public participation process for any deficiencies in the public participation process and will consider these against the standard that Parliament sets for itself.

South African Iron and Steel Institute and Others v Speaker of the National Assembly and Others [2023] ZACC 18

In this matter,[46] the South African Iron and Steel Institute, representing the collective interest of the South African primary steel industry, challenged Parliament in that certain material amendments to the N*ational Environmental Management Laws Amendment Act, 2022* (Act No. 2 of 2022) ("NEMLA") lacked further public involvement to an extent that it did not pass constitutional muster.[47] The first version of the Bill as introduced in the National Assembly and advertised did not contain any material changes to the definition of the term "waste".[48] Following public hearings, comments and representations were made by a range of stakeholders. The portfolio committee of the National Assembly dealing with the legislation considered these comments and amended the introduced version of the Bill, producing a "B" version of the Bill, but this version did not materially change the scope of "waste" from the previous version. After the adoption of the Bill in the National Assembly, the Bill was transmitted to the National Council of Provinces for concurrence, and a period of inactivity followed resulting in the lapse of the Bill in terms of the National Assembly rules.[49]

The Bill was revived a year later by the National Council of Provinces and during that time, in a separate matter, the Supreme Court of Appeal handed down judgment that considered the pre-amendment definition of "waste" in the NEMLA and in particular whether the definition of "waste" applied to Basic Oxygen Furnace slag ("BOF slag"), an important by-product of the steel-making process. The Supreme Court of Appeal held that, at the point of sale to third parties, BOF slag is not "unwanted, rejected or abandoned or disposed of" as it was a substance that could be re-used and recycled, and therefore these steel by-products were not "waste" as per the definition contained in the NEMLA.

Fast forward to 2021, where the National Council of Provinces in dealing with the amendments to the definition of "waste" further amended the definition to include any substance for which the original manufacturer had no further use within its own processes, whether or not the substance had commercial value. This proposed definition

[46] *South African Iron and Steel Institute and Others v Speaker of the National Assembly and Others*, [2023] ZACC 18 [*South African Iron and Steel*].

[47] *South African Iron and Steel* at para 7.

[48] *South African Iron and Steel* at para 8.

[49] *South African Iron and Steel* at para 9.

of "waste" and all the consequential amendments were passed by the National Council of Provinces without any further public participation and returned to the National Assembly for its concurrence. Although considerable amendments were made to the Bill by the National Council of Provinces, the National Assembly and its portfolio committee did not attempt to facilitate further public participation.[50]

The Constitutional Court held that the definition of "waste" in the NEMLA is fundamentally important as it would have consequential changes to legislation such as the *Waste Act*[51] and what constitutes waste, and it had equally serious commercial consequences to the steel industry. Therefore, the changes were not "semantic or technical" but rather material in nature. The Court held that there was no evidence that Parliament brought the public's attention to the impugned amendments, considering that the definition of "waste" did not remain the same. The Court also held that the argument that it would be impractical and cumbersome for new public comment process to be initiated every time an amendment is made to a draft Bill was misconceived, as during the various stages of the Bill when amendments were superficial, members of the public were invited to comment, however when the amendments were material it appeared that members were ignored.[52] The Court considered the effect of the amendments to the definition of "waste" and ascertained that various products including some which were never regulated as waste before would now be subject to the onerous requirements of the *Waste Act*.[53] The effect of this had significant consequences, including new regulatory requirements which bore cost implications.

The Constitutional Court declared certain sections of the legislation invalid and unconstitutional, based yet again on Parliament's failure to comply with its constitutional obligation to facilitate public involvement.[54] It held that the National Assembly, the National Council of Provinces and the provincial legislatures should create conditions that are conducive to the effective exercise of the right to participate in the law-making process, and do so by interrogating, specifying and clarifying the full import of the proposed amendment and therefore afford the public adequate opportunity to comment.[55] It can thus be summarised that the Court laid down an important principle in this matter when it came to interrogating whether there is a need for further participation:

(i) materiality of the amendment triggers the need for further participation, in order to ensure that all interested and affected parties had the opportunity to raise their concerns; and[56]

[50] *South African Iron and Steel* at para 20.
[51] *National Environmental Management: Waste Act, 2008* (Act No. 59 of 2008).
[52] *South African Iron and Steel* at para 48.
[53] *South African Iron and Steel* at para 36.
[54] *South African Iron and Steel* at para 50.
[55] *South African Iron and Steel* at para 47.
[56] *South African Iron and Steel* at para 43.

(ii) materiality can be ascertained through an interrogation of the amendment, and considering the far-reaching effects it would have to the public.

Conclusion

We understand that South Africa's democracy is both representative and participatory, and that these two concepts are distinct but equally important in law-making. Case law referred to in this paper shows that there needs to be a synergy between taking into account the needs of the South African people and the demands of the legislature, considering that law-making is the function of Parliament alone. What is evident is that although the executive is responsible for developing and proposing policy, it often appears as if the policy is frequently re-developed during participation at the legislative stage.

That said, it must be acknowledged that South Africa is only a 30-year-old democracy, and that there are economic factors that influence law-making, these factors include 62.7% of citizens living in abject poverty and 32.1% of citizens being unemployed. These factors place the legislature and the executive under extreme pressure to deliver impactful legislation that is fit for purpose and that rights the wrongs of apartheid's discriminatory effect on legislation. This, at times, culminates in blunders by the legislature in terms of procedure, as the pace of law-making is often accelerated.

In every judgment the courts have stressed that Parliament has the discretion to determine its procedure especially when it comes to public participation, yet the Constitutional Court measures and determines the standards in such a way that often could constitute judicial overreach. What is clear is that if there was legislation on public participation, or an implementation guideline, the Court would not have to continuously tweak the standard.

Perhaps South Africa's past warrants the level of engagement by the Court. The average South African has a deep-rooted mistrust for our government, and this stems from the trauma of a government that overtly ignored the views of the members of the public. It is this mistrust, that supports the argument that in order for South Africans to begin to trust their law makers and respect the laws created by government, it requires this level of participation set by the courts.

At first glance it may appear that the South African Constitutional Court keeps shifting the goal posts relating to the standard of public participation, but as South Africa is a young democracy, playing catch up with the rest of the world, the decision-making by the Constitutional Court is robust, dare I say progressive. Perhaps this is indicative of a healthy relationship between Parliament and the public, whose participation is integral to law-making and the Constitutional Court, the necessary "3rd wheel in the relationship". Therein we have answered our anecdotal question on what type of relationship Parliament and the public are in, I would argue a healthy one. I have been told once or twice that often in relationships the couple sometimes fights with each other but for the

most part they are fighting for each other. And isn't this the nature of our separation of powers in South Africa? The judiciary, the executive and the legislature are *fighting for* a democratic and prosperous South Africa.

Processes and Practices to Protect Confidentiality and Privileges during the Co-Development of Legislation: British Columbia's Approach

Kerri Sinclair[1]

Abstract

In the Canadian province of British Columbia, as in some other jurisdictions, there has been a rise in practical engagement between the Crown and Indigenous Peoples in the development of Crown policy and law. This is often referred to as "co-development".

This article discusses one aspect of that relatively new context for our work, by providing an overview of the measures taken in the Office of Legislative Counsel to protect confidentiality and privileges when drafting in the "co-development" context.

Introduction

In British Columbia, the *Declaration on the Rights of Indigenous Peoples Act* (the "Declaration Act") has been in force since November 28, 2019. Section 3 of that Act reads:

> ***Measures to align laws with Declaration***
> 3 In consultation and cooperation with the Indigenous Peoples in British Columbia, the government must take all measures necessary to ensure the laws of British Columbia are consistent with the Declaration.[2]

The "consultation and cooperation" required by the Declaration Act is more than the consultation normally engaged in with (parties generally called) "stakeholders" (e.g., a

---

[1] Legislative Counsel with the Office of Legislative Counsel, British Columbia, Canada. This article is based on part of a joint presentation given at the CALC conference held in Jamaica in May 2024 under the heading "Providing for the Rights and Interests of Indigenous Peoples and Reflecting Indigenous Lawmaking when Drafting Crown Legislation: Experiences in a Canadian Jurisdiction". That presentation was not made, and this article was not written, in an official capacity and they do not necessarily represent the views of the government of British Columbia.

[2] The "Declaration" being the *United Nations Declaration on the Rights of Indigenous Peoples* A/RES/61/295, 2 October 2007.

tribunal whose home statute is to be amended). The consultees are not mere stakeholders consulted as such; they are partners in the "cooperation" part of the obligation. This consultation and cooperation are often referred to as "co-development".

Engagement of co-development partners by the ministry

In British Columbia there is a very large number of individual Indigenous Nations. For each co-development project, the ministry responsible for the project, assisted by its solicitors and solicitors who specialize in Indigenous legal relations, engages the appropriate Indigenous partner(s) for co-development of that project. The co-development partner(s) are then involved in:

(1) the policy development,

(2) the preparation of proposal documents for Cabinet consideration, and

(3) the development of drafting instructions for legislative counsel.

Legislative counsel do not deal directly with the co-development partners; we get involved at the point when initial drafting instructions (which have been co-developed) are received from the ministry. We then produce drafts by following the usual iterative process, and provide them to the ministry. The ministry works with the co-development partner(s) to develop each set of drafting instructions responding to each draft.

Confidentiality and privileges to be protected

In co-development projects (as with any consultation on any legislative development project), we aim to protect confidentiality and privileges, while providing the ministry what is needed for meaningful consultation. By implementing certain measures (in accordance with Cabinet policy), we strive to protect:

(1) parliamentary privilege,

(2) solicitor client privilege, and

(3) Cabinet confidentiality (an aspect of public interest immunity).[3]

Parliamentary privilege

Parliamentary privilege may be breached if a "finalized" legislative proposal is disclosed before it is introduced in parliament. In British Columbia, we take the position that a legislative proposal is "finalized" at the point when the committee that reviews and approves drafts for introduction as Bills has given that approval.

[3] None of these is addressed in detail in this article; rather, they are briefly referred to as context for the subsequent discussion about measures taken to protect them.

Accordingly, the measure we take to protect parliamentary privilege is to not provide further consultation drafts to the ministry after that approval has been given (see more on consultation drafts, below).

Solicitor-client privilege

In British Columbia, as in all Canadian jurisdictions, legislative counsel are practising lawyers. We have case law confirming that the legislative text we produce is our legal advice to our client as to the wording that will achieve Cabinet's policy objective, and therefore that (as with any other legal advice) our drafts in their entirety are covered by solicitor client privilege.[4]

Solicitor client privilege may be breached if information that is subject to that privilege is intentionally disclosed outside of the solicitor client relationship. There is an exception to this rule that is important for our purposes: the "common interest" exception to waiver of that privilege. Our position is that any of our drafts disclosed in the co-development process (as in any consultation process) are covered by that exception — the disclosure being made only to parties who have a common interest in the development of the legislation.

Cabinet confidentiality

Information that would reveal Cabinet's decision-making is protected by Cabinet confidentiality (which is not a privilege but rather an aspect of public interest immunity). Certainly, disclosure of draft legislation (and, for that matter, information in other forms that reveals what is in draft legislation) would reveal what Cabinet deliberated on or will deliberate on.

Confidentiality Agreements and Consultation Drafts

So what measures do we take to protect the Crown's solicitor client privilege and Cabinet confidentiality? We take two measures, which apply to both.

Confidentiality Agreements[5]

Draft legislation is not disclosed to co-development partners unless a confidentiality agreement has been entered into by the government (ministry representative) and the co-development partner. There is a standard form of confidentiality agreement that is used for any consultation, but it may be tailored as needed. Advice as to the content that should be in any particular confidentiality agreement is provided by the solicitors advising the ministry on the legislative project. For consultations of stakeholders, normally confidentiality agreements are made on a per-project basis. However, there are some blanket agreements

[4] *British Columbia Teachers' Federation v. British Columbia,* 2010 BCSC 961.

[5] As the Office of Legislative Counsel is not involved in the preparation of these agreements, this article does not address the content of these agreements in any detail; essentially, they are comprehensive non-disclosure agreements.

(such as for consulting the courts). But for co-development partners it is often the case that an overarching group — in particular the First Nations Leadership Council — has been engaged as the co-development partner. In that case, confidentiality agreements have sometimes been made on a yearly basis and therefore cover multiple projects.

Whether for a particular project or for all projects in a one-year or other period, a confidentiality agreement is one of the measures implemented to protect the confidentiality and privileges of the Crown pertaining to the project(s).

Consultation Draft Format

Another measure is the format in which drafts are provided to the ministry for it to disclose to the co-development partner(s). A consultation draft format is used, which:

(1) has removed the enacting clause and any other indicators that the content is intended to go into a Bill or regulation,

(2) has removed drafter notes and any other content that reveals solicitor client privileged information other than the draft text itself,

(3) has, on every page, a header that says that the draft is a "consultation draft", is "privileged and confidential" and "may be used for consultation purposes only",

(4) has "privileged and confidential" stamped across the text on each page, and

(5) appears in a different font from that used for enactments.

Whether for consulting a stakeholder or for working with a partner as part of co-development, drafts are provided to the ministry in this consultation draft format.

Effects of measures taken

The measures we take to protect confidentiality and privileges are, of course, not a guarantee of absolute protection. But, very importantly, they serve to impose requirements on the signatories to the confidentiality agreements and the recipients of the consultation drafts. They also, in the case of solicitor client privilege, serve as evidence that the government did not intend by the disclosure to a party with a common interest to waive its privilege.

Conclusion

In recent years, legislative counsel in British Columbia have been working in a "co-development" context that entails new processes and practices for ministries' instructing officials. In that context, legislative counsel do not directly engage with the government's co-development partners. And, in keeping with government policy and our obligations, we continue to take measures to protect confidentiality and privileges in the same ways that we have done in "stakeholder consultation" processes.

From Colonialism to Citizen Engagement: Reforming Legislative Processes in Nigeria and Ghana

Emmanuel K. Nartey[1]

Abstract

This article critically interrogates the enduring colonial imprint on the political and legal architectures of Nigeria and Ghana, illustrating how colonial frameworks entrenched centralised, hierarchical governance structures that persist in alienating citizens and disrupting indigenous mechanisms of self-rule. The imposition of foreign legislative models not only severed the organic link between legislators and their constituencies but also undermined the inclusivity and responsiveness of the law-making process. Colonial rule marginalised traditional governance practices, many of which were deeply embedded in consensus-building and communal participation, replacing them with rigid, top-down structures ill-equipped to navigate the complexities of post-colonial societies. The persistence of these inherited frameworks has constrained legislative adaptability, often rendering legal institutions disconnected from the lived realities and aspirations of the populace. To redress these systemic shortcomings, the article argues for substantive reforms that reintegrate pre-colonial governance models attuned to local needs. This necessitates enhancing community participation in legislative processes, strengthening the capacity of lawmakers through targeted development initiatives, and leveraging digital innovations to foster transparency and civic engagement. Moreover, the article advocates for a comprehensive reassessment of outdated legislative structures that remain anchored in colonial paradigms. Such reforms must prioritise inclusivity, ensuring that law-making becomes more representative and reflective of contemporary socio-political dynamics. In

[1] Dr Emmanuel K. Nartey, Principal Lecturer, LLM Programmes Leader, Chair of Bath Spa University Staff and Black Academic Network, AI and Law Researcher at the Open University, and GATEWAY Project Leader.

reimagining governance beyond the constraints of colonial legacies, the article envisions a legal order grounded in ethical governance, indigenous traditions, and the democratic aspirations of the people, fostering a more just and participatory political landscape..

Introduction

Colonialism, in its fundamental nature, represents the exertion of external authority by one nation over another, whereby governance structures and institutional mechanisms are appropriated to serve the imperial interest.[2] Nowhere is this phenomenon more starkly illustrated than in the British colonial administration of Nigeria (until 1960) and Ghana (until 1957).[3] However, colonial rule was never an exercise in governance for the sake of order; rather, it was a strategic enterprise, enabling the systematic extraction of resources and the subjugation of local populations for the economic benefit of the metropole.[4] The trajectory of colonialism, from its nascent form in the 15th century to its dissolution in the 20th, reveals a historical force inextricably linked to imperialist expansion, transforming indigenous social, economic and political landscapes to reflect Western paradigms.[5]

Despite formal decolonisation, the administrative and legal infrastructures of many post-colonial states remain entrenched in the very structures imposed by the imperial powers. The persistence of these frameworks has fundamentally constrained the political agency of post-colonial states, rendering them dependent on institutions designed for external rather than domestic utility.[6] European legal and policy narratives, once constructed to facilitate colonial rule, were never intended to foster inclusive governance. Rather, they served to entrench Western ideological dominance while marginalising indigenous legal traditions and governance models.[7] This has resulted in a disjuncture between law and society, whereby many post-colonial states continue to operate within legal systems that bear little relevance to their socio-political realities.

Post-colonial governance thus remains burdened by an institutional legacy that is often resistant to reform. The inherited bureaucratic machinery of the colonial state, instead of fostering self-determination, has merely transposed the instruments of imperial administration into the hands of local elites. This has led to the entrenchment of rigid, centralised governance models that, rather than enabling democratic participation,

[2] S. Ocheni & B.C. Nwankwo, “Analysis of Colonialism and Its Impact in Africa” (2012) 8:3 *Cross-Cultural Communication* 46.

[3] J.K. Adjaye, “Asantehene Agyeman Prempe I and British Colonization of Asante: A Reassessment” (1989) 22:2 *The International Journal of African Historical Studies* 223.

[4] S. Bannerman-Wood, *The Impact of the Colonial Legacy on Development in the Third World States: The Case of Ghana* (Dissertation, University of Tasmania, 1984).

[5] R. Mawani, “Law and Colonialism: Legacies and Lineages” in A. Sarat & P. Ewick, eds, *The Handbook of Law and Society* (Wiley-Blackwell, 2015) 417.

[6] H.A. Bulhan, “Stages of Colonialism in Africa: From Occupation of Land to Occupation of Being” (2015) 3:1 *Journal of Social and Political Psychology* 239.

[7] V.M. Sangmor, *The Impact of Colonialism on Cultural Identity: A Comparative Study of Ghana & South Africa* (MA Dissertation, University of Ghana, 2013).

frequently exclude the very populations they were intended to serve. Legal codes, often direct remnants of colonial statutes, continue to regulate contemporary governance, despite their incompatibility with the historical traditions and lived realities of the people.[8] This structural inertia necessitates not merely reform but a fundamental reconstitution of governance systems that deconstructs the ideological foundations upon which they were built.

The establishment of colonial legal frameworks was a deliberate mechanism of control rather than a benign administrative measure. By imposing legal systems that had little or no grounding in local jurisprudential traditions, colonial powers disrupted the equilibrium of indigenous governance structures.[9] Traditional legal mechanisms—many of which were rooted in communal consensus, customary adjudication, and restorative justice—were systematically dismissed as archaic or insufficiently developed to meet the demands of modern governance.[10] The ramifications of this legal hegemony were profound, as indigenous authorities, once central to governance, were delegitimised in favour of colonial institutions.[11]

This transformation produced a dual legal system: one predicated on colonial jurisprudence, the other surviving in informal, customary spaces. However, where indigenous systems emphasised reconciliation and communal participation, colonial courts operated on hierarchical, retributive models that prioritised procedural formalism.[12] In Ghana and Nigeria, this legal bifurcation exacerbated tensions between imposed structures and local customs, reinforcing a disconnection between the judiciary and the communities it purported to serve.[13] The consequence was a judicial system that was not only alien to the people but also inaccessible, fostering widespread distrust in formal legal institutions and diminishing civic engagement in the legislative process.[14]

At the heart of this imposed legal order lies a fundamental illegitimacy. By supplanting indigenous legal traditions, colonial legal frameworks severed the intrinsic connection between governance and the communities it governed.[15] The assumption of European legal superiority ignored the adaptability and efficacy of indigenous systems, which had long

[8] R. Roberts & K. Mann, eds, *Law in Colonial Africa* (Heinemann Educational Press, 1991) at vol 199.

[9] S. Fullerton Joireman, "Inherited Legal Systems and Effective Rule of Law: Africa and the Colonial Legacy'" (2001) 39:4 *Journal of Modern African Studies* 571.

[10] F. Bernault, "The Shadow of Rule: Colonial Power and Modern Punishment in Africa" in F. Dikötter & I. Brown, eds, *Cultures of Confinement: A History of the Prison in Africa, Asia and Latin America* (Cornell University Press, 2007) 55.

[11] T. Falola & M.M. Heaton, *A History of Nigeria* (Cambridge University Press, 2008).

[12] F. Cooper & A.L. Stoler, "Introduction: Tensions of Empire: Colonial Control and Visions of Rule" (1989) 16:4 *American Ethnologist* 609.

[13] M. Ocran, "The Clash of Legal Cultures: The Treatment of Indigenous Law in Colonial and Post-Colonial Africa" (2006) 39 *Akron Law Review* 465.

[14] C. Leonardi, *Knowing Authority: Colonial Governance and Local Community in Equatoria Province, Sudan, 1900-1956* (Dissertation, Durham University, 2005).

