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Editor's Notes

On the eve of the 2013 CALC Conference, this issue contains articles presented at two legislative drafting conferences that took place in 2012: the Legislative Drafting Conference of the Canadian Institute for the Administration of Justice (10-11 September) in Ottawa and the CALC-Africa Africa Parliamentary Knowledge Network Conference (4-5 July) in Cape Town. Despite taking place on opposite sides of the globe, they addressed a common concern with the policy content of legislation and the role of legislative counsel in shaping policy. This topic is frequently discussed, but there are a range of views as to the extent of legislative counsel's role.

Under the traditional British model, legislative counsel work from instructions that define the content of the legislation they are to draft, focusing on legislative form and modes of expression rather than the merits of the policy to be expressed. The approach elsewhere, particularly in the United States, is to have legislation drafted by those who are responsible for, or involved in, determining its content. Although legislative practice is vastly more complex than these two models suggest, they nevertheless form the poles of debate about the policy role of legislative counsel.

In this issue, Elizabeth Bakibinga examines the shifting roles of legislative counsel in African countries, arguing for a more robust role in the interests of producing evidence-based legislation that more effectively addresses the needs of the societies for which it is enacted. Ed Rubin advances a similar position about legislative drafting in the US, the UK and Canada, seeing it as a way out of legislation that serves only political interests rather than the interests of the community.

These articles on the policy role of legislative counsel are balanced by two others that focus on the technical aspects of legislative drafting. Samson Maundu discusses drafting and interpretation issues arising from the Constitution of Kenya. His analysis is very topical given the inaugural elections that have recently taken place under this new Constitution.

In turn, Ruth Sullivan presents her analysis of one of the most difficult interpretive issues in legislation: how to deal with its application in relation to things that existed or happened before the legislation comes into force. She explains with remarkable clarity not only the substantive difficulties, but also the terminological confusion (“retroactivity” or “retrospectivity”) that characterizes this topic.

There is much to read and ponder in this issue. Stay tuned for more from the Cape Town Conference 10-12 April 2013!

John Mark Keyes

Ottawa, March, 2013

Implementing the Constitution of Kenya -- Why Parliamentary Counsel Find it Difficult

Samson Davies Maundu¹



Abstract:

The Constitution of Kenya is over 80,000 words long. It is the most important Kenyan legal document produced in the last decade. Its implementation is the will of millions. However, its implementation is held hostage to a style and system that has had its day. It incorporates traditional and modern styles and this has contributed to the confusion over its implementation. Other jurisdictions have successfully overcome these challenges: the Commonwealth of Australia and the State of Western Australia are just two. Kenya can overcome them too if it can successfully borrow and adapt plain language principles and other useful devices and techniques from successful jurisdictions. The litigation and confusion that the current system entails may be eradicated once and for all if the Office of the Attorney-General took control over the process of legislative drafting and ensured that all persons engaged in drafting followed its lead.

Introduction

Traditions are important; they remind us of who we are, where we come from, where we are going and why we do what we do. Without traditions, we would be like a ship adrift in the open sea with a stick for a rudder. Traditions are the foundations of our very existence as a people and, in the case of parliamentary counsel the world over, as a profession.

¹ Parliamentary Counsel II, Office of the Attorney-General of Kenya.

The Office of the Attorney-General of Kenya, especially its Legislative Drafting Department headed by the Chief Parliamentary Counsel, follows traditions that have ruled it since it was established. Parliamentary Counsel apply techniques that have been handed down by three generations of Parliamentary Counsel and exhibit a strong resistance to new and improved techniques applied in other jurisdictions.

In short, Kenyan Parliamentary Counsel are very conservative in the way they draft. How instructions are received, drafts are prepared and shepherded through the system, and then finalised, has largely remained the same since the Office of the Attorney-General was established, subject to the advance of technology forcing changes where it could. It seems that the Plain Language Movement, so prominent in other countries, has had minimal impact on Parliamentary Counsel and its principles are yet to be adopted as acceptable alternatives to the staid, older style. Despite its benefits, Plain Language Drafting must first overcome entrenched conservative traditions before it becomes the preferred standard in Kenya.