[15] B. Ibhawoh, "Historical Globalization and Colonial Legal Culture: African Assessors, Customary Law, and Criminal Justice in British Africa" (2009) 4:3 *Journal of Global History* 429.

regulated social relations in a manner both contextually relevant and participatory.[16] As such, the post-colonial state did not merely inherit legal codes—it absorbed an epistemological framework that privileged Western jurisprudence while relegating indigenous knowledge to the periphery.[17] This epistemic subjugation remains a defining feature of post-colonial legal discourse, in which indigenous principles, despite their historical efficacy, continue to be framed as secondary or anachronistic.

The broader ramifications of this legacy extend beyond the legal sphere, permeating the socio-political fabric of post-colonial states. The imposition of externally constructed governance models reinforced structural inequalities, codifying socio-economic hierarchies that persist in contemporary governance.[18] The rigidity of colonial legal systems, designed to impose order rather than foster participatory governance, has contributed to governance failures in the modern era, in which legislative and judicial institutions often remain detached from the realities of the populace.[19] By continuing to adhere to legal structures that were never intended to serve them, post-colonial states inadvertently reinforce the hierarchies established during the colonial period.

Moreover, colonialism was not simply an administrative imposition but an ideological project, shaping the very manner in which law and governance are conceptualised. The epistemic violence of colonial rule ensured that indigenous governance was not merely marginalised but actively devalued. This dynamic persists in contemporary governance discourses, in which post-colonial states must navigate the challenge of constructing autonomous legal and political identities while remaining within the constraints of inherited frameworks.[20] While some scholars argue that these inherited systems provide stability, others assert that they perpetuate structural inequalities and limit the scope of meaningful legal reform.

Given the intractable nature of these colonial legacies, there is an urgent need for a paradigm shift in post-colonial governance. Reform must transcend mere legislative amendments; rather, it must engage with the epistemological assumptions that continue to inform contemporary legal structures. A more authentic legal order would necessitate the synthesis of indigenous and contemporary governance principles, forging hybrid systems that reflect the lived experiences of post-colonial societies. Such an approach would restore legitimacy

[16] P.C. Ejeh, "Colomentalism: A Critical Analysis of the Effects of Colonization in Nigeria" (2021) 19:1 *AMAMIHE Journal of Applied Philosophy* 13.

[17] R.A. Williams Jr, "Documents of Barbarism: The Contemporary Legacy of European Racism and Colonialism in the Narrative Traditions of Federal Indian Law" (1989) 31 *Arizona Law Review* 237.

[18] M. Chanock, *The Making of South African Legal Culture 1902-1936: Fear, Favour and Prejudice* (Cambridge University Press, 2001).

[19] C. Young, "The African Colonial State and Its Political Legacy" in M.G. Schatzberg & W.T. Crowther, eds, *The Precarious Balance* (Routledge, 2019) 25.

[20] A.L. Robinson, "Colonial Rule and Its Political Legacies in Africa" (2019) *Oxford Research Encyclopedia of Politics*.

to governance, ensuring that legal systems are not simply inherited constructs but meaningful instruments of justice and representation.[21]

This necessitates an intellectual and structural re-evaluation of governance systems, one that moves beyond the Eurocentric paradigms that have dictated law and policy for decades. The task ahead is not one of mere reform, but of reconstruction — creating governance models that dismantle colonial hierarchies and prioritise the needs of post-colonial citizens. Until such a transformation occurs, post-colonial states will remain beholden to structures that perpetuate dependency and exclusion, ultimately hindering the attainment of true political and legal sovereignty. This article offers a comprehensive examination of legislative drafting in Ghana and Nigeria, with particular attention to traditional, customary, and ethical principles. Drawing on extensive research, it critically explores the historical evolution of legal frameworks in both nations, highlighting the complexities inherent in legislative formulation. The analysis emphasises the customary and ethical dimensions of law-making, particularly the importance of transparency, accountability, and inclusivity. Additionally, the article addresses contemporary challenges and potential future directions in legislative drafting, taking into account the legacies of colonisation, evolving ethical standards, and changing socio-political dynamics. The article is structured into four sections: the first outlines the research methodology; the second critically examines the historical evolution of legislation in Ghana and Nigeria; the third discusses the impact of colonisation on customary traditions; and the fourth concludes with recommendations for reform.

Methodology

This study employs a rigorous and multidimensional legal research methodology, synthesising doctrinal and socio-legal approaches to critically examine legislative drafting in Ghana and Nigeria. By integrating historical, ethical, and contemporary dimensions, the research scrutinises the enduring influence of colonial legacies and the role of indigenous customs within modern legislative frameworks. It not only analyses statutory and constitutional texts but also interrogates the broader socio-political forces shaping legislative development. At the heart of this inquiry lies doctrinal legal research, which facilitates an in-depth exploration of legal texts, including statutes, case law, and constitutional provisions. This method enables a critical appraisal of the historical evolution, ethical foundations, and contemporary challenges of legislative drafting in both nations. The research questions whether ethical principles and integrity are embedded within or overlooked in these legal systems. Primary legal sources such as the constitutions of Ghana and Nigeria, statutory enactments, legislative bills, and parliamentary debates serve as the cornerstone of legal evolution in these jurisdictions. Secondary sources, including academic legal commentaries, journals, and theoretical texts, provide critical perspectives on legislative processes, particularly in relation to customs, ethics, integrity, and inclusivity.

[21] A.P. Kameri-Mbote & P. Cullet, "Law, Colonialism and Environmental Management in Africa" (1997) 6 *Review of European, Comparative & International Environmental Law* 23.

The study incorporates historical and comparative analysis to trace the colonial foundations of legal frameworks and their continued dominance in post-independence governance. It explores how Ghana and Nigeria have navigated the complex terrain of legal reform, seeking to reconcile inherited colonial structures with indigenous jurisprudence. A comparative perspective highlights converging and diverging legislative trajectories, revealing broader trends in post-colonial African legal evolution. By juxtaposing these legal histories, the study uncovers systemic constraints and the potential for transformative reforms. Moving beyond formal legal doctrines, the socio-legal approach contextualises legislative drafting within its social, political, and cultural dimensions. This perspective acknowledges that law does not exist in isolation but is entwined with power structures, traditions, and external influences. The study critically evaluates how legislative processes are shaped by local customs, international treaties, and global legal standards, considering the ethical implications of legal harmonisation with Western frameworks. It also probes the persistence of imperialist influences in law-making, questioning whether post-colonial states have truly decolonised their legal systems.

The research is informed by critical legal theory, which interrogates the ways in which legislative processes sustain or dismantle hierarchical power relations. This theoretical lens challenges elitist legal frameworks, questioning whether contemporary legislative systems truly serve the public interest or merely entrench existing disparities. Through a critical evaluation of the exclusion of traditional governance structures, the study advocates for a reimagining of legislative drafting, one that prioritises inclusivity, ethical integrity, and democratic accountability. The ultimate aim is to ensure that law-making genuinely reflects the values, customs, and aspirations of post-colonial societies.

Historical Evolution of Legislation Process in Ghana and Nigeria

The legislative histories of Ghana and Nigeria illustrate a complex interplay between pre-colonial governance structures, colonial impositions, and post-independence struggles for self-determination.[22] The transition from indigenous legal traditions to imposed Western legislative systems created tensions that persist in contemporary governance. Pre-colonial governance models were deeply embedded in cultural values, prioritising communal decision-making, consensus, and social cohesion. However, colonialism imposed rigid legal frameworks that marginalised these indigenous traditions, leading to a governance system that often feels disconnected from local realities.[23] Despite this disruption, elements of traditional governance persist, albeit in fragmented and often marginalised forms.[24]

British colonial rule in Ghana and Nigeria introduced legal structures that sought not only to govern but to replace indigenous systems entirely. This process was not simply administrative; it was an epistemic rupture that displaced indigenous knowledge systems

[22] O.Y. Asamoah, *The Political History of Ghana (1950-2013): The Experience of a Non-Conformist* (AuthorHouse, 2014).

[23] R.S. Gocking, *The History of Ghana* (Bloomsbury Publishing USA, 2005).

[24] W.B. Harvey, *Law and Social Change in Ghana* (Princeton University Press, 2015).

and privileged European legislative norms.[25] The transplantation of British legal frameworks, often unsuited to the socio-cultural realities of Ghana and Nigeria, resulted in a hybrid legislative system in which indigenous and colonial traditions exist in uneasy coexistence. This disjunction continues to impede the development of coherent and effective governance structures.[26]

Much contemporary discourse on legislative evolution remains overly fixated on the external legacies of colonial rule, often neglecting the resilience of indigenous governance traditions.[27] These traditional systems, characterised by inclusivity, flexibility, and participatory governance, challenge the rigid and exclusionary nature of colonial legal frameworks. Their marginalisation is not only a political issue but an intellectual one, representing the epistemic violence of colonialism. The imposition of Western legal systems did not merely introduce new governance models; it actively delegitimised the indigenous political knowledge that had structured African societies for centuries. However, this erasure is neither complete nor irreversible. Reintegrating indigenous governance principles into contemporary law-making offers a means to correct these historical distortions. A meaningful approach to legislative reform requires not simply a restoration of the past but a synthesis of pre-colonial and modern governance traditions. Such an approach acknowledges historical injustices while developing legislative systems that are ethical, participatory, and reflective of contemporary realities.

Before colonisation, both Ghana and Nigeria had legislative frameworks deeply embedded in their indigenous governance traditions. In the Gold Coast (now Ghana), legislative authority was decentralised, vested in traditional rulers and councils of elders.[28] Among the Akan, one of the most influential ethnic groups, decision-making was a collective endeavour, prioritising community consensus. Chiefs and councils acted as custodians of customary law, ensuring that legislative decisions aligned with social values.[29] Although unwritten, these customary laws were highly structured and adaptable, reflecting the evolving needs of the people.[30] Governance legitimacy was rooted in a social contract between rulers and the people, where authority was earned rather than imposed. This model suggests that contemporary legislative practices in Ghana could benefit from the foundational principles of shared responsibility, consensus-building, and cultural legitimacy, fostering greater public trust and participation.

[25] B.A. Forjwuor, *Constituent Specter of Colonialism: Between Liberal Democracy and the Politics of Decolonization* (Dissertation, Northwestern University, 2015).

[26] G. Ayittey, *Indigenous African Institutions* (Brill, 2006).

[27] C. Ake, "The Unique Case of African Democracy" (1993) *International Affairs (Royal Institute of International Affairs 1944-)* 239.

[28] D. Appiah, *The Politics of Traditional-Federal State Formation and Land Administration Reform in Ghana: 1821-2010* (Dissertation, University of York, 2012).

[29] N.Q. Owusu-Nti, *Indigenous Culture and the Path to Democracy: An In-Depth Case Study of Ghana's Democratization Process, 1992-Present* (Dissertation, Antioch University 2024).

[30] I. Owusu-Mensah, W Asante & W.K. Osew, "Queen Mothers: The Unseen Hands in Chieftaincy Conflicts Among the Akan in Ghana: Myth or Reality" (2015) 8:6 *The Journal of Pan African Studies* 1.

Similarly, Nigeria's pre-colonial legislative landscape reflected its ethnic diversity and regional governance structures.[31] In the north, the Sokoto Caliphate established a highly centralised legal system based on Islamic law. Emirs wielded legislative and judicial authority but remained accountable to a central religious and political leadership. In contrast, the Yoruba of the southwest practised a structured but decentralised governance system, where the Oba ruled alongside a council of chiefs. The Igbo of the southeast adopted a more egalitarian system, with village assemblies engaging in collective decision-making. These systems prioritised communal well-being and restorative justice, offering a participatory and culturally grounded approach to governance.

Colonial rule disrupted these indigenous systems, replacing them with Western legislative models that disregarded local governance traditions. In both Ghana and Nigeria, British authorities introduced legislative councils designed primarily to serve colonial interests rather than the needs of indigenous populations. The failure to align colonial legal systems with local governance models created enduring tensions. In Nigeria, in particular, the imposition of a unitary colonial legislative system failed to reflect the legal traditions of its diverse ethnic groups, contributing to governance inefficiencies and systemic disconnection.[32] The alienation of indigenous governance structures from formal legislative processes has resulted in public mistrust and an ongoing struggle to reconcile traditional legal customs with modern governance needs.

The advent of British colonialism in the late 19th century marked a turning point in the legislative development of both Ghana and Nigeria.[33] The British imposed legal systems that prioritised administrative control over local governance needs.[34] In Ghana, a legislative council was established in 1850, though it served primarily colonial administrative interests.[35] While African representation gradually increased, colonial legislative institutions remained exclusionary. The creation of Ghana's Legislative Assembly in 1951 laid the groundwork for independence in 1957, yet the coexistence of British legal structures and customary law created enduring tensions. British legal frameworks were presented as superior, marginalising indigenous governance and fostering a fragmented legal system that continues to challenge Ghana's legislative development. Nigeria followed a similar trajectory. The British established a legislative council in Lagos in 1861, which excluded

[31] E.E.G. Iweriebor, "State Systems in Pre-Colonial, Colonial and Post-Colonial Nigeria: An Overview" (1982) 37:4 *Africa: Rivista Trimestrale di Studi e Documentazione dell'Istituto Italiano per l'Africa e l'Oriente* 507.

[32] E.M. Ogugbuaja, V.N. Nworie, H.O. Mustapha & N.E. Willies, "The Pre-Colonial Traditional Governance Structures in Igboland: A Framework for Effecting Efficacy, Representation, and Accountability of Modern Public Administration in Nigeria" (2024) 10:4 *Journal of Humanities and Social Policy* 50.

[33] J.D. Hargreaves, *The End of Colonial Rule in West Africa: Essays in Contemporary History* (Springer, 1979).

[34] A. Okoth, *History of Africa: African Societies and the Establishment of Colonial Rule* (East African Publishers, 2006).

[35] D. Owusu-Ansah, "History of Ghana" (2023) *Oxford Research Encyclopedia of African History*.

most Nigerians from political participation. The Richards Constitution of 1946 [36]introduced a more centralised legislative body, yet it remained structured to maintain colonial authority rather than facilitate genuine self-governance. Nationalist resistance to these exclusionary structures led to the creation of regional legislatures, culminating in Nigeria's independence in 1960.[37] However, the post-colonial state inherited a legislative system deeply entrenched in colonial-era elitism, fostering governance structures that centralised power and limited public participation.[38]

The legislative trajectories of Ghana and Nigeria reveal an ongoing struggle to reconcile indigenous governance traditions with inherited colonial frameworks. Pre-colonial legislative systems were community-oriented, flexible, and responsive to local needs. Colonialism, by contrast, introduced rigid and hierarchical legal structures that disrupted these traditions. In the post-independence era, both nations have struggled to integrate traditional governance models into modern legislative frameworks, often privileging inherited British legal norms over indigenous systems. The persistence of this hybrid legal system highlights the enduring impact of colonial legacies on post-colonial governance. Ghana and Nigeria continue to grapple with the challenges of bridging British legal structures with indigenous governance traditions. This tension underscores the need for a reassessment of legislative frameworks, ensuring they reflect both historical realities and contemporary aspirations. A reimagined governance model—one that integrates indigenous customs with democratic principles—offers a pathway to creating more inclusive, responsive, and effective legislative systems. This requires not just legislative reform but a fundamental rethinking of governance, recognising the legitimacy of indigenous political traditions and moving beyond the constraints imposed by colonial legal frameworks. Only by addressing these historical tensions can Ghana and Nigeria develop governance systems that are both representative of their people and capable of addressing the complexities of the modern state.

Ghana

The political organisation of the region now known as Ghana before European colonisation was deeply rooted in ethical principles and traditional leadership structures. The diversity of governance systems across the various ethnic groups in pre-colonial Ghana underscores the sophistication of these governance traditions, which, despite their differences, shared fundamental philosophical underpinnings.[39] At the centre of these systems were traditional

[36] United Kingdom, *Order in Council Making Provision for the Constitution and Powers of a Legislative Council for Nigeria: London, August 2, 1946* (HMSO 1946) Cmd 6553 https://lawcat.berkeley.edu/record/174768 accessed 23 March 2025.

[37] K. Ezera, *Constitutional Developments in Nigeria* (CUP Archive, 1964).

[38] J.A. Yakubu, "Colonialism, Customary Law and the Post-Colonial State in Africa: The Case of Nigeria" (2005) *Africa Development/Afrique et Développement* 201.

[39] S Tweneboah, **"**The Sacred Nature of the Akan Chief and Its Implications for Tradition, Modernity and Religious Human Rights in Ghana**"** (MA Thesis, Florida International University, November 2012) https://digitalcommons.fiu.edu/etd/590 accessed 1 July 2024.

rulers, such as the Omanhene among the Akan, alongside chiefs and councils of elders. These leaders did not merely exercise political authority but also bore ethical responsibilities, their power legitimised through customary law and cultural traditions that prioritised justice, social harmony, and the collective well-being of their communities.

Governance in pre-colonial Ghana was deeply embedded in the spiritual and moral fabric of society. Leaders were seen not just as political figures but as stewards of the land and intermediaries between the living and the ancestral spirits, entrusted with preserving the values that defined communal life. The ethical foundation of their authority meant that governance was primarily oriented towards the collective good, ensuring that justice and social cohesion were preserved. This moral obligation transcended personal or political ambitions, reinforcing a system of governance that was fundamentally attuned to communal welfare.

The pre-colonial Ghanaian model of governance achieved a delicate balance between spiritual authority and political power. The legitimacy of traditional rulers was not derived from coercion but from their moral duties. They were custodians of both legal and ethical responsibilities, expected to foster unity, protect communal values, and mediate disputes to uphold social harmony.[40] This system of governance, which relied on consensus and ethical stewardship, starkly contrasted with the individualistic legal frameworks introduced by colonial authorities, which disregarded the communal ethos that had historically guided governance structures.

Governance in pre-colonial Ghana was largely decentralised, with ethnic groups such as the Akan, Ewe, Ga, and Dagomba developing distinct political structures while sharing core governance principles.[41] Among the Akan, for example, governance followed a hierarchical yet participatory model, in which the Omanhene (paramount chief) governed a state (oman), while sub-chiefs (Abusuapanin) and village chiefs (Odikro) managed smaller administrative divisions.[42] This structure was not autocratic but balanced by councils of elders, who played an advisory role, ensuring rulers were held accountable through community consultation and collective decision-making.

Traditional rulers were not merely political administrators but also guardians of customary law. They were responsible for resolving disputes and maintaining social order in ways that aligned with the moral and ethical values of their communities.[43] Their connection to the spiritual realm reinforced their legitimacy, as they were perceived as divinely sanctioned leaders who acted as protectors of both the people and the land. Similarly, for traditional rulers, deriving legitimacy from divine authority meant integrating governance with moral

[40] E.A. Essel, "The Role of Traditional Leaders in Governance Structure Through the Observance of Taboos in Cape Coast, Kumasi and Teshie Societies of Ghana" (2021) 9:3 *International Relations and Diplomacy* 122.

[41] Gocking.

[42] K. A. Busia, "The Prospects for Parliamentary Democracy in the Gold Coast" (1951) 4 *Parliamentary Affairs* 438.

[43] Owusu-Ansah.

leadership and environmental stewardship, rather than simply justifying their right to rule. Therefore, their role was to preserve societal harmony, protect nature, and maintain the relationship between humanity and the spiritual realm. In contrast, the British monarchy's divine authority, rooted in the Divine Right of Kings, primarily reinforced political sovereignty rather than communal or ecological responsibility. While Ghana and Nigeria rulers acted as custodians of both people and nature, the British Crown's legitimacy served to consolidate hierarchical rule. Thus, Ghana and Nigeria's governance emphasised ethical and cosmic balance, whereas the British model prioritised state control and institutional stability. Hence, this belief system fundamentally integrates authority with moral leadership and societal responsibility, reinforcing rulers' governance and their role as custodians of the community.

The pre-colonial governance system was inherently participatory, with decision-making processes structured to involve community members at various levels. The authority of traditional rulers was not an expression of unchecked power but a reflection of the values, customs, and social obligations of their societies. The emphasis on consensus-building, ethical stewardship, and spiritual legitimacy ensured that governance structures functioned as an integrated system, in which political authority was deeply intertwined with moral responsibility.

The claim that traditional rulers in pre-colonial Ghana were divinely chosen remains a subject of scholarly debate. Some argue that divine selection conferred legitimacy upon rulers, providing them with a spiritual mandate to govern. However, others contend that their authority rested primarily on ethical principles and moral conduct. While customary laws dictated that a ruler's primary duty was to serve the interests of the community, ensuring justice and social harmony, their legitimacy was not derived solely from divine endorsement. Instead, their effectiveness as leaders depended on their ability to uphold ethical obligations, resolve disputes fairly, and maintain societal order.

Traditional governance in pre-colonial Ghana can be likened to a social contract in which rulers were entrusted with acting for the common good. This arrangement was underpinned by mutual expectations—rulers were expected to prioritise the well-being of their people, while communities were expected to support their leadership as long as it adhered to ethical standards. This created a system of accountability and legitimacy, ensuring that governance remained responsive to the needs of the people. While divine selection may have symbolically reinforced authority, it was the ethical conduct of rulers that truly solidified their leadership.

The imposition of colonial rule in the late 19th century profoundly disrupted Ghana's traditional governance system. Colonial authorities replaced traditional rulers with colonial appointees who derived their authority not from community legitimacy but from colonial administrative structures. This fundamentally severed the connection between governance and the governed, leading to a decline in public trust and an erosion of the ethical foundations that had legitimised governance in pre-colonial times.

Colonial legal systems, which prioritised the enforcement of foreign legal codes, further undermined traditional governance by marginalising customary law and the ethical principles that had guided governance for centuries. The introduction of centralised bureaucratic systems alienated local communities, as laws were perceived as external impositions rather than organic developments from within Ghanaian society. This displacement of indigenous governance structures contributed to a modern political environment that often struggles to align with local realities and cultural values. The exclusion of traditional rulers from modern governance widened the gap between state institutions and local communities. Many of the ethical and participatory elements of pre-colonial governance were lost, leading to an elitist system detached from communal engagement. The absence of traditional leadership from contemporary governance frameworks has resulted in weakened cultural legitimacy, further reinforcing the disconnect between the state and its people.

The ethical principles that guided pre-colonial governance remain relevant for contemporary Ghana. The emphasis on justice, social cohesion, and participatory decision-making offers valuable insights into addressing modern governance challenges, such as corruption, lack of accountability, and political exclusion.[44] Unlike colonial and post-colonial bureaucratic structures, which often prioritised legal formalism over community engagement, pre-colonial governance ensured that leadership remained responsive to the people's needs. Incorporating these ethical principles into contemporary governance could bridge the gap between state law and customary law, fostering a legal and political system that genuinely reflects Ghanaian cultural values. By embedding principles of fairness, inclusiveness, and moral responsibility into the legislative framework, Ghana could transition towards a more transparent and participatory governance model.

A re-examination of pre-colonial governance structures provides an opportunity to develop a more ethically grounded governance framework, ensuring that leadership remains accountable, responsive, and culturally legitimate. The integration of indigenous ethical values into contemporary governance would strengthen public trust, enhance social harmony, and foster a system of governance that reflects the collective aspirations of the Ghanaian people. The governance structures of pre-colonial Ghana were distinguished by their ethical foundations, participatory decision-making, and integration of spiritual legitimacy. Traditional rulers, operating as moral custodians and political leaders, ensured that governance was responsive, accountable, and community-centred. The colonial imposition of Western legal and political systems disrupted these indigenous governance structures, severing the ethical and spiritual dimensions that had historically legitimised leadership. However, the principles of justice, consensus-building, and social cohesion that underpinned pre-colonial governance remain highly relevant for contemporary Ghana. Reintegrating indigenous governance principles into modern political structures could foster

[44] K. Arhin, *Traditional Rule in Ghana: Past and Present* (Sedco Publishing, 1985).

a more participatory, transparent, and culturally resonant governance system, ensuring that laws and policies reflect the ethical and social realities of the Ghanaian people.

Nigeria

The imposition of colonial rule in Nigeria marked a significant shift in governance, disrupting the intricate political systems that had long been shaped by indigenous customs and ethical frameworks.[45] Before the colonial era, Nigeria was a mosaic of ethnic groups, each with its own distinct governance structures, but all unified by principles of collective welfare, accountability, and justice. Traditional rulers were central to these systems, functioning not merely as political leaders but as custodians of ethical values and social harmony. They derived their legitimacy from customary laws rooted in consensus-building and moral responsibility, ensuring that governance prioritised justice and the well-being of their communities.

Despite the diversity of governance structures across Nigeria's various ethnic groups, common themes emerged, particularly the emphasis on communal engagement, the prioritisation of justice over retribution, and the intertwining of spiritual legitimacy with political authority.[46] The Yoruba kingdoms, for instance, practised a hierarchical yet participatory governance model, where the Oba (king) ruled alongside a council of chiefs whose counsel was integral to maintaining political stability and ethical governance.[47] Similarly, among the Hausa-Fulani, governance was heavily influenced by Islamic principles, with the Sultan and Emirs governing according to Sharia law, supported by Islamic scholars (Mallams) who ensured that legislative processes adhered to religious and ethical standards.[48] In contrast, the Igbo people operated a decentralised governance model, with power vested in village assemblies and councils of elders who governed through consensus rather than centralised rule.[49]

A striking parallel can be drawn between Nigeria and Ghana, where pre-colonial governance similarly reflected ethical and spiritual values. In Ghana, the Akan political system centred on the Omanhene (paramount chief), who ruled in consultation with councils of elders, ensuring that leadership was accountable and decisions aligned with communal values.[50] This structure bore a resemblance to Yoruba governance, where the Oyo Mesi, a

[45] S.J. Salm & T. Falola, *Culture and Customs of Ghana* (Bloomsbury Publishing USA, 2002).

[46] O. Vaughan, *Nigerian Chiefs: Traditional Power in Modern Politics, 1890s–1990s* (University of Rochester Press, 2006) at vol 7.

[47] O.B. Osadolor, "State Management and Political Institutions in Nigeria Before 1800" (2022) *The Oxford Handbook of Nigerian History* 151.

[48] A. Patton Jr, "Ningi Raids and Slavery in Nineteenth Century Sokoto Caliphate" (1981) 2:2 *Slavery and Abolition* 114.

[49] G. Thomas-Emeagwali, "Class Formation in Precolonial Nigeria: The Case of Eastern and Western Nigeria and the Middle Belt" in D. Hondius, P. Kemeny & J. Cohen, eds, *Domination and Resistance* (Routledge, 2005) 320.

[50] K.A. Busia, *The Position of the Chief in the Modern Political System of Ashanti: A Study of the Influence of Contemporary Social Changes on Ashanti Political Institutions* (Routledge, 2018).

council of chiefs, acted as a check on the authority of the Alaafin (king), ensuring that power was exercised ethically.[51] The Ga people of Ghana, much like the Yoruba, integrated spiritual and political governance, with the Ga Mantse (king) relying on the Wulomei (high priests) to guide decisions and maintain social harmony.[52] These similarities highlight a shared West African tradition of governance, in which ethical leadership, collective decision-making, and spiritual legitimacy were central to political authority.

The role of women in governance also displayed notable similarities between Ghana and Nigeria. In Ghana, the Ohemaa (queen mother) played a vital role in advising the king and advocating for women's rights, a function mirrored in Nigeria by the Iyaloja (market women's leader) among the Yoruba, who wielded significant influence over economic and political affairs.[53] These figures exemplified the belief that governance necessitated a balance of political, ethical and spiritual responsibilities, ensuring that leadership reflected the interests of all members of society, including marginalised groups.

The pre-colonial legal systems of both Nigeria and Ghana were largely unwritten but functioned effectively through community engagement and consensus-building. Among the Yoruba, the principle of afonja dictated that no ruler could govern without the endorsement of the Oyo Mesi, underscoring the participatory nature of governance.[54] Similarly, the Ga Wulomei played a pivotal role in interpreting customary laws, ensuring that governance remained aligned with ethical expectations. The Igbo, with their decentralised governance model, maintained laws through collective deliberation, with elders serving as the primary custodians of justice.[55] The Hausa-Fulani, governed under the Sokoto Caliphate, implemented a more codified legal system based on Sharia law, blending religious precepts with indigenous traditions to maintain social order.[56]

A key feature of these governance structures was the expectation of ethical leadership and accountability. Traditional rulers were bound by moral obligations to act justly, resolve disputes fairly, and protect the vulnerable. Among the Yoruba, the Oba was seen as the chief arbiter of justice, responsible for upholding social harmony, and failure to do so could result in his removal from power.[57] The Igbo, despite lacking a centralised authority figure, operated a system of collective accountability, where governance decisions were made

[51] J. O. Adeuyan, *Contributions of Yoruba People in the Economic & Political Developments of Nigeria*. (AuthorHouse, 2011).

[52] G.A. Akpaloo, "The Impact of Legislations on the Customary Practices of the Ga-Dangma Peoples of South Eastern Ghana" (1994) 7 *Law and Anthropology* 203.

[53] J. A. Shinaba, *Women and Leadership in Nigerian Marketplace* (Diss, 2006).

[54] O.E. Babalola, "Yorùbá Traditional Institution and Maintenance of Laws and Order in the Precolonial Period" (2017) 3 *International Journal of Social Sciences* 1.

[55] A.O. Isichei & W.W. Sanford, "The Effects of Waste Gas Flares on the Surrounding Vegetation in South-Eastern Nigeria" (1976) *Journal of Applied Ecology* 177.

[56] M.J. Kuna, "The Sokoto Caliphate, Colonialism and the Formation of Identities: The Construction of Northern Nigeria" (1998) 10 *Annals of Social Science Council of Nigeria*.

[57] J.A.I. Bewaji, *The Rule of Law and Governance in Indigenous Yoruba Society: A Study in African Philosophy of Law* (Lexington Books, 2016).

through village assemblies to ensure inclusivity.[58] In the Hausa-Fulani emirates, justice was dispensed in accordance with Sharia principles, ensuring that rulers adhered to both religious and ethical obligations.

The disruption of these indigenous governance structures by colonial rule had profound and lasting consequences. The British indirect rule system, introduced in Nigeria, transformed traditional rulers from custodians of their communities into enforcers of colonial policies. This fundamentally severed the organic relationship between rulers and their people, as traditional leaders were now accountable to colonial administrators rather than their communities. Similarly, in Ghana, the establishment of parallel native courts under colonial rule marginalised the authority of traditional rulers, diminishing the participatory and inclusive nature of governance. The imposition of Western legal codes further eroded indigenous legal traditions, replacing customary justice systems with formalised courts that often lacked cultural legitimacy.

One of the most significant consequences of colonial rule was the entrenchment of elitism in governance. Traditional rulers who had once been accountable to their people became instruments of colonial control, leading to a decline in public trust and political alienation. The erosion of communal governance structures resulted in a disconnect between the state and ordinary citizens, a legacy that persists in contemporary Nigerian and Ghanaian politics. The exclusion of traditional leadership from modern governance has contributed to political systems dominated by elites, often detached from local realities and ethical imperatives. The challenges faced by post-colonial Nigeria and Ghana in reconciling indigenous governance traditions with modern state structures highlight the enduring impact of colonial rule. Contemporary legislative frameworks often struggle to reflect the ethical principles and participatory governance models that defined pre-colonial societies. The dominance of Western bureaucratic models has, in many instances, led to governance systems plagued by corruption, exclusion, and inefficiency. However, revisiting the ethical foundations of pre-colonial governance could offer valuable insights for reforming contemporary political structures.

By integrating traditional governance principles into modern legislative processes, Nigeria and Ghana could foster more inclusive, participatory, and culturally relevant governance systems. The consensus-based decision-making models of the past demonstrate the importance of community engagement in political processes, ensuring that governance remains responsive to the needs of the people. Additionally, the ethical imperatives that guided pre-colonial rulers—justice, accountability, and the prioritisation of communal welfare—could help address the challenges of corruption and political disillusionment in modern governance.

The colonial legacy of centralised authority and elite governance has created structural barriers to political inclusivity, but the reintroduction of ethical leadership frameworks from

[58] K.I. Anthony, "Igwebuike as an Igbo-African Philosophy of Inclusive Leadership" (2017) 3:7 *IGWEBUIKE: African Journal of Arts and Humanities*.

pre-colonial times could provide a pathway towards more representative and legitimate governance. Traditional rulers, once sidelined by colonial rule, could play a renewed role in contemporary governance, serving as bridges between state institutions and local communities. This approach would restore cultural legitimacy to governance while ensuring that political systems reflect the values and aspirations of the people.

In summary, the governance structures of pre-colonial Nigeria and Ghana were defined by ethical integrity, communal engagement, and participatory decision-making. The disruption of these systems by colonial rule marginalised traditional leadership, eroded accountability, and entrenched elitism in governance. However, the principles that underpinned pre-colonial governance—justice, consensus-building, and moral responsibility—remain highly relevant for addressing the challenges of contemporary governance. By reintegrating these ethical frameworks into modern political systems, Nigeria and Ghana can build more inclusive, accountable, and culturally resonant governance structures, ensuring that leadership serves the interests of all citizens, rather than a privileged few.

Discussion: The Legacy of Traditional Governance in Post-Colonial Nigeria and Ghana

The establishment of colonial legal systems in Ghana and Nigeria, executed without meaningful consultation with local populations, initiated an era of exclusivity and elitism in legislative processes. These challenges continue to shape contemporary governance, affecting both nations' ability to foster inclusive and representative political systems. Under British colonial rule, a dual legal framework emerged, juxtaposing indigenous customs with British-imposed structures that primarily served imperial interests. Legislative councils, established ostensibly to promote orderly governance, were often insular and unrepresentative, entrenching a sense of alienation among the indigenous populace. In Ghana, for instance, the British instituted the first Legislative Council in 1850, followed by subsequent reforms aimed at incorporating African voices. However, such attempts were largely tokenistic, serving more as symbolic gestures than substantive efforts to integrate indigenous governance traditions.[59] A similar trajectory unfolded in Nigeria, where the Lagos Legislative Council was established in 1861.[60] Yet, much like in Ghana, these councils remained disconnected from the broader population, and it was only through later constitutional reforms that indigenous representation began to take shape.[61] The failure to meaningfully engage local voices in the formative phases of these colonial legislative councils laid the foundation for elitist governance structures, which continue to impede democratic inclusion in the post-colonial era.

Ghana's contemporary parliamentary system exemplifies these structural legacies. Operating as a unicameral body, Parliament wields full legislative authority, with Article 11

[59] A.A. Boahen, *African Perspectives on Colonialism* (John Hopkins University Press, 1989).

[60] K. Ezera, *Constitutional Developments in Nigeria* (Cambridge University Press, 1964).

[61] J.S. Coleman, *Nigeria: Background to Nationalism* (University of California Press, 2023).

of the 1992 Constitution defining the sources of Ghanaian law, including parliamentary enactments, common law, and customary law.[62] However, despite its outwardly democratic structure, Ghana's parliamentary system remains deeply influenced by its colonial origins. Historically, the 1850 Legislative Council had a highly limited advisory role, mainly serving the interests of the Colonial Governor. It was only in 1916, under Sir Hugh Clifford, that the Council was expanded to allow for marginal African representation, though British interests remained dominant.[63] The Guggisburg Constitution of 1925[64] introduced a Provincial Council for paramount chiefs, nominally acknowledging African concerns while still reinforcing colonial priorities. A more profound shift occurred with the Burns Constitution of 1946[65] and the Coussey Committee's recommendations of 1951,[66] which significantly increased African participation in governance. However, true self-representation did not materialise until the 1954 Constitution, which marked Ghana's transition towards full self-governance and eventual independence in 1957.[67]

While these reforms signified progress, they primarily involved the transplantation of British legal structures onto Ghana's governance framework rather than an organic evolution of indigenous governance traditions. The imposed parliamentary model, while ostensibly inclusive, effectively supplanted pre-colonial communal decision-making processes with a hierarchical system that privileged political elites. The 1954 Constitution, for instance, established a 104-member assembly elected through political representation, yet its structure closely mirrored British parliamentary traditions, reinforcing partisan politics at the expense of traditional consensus-driven governance. The emphasis on party-based representation marginalised community-oriented legislative practices, which were historically centered on collective dialogue and ethical decision-making. Consequently, while Ghana's parliamentary system evolved towards greater inclusivity, it simultaneously distanced itself from the core values of pre-colonial governance, thereby diluting the effectiveness of indigenous legislative principles.

Since independence, Ghana's Parliament has remained the principal legislative authority, with MPs required to be Ghanaian citizens, aged 21 or older, and registered voters. Article 94 of the 1992 Constitution mandates that MPs must reside in or have lived in their constituency for at least five of the previous 10 years. While these requirements suggest an effort to maintain local representation, the overall parliamentary structure remains rooted in

---

[62] Ghana, *Constitution of the Republic of Ghana 1992* (entered into force 7 January 1993) https://www.constituteproject.org/constitution/Ghana_1996.pdf accessed 23 March 2025.

[63] T.P. Biswal, *Ghana, Political and Constitutional Developments* (Northern Book Centre, 1992).

[64] United Kingdom, *The Guggisburg Constitution of 1925: Order in Council providing for the establishment of the Legislative Council of the Gold Coast Colony* (8 April 1925) SR & O 1925 No 422.

[65] Gold Coast, *Gold Coast Colony and Ashanti (Legislative Council) Order in Council 1946* (19 February 1946) SI 1946/280.

[66] Gold Coast, *Report of the Committee on Constitutional Reform* (Coussey Committee Report, 1951) https://link.springer.com/chapter/10.1057/9780230603486_7 accessed 23 March 2025.

[67] F.K. Drah, "Nkrumah and Constitutional Democracy: 1949-1966 Revisited" (1992) 8:1-2 *Research Review* 1.

Western political traditions, lacking full integration of Ghana's ethical governance heritage. The Parliamentary Committee system, outlined in Article 103, plays a key role in reviewing legislation, yet decision-making is still dominated by elite actors, with limited grassroots engagement. The requirement for a majority vote to pass legislation entrenches a rigid, adversarial model that diverges from the participatory ethos of traditional Ghanaian governance. While majority rule is a recognised democratic principle, its application within Ghana's legislative framework enables a government with a parliamentary majority to pass laws with minimal opposition, potentially undermining checks and balances. This reflects a colonial legacy where legislative dominance overrides consensus-driven decision-making. Thus, rather than rejecting majority rule itself, the concern lies in its implementation, which risks consolidating executive control over Parliament, diminishing the deliberative and inclusive nature of governance inherent in indigenous traditions.

The process of legislation in Ghana is often described by Oquaye as the "crystallisation of ideas", implying a deliberative and reflective approach to law-making.[68] However, this concept warrants scrutiny, particularly regarding the actual involvement of ordinary citizens in the legislative process. Various stakeholders — including government ministries, the Attorney General's Office, and the Law Reform Commission — play significant roles in the formulation of legislation, yet these contributions often remain secondary to the authority of Parliament and the Executive. Although the Law Reform Commissions (LRCs) in Ghana and Nigeria review both statutory and customary laws, their influence is largely limited to technical assessments rather than ensuring broad public participation. The Attorneys General and Parliamentary Counsel, responsible for drafting bills, operate within elite bureaucratic circles, thereby excluding local voices from the core legislative discourse. However, while LRCs in some jurisdictions actively engage the public through consultations and stakeholder involvement, in Ghana and Nigeria, their role remains highly restricted, often focusing on legal coherence, consistency, and procedural refinements rather than substantive engagement with the broader population. Despite formal provisions for public participation in the law reform process, citizen involvement in these two countries is minimal and largely symbolic. Moreover, although public consultations may take place, they are often limited to elite stakeholders, policymakers, and politically connected groups, with ordinary citizens largely excluded from shaping legislative outcomes. As a result, many remain unaware of new legal developments and their implications. This top-down, bureaucratic approach contrasts sharply with traditional governance structures in Ghana and Nigeria, where decision-making historically emphasised inclusive participation, social cohesion, and collective deliberation. Additionally, legislative drafting processes in both countries remain predominantly controlled by the Attorney General's office and Parliamentary Counsel, reinforcing an elite-driven model of lawmaking that lacks meaningful grassroots engagement. While LRCs are theoretically mandated to examine both policy rationales and legal frameworks, their practical influence is often constrained by

[68] M. Oquaye, *Politics in Ghana, 1982–1992: Rawlings, Revolution, and Populist Democracy* (Tornado Publications, 2004).

political considerations, leading to reforms that reflect institutional priorities rather than addressing broader societal concerns. Thus, in Ghana and Nigeria, the shift from community-based legal evolution to centralised, technocratic decision-making marks a departure from traditional participatory governance. Addressing this limitation requires greater transparency, broader public consultations, and more inclusive mechanisms that ensure legal reforms are not only technically sound but also socially responsive and democratically legitimised.

This raises a critical question: to what extent does the Ghanaian legislative process genuinely represent its citizens? While public hearings and Gazette publications are intended to create avenues for public engagement, low public awareness and accessibility barriers severely limit meaningful participation. Although the Parliamentary Counsel is not legally responsible for public consultations, their role within the legislative framework places them in a unique position of influence. As the drafters of legislation, they operate within elite bureaucratic circles, where laws are shaped in ways that often exclude grassroots voices. From a traditional governance perspective, this contradicts the historical role of consensus-building and community engagement, which was fundamental in pre-colonial Ghanaian governance structures. Traditional rulers did not merely enact laws but worked collaboratively with community members, ensuring that governance was deeply participatory and reflective of collective interests. Given this, the Parliamentary Counsel, while not directly responsible for engagement, holds a moral duty to collaborate with the LRC in ensuring that public consultations are substantive and not merely procedural formalities. The LRC, as the primary body overseeing law reform, is expected to solicit broad-based feedback from the citizenry, but its effectiveness is often undermined by political influence and bureaucratic constraints. Without greater accountability in this process, lawmaking remains disconnected from the lived experiences of ordinary Ghanaians, reinforcing an elite-driven model that echoes colonial-era legislative structures. By failing to uphold inclusive legislative practices, Ghana's governance framework continues to marginalise traditional participatory mechanisms, despite operating under a formal democratic system. Addressing this requires not only legal reforms but a fundamental shift towards governance that actively incorporates public voices, ensuring that the law-making process is not merely the domain of political and bureaucratic elites but a true reflection of the needs of the people.