The Constitution of Kenya and the challenges of interpretation

The [Constitution of Kenya](#) is hailed as one of the most progressive in world, but at over 80,000 words, it is an exercise in many of the traditions that have hindered the cause of Plain Language Drafting in Kenya. In some key areas, the drafters of the Constitution abandoned the tradition. But in many others, they have repeated and compounded some of the worst excesses of the traditional style. For this reason Kenyans remain in the dark about the date of the next general election or whether the Two-thirds Gender Rule will be achieved through elections or other means.

It is uncommon for a constitution to be interpreted in the same way as ordinary legislation. The rules for interpreting constitutions are influenced by, among other things, the fact that it is the supreme law from which all other laws are derived. Without the constitution there is no law. Therefore, some of the rules of interpretation are necessarily special, but others are similar to those for interpreting ordinary statutes. To apply the ordinary rules of interpretation when interpreting the constitution requires fine judgement.

What are some examples of plain language drafting in the Constitution of Kenya?

Article 13(2) and (3) on Citizenship are drafted simply and plainly:

- (2) Citizenship may be obtained by birth or registration.
- (3) Citizenship is not lost by marriage or dissolution of marriage.

So too are many of the provisions of Chapter Nine on the Executive. For instance, Article 129 (1) states:

(1) Executive authority derives from the people of Kenya and shall be exercised in accordance with this Constitution.

And Article 131 states:

(1) The President

- (a) is the Head of State and Government;
- (b) exercises executive authority of the Republic, with the assistance of the Deputy President and Cabinet Secretaries;
- (c) is the Commander-in-Chief of the Kenya Defence Forces;
- (d) is the Chairperson of the National Defence Council; and
- (e) is a symbol of national unity.”

These examples demonstrate many of the principles of Plain Language Drafting. The sentences are short, precise and clear; they contain no superfluous words; they are in the active voice; they prefer the singular to the plural; they are gender-neutral; many key provisions use the word “includes” to expand their use beyond the examples provided in the text; and the structure is well-organized with the use of headings, divisions and careful numbering. Even the visual appearance of the text encourages one to read it; the use of “white space” effectively draws in the reader.

Some examples of traditional drafting in the Constitution of Kenya

First general election under the Constitution

The provisions regarding elections are found in Chapter Eight on the Legislature. Article 101 provides for the election of Members of Parliament. It states:

101. (1) A general election of members of Parliament shall be held on the second Tuesday in August in every fifth year.

So far, so good. The provision is short, precise and leaves no doubt about the date of the election. However, a glimmer of doubt is heralded by Article 262 (Transitional and consequential provisions), which provides:

262. The transitional and consequential provisions set out in the Sixth Schedule shall take effect on the effective date.

Section 2 of the Sixth Schedule suspends some of the provisions of the Constitution until after the announcement of the results of the first (general) elections for Parliament under the Constitution, including Chapter Eight. However, it also states that the provisions relating to the election of the National Assembly and the Senate “shall apply to the first general elections under this Constitution”.

Section 3 extends the application of provisions of the former Constitution concerning the Executive and the application of the *National Accord and Reconciliation Act* until the first general elections held under the Constitution. However, section 3 does not apply to the system of elections, eligibility for election or the electoral process.

But it is sections 9(1) and 10 of the Sixth Schedule that pose real problems. They state:

9. (1) The first elections for the President, the National Assembly, the Senate...under this Constitution shall be held at the same time, within sixty days after the *dissolution of the National Assembly* at the end of its term.

10. The National Assembly existing immediately before the effective date shall continue as the National Assembly for the purposes of this Constitution for its *unexpired term. (Emphasis mine)*

These provisions provide no clarity about the actual date of the first general elections under the Constitution, as Article 101(1) may have suggested. It is clear from Article 101(1) that the general elections must be held on the first Tuesday of August in every fifth year. Whether this provision is suspended by section 2 of the Sixth Schedule is hotly disputed.