In Nigeria, the colonial legacy of legislative elitism continues to shape the structure and function of governance. The 1999 Constitution [69]establishes a tripartite system of government, with separate executive, legislative, and judicial branches. While the legislature is tasked with enacting laws, its function is often influenced by executive dominance, creating a complex balance between democratic governance and institutional autonomy. The bicameral National Assembly, composed of the Senate and the House of Representatives, is theoretically designed to facilitate legislative scrutiny and policy refinement. However, in

[69] Nigeria, *Constitution of the Federal Republic of Nigeria 1999* (enacted 29 May 1999) https://faolex.fao.org/docs/pdf/nig164561.pdf accessed 23 March 2025.

practice, the executive's influence frequently shapes legislative priorities, leading to concerns about policy stagnation, inefficiencies, and legislative delays. While it is not inherently problematic for the ruling party to exercise control over legislative processes — given that democratic systems naturally allow the governing party to set the legislative agenda — the challenge in Nigeria arises when executive dominance weakens parliamentary independence, limiting robust legislative debate and oversight. Furthermore, corruption and political patronage exacerbate this issue, undermining the credibility and effectiveness of the legislative process. The executive's ability to influence lawmakers through political alliances, patronage networks, and resource allocation raises concerns about whether legislative decisions genuinely reflect the interests of ordinary Nigerians or are shaped by elite bargaining and power consolidation. Thus, while executive influence in a democratic system is not inherently negative, its impact on legislative autonomy and democratic accountability in Nigeria requires critical examination. Addressing this issue necessitates institutional reforms to enhance legislative independence, transparency, and accountability, ensuring that the law-making process serves broader democratic interests rather than elite political calculations.

The structural foundations of Nigeria's legislative process are deeply embedded in British constitutional principles, particularly the separation of powers doctrine. However, this system contrasts sharply with pre-colonial Nigerian governance models, which emphasised integrated decision-making through rulers, councils of elders, and community dialogue. The British parliamentary model, imposed during colonial rule, largely disregarded indigenous structures, leading to a disconnect between governance and societal norms. This has contributed to institutional inefficiencies, particularly given Nigeria's ethnic and regional diversity. The rigid application of a Westminster-style system has led to legislative conflicts that hinder effective governance, reflecting an enduring mismatch between imposed legal structures and indigenous traditions.

Section 58(1) of the Nigerian Constitution empowers the National Assembly to legislate through bills that require Presidential assent. Meanwhile, Section 9 grants the Assembly the authority to amend the Constitution, requiring a two-thirds majority in the State Houses of Assembly. However, bureaucratic bottlenecks and weak public engagement frequently impede these processes, resulting in a legislature that is often perceived as detached from its constituents. The Committee System, designed to enhance legislative efficiency, frequently operates in a vacuum, limiting its engagement with grassroots concerns. Consequently, legislative outputs tend to reflect elite priorities, rather than addressing the socio-economic realities of everyday Nigerians.

A similar dynamic exists in Ghana, where the parliamentary process, despite its constitutional safeguards, remains highly centralised. The Attorney General, designated as the "principal legal adviser" to the government, wields significant influence over the law-making process. Additionally, the requirement for presidential assent before any bill becomes law further consolidates executive power, echoing colonial-era governance

structures. While Ghanaian laws are published in the Gazette,[70] low levels of public awareness and accessibility render this mechanism largely ineffective for genuine citizen engagement. Conversely, while executive dominance in Ghana's legislative process may appear problematic, it is important to acknowledge that centralised authority was also a feature of traditional governance systems. In pre-colonial Ghanaian societies, particularly among the Akan, the paramount chief (Omanhene) and council of elders exercised significant authority, with the final say often resting with the king. This structure, like the modern executive-led governance system, concentrated power in a central figure. Nevertheless, what distinguishes traditional governance from the modern legislative process is its deep-rooted connection to spirituality, moral obligations, and communal well-being. Unlike contemporary political structures, where self-interest, political alliances, and elite influence can shape governance, traditional rulers were expected to uphold the moral and ethical values of the community, guided by the ancestral spirits and customary laws. The spiritual dimension of traditional governance imposed a higher moral duty on rulers, limiting the extent to which personal interests could override the collective good. Therefore, while executive authority in governance is not inherently negative—either in the traditional or modern context—the challenge in Ghana's contemporary system lies in ensuring that executive power is exercised in a way that prioritises democratic accountability, transparency, and public participation. Unlike traditional rulers, who derived legitimacy from ancestral and communal obligations, modern political leaders operate within a framework that is vulnerable to political patronage, self-interest, and elite influence. Addressing this gap requires institutional reforms that balance executive authority with stronger public engagement mechanisms, ensuring that governance serves not just political elites but the broader society, much like traditional leadership once did.

Addressing the historical and structural deficiencies in the legislative processes of Nigeria and Ghana requires a fundamental shift towards inclusive governance. Efforts to reintegrate pre-colonial governance values — such as consensus-building, community involvement, and ethical leadership — must be strategically incorporated into existing institutional frameworks to ensure greater public participation and democratic legitimacy. One potential approach involves formalising the role of traditional authorities in the legislative process. In some jurisdictions, a House of Chiefs or an equivalent advisory body allows traditional leaders to review and provide input on proposed legislation. Ghana already has a National House of Chiefs, which plays a role in customary law matters, but its involvement in broader statutory law-making remains limited. Expanding its mandate to include consultative engagement on key legislative matters could enhance civic inclusivity while maintaining constitutional safeguards. Similarly, in Nigeria, the creation of a Traditional Leaders' Advisory Council could serve as a mechanism for integrating indigenous perspectives into legislative deliberations while preserving the separation of powers within the tripartite system of government. In addition to strengthening traditional governance

[70] Ghana Legal Information Institute (GhaLII), *Gazette Collection* https://ghalii.org/gazettes accessed 23 March 2025.

participation, there is a critical need for greater legislative independence. In Nigeria, limiting executive overreach and ensuring that the National Assembly operates autonomously would enable more effective law-making, free from undue political influence. This could be achieved through constitutional amendments that enhance parliamentary oversight powers, reinforce financial independence, and introduce stricter safeguards against executive interference. Likewise, Ghana's Parliament must transition beyond the rigid colonial-era structures that concentrate authority within elite bureaucratic circles, fostering a more participatory legislative process. This could include public engagement reforms, such as mandatory community consultations on major legislative proposals and enhanced transparency measures, ensuring that legislative decisions are accessible and reflective of broader societal needs. By implementing structural reforms that promote both traditional governance values and institutional accountability, Ghana and Nigeria can establish more inclusive, representative, and effective legislative systems, bridging the gap between historical governance models and contemporary democratic principles.

Conclusion

In conclusion, the legislative processes in Nigeria and Ghana remain inextricably linked to their colonial histories, resulting in substantial flaws that undermine both citizen engagement and the efficacy of governance. The persistence of top-down approaches in law-making often alienates the very populations these frameworks are intended to serve, perpetuating a disconnect between the state and its citizens. To forge a more inclusive, responsive, and effective legislative architecture, it is imperative to weave pre-colonial governance perspectives into contemporary law-making, ensuring that the legislative process resonates with the lived realities of the populace. Both Nigeria and Ghana must establish formal mechanisms for meaningful community involvement in the legislative process. Regular public forums and consultations can provide citizens with a platform to articulate their concerns and contribute to discussions regarding proposed laws. Such initiatives would not only empower communities but also ensure that legislation genuinely reflects local needs, customs, and traditions.

Recognising the vital role of traditional leaders in governance is essential for bridging the divide between formal and informal law-making processes. In Nigeria, local councils should be granted a more significant role in legislative discussions, ensuring that governance structures reflect the diverse socio-political realities of local communities. Similarly, in Ghana, formalising institutional channels for traditional authorities to contribute to parliamentary committees would provide a structured framework for integrating customary law perspectives into national legislation. One potential mechanism to achieve this is the establishment or expansion of a House of Chiefs with an advisory function, allowing traditional leaders to review and provide input on relevant legislative matters, particularly those concerning customary law, local governance, and community development. This approach would enhance the legitimacy of laws and foster greater public trust in legislative processes by ensuring that governance structures reflect the historical and cultural realities

of both countries. Additionally, improving the quality of legislation requires investment in capacity-building initiatives aimed at lawmakers. Training programmes focused on stakeholder engagement, customary law interpretation, and local governance challenges would equip legislators with the necessary skills to draft laws that genuinely reflect the needs and aspirations of their constituents. Strengthening the institutional relationship between traditional governance structures and formal legislative bodies would ensure a more inclusive and representative law-making process, reinforcing the democratic legitimacy and effectiveness of governance in Ghana and Nigeria. Embracing digital platforms for public consultations and feedback on proposed legislation can significantly enhance transparency and civic engagement. While some online legislative resources, such as the Gazette, already exist, they are not widely known or easily accessible to the average citizen. The lack of public awareness and accessibility barriers limits the effectiveness of these platforms in fostering meaningful participation in legislative processes. Currently, many official government websites and digital legislative resources in Ghana and Nigeria are often complex, difficult to navigate, or do not provide interactive features that allow for real-time public engagement. The Gazette, for example, primarily serves as a publication tool for legal notices rather than a forum for citizen participation and feedback. This gap in accessibility and usability hinders the ability of ordinary citizens to stay informed about legislative developments, thereby reinforcing public disengagement from the law-making process. To address these challenges, both nations should invest in user-friendly online portals that provide simplified access to legislative information and allow citizens to engage in discussions, submit feedback, and track the progress of bills. A comprehensive review of existing digital frameworks is also necessary to ensure that public engagement tools are not only technically available but also practically accessible to diverse groups, including those with limited digital literacy or restricted internet access. Additionally, a participatory approach to legislative review is essential for identifying outdated or redundant laws that impede effective governance. This process should actively involve civil society organisations, legal experts, and community representatives, ensuring that legislative reforms reflect a holistic understanding of governance challenges and address the barriers that currently exclude ordinary citizens from legislative participation. By improving digital accessibility and public awareness, Ghana and Nigeria can create a more inclusive legislative environment, where law-making processes are transparent, participatory, and reflective of public interests.

These recommendations highlight a broader imperative: the restoration of the social contract between the state and its citizens. By actively involving the populace in the legislative process, Nigeria and Ghana can reaffirm the foundational democratic principle that sovereignty resides with the people. This restoration necessitates a paradigm shift from a purely procedural understanding of law-making to a more substantive, participatory model that acknowledges the voices and experiences of all citizens. Moreover, the integration of traditional governance structures is not merely a pragmatic solution but a recognition of the rich tapestry of indigenous knowledge systems that can enhance contemporary governance. By valuing these systems, the state not only enriches its legislative processes but also

affirms the cultural identities and values of its citizens. By implementing these practical recommendations, Nigeria and Ghana can cultivate legislative processes that are inclusive and effective while reflecting the democratic ideals they espouse. Such reforms would represent a significant step toward transcending the vestiges of colonialism and nurturing a more equitable and just society—one where the laws truly embody the collective will of the people they govern.

How Do You Solve a Problem Like a Typo? Some Pondering on Bill Corrective Powers in the Canadian Context

Charlie Feldman[1]

Abstract

This article examines the little-known but important realm of non-substantive legislative corrections in Canada, focusing on the powers of Law Clerks to address errors in bills before they become law. It analyzes the scope and limitations of these powers through two federal case studies. While such corrective powers may enhance legislative efficiency, they also raise questions about transparency and the risk of overreach. The author calls for further study to help refine codified corrective powers in jurisdictions where they exist and to guide their potential adoption where they do not. This article is based on a presentation delivered by the author at the 2024 CALC Conference in Jamaica.

Introduction

To err is human. Until our artificial intelligence drafting robot overlords take over and perform flawlessly (despite any flaws in instructions!), mistakes will continue to appear in bills before legislatures. At the CALC 2024 conference in Jamaica, I presented on corrective powers in Canadian legislatures – that is, powers of unelected actors within a legislature to make non-substantive corrections to bills before they become law.[2] The purpose of this companion paper is to explore the subject through two case studies on the limitations of corrective powers.

Across Canada's legislative institutions, the majority of debated bills are drafted by the government. Some Canadian jurisdictions have separate drafting offices within the legislature to serve legislators not in government; in the other jurisdictions, the government

[1] Charlie Feldman is the President of the Canadian Study of Parliament Group. The views herein are not those of any employer.

[2] The accompanying paper was far too long for *The Loophole* and will appear in a future edition of the *Journal of Parliamentary and Political Law.*

drafting shop is also responsible for the drafting of any non-government legislation. The offices located within legislatures are typically headed by a person known as the Law Clerk and Parliamentary Counsel (in this paper "Law Clerk" will be used regardless of title). The position is non-partisan and the role is usually that of a senior officer within the administration of the legislature.

It should be understood that the Law Clerk may not have had any involvement with the drafting of a bill before the legislature and may have no inside knowledge of what the drafters intended. Federally, Canada's Department of Justice drafts government legislation and the Senate and House of Commons each have a drafting shop to assist parliamentarians in their respective chamber who are not in government. While the Law Clerk of the Senate and House head their respective offices, their personal involvement with the drafting of a particular bill is uncommon in the contemporary era in which there are multiple drafters in each office who handle drafting files independently.[3]

Corrective Powers in Canada: A Brief Overview

If every change to a bill must be made by formal amendment subject to a vote, legislators' time and energy will invariably be devoted to the correction of non-substantive matters, such as obvious typos. In a bicameral context, amendments proposed by one chamber may sit imperfectly with the bill as adopted by the other chamber. As such, additional actions may be required by both chambers to ensure that the same legislative text (hopefully perfect in form) is adopted by each House such that the bill can receive royal assent. As one Canadian Member of Parliament expressed in frustration during a 1988 during a legislative back-and-forth on a correction issue: "we must do a better job of drafting. These things are going backwards and forwards like a yo-yo between this place and the Senate in order that these corrections can be made."[4]

From an efficiency standpoint, it makes sense to allow for the correction of non-substantive and minor issues in bills to be effectuated "behind the scenes". These corrective powers to bills are distinct from correction powers that may exist to modify statutes.[5] That is, the focus is on correcting bills *before* they become law. In the bicameral setting, correcting bills in one House before they are sent to the other can minimize the so-called "yo-yo" mentioned earlier, provide greater clarity to the second House as to the amendments made by the first House, and may limit the need for any post-enactment correction through executive action or subsequent corrective legislation.

[3] See: M.-A. Roy, "Drafting Bills in the Senate and House of Commons" (2008) https://ciaj-icaj.ca/wp-content/uploads/documents/import/LD/LD2008/LD140.pdf?id=812&1729079515.

[4] Canada, *House of Commons Debates*, 33rd Parl, 2nd Sess, Vol 13 (2 June 1988) at p 16045.

[5] See, for example, the *Legislation Revision and Consolidation Act*, RSC 1985, c S-20, s 27.

Public documentation of Law Clerk powers is non-existent in some Canadian jurisdictions.[6] Three Canadian legislative institutions have explicitly empowered their Law Clerk to make non-substantive corrections to bills and have enumerated the types of corrections envisaged in their relevant rules or standing orders. These will be discussed below. No Canadian jurisdiction requires public-facing reporting on bill corrections made by the Law Clerk.

At the provincial level, only the *Rules and Forms of Procedure of the House of Assembly* from Nova Scotia's House of Assembly provide for a very clear alteration power, which is vested in the Law Clerk. Specifically, the rule reads as follows:

> Changes by Legislative Counsel
>
> 79A After introduction of a Bill but before certification of the engrossed Bill by the Speaker and the Clerk for the purpose of Royal Assent, the Legislative Counsel may make changes to the Bill that the Legislative Counsel considers are necessary or advisable to
>
> (a) correct numbering or lettering of provisions, including cross-references;
>
> (b) correct formatting, spelling, punctuation, grammatical and clerical or printing errors; and
>
> (c) change language to preserve a uniform mode of expression

Federally, the House of Commons and the Senate have corrective powers in their *Standing Orders* and *Rules*, respectively. They are similar in scope:

House of Commons	**Senate**
Standing Orders of the House of Commons	*Rules of the Senate*
Non-substantive corrections to a bill. 156 (1) The Law Clerk of the House may, as required at any stage in the legislative process, make minor non-substantive corrections to a bill, including corrections:	Non-substantive corrections to a bill 10-10. (1) The Law Clerk may, as required at any stage in the legislative process, make minor non-substantive corrections to a bill, including corrections to:
(a) to remove technical, typographical, grammatical or punctuation errors;	(a) remove technical, typographical, grammatical or punctuation errors;

[6] As discussed in the companion piece, some legislatures' standing orders (or equivalent) do not even mention there being a Law Clerk. For example, the Rules of the Legislative Assembly of Prince Edward Island do not mention a Law Clerk and provide explicitly only for the correction of an entry in the Journals. The National Assembly of Quebec's *Standing Orders and Other Rules of Procedure* mention the Law Clerk, particularly in respect of private bill practice, but say nothing of corrective powers; however, the Assembly procedural reference, *Parliamentary Procedure in Quebec,* mentions the Law Clerk being tasked with correcting amendments made at clause by clause but says nothing of their scope of authority in so doing.

(b) to the table of provisions, the summary or the marginal notes to take into account substantive amendments made to the bill during the legislative process;	(b) modify the table of provisions, the summary or the marginal notes to take into account substantive amendments made to the bill during the legislative process;
(c) to the numbering of provisions as a consequence of amendments made to the bill during the legislative process;	(c) renumber provisions as a consequence of amendments made to the bill during the legislative process;
(d) to cross-references as a consequence of corrections made under paragraph (c);	(d) update cross-references as a consequence of corrections made under paragraphs (a) or (c);
(e) to modify, add or remove headings as a consequence of amendments made to the bill during the legislative process, to ensure that the headings correspond with the provisions that follow them; and	(e) modify, add or remove headings as a consequence of amendments made to the bill during the legislative process, to ensure that the headings correspond with the provisions that follow them; and
(f) to coordinating amendments as a consequence of the enactment of any provision referred to in those amendments.	(f) revise or remove coordinating amendments as a consequence of the enactment of any provision referred to in those amendments.
Report of corrections. (2) The Law Clerk of the House shall report any corrections made under subsection (1) to the Clerk of the House, as the clerk may from time to time require	Report of corrections (2) At the request of the Clerk, the Law Clerk shall report any corrections made under subsection (1) to the Clerk.

Other jurisdictions in Canada provide roles for the Law Clerk that may include some corrective ability. For example, the *Standing Orders of the Legislative Assembly of British Columbia* require the Law Clerk to "revise, print, and put marginal notes upon all Bills, and be generally responsible for the correctness of all Bills in their various states".[7] Revision in this context might be understood as renumbering as opposed to, say, striking a duplicative word. Readily-available, public-facing materials do not describe the exercise of this power.

It is not clear in every jurisdiction whether a practice around corrections has developed that might not find any expression in the rules. It may be that some jurisdictions allow for

[7] Standing Orders of the Legislative Assembly of British Columbia, Standing Order 94(3).

corrections to occur by an actor in the legislative branch without a formalized rule or process, and without this necessarily being publicly known (or even known to legislators themselves).

Although there is no automatic public reporting on changes made by Law Clerks using corrective powers, traces of their work can be seen when piecing together a bill's journey through the legislature. For example, the House of Commons committee report of amendments made to Bill C-11 during the 42nd Parliament shows that the committee agreed to add a provision that used the phrase "strenghten the democratic process". [8] Notice the typo in what should be "strengthen". The minutes of the meeting in which the amendment was adopted reflect the typo ("strenghten") as well – and that the vote on this amendment was carried unanimously.[9] However, in the reprint of the bill marked "reprinted as amended by the Standing Committee […]",[10] this new provision has the corrected spelling, "strengthen". The intervening actor would appear to be the Law Clerk, who corrected this obvious typo.

Another example of a behind-the-scenes change can be observed in British Columbia's legislature. Bill 26, the *Environmental Management Amendment Act, 2022* was introduced on June 2, 2022 and passed without subsequent amendment on October 4, 2022.[11] The text is different between the introduced version and the royal assent version in a very noticeable way. At First Reading, the bill began "HER MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of British Columbia, enacts as follows";[12] however, the assented-to version certified by the Clerk begins "HIS MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of British Columbia, enacts as follows".[13] With the demise of the Crown in September of 2022, this change is an obvious and necessary one. But who made the change and under what authority is unclear.

Why do corrective powers matter?

Looking through rose-coloured glasses, corrective powers save time for legislators by obviating the need to propose and vote on amendments to correct minor, non-substantive

[8] Canada, House of Commons, Standing Committee on Canadian Heritage, *Bill C-11, An Act to amend the Broadcasting Act and to make related and consequential amendments to other Acts*, 44th Parl, 1st Sess, No 2 (15 June 2022) (Chair: H. Fry).

[9] Bill C-11, *An Act to amend the Broadcasting Act and to make related and consequential amendments to other Acts*, 1st Sess, 44th Parl, 2022 (as amended by committee 15 June 2022).

[10] Canada, House of Commons, Standing Committee on Canadian Heritage, *Minutes of Proceedings*, 44th Parl, 1st Sess, No 36 (14 June 2022).

[11] See Legislative Assembly of British Columbia, "Progress of Bills" (2022) https://www.leg.bc.ca/parliamentary-business/overview/42nd-parliament/3rd-session/bills/progress-of-bills.

[12] Bill 26, *Environmental Management Amendment Bill,* 3rd Sess, 42nd Parl, British Columbia, 2022 (assented to 3 November 2022), SBC 2022, c 25, https://www.leg.bc.ca/parliamentary-business/overview/42nd-parliament/3rd-session/bills/1st_read/gov26-1.htm.

[13] Bill 26, *Environmental Management Amendment Bill,* 3rd Sess, 42nd Parl, British Columbia, 2022 (assented to 3 November 2022), SBC 2022, c 25, https://www.leg.bc.ca/parliamentary-business/overview/42nd-parliament/3rd-session/bills/3rd_read/gov26-3.htm.

matters. They also take some pressure off drafters to be perfect in their work because the drafters know that there is an ability to fix some matters without necessarily needing to draw attention to them. There is also the impact that corrective powers may have on amendment drafters' workload. For example, if an amendment drafter knows that renumbering can occur to update cross-references as a result of an amendment, the drafter may be able to draft fewer amendments to implement an instruction and might rely on the corrective power to update cross-references should the primary amendments be adopted.

Viewed from the other extreme, corrective powers raise questions about transparency in the legislative process if one is concerned about unelected or unappointed actors modifying legislative texts. A lack of clarity around their use can create challenges for both government and parliamentarians as there may be competing expectations about what can (and cannot) be addressed, as well as when or how provisions might be modified administratively. While errors in bills are not desirable, any action by officers of the legislature that could impact the legal effect of legislation may raise serious questions (and potentially doubts) about what the legislature actually enacted.[14]

Somewhere in the middle exists a conception of the corrective power that allows for useful and necessary fixes, such as addressing the recurrent typo where "public" is missing its L and where this occurs in an obvious context – such as a reference to the "pubic trustee" appearing in the *Public Trustee Act.*[15] As well, it can be useful where a drafter need not worry about producing amendments to renumber and move conjunctions and modify punctuation in lists when producing an amendment to add or remove an item. However, there are cases where the "obvious fix" could be seen as a change to the legal effect of a provision. In such cases, the exercise of the corrective power involves an evaluation of risk. Might someone notice the change and raise a concern that the authority of the Law Clerk was exceeded? What follows are two case studies for consideration.

First Case Study: Typo or Risk Tolerance?

Consider a provision that begins in its first subsection "(1) In subsections (2) to (27), ***Minister*** means the Minister of Finance." For whatever reason, the subsections that follow are numbered from (1) to (14) and then from (16) through (27), omitting any (15) entirely. Using the corrective powers outlined for Nova Scotia and the federal Houses of Parliament, it would appear permissible to renumber the subsections consecutively and to change the chapeau to refer to (26) instead of (27). One could easily chalk this omission up to someone miscounting the number of provisions and be confident that correcting this minor and non-substantive error produces no change in legal effect.

[14] See *Field v Clark,* 143 U.S. 649 (1892) (United States); and Bailey, Diggory "What is an Act of Parliament?" (2024) 2 *Public Law*.

[15] *Public Trustee Act,* SNL 2009, c P-46.1 at s 14 (as of February 2025, the typo remains).

If instead of (15) being missing, however, imagine that there were actually an extra subsection. That is, the provision's chapeau referenced subsections (2) to (27) but the provision had a subsection (28). This question is perhaps more difficult than meets the eye.

On the one hand, it is easy to imagine someone miscounted or simply hit "7" instead of "8" on their keyboard. On the other, what if subsection (28)'s use of "Minister" was indeed intended to have a different meaning than in the subsections that preceded it? Even if one can read the scheme and discern that it is obvious that the Minister in subsection (28) *must* be the same Minister as in the previous subsections for the scheme to make sense, changing the number in the chapeau extends a definition to a provision to which it did not apply previously. Arguably, this is a substantive change because the term goes from undefined in that instance to being expressly defined. Explicitly defining a term that is otherwise undefined in a provision of legislation would be impermissible under an administrative corrective power only permitted for non-substantive changes.

To make the situation more complex, suppose the bill at issue is federally introduced and bilingual. If the French version of the chapeau correctly refers to subsections (2) to (28), is there an argument that changing (27) to (28) in the English chapeau, despite its apparently substantive nature, constitutes a minor non-substantive change in the name of linguistic consistency?

Recall that the federal corrective powers refer to removing typographical errors. While we can perhaps be better satisfied that the matter is only typographical if it appears in one language, does characterizing the change that way reflect the reality of the effect the change has on the English version when interpreted without reference to the French version? Reasonable people may disagree and a cautious Law Clerk may prefer that parliamentarians adopt an amendment to fix the issue. A bolder Law Clerk might be prepared to assert that they were satisfied this was a typo to be fixed even if there could be arguments that it was changing the legal effect of a provision, given the obvious nature of the change. Still another Law Clerk might ask "What's the point of any correction?" and figure that an issue like this is unlikely to ever make it to court and so, while the desire to fix errors is noble, it may not be worth sticking one's neck out if ever asked to justify the authority for the change in question.

It may be useful to recall here that the Law Clerk does not propose amendments to the legislature as does a member of the legislature. While there may be lines of communication between bill sponsors and the Law Clerk, there is no practice in the Canadian federal context by which the Law Clerk would sit with a committee to review bills for possible errors as matter of course or produce a report of their own proposed changes. Of course, a Law Clerk could flag an issue informally (if made aware of it) but they may also not see the point in raising it for the reasons discussed above.

Perhaps this is where a reporting mechanism could be of interest. Imagine if the Law Clerk were empowered to report proposed administrative changes – including "borderline" cases – to the committee studying the bill for it to exercise a right of refusal? Such a mechanism

could allow for these changes (e.g., those that are closer to the line of substantive changes) to be made with legislators' clear consent.

This case study is based on clause 406 of Bill C-75 of the 42nd Parliament, as introduced. As assented to, the first subsection begins "(1) Subsections (2) to (27) apply if […]" and the final subsection of the section is subsection (29). It would appear that subsections (28) and (29) were only intended to apply if the condition in subsection (1) – that applied to all the other subsections of that section – were met. Note that a subsection was inserted into the section (subsection (10.1)) but the whole section was not renumbered by the Law Clerk, perhaps to avoid entirely the questions of how to change the references in subsection (1) and whether this could be done with the corrective power. As the title of this case study suggested, the question of whether this is a "typo" reflects perhaps more a question of risk tolerance for the Law Clerk to make such a change and whether they would be comfortable defending it if raised in the legislature.

Case Study 2: Duplication Limitations

The parliamentary consideration of Bill S-245 of the 44th Parliament, 1st Session, illustrates another corrective power limitation. As passed by the Senate, the bill had two clauses. It was then modified by a committee of the House of Commons, which adopted conflicting and overlapping amendments. In doing so, the committee created a rather anomalous situation.

In the House committee, two amendments were adopted that each contained the following amending formula: "That Bill S-245 be amended by adding after line 18 on page 1 the following new clauses:". What followed both was a new proposed clause 1.2. In the normal course, one would expect a later administrative renumbering so that there would not be two clauses in the bill each designated as 1.2. However, this situation is far from that straightforward.

The first amendment's proposed new clause 1.2 would replace paragraph 5.1(4)(a) of the *Citizenship Act*. The second amendment's proposed new clause 1.2 also amended paragraph 5.1(4)(a) of the *Citizenship Act*. As a result, the committee-amended version of the bill would have two new clauses numbered 1.2, both proposing to amend the same paragraph of the *Citizenship Act* but with each proposing a different wording for that paragraph.

As introduced, the bill had no coming-into-force clause, meaning that it would come into force on assent under the *Interpretation Act*. The committee proposed a new coming-into-force clause providing that the entire Act to would come into force on one day to be set by order of the Governor in Council within 548 days of royal assent. If the bill were to come into force without any intervening action, two conflicting versions of the *Citizenship Act*'s paragraph 5.1(4)(a) would exist at the same time.

In an ideal world, a parliamentary committee would offer one coherent vision for what it wants the ultimate state of the law to be at any one time. As that would not happen here given the conflicting adopted amendments, eyes might turn to the Law Clerk to exercise a

corrective power. However, there are several points where the corrective powers as we understand them would not help address the issues posed by the committee's amendments.

First, and perhaps most obviously, the Law Clerk cannot decide which version of paragraph 5.1(4)(a) is "correct", as the committee adopted two of them. There is no question that picking one policy over is a substantive change. Second, even if the Law Clerk wanted to be "helpful" by inserting a paragraph 5.1(4)(a) from one version and, say, a paragraph 5.1(4)(a.1) from the second to avoid a direct numbering conflict, this could have downstream effects for the scheme and require additional extensive amendments (made traditionally or through corrective means or potentially both). It is, of course, a substantive matter.

Third, and perhaps less obviously, the Law Clerk cannot easily renumber the bill to eliminate the duplicative clauses 1.2. If the bill were to be reprinted, the temptation might be to make the second clause 1.2 into a clause 2.2 or some such, and this could be beneficial to drafters who need to prepare subsequent amendments to either of the clauses. Corrective motions were on notice at report stage -- in one instance, they address the matter by "deleting the first subclause (2.1)" and in the other instance they spell out the clause's text to avoid confusion from what would otherwise be an ambiguous reference.[16]

The issue here is the intersection between renumbering and what might follow. That is, if the first clause 1.2 were "incorrect" and to be deleted, but the second clause 1.2 had been renumbered, the result of the deletion would be to create a numbering gap. Potentially, that gap could be addressed by another exercise of the corrective power. But should the Law Clerk use their corrective power now to do something that might later require further use of their corrective power? It is not entirely clear.

Fundamentally, the Law Clerk cannot use their corrective powers to resolve a substantive legislative conflict between amendments adopted by a committee. Nor was there a practical alternative in which the Law Clerk could have in some way prevented the committee from making these choices – save for sitting with the committee members and walking through every proposal (a very resource-intensive proposition and one that may have the effect of shifting responsibility for sound law-making practices away from legislators, who are responsible for understanding the impacts of their amendments).

Simply put, the Law Clerk's corrective power to make non-substantive change only goes so far when legislators make substantive decisions that cannot be reconciled.

Conclusion

Across jurisdictions and for as long as anyone can remember, there have been mistakes in bills before legislatures.[17] The existence and use of corrective powers deserves more study.

[16] See "Report Stage" notices of motion for S-245, notice given October 17, 2023.

[17] Steven Reynolds tells of a bill in Australia where "careful" was substituted for "lawful" by a Clerk in 1882. See "'You Have Committed a Great Offence and Have but a Weak Answer to Make for Yourself': When Clerks Make Mistakes" (2013) 81 *The Table* at p 5.

As efficiencies might be identified (such as being able to correct a typo without a formal amendment being adopted), so might substantive barriers to correction or matters that should be clarified in the powers themselves.

For example, the cover of Bill S-5 of the 44th Parliament, 1st Session, as introduced, has a box reading "[t]his reprint properly aligns the provisions of the bill in each official language. Certain provisions were not aligned correctly in the original printed version due to a technical issue." There may be cases in the future where a technical error in how data is transmitted from one entity to another in the parliamentary ecosystem is the source of a problem – a clear corrective power to address this may be useful so that this type of correction is explicitly recognized by the authority to make non-substantive changes to a bill or to cause it to be reprinted as necessary.

Law Clerks and their partners (such as government drafting officials or their bicameral Law Clerk counterpart) should ensure they are on the same page about how best to communicate when a potential issue for correction is identified (e.g., whom to contact and should they just be informed of a problem or offered a recommended solution?) and to establish expectations for what might be done in common situations (e.g., is cosmetic renumbering of new provisions to avoid the need for section designators with decimal points expected in all cases?). Law Clerks should consider seeking codification of any informal correction practices so that there is clarity about their authority (and ability!) to act.

Law Clerks or legislatures looking to codify corrective powers may understandably seek to learn from best practices elsewhere. Law Clerks opining openly about what has worked (and what has not) can help inform other decision-making in this space. If we do not know about the impact these powers have and challenges with their exercise, we cannot easily adjudicate whether they are working as intended (where they exist) or suggest they should be adopted (where they are not currently present).

As legislatures become increasingly busy with more bills being considered more quickly, the risk for error increases. While there is no perfect safety net that will catch every error, corrective powers can help increase the odds of an improved statute resulting from the legislative process. In the end, however, corrective powers cannot fix bad policy, poor instructions, or compressed time for drafting and the consideration of legislation. Arguably, those might be the bigger matters for which the exercise of corrective powers by any actor so empowered may be most welcome by drafters – and perhaps legislators as well.

How to Ensure Regulatory Completeness, with Classic Tools and Large Language Models

Manfred Kohler[1]

Abstract

Following a brief introduction to the subject of regulatory completeness, this article will present classic tools fostering regulatory completeness that do not require any familiarity with large language models,[2] *such as internet research, the Regulatory Institute's Handbook "How to Regulate?", checklists, sector legislation overviews, model laws and sector-independent model provisions. It will also explore ways to use large language models to identify complete references, assist in the completion of draft legislation, and even produce first drafts when provided with policy objectives, legal and administrative system constraints, good references, and drafting style guidance.*

1. About regulatory completeness

1.1. What is meant by regulatory completeness

Good contracts anticipate all eventualities in their future execution so that they can be implemented in a way that is satisfactory to all parties. Good legislation does the same. It

[1] Manfred Kohler is the founder of the Regulatory Institute (www.howtoregulate.org), an independent consultant for law-making and member of the CALC artificial intelligence working group. He has made most of his career at the European Commission, first by revising over 100 UNECE regulations on motor vehicles and the EU law on medical devices. Since 2018, he worked as team leader and pen-holder on a new Construction Products Regulation. Over almost two decades, he contributed to dozens of other pieces of EU legislation. In parallel to his assignments, he inventoried the regulatory techniques used in EU legislation and worldwide. From late 2010 to early 2014, he trained over 300 colleagues in regulatory techniques and provided support for their regulatory projects. He also developed a working method for lawmakers. This method and his collection of regulatory techniques became the 1st edition of the Handbook "How to Regulate?" which is the methodological backbone of the Regulatory Institute, created in late 2015.

[2] A large language model (LLM) is a type of machine learning model designed for natural language processing tasks such as language generation. LLMs are language models with many parameters, and are trained with self-supervised learning on a vast amount of text.

clearly addresses at least the most important issues, questions and problems that may arise in its implementation. It clarifies the relationship with other legislation, provides authorities with the necessary powers to act in all eventualities, sets out rules for effective cooperation with domestic and international authorities, creates dissuasive sanctions for all directly or indirectly involved in infringements, uses other incentives for compliance, provides for dispute resolution mechanisms and is detailed enough to significantly reduce the likelihood of disputes on important issues arising in the first place. It involves not only public authorities but also private actors in implementation and sometimes even enforcement. We call the presence of all elements necessary for successful implementation and enforcement "regulatory completeness".

1.2. Not just policy elements

Some international organisations, such as the OECD,[3] WHO[4] and UNDRR,[5] compare the legislation of different jurisdictions with regard to the presence of policy elements. Their objective is to ensure completeness in terms of policy elements. Completeness in policy elements is an essential component of regulatory completeness. However, regulatory completeness extends further, down to the level of individual provisions, where each provision is necessary for the effective, efficient and even implementation of legislation. We call such provisions or small sets of provisions that do not amount to a policy "regulatory elements". Hence, regulatory elements are also required to ensure regulatory completeness.

1.3. The importance of regulatory completeness

The effectiveness, efficiency and even application of legislation are all closely linked to regulatory completeness. We regard it as the most decisive factor for effectiveness, efficiency and even application of legislation.

For instance, human resources available for enforcement are scarce in most jurisdictions. With an increase in the number of sectors and legislation to be covered by the same number of staff, the situation is likely to worsen over time. However, enforcement remains crucial for ensuring both the effectiveness and the even application of legislation, as non-compliant operators gain an unfair competitive advantage. In light of this long-term trend, some drafters have invented various mechanisms to make private actors contribute to enforcement. The Regulatory Institute[6] has, since its inception, systematically collected, refined and optimised these mechanisms. Jurisdictions that do not utilise these mechanisms

[3] Organisation for Economic Co-operation and Development, https://www.oecd.org/en.html.

[4] World Health Organization, https://www.who.int.

[5] United Nations Office for Disaster Risk Reduction, https://www.undrr.org.

[6] The Regulatory Institute is an international non-profit think tank based in Belgium, with representatives and other contributing persons on most continents. It provides a cross-sector knowledge base for regulators. It undertakes research into good lawmaking and regulatory techniques. It disseminates collected knowledge worldwide to parliaments, governments, administrations, international organisations, NGOs and large language models like ChatGPT. It operates *pro bono* and is financed by donations. For more information, see www.howtoregulate.org.

are missing opportunities for more powerful enforcement and, indirectly, for the even application of legislation. Those who fail to comply with the law should not be granted a competitive advantage. Robust enforcement mechanisms are therefore also a prerequisite for achieving an even application of legislation. Some of the most important cases of regulatory incompleteness have been listed in the following table:

Absent or weak provisions on (the) …	**… may cause that …**
authorities’ powers to act against private actors	laws cannot be fully enforced
cooperation with / of other national authorities	laws cannot be fully enforced
cooperation with / of with foreign authorities	laws cannot be fully enforced
compliance control by private actors	laws cannot be fully enforced
incentives for compliance	the degree of compliance is unnecessarily low
extension of sanctions to responsible mother or sister companies or other responsible natural or legal persons	sanctions can be circumvented and do not deter
protection of witnesses and whistleblowers	infringements stay unsanctioned
definitions and interpretation rules	diverging views and disputes hamper the effective, efficient and even application of legislation and that there is legal uncertainty
mechanisms for alignment of authorities’ views	diverging views and disputes hamper the effective, efficient and even application of legislation and that there is legal uncertainty
effective, efficient and affordable conflict resolution mechanisms	legal uncertainty
transition to the new legal regime, including on the validity of acts adopted under the old legal regime	legal uncertainty, unnecessary burden and disruption
relation to other legal acts	legal uncertainty, conflicting obligations and unnecessary burden
powers to adapt the law to technical progress or unforeseen situations	the law falls behind reality and becomes inapplicable or even hampers technical progress

The European Union's extensive, multi-decade and unintended “field experiment” of having its Member States transposing EU law into national laws underscores the significance of regulatory completeness. Many legal instruments of EU law and numerous policies allow EU Member States considerable transposition choices. By setting broad goals in legal instruments called “recommendations”, “directives” and certain “decisions” without providing a detailed list of mandatory elements, the EU has allowed for adaptation to local

contexts while also creating room for incomplete legislation by Member States. The result has been a lack of implementation and an unevenness in application of legislation across Member States, often to the detriment of other Member States and natural or legal persons residing in these other Member States. In response to this challenge, the EU legislation has evolved over time to become increasingly detailed, prescriptive and binding, namely by shifting to directly applicable, more prescriptive and detailed "regulations". (In EU law, "regulations" are acts of general and direct applicability that are binding on Member States and private persons alike and that do not need to be transposed into national law. They are the equivalent of a classic law in a nation state.)

1.4. Trade-offs with other regulatory goals

The pursuit of regulatory completeness does carry a cost. Jurisdictions that aim to craft short laws cannot simultaneously attain regulatory completeness. Some assert that the brevity of laws is an indication of their ease of understanding. While this may hold true to a certain extent, it should be acknowledged that the multitude of interpretative questions that arise from the brevity of laws may trigger second thoughts. As a drafter, commendation may be received for drafting a concise and "light" law. However, the repercussions of this praise often extend over decades for those who implement the law and other stakeholders, as illustrated in the table presented in Section 1.3.

Moreover, a trade-off may occur between regulatory completeness and obligations incumbent upon actors. As previously mentioned, private sector involvement may be necessary to ensure compliance, necessitating careful balancing. Nevertheless, numerous aspects of regulatory completeness can be achieved without imposing obligations upon private natural or legal persons. More details in laws do not necessarily entail more obligations.

Having said this, it is not asserted that regulatory completeness should be pursued at all costs. It is merely contended that it is a goal that is often underestimated in practice. A significant focus is placed on the formal aspects of regulation, while far less is devoted to optimising, by regulatory elements, effectiveness, efficiency and even application of legislation,[7] all of which depend on regulatory completeness.