Although section 2 of the Sixth Schedule suspends Chapter Eight, it continues to apply the provisions on elections (Article 101). Section 10, meanwhile, preserves the life of the National Assembly for its unexpired term. The former Constitution made no mention of the life of Parliament; it only stated when Parliament would be dissolved – five years after the first meeting after its previous dissolution. Further, the President, under the former Constitution, enjoyed the power to prorogue and dissolve Parliament (which could be used at any time after the first meeting of the National Assembly); those powers no longer exist under the new Constitution. The dissolution of Parliament is preserved only under section 59(4) of the former Constitution, which is also preserved by section 10 of the Sixth Schedule.

In attempting to resolve the political challenges the drafting of the Constitution entailed, the Committee of Experts went to extraordinary constitutional lengths to reassure the members of the Tenth Parliament that the provisions of Chapter Eight on elections would not affect the MPs. The result is that a reading of Article 101, the Sixth Schedule, the provisions of the former Constitution and those of the National Accord and Reconciliation Act, leaves one unclear about the intent of the Committee of Experts. Court challenges based on one interpretation of these provisions set against others did not provide clarity. The High Court ruled that the elections could be held in August or December 2012 or d in March 2013.² If the High Court could not decipher the intent of the Constitution regarding the date of the general elections and order a date on when they could be held, it is too much to expect that lay readers can.

² Elections were scheduled for March 4, 2013.

Two-thirds Gender Rule

Many of the statutes drafted to implement the Constitution have ended (or many experts predict will end) in litigation.

Parliamentary Counsel have faced difficulties in drafting legislation to give effect to the Two-thirds Gender Rule found in Article 27 (Equality and freedom from discrimination). Clauses (6) and (8) of Article 27 provide:

(6) To give full effect to the realization of the rights guaranteed under this Article, the State shall take legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination.

(8) In addition to the measures contemplated in clause (6), the State shall take legislative and other measures to implement the principle that *not more than two-thirds of the members of elective and appointive bodies shall be of the same gender.* (*Emphasis mine*)

The understanding of the enforcement of the Two-thirds Gender Rule, especially regarding Parliamentary representation, has concentrated overwhelmingly on how to ensure that not more than two-thirds of elected representatives are of the same gender. Many It is generally accepted that the matter needs to be seen from that light alone: the requirement in Article 27(8) is for the government to take legislative and other measures to implement the Two-thirds Gender Rule, including the measures contemplated in Article 27(6), that is, affirmative action programmes and policies among others.

The instructions sent to Parliamentary Counsel concentrated on ensuring that, of the elected representatives in Parliament and the county assemblies, not more than two-thirds belong to one gender. The instructions were aimed at finding a legislative device to ensure that elected representatives satisfied the Two-thirds Gender Rule. Counsel were unable to find such a device and consequently advised the Executive to propose the first constitutional amendment in Parliament to remove the need for elected representatives to satisfy the Two-thirds Gender Rule.

Why do Parliamentary Counsel face difficulty in drafting legislation to implement the Constitution?

An examination of the process of drafting legislation in Kenya reveals that more often than not, Parliamentary Counsel are incapable of effectively turning the instructions of government departments or agencies regarding the Constitution into coherent legislation. Two reasons for this are briefly discussed below.

Poor and inconsistent interpretation of the provisions of the Constitution

To understand drafting instructions, Counsel must understand the relevant provision or provisions of the Constitution on which the instructions are based. As shown above, it is becoming increasingly difficult to determine what the constitutional intent is. Often, instructing officers are non-lawyers who do not have extensive experience in the interpretation of this Constitution, as they did with the former one. They must rely on pronouncements of the High Court or legal opinions of outside consultants, as they must on those of the Attorney-General who remains the Government's principal legal advisor.

The Office of Attorney-General insists on receiving drafting instructions in the form of draft Bills. Many instructing officers rely on outside consultants to prepare these draft Bills. Many outside consultants are experienced lawyers but have a rudimentary grasp of the principles of drafting, whether in plain language or even traditionally, and the Bills they prepare reflect this. Thus, when draft Bills are submitted to the Attorney-General, it is often difficult to determine their purposes and how they may be achieved.