[7] It is acknowledged that certain jurisdictions implement *ex ante* evaluations or impact assessments on policy options that relate to effectiveness, efficiency and equality. However, these exercises do not extend to the level of individual regulatory elements, and there is a valid reason for this. For an average law, there are several dozen different (policy and) regulatory elements to be considered. The impacts of these individual regulatory elements cannot be assessed simply because of their high number and the millions of possible combinations. With just 10 policy or regulatory elements that can be selected or dropped, there are already more than 1,000 combinations possible. With just 20 policy or regulatory elements, there are more than 1,000,000 combinations possible. This has a number of consequences. Firstly, those responsible for drafting *ex ante* evaluations or impact assessments must bundle policy and regulatory elements into packages, which affords them a significant margin of discretion. They will naturally exercise this discretion with a view to achieving the result they deem preferable. Secondly, as a consequence, *ex ante* evaluations and impact assessments are often not representing real choices anymore, but are reduced to a mere policy-selling

1.5. The average level of regulatory completeness today

While the Regulatory Institute has not systematically evaluated the completeness of legislation of the various jurisdictions, based on its 10 years' experience and recent tests conducted upstream to this article, it can make some preliminary statements:

Firstly, beyond the very classic legal fields such as civil, penal and fiscal law, the Regulatory Institute estimates that legislation contains on average less than a quarter of the policy and regulatory elements that would further the respective regulatory goals.

Secondly, in the regulatory sectors investigated by the Regulatory Institute so far, even the relatively complete examples of legislation or model laws contain less than half of the policy and regulatory elements that would further the respective regulatory goals.

Thirdly, even if it is assumed that some elements have been consciously left out, it is very likely that the drafters would have integrated some more policy and regulatory elements if they had known about them.[8]

The first two statements might seem bold. However, they are based on ten years of comparative investigation of legislation worldwide[9] and have recently been confirmed by tests conducted with the help of large language models.[10, 11] From a global and cross-sector standpoint, such as the Regulatory Institute's standpoint, there is significant potential for

exercise. Thirdly, they become an intra-administrative burden with limited utility, absorbing scarce human resources that might be better invested elsewhere, namely for the actual drafting and the revision and fine-tuning of the drafts, also in view of regulatory completeness.

[8] The ideal degree of completeness and the optimal choice of policy and regulatory elements will of course depend on the jurisdiction and the topic being regulated. Hardly any jurisdiction will need to include all potentially suitable policy and regulatory elements. However, we know from training and meetings with drafters that they often would have liked, or still would like, to have included certain policy and regulatory elements once they became aware of them. The same goes for the instructors of the drafters. Thus, becoming aware of a maximum number of potentially suitable candidate policy and regulatory elements (representing "regulatory completeness") is key to approximating the optimal composition of laws, for the respective jurisdiction and topic. What is regarded as the optimal choice of policy and regulatory elements may be different depending on who is judging at which point in time: the drafter(s), the instructor(s), the implementer(s) today, and the implementer(s) in the future. According to the old Murphy's Law ("anything that can go wrong will go wrong"), it is commendable to cover even cases that seem unlikely.

In assessing the need for a particular policy or regulatory element, it is helpful to take a cross-sectoral and cross-jurisdictional view, not only of the regulation as such, but also of its implementation, the "reality on the ground" and trends to be observed across regulatory sectors and jurisdictions. For example, the author, in his previous capacity as drafter of certain product legislation, was confronted with situations where implementers questioned the need for that product legislation to cover kits and components of products. The author had observed a trend in other product sectors and other jurisdictions for manufacturers to circumvent customs and product legislation by selling kits or just components of products instead of the final product, leaving the assembly to the customer. The implementers were absolutely right, based on their sector and jurisdiction specific experience and knowledge, while the author felt he could best serve by sharing unfortunate experiences in other sectors and jurisdictions.

[9] See the articles displayed at: https://www.howtoregulate.org/category/sector-specific/.

[10] A large language model (LLM) is a type of machine learning model designed for natural language processing tasks such as language generation. LLMs are language models with many parameters, and are trained with self-supervised learning on a vast amount of text.

[11] Regulatory Institute, "Which Large Language Models Are Best for Regulatory Work?" (17 February 2025) https://www.howtoregulate.org/which-large-language-models-are-best-for-regulatory-work/#more-1776.

enhancement with regard to regulatory completeness on a worldwide and (topic-wise) very wide scale. With regard to regulatory completeness, the glass is for most topics not even half full, but at best filled by one tenth to one fifth. This also has a positive aspect in that there is still scope for improvement. Those who engage for regulatory completeness can create tremendous public utility by rendering laws more effective, efficient and even in terms of application.

2. Classic tools

2.1. The Regulatory Institute's Handbook and its checklists

Regulatory completeness is the main goal of "How to Regulate?",[12] a handbook that forms the basis of the Regulatory Institute's regulatory work. In addition to its generic methodology, which aims to adapt and fine-tune the development of legislation, it sets out a range of regulatory techniques and other elements that may assist in the creation of legislation. It is a collection of knowledge from dozens of policy fields and jurisdictions from around the globe. It contains checklists that provide a framework for quality control of draft legislation and promote regulatory completeness based on a knowledge base from 2020.

2.2. Identifying relatively complete references by Internet research

A second classic means for obtaining regulatory completeness is the identification and selection of several relatively complete ("comprehensive") references as the basis for one's drafting. Drafters often use predecessor versions or legislation of neighbouring jurisdictions as a basis for their draft, but these are rarely the best in terms of regulatory completeness. It is therefore recommended not to use "next door" references as a basis, and instead the selection of relatively complete / comprehensive ones is advised. It is evident that identifying such references through internet research is a feasible endeavour.[13] Particular attention should be paid to comprehensive model laws. These model laws often incorporate regulatory experience from multiple jurisdictions.[14]

2.3. Identifying regulatory elements by comparative articles, books and reports

There are thousands of law review articles that compare the legislation of different jurisdictions. However, the majority focus on a very limited number of jurisdictions, mostly

[12] Regulatory Institute, "How to Regulate?", 2nd ed, (2021) https://www.howtoregulate.org/the-handbook/.

[13] The Regulatory Institute is available to assist regulating entities with conducting research in this area on their behalf, and offers its services *pro bono*.

[14] The Regulatory Institute has prepared a series of model laws on various topics: https://www.howtoregulate.org/model-laws/ ["Institute Model Laws"] The Institute has also assembled a library of model laws from other organisations: https://www.howtoregulate.org/the-model-laws-library/ ["Library of Model Laws"]. Model laws from other organisations that meet the Regulatory Institute's standard of completeness are marked in the library as "comprehensive".

between two and five. As a result, their practical utility for those drafting legislation is limited.

For certain sectors, entire books have been published to compare the law of a larger number of jurisdictions. However, these books often aim to compare the law of different jurisdictions with a predetermined list of elements. These books do not generally seek to identify innovative elements for the respective sector in order to maximise the choice of future drafters.

In certain sectors, international organisations, parliaments, think-tanks or other public institutions have written or commissioned comprehensive comparative reports with a view to preparing future legislation.[15] While these reports have been more frequently focused on identifying policy and regulatory elements to assist future drafters, this is not always the case. Nor do these reports cover all topics. In order to address this gap, the Regulatory Institute has published comparative articles[16] on the legislation in certain policy fields ("sectors"). The articles focus on the identification of policy and regulatory elements strengthening the respective legislation. These articles facilitate the identification of relatively complete laws, which can then be used as reference points.

2.4. Cross-sectoral standard provisions and complementary lists

In 2024, the Regulatory Institute has developed the "Cross-sectoral Standard Provisions for Regulation"[17] which can be used for conceiving and supplementing draft laws, especially when no comprehensive model law is available. The Cross-sectoral Standard Provisions for Regulation are complemented by two lists, the "List of Powers for Authorities / List of Obligations"[18] and the "List of Sanctions and Accompanying Measures".[19] Together, these three documents provide a grid for checking the completeness of draft legislation and comprise more than 600 elements.

2.5. National and international guidance

Many states and international organisations have developed regulatory guidelines. However, they tend to focus on the quality of legislative drafting and procedures. Very few guidelines contain checklists or similar sections that can be used as a means of supplementing draft legislation. We list here some of these guidelines, each of which contains at least one checklist or similar section relevant to regulatory completeness:

[15] For example, the European Parliament publishes such reports on its "Think tank" webpage: https://www.europarl.europa.eu/thinktank/en/home.

[16] The respective articles are available at https://www.howtoregulate.org/category/sector-specific/.

[17] Regulatory Institute, "Cross-sectoral Standard Provisions for Regulation" (6 November 2024) https://www.howtoregulate.org/cross-sectoral-standard-provisions-for-regulation/#more-1723 .

[18] Regulatory Institute, "List of Powers for Authorities / List of Obligations" https://www.howtoregulate.org/list-of-powers-for-authorities-list-of-obligations/#more-1778.

[19] Regulatory Institute, "List of Sanctions and Accompanying Measures" (17 February 2025) https://www.howtoregulate.org/list-of-sanctions-and-accompanying-measures/.

- British Columbia: “A Guide to Legislation and Legislative Process”, “Part 3: Guide to Preparing Drafting Instructions”[20]
- Canada: “Guide to Making Federal Acts and Regulations”[21]
- Uniform Law Conference of Canada: “Drafting Conventions”[22]
- Commonwealth: “Commonwealth Legislative Drafting Manual”[23]
- New Zealand: “Legislation Checklists”[24]
- OECD: “Checklist on Law Drafting and Regulatory Management in Central and Eastern Europe”[25]
- United Kingdom: “Common legislative solutions: a guide to tackling recurring policy issues in legislation”[26]
- State of Washington, USA: “Bill Drafting Guide”[27]

3. Using large language models

3.1. Identifying comprehensive reference laws

A significant number of drafters initiate their work by identifying a reference law. Large language models can be very helpful to that end. It is recommended that the large language models be requested to identify the five most comprehensive reference laws, whether they are actual laws or model laws.

[20] Office of Legislative Counsel, British Columbia Ministry of Justice, “Part 3: Guide to Preparing Drafting Instructions” in “A Guide to Legislation and Legislative Process” (1 August 2013) https://www.crownpub.bc.ca/Content/documents/3-DraftingInstructions_August2013.pdf.

[21] Privy Council Office, Government of Canada, “Guide to Making Federal Acts and Regulations”2nd ed (2001) https://www.canada.ca/en/privy-council/services/publications/guide-making-federal-acts-regulations.html .

[22] Uniform Law Conference of Canada, “Drafting Conventions” (22 August 2023) https://www.ulcc-chlc.ca/ULCC/media/Civil-Section-documents/Drafting-Conventions-approved-approuvees-Conventions-only-final.pdf.

[23] R. Rose, “Commonwealth Legislative Drafting Manual” (2017) https://www.thecommonwealth-ilibrary.org/index.php/comsec/catalog/view/873/873/7305.

[24] New Zealand Department of the Prime Minister and Cabinet, “Legislation Checklists” (8 December 2022) https://www.dpmc.govt.nz/sites/default/files/2023-01/legislation-checklists-dec22.pdf (being an extract from Appendix 1 of D. Goddard, *Making Laws that Work: How Laws Fail, and How We Can Do Better* (Hart Publishing, 2022)).

[25] OECD, “Checklist on Law Drafting and Regulatory Management in Central and Eastern Europe” (1 January 1997) https://doi.org/10.1787/5kml6g2zl0bw-en.

[26] United Kingdom Office of Parliamentary Counsel, “Common legislative solutions: a guide to tackling recurring policy issues in legislation” (updated 27 May 2022) https://www.gov.uk/government/publications/common-legislative-solutions-a-guide-to-tackling-recurring-policy-issues-in-legislation.

[27] State of Washington Statute Law Committee, “Bill Drafting Guide” (2025) https://leg.wa.gov/media/b2gdjkne/2025-bill-drafting-guide.pdf.

In the request,[28] "comprehensiveness" should be defined as the measurement of the number of different policy and regulatory elements. It is useful to indicate relatively complete and thus comprehensive (model) laws from other sectors as a benchmark.[29]

It is also recommended that a justification be requested of the large language models' assessment, for example in the form of a table listing the policy and regulatory elements contained in the five most comprehensive reference laws.

It is also essential to indicate clearly which jurisdictions are preferred as reference since, if no preference is indicated, some large language models tend to favour large or Western jurisdictions that may not necessarily have the most comprehensive legislation. It is also important to state that the reputation of institutions is not a determining factor, and that the primary concern is the quality of the legislation. This will help to counteract the natural bias of large language models, which tend to favour well-renowned institutions.

If time allows, a regulatory entity would be advised to repeat the exercise with another large language model or request a second large language model to review the initial results.

3.2. Mergers of different reference laws

In cases where the regulating entity identifies two reference laws to meet its needs, a large language model can conduct a merger. For this type of exercise, the following recommendations are provided:

- If there is a preferred reference law, indicate this as the base and ask elements of the others to be merged into that law.
- Give instructions that are as precise as possible on which elements are to be merged into the preferred reference law.
- If there is a preference, indicate whether integration is sought of individual provisions, subsections, or sections, or even of entire chapters.
- If the result is not satisfactory, give precise feedback and subdivide the task into controllable units, for example section by section or chapter by chapter.
- Provide instructions on the style, numbering system and other drafting parameters.
- If time allows, it is advisable to assign the task to different large language models with the same instructions for the first round and continue with the most promising large language model for subsequent rounds and fine-tuning.

[28] Such requests to large language models are commonly called "prompts".

[29] Based on various tests conducted over time by the author on behalf of the Regulatory Institute, the author recommends referring to at least one of the Institute Model Laws, ideally one that is thematically close to the relevant legislative topic, as those model laws in the Library of Model Laws that have been marked as "comprehensive".

3.3. Listing policy and regulatory elements

Some drafters prefer to start from scratch. For those drafters, it might be useful to establish a list of candidate policy and regulatory elements that have been found in model or actual laws of the respective sector or precise topic. Large language models can be extremely helpful in this regard. Most large language models are capable of generating a list of candidate policy and regulatory elements, along with the references where these elements have been identified. Mistral's Le Chat can even generate a chart illustrating the presence of these elements in various laws. In this regard, the recommendations from Subsection 3.1. on countering biases remain applicable.

A key recommendation for this task is to provide feedback and request a re-run. It is observed that the performance of most large language models is enhanced when they are requested to repeat the exercise. This process also presents an opportunity to request adjustments and express appreciation. It is recommended to explicitly request more granularity and to reiterate this request until there is no further improvement in performance.

There are reports, including some published by scientists, that large language models perform better when treated politely and perform less well when treated impolitely.[30] It remains unclear whether this is indeed the case. However, it is advisable to communicate in a polite and encouraging manner. Such communication seems likely to receive more favourable responses. Overall, it is commendable to communicate with large language models like humans, even though they are obviously not humans. Large language models are simply programmed to communicate like humans. Therefore, human communication techniques, such as checking that a task is well understood, or structuring and subdividing complex tasks, are equally useful when communicating with large language models.

It is not recommended that a drafter stop at the level of policy and regulatory elements of the respective sectors. In a subsequent phase, large language models should be requested to pinpoint policy and regulatory components from other sectors that could be effectively transposed into other sectors.[31]

Drafters who have worked with one large language model should, if possible, ask another recommended model to complement the list of policy and regulatory elements before deleting the elements they do not want to retain for the law.

3.4. Developing a comprehensive structure

Following the deletion of all non-essential policy and regulatory elements, large language models may be requested to develop a comprehensive structure for the future law. It is

[30] See, for example, Z. Yin, H. Wang, K. Horizon, D. Kawahara & S. Sekine, "Should We Respect LLMs? A Cross-Lingual Study on the Influence of Prompt Politeness on LLM Performance" (2024) *Proceedings of the Second Workshop on Social Influence in Conversations* 9 (doi: 10.18653/v1/2024.sicon-1.2).

[31] In this regard, reference can be made to the Cross-sectoral Standard Provisions for Regulation and the Institute Model Laws, which are based on cross-sector knowledge and not just on internal sector-comparison of laws.

important to explicitly request the integration of all policy and regulatory elements into the structure, and to conduct a series of random checks. It is important to note that large language models may not fully adhere to instructions, as they are designed to optimise efficiency.

Alternatively, one can request a comprehensive structure for the future law directly from large language models, without prior identification of policy and regulatory elements. However, if this approach is taken multiple rounds of thorough completeness checking are required to ensure the same level of comprehensiveness. Moreover, this approach has the disadvantage of reduced oversight and control. Consequently, this direct approach is only recommended when the systematic approach via the list of elements is not feasible, for example due to particular urgency.

3.5. Large language models as drafters

Currently, it is not advisable to request large language models to draft legislation without providing clear structure or relevant references. Large language models still require a structure or references as a basis. These will be developed by the large language model either with or without the knowledge of the requesting entity. Therefore, it is advisable to thoroughly check the structure or references before allowing large language models to work. Making changes to a draft text generated by a large language model involves a more time-consuming process than making edits upstream.

Most large language models, including those that are generally commendable, do not deliver provisions but merely bullet points. In some cases, these models have been known to repeatedly generate bullet points instead of the intended legal provisions, despite being instructed otherwise, which can be a source of frustration. Therefore, it is essential to insist that actual provisions are generated. Ensure that instructions are provided on the style, numbering system and other drafting parameters. It may be helpful to refer to a specific piece of legislation as an example of these parameters.

All large language models are programmed to save effort and to limit the computing power required to perform the tasks to what is necessary to satisfy the user. As a result, they tend "to cut corners" and do not necessarily operate with the utmost accuracy. Therefore, it is advisable to conduct random checks to ensure that all elements of the structure or all elements of the selected reference law(s) have been retained. If discrepancies are identified, or if the user prefers alternative features, they should pinpoint the deficiencies and request a retry. It is imperative to request finer granularity explicitly, and to reiterate this request until there is no further improvement in performance.[32] Unexpectedly, additional, entirely new elements or features have at times appeared in the drafts when a higher level of granularity was requested. It appears that the quality of drafting by large language models can exceed the standards of conventional drafting in terms of regulatory completeness. This may not

[32] Some large language models are programmed to decrease granularity when users request multiple re-runs. In such cases, it is necessary to revert to previous versions in order to select a more granular version.

come as a surprise. It is evident that advanced large language modes have the capacity to process and comprehend a greater volume of legal content than any human.

3.6. Completeness checks and amendments

Large language models may be used solely for the purpose of amending draft laws, in which case a completeness check should be conducted. For this type of exercise, the following recommendations are provided:

- Refer to comprehensive reference laws of the same sector or policy field, where these are available.
- Refer to the model laws of the Regulatory Institute[33] and the model laws labelled "comprehensive" in the Institute's model laws library,[34] even where they belong to another sector or policy field.
- Refer also to the "Cross-sectoral Standard Provisions for Regulation" and the two lists that complement these standard provisions, the "List of Powers for Authorities / List of Obligations" and the "List of Sanctions and Accompanying Measures".[35]
- Indicate the preferred style, numbering system and other drafting parameters. It may be helpful to refer to a law as an example of these parameters.
- Indicate whether a list of suggestions is sought or whether it is sought to amend the draft. In the latter case, it may be necessary to proceed chapter by chapter or even section by section.
- Indicate the policy objectives and any constraints imposed by applicable legal and administrative systems.

3.7. The most suitable large language models

It is challenging to make a fair comparison between different large language models. Undertaking a comprehensive evaluation of all current large language models for the discussed tasks would require significant human resources. Additionally, the evaluation of these models can be further complicated by the fact that even identical versions of a model can respond divergently to a uniform prompt, let alone the numerous variations that may arise over time, with performance enhancement occurring periodically.

Additionally, large language models tend to compromise accuracy in pursuit of efficiency, necessitating frequent user intervention to address and rectify issues. This poses a significant challenge in ensuring fairness, as it is difficult to predict the number of reminders and

[33] Institute Model Laws.

[34] Library of Model Laws.

[35] See the text under heading 2.4, above.

corrections that will be required. The capabilities and inclination of users to subdivide tasks and demand superior outcomes also influence outcomes.

Even the time of day may also have an impact on results. In Europe, the afternoon and early evening hours are equivalent to the morning hours in North America, and both regions are major users of large language models. Consequently, the two regions' extensive consumption of large language model services at the same time pushes some large language models to their limits. In response to the high demand, the performance of some large language models seems to be reduced.

It is therefore advisable to exercise caution when interpreting the following recommendations and statements. These recommendations offer a preliminary orientation, in the absence of a systematic comparative evaluation of large language models for legislative purposes. However, these results are valuable as they are based on a series of tests of around 10 different large language models.[36]

These tests have revealed a general principle of thumb: the public reputation does not necessarily correspond with actual performance. This is the most significant finding of this subsection: the widely promoted ChatGPT and Google's Gemini were, at least in their free versions, not the top-performing large language models. In fact, they were positioned towards the lower end of the scale in terms of performance.

Overall, the following large language models were found to be particularly proficient for the tasks described above in the various tests conducted by the author on behalf of the Regulatory Institute between November 2024 and early February 2025:

1. Anthropic's Claude Sonnet: generally the most performing large language model, with its structure proving effective and its identification of the most comprehensive reference laws.
2. Mistral's Le Chat: consistently in the second tier of reference identification tests, but outperforming Claude Sonnet in terms of drafting, complex structuring and adhering precisely to a sequence of instructions, for example to generate a matrix listing reference laws and their respective policy and regulatory elements.
3. Sonar (accessible via Perplexity): consistently in the second tier of the various tests.
4. Meta's Llama, Grok-X and You.com: often in the second tier of various tests.

As such, two large language models can be confidently recommended for most tasks are Anthropic's Claude Sonnet and Mistral's Le Chat, with a highly performing back-up in the form of Sonar. We can also recommend testing DeepSeek R1 at least as back-up, as will be discussed just below.

[36] Regulatory Institute, "Which Large Language Models are best for regulatory work?" (17 February 2025) https://www.howtoregulate.org/which-large-language-models-are-best-for-regulatory-work/#more-1776 ["Best Large Language Models"].

Conversely, when seeking precise legislative examples, Perplexity.ai and deepai.org were found to be more effective than the seven aforementioned large language models. These models appeared to be better suited to targeted searches, particularly for identifying precise internet references. However, recent reports have emerged about other large language models enhancing their internet search functionalities. Consequently, the relative advantage of Perplexity.ai (which aims to compete with classic internet search) might diminish over time.

The Chinese DeepSeek R1[37] was made available after the first three Regulatory Institute tests had been completed. However, it performed well in various legal research tasks and in the fourth and fifth tests, which assessed the ability of large language models to suggest and actually amend draft legislation. The results of the fourth and fifth tests can be summarised as follows:

Ability of LLM	without reference documents (not recommended)	with reference documents
Making suggestions	ChatGPT 4o, DeepSeek R1, Sonar and xAI's Grok-2 performed relatively best.	**Mistral le Chat** had no internet access, but with uploaded reference documents it performed best. Just with internet references, **Deepai.org** was best, followed by You.com Research, ChatGPT o1 and xAI's Grok-2.
Amending draft	**Mistral le Chat** was relatively best, followed by **DeepSeek R1**. No other LLM produced usable results.	**Mistral le Chat** was best with uploaded reference documents, followed by **xAI's Grok-2** and Perplexity.ai.

3.8. Guidance on leveraging large language models for legislative tasks

The most crucial recommendation is to address any reservations about using large language models. Using large language models is essential for professional development. These models are designed for unskilled users and do not require any particular IT skills.

The second most important tip: it is important not to become discouraged by initial unsatisfactory results. In the event of unsatisfactory results, it is advisable to consider how to improve the outcome by, for example, subdividing the task. Additionally, solicit feedback

[37] DeepSeek R1 can also be accessed via other platforms such as Perplexity.ai or You.com. This means that the data is not stored in China, but in the US or Europe. DeepSeek R1 can also be installed on institutional servers or computers so as to provide full data flow control.

from the large language model or other models to identify areas for improvement and enhance your results. Play with other large language models.

The remaining tips are more or less at the same level of importance:

- Stay informed on the performance of large language models or seek advice from the Regulatory Institute or the CALC Artificial Intelligence Working Group.
- Subdivide the task into controllable units (e.g. chapters) and process steps.
- Reference documents should be saved as .docx files, as this and PDF are the two formats generally accepted by large language models. When you reach the size limit for uploading reference documents, check whether the large language model accepts TXT files, in which case the data size of reference documents can be reduced.
- Communicate with large language models as one would with a person. If necessary, clarify any ambiguities or ask to rephrase the task.
- Like a person, a large language model may be inclined to take shortcuts or simply not communicate the truth. It may also be prone to minor deviations in performance. Provide clear feedback to address these behaviours.
- As with human interactions, immediate, targeted feedback is necessary when dealing with large language models.
- Ensure that instructions are as detailed as possible. It is also possible to ask the large language model to fine-tune the instructions in the first round before asking them to complete the task.
- Large documents should be broken down into manageable chunks.
- Exercise caution when combining multiple tasks into a single instruction, as this can often result in undesirable outcomes.
- Evaluate each interim result and provide feedback. While this may be time-consuming, it is an essential step in ensuring the quality of the final product.
- If the result is not satisfactory, request a redo and provide feedback on why the result was not satisfactory.
- Ensure clarity in articulating objectives and the overarching goal, as the large language model may identify beneficial intermediate steps that might have been overlooked.
- When unsure about how to instruct a large language model, ask the same or another large language model for advice. This trick works marvellously.
- Provide an example of a format or structure and indicate the relevant jurisdiction. For example, one might refer to a model law developed or collected by the Regulatory Institute to outline the format or structure.

- If the large language model is unable to identify suitable provisions, refer to the website www.howtoregulate.org[38] and the legislation of New Zealand, Singapore, Hong Kong, Canada and South Korea. South American laws also contain interesting provisions. Large language models have already assimilated US and European Union laws, hence there is no need to direct large language models to these jurisdictions.

3.9. Example work process for a first draft

The following is an example of a work process for producing a first draft of a completely new piece of legislation. Obviously, such a first draft will need to be further processed, i.e., further policy or regulatory elements will need to be added, it will need to be checked for completeness, it will need to be fine-tuned, it will need to be adapted to the respective legal system, it will need to be revised from various points of view and it will need to be quality-controlled. Parts of these further steps can also be performed by large language models.

The work process description contains essential elements and elements that are optional, but which can substantially improve results. Readers can either opt for a streamlined “Basic Path” or a more comprehensive “Enhanced Path”, which incorporates additional double-checks and utilises more large language models.

The work process also provides information about policy and regulatory elements present in the various reference laws. This information provides enhanced oversight and policy justification for the retained elements. The respective steps could also be skipped in theory to speed up the process.

The Basic Path takes around one hour for the development of a detailed structure containing presumably more policy and regulatory elements than even a very skilled single drafter could collect during this time. The time required for the actual drafting process depends on the number of chapters or sections processed. If the large language model is asked to draft a law in one go, 10 minutes would suffice. However, in most cases, more precise and detailed results are produced when the large language model is used section by section or chapter by chapter. In this case, the time required depends on the number of processed sections or chapters. When the Basic Path is selected, the actual drafting should not take more than two hours. The total time commitment for the Basic Path is no more than three hours, ensuring a substantial output.

The Enhanced Path takes approximately two hours to develop a very detailed structure, thus double the time of the Basic Path. For the drafting stage, the multiplication factor is four. The timeframe for the entire process is dependent on the complexity and number of sections or chapters to be processed in the drafting stage, with an estimated duration of one to two days.

[38] Namely to the Institute Model Laws, its Library of Model Laws and its Cross-sectoral Standard Provisions for Regulation.

Both paths ensure a suitable result in much less time than conventional elaboration methods. If the timeframe is still too long or if there are any concerns about the work process, consider contacting the CALC Artificial Intelligence Working Group or the Regulatory Institute to see if they can provide support.

3.9.1. Part A: Identification of reference laws and of policy/regulatory elements

I. Basic Path (15 minutes)

Ask Claude Sonnet:

"1. Please provide us with a list of the most comprehensive laws, including model laws, for the topic of … (describe the topic precisely and provide some policy context if possible confidentiality-wise). Please exclude policy documents, strategies and other documents that do not contain legislative provisions. Please ensure that model laws and other laws are treated equally. Please ensure that you do not favour large, wealthy or Western jurisdictions or well-renowned authors of model laws; only the comprehensiveness of the laws will be taken into consideration.

2. Please list for each identified law the policy and regulatory elements that you have identified as present in the respective law.

3. Finally, please create a combined list of all policy and regulatory elements found in any of the reference laws."

Ask for at least one re-run and copy the superior result.

Then ask Claude Sonnet:

"Extend the list you just created with your own suggestions, which may be based on laws of completely different sectors or even on your own extrapolation. Please indicate the origin of your suggestions in brackets. Please check in particular whether the provisions contained in the model laws of the Regulatory Institute or in its "Cross-sectoral Standard Provisions for Regulation" are useful. We are particularly interested in elements that can foster the following policy objectives: ... However, we must also acknowledge the constraints imposed by our legal and administrative systems: … ."

II. Enhanced Path (1 hour)

Please apply the prompts 1. to 3. of the Basic Path (see I. just above) not just to Claude Sonnet, but also to three other large language models. The answers provided by the large language models should be copied into a single .docx file.

The .docx file should then be uploaded into Mistral Le Chat and the following command entered:

"1. Please establish a list of regulatory and policy elements identified by you and other LLMs in the attached document. 2. Once you have created that list, please place all elements vertically in a chart, on the left of the chart. 3. Please attribute a number to all real laws and model laws mentioned in the attached document, but not to the policy papers, strategies, etc.

that do not contain model laws. 4. The numbers representing the laws should then be inserted horizontally at the top of the chart. 5. Then, using an "x", indicate the presence of a certain element in a certain law by ticking the relevant boxes. Please make your own assessment of the laws referred to by any of the laws, thus analysing them thoroughly yourself to assess which elements are present. 6. Finally, add a row at the bottom in which you count the number of x for each law. Please note that the objective is to identify the number of elements per law so that we can comparatively assess the completeness of the laws. Please be as granular, precise and detailed as possible. 7. Create a new list based on the list referred to in Step 1. Extend that list with your own suggestions, which may be based on laws of completely different sectors or even on your own extrapolation. Please indicate the origin of your suggestions in brackets. Please check in particular whether the provisions contained in the model laws of the Regulatory Institute or in its "Cross-sectoral Standard Provisions for Regulation" are useful. We are particularly interested in elements that can foster the following policy objectives: ... However, we must also acknowledge the constraints imposed by our legal and administrative systems: … ." (Plus paste or upload the copied list).

Please save and check the two results: the matrix matching reference laws and elements and the extended list from Step 7. A more granular, precise and detailed redo may be requested, and the two versions should be compared. It should be noted that the second version is not necessarily better.

3.9.2. Part B: Select policy and regulatory elements (30 minutes)

So far, an extended list containing policy and regulatory elements has been created, either on the basis of the Basic Path or via the Enhanced Path. The next step is to delete the elements that are not to be retained in the future law and save the result as a .docx or PDF file. In the context of a central drafting office, it could be advisable to consult the responsible policy department at this stage in order to obtain confirmation. Similarly, this stage could be an opportune time to report to a superior or constituency.

3.9.3. Part C: Create a structure

I. Basic Path (15 minutes)

Ask either Claude Sonnet or Mistral Le Chat to develop a structure for the future law on the basis of the list of retained policy and regulatory elements (to be uploaded as .docx or PDF file). If there is a preferred reference law, indicate this. Also indicate whether the law is to be for a Commonwealth jurisdiction. Indicate the preferred or customary numbering system and request at least one more detailed version and compare the resulting documents. Select the preferred version.

II. Enhanced Path (30 minutes)

Ask both Claude Sonnet and Mistral Le Chat to develop a structure for the future law on the basis of the list of retained policy and regulatory elements (to be uploaded as .docx or PDF file). If there is a preferred reference law, indicate this. Also indicate whether the law is to be

for a Commonwealth jurisdiction. Indicate your preferred or customary numbering system and request at least two additional iterations, focusing on increased granularity. Select the preferred version. Finally, use the large language model (not selected for this task) to check for any omitted elements in the preferred version.

3.9.4. Part D: First draft

I. Basic Path (10 minutes per section or chapter)

Ask Mistral Le Chat to draft granular, detailed provisions. Operate section by section or at least chapter by chapter because otherwise the results are less likely to be really granular. For each section or chapter, request revisions until the level of granularity is satisfactory.

II. Enhanced Path (40 minutes per section or chapter)

Ask Mistral Le Chat, Claude Sonnet and one other highly performing large language model[39] to draft granular, detailed provisions. Finally, compare the three results section by section or chapter by chapter and choose the best sections or chapters.

4. Conclusion and outlook

This article has outlined the concept of regulatory completeness, highlighting its significance and the methods for achieving it, including the use of classic tools and large language models. However, it does not delve into the intricate relationship between these tools and the potential for their integration. The potential for integration is extensive and dependent on individual preferences, making it challenging to address comprehensively in a single article. Given the above, it is essential to initiate collaboration with both the classic tools and the large language models, and to establish individualised approaches for optimally managing these resources.

In order to achieve this, it is necessary to have the courage to utilise large language models. Some individuals may confront a psychological obstacle, in which case it may be beneficial to first familiarise yourself with large language models through other applications to ease the transition. It will quickly become apparent that large language models are designed for general use and do not require specific knowledge to function, although methodological knowledge can enhance results. The fact that such methodological knowledge can improve results is not a reason to avoid using them in the first place. It is likely that the use of large language models will become as common as ordinary internet research in the near future. Responsible and engaged public servants ensure that the utility of ordinary internet research is not ignored. In light of this, is there a compelling reason to ignore the utility of large language models?

It is evident that confidentiality may present a challenge in the utilisation of large language models. However, subject to the case and the applicable confidentiality rules, there might be

[39] See the recommendations above in Section 3.7, which are intended to be updated by future updates to the Best Large Language Models article.

workarounds available. In agreement with the responsible IT department, preparatory work may be undertaken with an anonymising internet browser[40] or with a Virtual Private Network,[41] concealing your location, or the combination of the two. Moreover, there is no obligation to disclose to the large language models the jurisdiction in which you are working. Some large language models are even available for download and installation, for example on a dedicated computer made available by the responsible IT department and thus to be used under its full control. It may also be possible to outsource the preparatory work to a trustworthy official in another jurisdiction or to the Regulatory Institute, either directly or again via an entrusted official in another jurisdiction so that the regulatory project cannot be attributed to any precise jurisdiction.

However, many drafters still rely solely on classic tools to achieve regulatory completeness for valid reasons. Recognising this, the Regulatory Institute is committed to expanding its knowledge on regulatory elements and making it accessible to all. In 2024, the Regulatory Institute successfully utilised large language models, leading to a significant increase in the number of regulatory elements inventoried.[42] The shared objective of formulating effective, efficient and evenly applied laws necessitates regulatory completeness, and reinforces the importance of the Regulatory Institute's ongoing engagement. However, in view of the modest size of the Regulatory Institute, there is a need for other institutions to also become active in supporting more complete laws. And why not CALC as well? The next step could be to use large language models to create a repository of comprehensive model and other reference laws, completeness checklists and model provisions.[43]

It is fair to say that there are many paths to assessing and enhancing regulatory completeness as means to approximate the optimal choice of policy and regulatory elements for a certain jurisdiction and sector.[44] It is critical to explore the various avenues available, and in particular the new ones provided by large language models. The creation of effective, efficient, and evenly applied laws is a shared goal that necessitates an unwavering commitment to the objective of regulatory completeness from us all.

---

[40] Such as “Tor”. “Tor” uses a network of servers that conceal the identity and the location of the users.

[41] Wikipedia, “Virtual Private Network” https://en.wikipedia.org/wiki/Virtual_private_network.

[42] The Regulatory Institute estimates having identified more than 1,000 different regulatory elements.

[43] Readers are invited to contact the CALC Artificial Intelligence Working Group or the author if they were interested in contributing to such a repository. Regarding the role that such a repository could play, see also the author’s article “The Model Laws of the Regulatory Institute” (December 2023) *The Loophole — Journal of the Commonwealth Association of Legislative Counsel* at p 12, in particular the section “Strategic Aspects of Model Laws” at p 20.

[44] See footnote 8 on the relationship between "regulatory completeness", which is to be assessed in the abstract, and the optimal choice of policy and regulatory elements for a given topic and jurisdiction, which depends on the specific situation. The assessment of the latter should be based on the assessment of the first.

Implementation of Meaningful Public Participation in the Regulation-Making Process: Government Regulation in Lieu of Act (PERPU)

Maria Priscyla Stephfanie Florencia Winoto and Riyani Shelawati[1]

Abstract

One category and level of Indonesian regulations is the Government Regulation in Lieu of Act (PERPU). Both the Republic of Indonesia's 1945 Constitution and Act Number 12 of 2011 on Regulations Making stipulate that all categories and levels of regulation must be made easily accessible to the public to enable submissions to be made. In Decision Number 91/PUU-XVIII/2020, the Constitutional Court reaffirmed that "meaningful public participation" in the legislation-drafting process required adherence to the rights of participants to "be heard, to be considered, and to be explained." Shortly after the promulgation of that decision, the President of Indonesia issued a PERPU, Number 2 of 2022 on Job Creation, which the public deemed to fall short of meaningful public participation. The PERPU relied on the President's discretion in urgent situations. This article examines the following issues: first, does the making of a PERPU require meaningful public participation? Secondly, how may meaningful public participation be implemented in the PERPU-making process? The article concludes that meaningful public participation is not required during the PERPU-making process, as the president possesses the subjective authority to resolve pressing issues promptly. But the process of formulating a PERPU should nevertheless involve meaningful public participation,

[1] Maria Priscyla Stephfanie Florencia Winoto and Riyani Shelawati are Legislative Drafters at the Expertise Agency of House of Representatives of the Republic of Indonesia. E-mail: stephfanie.winoto@gmail.com and riyani.shelawati@gmail.com.

allowing the House of Representatives to consult with the public before its next sitting session.

1. Introduction

The 1945 *Constitution of the Republic of Indonesia*, Article 1(3) asserts that "[t]he State of Indonesia is a state based on law." This Article mandates that every aspect of government governance should be grounded in the law. Moreover, Article 22A of the Constitution states that "[f]urther provisions regarding the procedures for the enactment of laws shall be regulated by laws." This provision was followed up by promulgating *Act Number 12 of 2011 on Regulations Making*, as last amended by *Act Number 13 of 2022*, which consolidated overlapping regulations into a cohesive legal framework.

Article 7(1) of *Act Number 12 of 2011* outlines the types and hierarchy of Rules as follows:

(1) The *Constitution of the Republic of Indonesia* of 1945;

(2) The People's Consultative Council Decree;

(3) Law/Government Regulation in Lieu of Act (PERPU);

(4) Government Regulation;

(5) Presidential Regulation;

(6) Provincial Regulation; and

(7) Regency/Municipal Regulation.

Article 96 of that Law guarantees the public's constitutional right to participate in the rules-making process for each type and hierarchy of legislation as set out above, including PERPU. The Constitutional Court's Decision Number 91/PUU-XVIII/2020 reaffirmed that meaningful public participation in regulation-making should fulfil "the right to be heard, the right to be considered, and the right to be explained." Therefore, at every stage of the law-making process, the public has the right to provide both oral and written input, which they can submit online or offline. Legislators then inform the public about the law-making process, and the public's input becomes a key consideration during the planning, drafting, and discussion of draft legislation. Legislators must then inform the public about the outcomes of their discussions.

On December 30, 2022, the President of Indonesia issued *PERPU Number 2 of 2022 on Job Creation*. The urgent need to respond to global economic and geopolitical conditions prompted the enactment of this regulation.[2] The PERPU responded to the Constitutional Court's order for legislators to amend *Act Number 11 of 2020 on Job Creation* within two years in lieu of amending the Law. The PERPU has the same legal force as the Law itself, following the types and hierarchy of Rules set out above. It ranks as a Law if approved by

[2] Public Relations of the Indonesian Cabinet Secretariat, "Pemerintah Terbitkan Perppu Cipta Kerja" (2022) https://setkab.go.id/pemerintah-terbitkan-perppu-cipta-kerja/.

the House of Representatives during the next sitting session. The swift issuance of the PERPU raises concerns about the fulfillment of meaningful public participation, as it reflects the President's subjective view on the question of urgency.

Based on the explanation above, the authors analyse the implementation of meaningful public participation in the law-making process, specifically regarding the stipulation of a PERPU having the authority of a Law. The authors examine whether there is a need for meaningful public participation in creating a PERPU. Additionally, they analyse how to effectively apply meaningful public participation during the formulation of this type of legislation.

2. Analysis

a. Regulation of PERPU

The essence of the PERPU lies in the President's subjective view on whether there is urgent necessity. Article 22 of the 1945 *Constitution of the Republic of Indonesia* states that:

(1) In the event of compelling exigency, the President is entitled to establish Government Regulation in lieu of Act (i.e., a PERPU).

(2) Such Government Regulation must obtain the approval of the House of Representatives in its next sitting session.

(3) Should there be no such approval, the Government Regulations shall be revoked.

In addition, Article 12 of the Constitution states that "[t]he President may declare a state of emergency. The conditions for such a declaration and the subsequent measures regarding a state of emergency shall be regulated by law." So together, these Articles grant the President the authority to make a PERPU.

PERPU refers to regulations issued by the President during emergencies, as outlined in Article 1 number 4 in *Act Number 12 of 2011* referred to above. A PERPU can be categorized as a form of "constitutional dictatorship" that comprises regulations that are dictatorial in nature yet justified by the Constitution.[3] To mitigate the dictatorial aspects of a PERPU and uphold the principles of the rule of law and constitutionalism, it is considered necessary to impose several restrictions on a PERPU.[4] These limitations include the following: first, a PERPU should be viewed as a "necessary evil", something to be avoided but sometimes required to address situations where normal regulatory processes are inadequate. Secondly, the term "compelling necessity" must refer to a condition characterized by a "serious and immediate threat", ensuring that such urgency is clearly defined and not merely assumed. Thirdly, PERPU must undergo rigorous testing, both

[3] C. Rossiter, *Constitutional Dictatorship: Crisis Government in the Modern Democracies* (Harbinger, 1948) at p 6.

[4] S.D. Harijanti, "Perppu Sebagai Extra Ordinary Rules Makna dan Limitasi" (2017) 2:1 *Jurnal Paradigma Hukum Pembangunan*.

politically and legally, to validate its necessity and compliance with constitutional standards.[5]

A PERPU is issued as an instrument to normalize situations rather than merely managing a compelling crisis.[6] People often refer to a PERPU as extraordinary rules or extraordinary measures.[7] It is considered extraordinary because it allows deviations from the general order that typically applies; under normal circumstances, such actions and arrangements would be prohibited.[8]

To anticipate potential states of emergency or crises, special regulations must be formulated.[9] An emergency encompasses a wide range of meanings, including military emergencies or wars, natural disasters, and administrative issues like financial or social welfare emergencies.[10] In an emergency situation, specific norms come into play, requiring distinct regulations concerning the conditions, implementation procedures, termination procedures, and guidelines governing what the government can and cannot do. These measures aim to prevent the misuse of authority that contradicts the constitution.[11] A state emergency justifies the President taking the necessary actions to overcome the emergency while still paying attention to the role of the House of Representatives to:

1. ensure strict supervision when determining the existence or recognition of an emergency.
2. form the powers to deal with the emergency (creating the powers to deal with it).
3. monitor the implementation of government (executive) authority to overcome these abnormal conditions.
4. investigate various irregularities or abuse of authority during the emergency.
5. if necessary, declare the end of the state of emergency or ask the President to declare an end to the state of emergency.[12]

Article 7(1) of *Act Number 12 of 2011* aligns the hierarchy of a Law with the PERPU, granting them both the same binding force. According to Article 11 of that Law, the material contents of a PERPU are similar to those of a Law. Article 10 of *Act Number 12 of 2011* states that the material content of a Law may include the following:

[5] B. Manan & SD. Harijanti, "Peraturan Pemerintah Pengganti Undang-Undang Dalam Perspektif Ajaran Konstitusi dan Prinsip Negara Hukum" (2017) 4:2 *Padjadjaran Jurnal Ilmu Hukum* at p 238.

[6] Harijanti.

[7] Manan & Harijanti.

[8] Manan.

[9] P. Astomo, *Ilmu Perundang-Undangan: Teori dan Praktik di Indonesia* (PT Raja Grafindo Persada, 2018) at p 61.

[10] Astomo.

[11] J. Asshiddqie, *Hukum Tata Negara Darurat,* 2nd ed (PT Raja Grafindo Persada, 2008) at p 3.

[12] Asshiddqie.

1. further regulation of the provisions of the 1945 Constitution of the Republic of Indonesia;
2. order of a certain act to be regulated by the act;
3. ratification of certain treaties;
4. follow-up on the Constitutional Court's decision; or
5. fulfillment of public legal needs.

The President interprets the urgency of enacting a PERPU subjectively, but it must be based on objective circumstances. The Constitutional Court Decision No. 138/PUU-VII/2009 establishes the parameters for the issuance of a PERPU:

1. There is an urgent need to resolve legal problems quickly based on the act;
2. The absence of the required act creates a legal vacuum. Alternatively, the existing Law may be insufficient.
3. This legal vacuum cannot be overcome by making an act using the normal procedure because it will take quite a long time, while the urgent situation needs to be resolved.

The Constitutional Court's consideration in its Decision Number 54/PUU-XXI/2023 states that:

> [3.15.5] The bill regarding the stipulation of a PERPU into law has a different character from a regular bill, such as the stages and deadline. The special characteristics mean that not all lawmaking principles as regulated in Article 5 of Law No. 12 of 2011 absolutely bind the bill. For example, the Elucidation to Article 5 of Law No. 12 of 2011 stipulates that the lawmaking stages of planning, drafting, discussion, ratification, and promulgation be transparent and open. This ensures a broad opportunity for all societal levels to contribute to the creation of regulations. In fact, as previously explained, the mechanism of the formation of regulations originating from a PERPU does not cover every stage mentioned in the Elucidation. Also, because of the need for speed, there are time limits on the process of lawmaking that comes from a PERPU. This means that, logically, laws that originate from a PERPU should differ from ordinary laws, including in the implementation of the principle of meaningful participation. Therefore, it is no longer relevant for the ratification of a bill on the stipulation of a PERPU into a law in the House of Representatives to implement extensive meaningful public participation. This is because an emergency situation requires the House of Representatives to approve the bill within a framework that carries out a supervisory function, essentially representing the will of the people. However, despite the process of discussing the bill about the enactment of the PERPU not involving meaningful public participation, the House of Representatives is obliged to inform the public so that they can access and provide

inputs, such as through an application information system on the House of Representatives official website.

[3.15.6]…Therefore, during the formation process of an ordinary act, meaningful participation is mandatory at all stages, particularly during the submission, discussion, and approval stages. However, the case is different in the process of approving bills originating from PERPU; the implementation of meaningful participation is no longer relevant. Therefore, the Constitutional Court states that the petitioners' argument that stating PERPU Number 2 of 2022 on Job Creation as the forerunner to the birth of Act Number 6 of 2023 was stipulated by the President in violation of Constitutional Court Decision Number 91/PUU-XVIII/2020 regarding meaningful participation is not legally justified.

The PERPU represents a "constitutional amputation" of the substance and democratic procedures involved in enacting legislation.[13] A PERPU that has been approved by the House of Representatives in the next sitting session, from the perspective of democratic principles — specifically the notion that "the damage has already been done" — can indeed have legal consequences. This is because, once enacted, a PERPU immediately creates binding legal norms and can generate new legal statuses, even before formal approval or rejection by the House of Representatives. This is especially the case if the PERPU contains material or provisions that "absolutely" can be determined only by democratic forums and procedures, such as qualifying an act as a serious crime by including the threat of aggravated corporal punishment of up to 20 years. These legal consequences can occur because the authority to enact PERPU is an unlimited power.

b. Meaningful Public Participation in Regulation-Making Process

Meaningful public participation in the legislative process is a hallmark of a democratic state, where citizens are actively involved in formulating policies that will affect them. Only that participation can truly build democracy, ensuring equal opportunities for all citizens to engage in discussions, debate issues, and contribute to decision-making processes.[14] Meaningful public participation is defined by Riskiyono as the active involvement of society, both at individual and group levels, in determining public policy or regulation.[15]

Article 1(2) of the 1945 Constitution states that "[s]overeignty is in the hands of the people and is implemented according to this Constitution". Thus the Constitution guarantees people's sovereignty through meaningful public participation. Furthermore, Article 96 of

[13] Manan at p 236.

[14] R.A. Dahl, *Perihal Demokrasi, Menjelajahi Teori dan Praktik Demokrasi Secara Singkat* (Yayasan Obor Indonesia, 2001) at p 15.

[15] J. Riskiyono, *Pengaruh Partisipasi Publik dalam Pembentukan Undang-Undang: Telaah atas Pembentukan Undang-Undang Penyelenggara Pemilu* (Perkumpulan untuk Pemilu dan Demokrasi (Perludem), 2016) at p xi.

Act Number 12 of 2011, as amended, regulates meaningful public participation in making regulations:

(1) The public has the right to provide input orally and/or in writing at each stage of the formation of regulations.

(2) The public can provide input online or offline, as mentioned in paragraph (1).

(3) The public, as defined in paragraph (1), refers to an individual or group of people have an interest in the substance of the draft Regulations.

(4) To make things easier for the public to provide input as intended in paragraph (1), drafts of the regulations should be easily accessible by the public.

(5) In exercising the rights as intended in paragraph (1), legislators must inform the public concerning the formation of regulations.

(6) Legislators can carry out public consultation activities to fulfill the rights mentioned in paragraph (1):

  a. public hearings;

  b. work visit;

  c. seminars, workshops, discussions, and/or

  d. other public consultation activities.

(7) Results of public consultation activities as referred to in paragraph (6) become material considerations in planning, drafting, and discussing bills.

(8) Legislators can provide the public with an explanation of the results of the public input discussion, as mentioned in paragraph (1).

(9) The House of Representatives Regulations, Regional Representatives Council Regulations, and Presidential Regulations regulate additional provisions regarding public participation, as intended in paragraphs (1) to (8).

From the above provisions it can be seen that the Law guarantees meaningful public participation by enshrining the right to be heard, considered and explained and reflects the Constitutional Court's decision.

Providing guarantees for meaningful public participation allows society to access information and ensures equal treatment for all citizens in expressing their opinions through various dialogues. This can encourage the formation of participatory and effective regulations in a country that has chosen participatory democracy.[16] Regulations are considered aspirational and participatory if they possess the following characteristics:

[16] Saifudin, *Partisipasi Publik dalam Pembentukan Peraturan Perundang-Undangan* (FH UII Press, 2009) at p 143.

1. General and Comprehensive: They should be broad in scope, which allows for limited exceptions and special provisions.
2. Universal: We cannot formulate regulations solely for specific situations; instead, we must design them to address future events.
3. Self-Correcting: Effective regulations should include provisions for self-correction and improvement. It is common for regulations to contain clauses that allow for judicial review.[17]

Meaningful public participation is understood as involvement that begins at the planning stages and continues through the preparation, approval, and implementation phases of legislation. Ideally, public participation in the formation of statutory regulations should occur at every stage; however, it is most effective during the planning, preparation, and discussion stages. Typically, public participation is not allowed during the ratification and promulgation stages because the substance is no longer open for discussion and is primarily formal in nature, ensuring that statutory regulations can be legally binding.

c. Implementation of Meaningful Public Participation in Regulation-Making Process: Stipulation of PERPU Number 2 of 2022 towards Job Creation Becoming Act

After the Constitutional Court's Decision Number 91/PUU-XVIII/2020 was promulgated, the President of Indonesia quickly issued a PERPU, Number 2 of 2022, on Job Creation, which was considered by the public not to fulfil the requirement of meaningful public participation. According to that Constitutional Court's Decision, legislators had two years to amend *Act Number 11 of 2020 on Job Creation*. However, instead of legislators using the two-year period to amend the law, which would involve meaningful public participation, the President issued a PERPU, which can be done only in cases of urgent necessity.

The government asserted that the PERPU addressed an urgent need, specifically the legal void left after the Constitutional Court's Decision Number 91/PUU-XVIII/2020. However, the Government should also not forget that the Decision also mandated meaningful public participation in the drafting process. Therefore, the public believed that the PERPU failed to meet the requirements of compelling urgency that would allow dispensing with meaningful public participation.

Since *Act Number 11 of 2020 on Job Creation* came into effect, the government has increased meaningful public participation, according to the Coordinating Minister for the Economy. Ministries or institutions have carried out outreach and consultations 610 times, and the Job Creation Socialization Task Force has done so 29 times.[18]

[17] Riskiyono.

[18] Coordinating Ministry for Economic Affairs, 2023. See:

The government asserted that *PERPU Number 2 of 2022 on Job Creation* fulfilled "the right to be heard, the right to be considered, and the right to be explained." The Task Force on Job Creation, which was formed through Presidential Decree Number 10 of 2021, is a space for people affected by the PERPU to provide input so that it fulfills the "right to be heard". The input from the community then became a consideration for the government in preparing improvements to *Act Number 11 of 2020 on Job Creation* through PERPU Number 2 of 2022 as an embodiment of the "right be considered". It is difficult to determine if focus group discussions and aspiration gathering activities have effectively implemented the right to receive an explanation for given opinions. Thus the implementation of meaningful public participation in PERPU Number 2 of 2022 has not been optimally implemented, as there is no explanation regarding the consideration of community input (the "right to be explained").

Despite the government's assertion that the PERPU ensured meaningful public participation, the public and many legal experts saw it as a violation of the constitution. This is because it goes against what the Constitutional Court said was necessary for meaningful public participation.[19] According to the Center for Law and Policy Studies:

> First, the government positions the public as the party facing the government in the legislative process. The dynamics of the law formation process reflect this message, with government representatives frequently saying, "If you reject this bill, please go to the Constitutional Court". Government representatives are positioning the public as opponents in the drafting process instead of involving them as partners. Implementing an act will impact the people. The government's "socialization" program, which is essentially a one-sided communication campaign, exemplifies the act of excluding meaningful public participation, despite its purported fulfillment of participation requirements.
>
> Secondly, the government places stakeholders in an unbalanced position when it comes to planning, drafting, and discussing legal products. The involvement of affected parties appears to vary significantly. The drafting of the Job Creation Bill in 2019 and the Criminal Code Act in 2022 serve as examples. The government affords the opportunity to hear only those from society who share its interests.
>
> Thirdly, confusion about the priority scale of legalization content materials. The PERPU Number 2 of 2022 on Job Creation fails to consider legal vacancies, which

1. Focus Group Discussions: Protection and Empowerment of Cooperatives and Micro, Small, and Medium Enterprises in Bandung on July 28, 2022 (Ministry of State Secretariat, 2022);
2. Aspiration Network with Central Java Trade Unions in Semarang on September 26, 2022 (Ministry of State Secretariat, 2022);
3. Aspiration Network with Workers Unions throughout Kalimantan in Balikpapan on October 7, 2022 (Ministry of State Secretariat: 2022); and
4. Joint Aspiration Network of North Sulawesi Unions in Manado on October 28, 2022. (Ministry of State Secretariat, 2022).

[19] Pusat Studi Hukum dan Kebijakan, "PSHK: Perppu Cipta Kerja Praktik Ugal-Ugalan dan Pengabaian Partisipasi Publik Bermakna" (2022) https://www.hukumonline.com/berita/a/pshk--perppu-cipta-kerja-praktik-ugal-ugalan-dan-pengabaian-partisipasi-publik-bermakna-lt63b04a3f200bc/.

> should be a primary prerequisite for its establishment. The government actively ignored the mandate of the Constitutional Court's decision to rewrite Act Number 11 of 2020 on Job Creation, with the issuance of that PERPU.

As explained above, the government should fully implement the Constitutional Court's mandate by amending *Act Number 2 of 2022 on Job Creation* through a bill rather than by using a PERPU. The Constitutional Court gave legislators two years to amend *Act Number 2 of 2022 on Job Creation* so they could fulfil meaningful public participation. This is different from the formation of a PERPU, which the president regarded as being needed as a matter of urgency, so that the meaningful aspect of public participation could not necessarily be fulfilled.

It would be preferable if the President had required meaningful public participation in the PERPU before bringing it to the next sitting session of the House of Representatives. The next sitting session of the House of Representatives would have provided ample time between the enactment of the PERPU and its eventual ratification. The House of Representatives can solicit public input during the period before the adoption of the PERPU as a Law. Once the PERPU was determined to become a Law, the House of Representatives no longer had the opportunity to discuss its contents, having only the power to approve or reject it.

On February 15, 2023, the House of Representatives and the government approved the *PERPU Number 2 of 2022 on Job Creation*, making it a legally binding Law. Once again, in the process of stipulating the PERPU becoming Law, the House of Representatives did not consult the public and immediately agreed. This process clearly fails to achieve meaningful public participation.

The Constitutional Court mandates that all types of regulations, including PERPU, must fulfil meaningful public participation. Therefore, the authors, who currently work as legislative drafters in the House of Representatives, intend to propose to the Indonesian Parliament — when considering amendments to *Act Number 12 of 2011* — that the process of creating a PERPU does not require meaningful public participation, as it is the prerogative of the president to enact regulations in emergency situations with limited time. However, we believe that meaningful public participation remains necessary during the parliamentary process of approving or rejecting the PERPU.

The authors concur with the Constitutional Court's Decision Number 54/PUU-XXI/2023, which asserts that the bill pertaining to the enactment of the PERPU differs from a regular bill due to its emergency nature. Because a PERPU has time limits, it makes sense to distinguish Laws based on PERPU from other Laws, especially when it comes to the principle of meaningful public participation. In the process of approving bills originating from a PERPU, the implementation of meaningful participation is no longer relevant.

3. Conclusion

First, meaningful public participation is not needed in the process of making the PERPU, because it is the President's subjective opinion if it is needed to overcome urgent issues in a short time. Secondly, the process of stipulating a PERPU becoming law can involve meaningful public participation, allowing the House of Representatives to consult with the public before enacting it during the next sitting session.

Based on the conclusion, the authors suggest that the legislators should apply meaningful public participation in the making of a PERPU even if it is not required. It should be carried out before the process of stipulating a PERPU becoming law, if the House of Representatives has time to consult with the public.

Book Review

Essentials for Drafting Clear Legal Rules

by Bryan Garner and Joe Kimble (Administrative Office of the United States Courts, 2024)

Reviewed by John Mark Keyes[1]

Bryan Garner and Joe Kimble are two of the most well-respected authorities on legal writing and drafting in the United States. For more than 30 years, they have (among their many other activities) participated as style consultants on projects to redraft US federal court rules.[2] In the course of their work, they have produced drafting guidelines to inform the work of those involved in drafting or revising court rules. Professor Garner published the first edition in 1996.[3] They have now produced a new edition retitled as *Essentials for Drafting Clear Legal Rules*, available for download free of charge from the US Courts website.[4]

The title is true to itself, clearly conveying the gist of the book's content. It is founded on the authors' work on court rules, but it deals with matters relating to drafting "legal rules" more generally. And although drafting is addressed in some detail (126 pages), the book focuses on the "essentials" on which there is widespread agreement.

The essentials are guidelines or principles for clear drafting, rather than hard and fast rules. The object of the guidance is to produce rules that are "clear", which is where Chapter 1 begins: discussing clarity ("Be clear") as the first of the basic principles for drafting. Clarity is framed as to "convey an unambiguous meaning", "to sharpen the wording" and "— as a matter of efficiency if nothing else — to make it as easy as possible for readers to find and understand the information they're looking for."

Following "Be Clear", the authors add three more basic principles:

- Be consistent.
- Make the draft readable, which is elaborated in terms of five elements:
  1. Sentence length.
  2. Plain words.
  3. Headings.
  4. Structure.

[1] Sessional Professor, Faculty of Law, University of Ottawa.

[2] For an overview of their work, see J. Kimble, "Redrafting All the Federal Court Rules: A 30-Year Odyssey" (2024) 107:3 *Judicature* at p 24.

[3] B.A. Garner, *Guidelines for Drafting and Editing Court Rules* (Administrative Office of the United States Courts, 1996).

[4] https://www.uscourts.gov/sites/default/files/essentials_for_drafting_clear_legal_rules_2024.pdf.

5. Document design.

- Be as brief as clarity and readability permit.

The rest of the book explores how these basic principles may be realized in clear legal rules.

Chapter 2 is titled "General Conventions", but it more specifically addresses drafting sentences in terms of number, tense, voice and syntax. From there, the authors move on to structural considerations – organization, structural divisions, vertical lists (Chapter 3), words and phrases (Chapter 4) and punctuation (Chapter 5). These chapters are in turn divided and subdivided into topics that tease out the various drafting aspects they embrace. For example, the treatment of syntax in Chapter 2 explores nine distinct aspects of constructing sentences and dealing with the complexity that legal rules must often convey. It is not encumbered by lengthy discussions of these aspects, but rather gets straight to the point in providing guidance on how to deal with them.

The book is intensely pragmatic and geared towards practitioners. It largely consists of short statements of advice followed by examples of how not to draft ("Not This:") and how to ("But This:"). Reasons for the guidance are stated with equal succinctness. The first of the General Conventions is a good example:

> **2.1 Number.** Draft in the singular number unless the sense is undeniably plural. Why? A needless plural can give rise to the "plain meaning" argument that two or more are required — an argument that has sometimes prevailed in common-law jurisdictions since the 13th century.*

Not This:	**But This:**
When *issues* not raised by the pleadings *are* tried by express or implied consent of the parties, *they* shall be treated in all respects as if *they* had been raised in the pleadings.	When *an issue* not raised by the pleadings *is* tried by the parties' express or implied consent, *it* must be treated in all respects as if raised in the pleadings.
Old Fed. R. Civ. P. 15(b).	Current rule 15(b)(1).

> *See Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts § 14, at 130–31 (2012).

Much of the guidance is also expressed as a general matter that is subject to exceptions. For example, the use of the active voice in General Convention 2.3 is expressed as a preference, not a rule. Three exceptions are given when the passive voice is used:

> (1) when the actor is understood or unimportant;
>
> (2) when changing to the active voice would undesirably shift the emphasis in the sentence; and, similarly,

(3) when using the active voice would create a discontinuity between sentences by shifting.

The examples the book provides are taken from court rules and constitute the bulk of the book. They offer readers contrasting drafting approaches and allow them to see for themselves how the approaches differ and why one is better than the other. There may of course be debate about the merits of differing approaches (for example, about the use of bullets instead of numbering, at page 63, or serial commas, at page 104), but even when there is debate, the guidance is valuable in prompting it.

Essentials for Drafting Clear Legal Rules clearly lives up to its name. Although its extensive examples are taken from court rules, the points they illustrate are relevant to all forms of legislative drafting and deserve serious consideration. And perhaps the most remarkable feature of the book is its availability free of charge on-line from the US Courts website. It is well worth taking a look at this book, if not adding it to your library.