Sometimes more time is lost attempting to determine the purposes or principles of the proposed legislation than in actual drafting. As is common in other jurisdictions, the time allocated to one drafting exercise is never enough, and thus the Bills debated on the floor of Parliament unintentionally omit many of the important objectives of the provisions of the Constitution under consideration in the Bills. After their enactment, they are sometimes vetoed by the President or they are subjected to amendments even before being fully implemented.

Poor drafting instructions

Without a coherent understanding of the provisions of the Constitution, and how they can best be implemented by legislation, instructing officers do not have a standard to apply when issuing instructions to legislative counsel. Even though many instructing officers have extensive experience by virtue of their ranks in the civil service, the implementation of the Constitution presents special difficulties, especially in the absence of a body of common law derived from court rulings or an acceptable body of legal opinions from the Attorney-General.

Without a proper foundation for interpreting various critical provisions of the Constitution, both instructing officers and legislative counsel are left to feel their way in the dark. As a result, by the time final instructions are settled, time is already running out. Some of the unwanted effects of proposed legislation are discovered only after the Bill has been introduced into Parliament or, sometimes, after it is enacted into law.

Despite strict deadlines prescribed in the Fifth Schedule of the Constitution, the process of agreeing on the items in instructions limits how much effective drafting can be achieved by

counsel. This has led to litigation and accusations from diverse actors of malicious governmental sabotage of the implementation process

What can we do to improve the process of drafting to implement the constitution?

Parliamentary Counsel have no control over court process, but ...

Were the Office of the Attorney-General a private law firm, it would be the largest in Kenya. The Attorney-General has at his call some of the brightest lawyers in government service. His opinions are valued by many. Until the courts rule on the many controversies being litigated over the Constitution, the A-G must take the lead in offering guidance as to what the Constitution means.

This guidance must be provided by Parliamentary Counsel. Parliamentary Counsel draft legislation to give effect to the provisions of the Constitution; they are best placed to make the initial interpretation of its provisions. In this way, they will be better able to assist instructing officers in crafting the instructions by which the drafting exercise will be conducted.

Many lawyers claim constitutional interpretation expertise and have been contracted by departments to prepare draft Bills. These experts apply different principles while interpreting the Constitution and different styles while drafting. It is left to Parliamentary Counsel to review and harmonise these draft Bills so that they have a uniform style and fit well in the law of Kenya. An added bonus perhaps is that the courts will be able to make rulings that do not sow further confusion.

Creation of a drafting manual for use by all instructing departments

A number of Parliamentary Counsel Offices around the world have developed manuals for instructing officers and parliamentary counsel. For example, the [Parliamentary Counsel's Office of the Government of Western Australia](#) has developed a manual for use by its parliamentary counsel that addresses many, perhaps all, the issues that may arise while drafting or amending legislation. The manual arose out of practice notes that were periodically issued by the Parliamentary Counsel over the years. It describes what parliamentary counsel can do when drafting legislation, including providing the mechanical details of how to number, when to use italics, and which formulae to use when inserting provisions in a Bill. It is the most revolutionary document I have seen in the context of statutory drafting.

A manual for Kenya would standardise procedures across the entire government for drafting legislation, especially drafts by non-legislative counsel. It would help ensure through administrative means that all departments, especially those that rely on outside consultants, prepare drafts that meet the requirements of the Office of the Attorney-General. It would

reduce drafting errors, ensure uniformity, and increase efficiency. The time taken by legislative counsel and instructing officers in agreeing to the instructions would be reduced significantly, ensuring that deadlines are met and the drafting process is accelerated. It would also free-up legislative counsel to concentrate on their core function of drafting, and reduce their need to engage in drafting-related activities such as policy activities that should ideally remain the preserve of instructing officers and their departments.

The Western Australia Parliamentary Counsel's Office has also prepared a booklet on how to read legislation. It is an ideal document for those who are not professional lawyers. Indeed, even lawyers of long experience have found it to be an invaluable tool in reading and understanding legislation. It prepares the reader for what to expect when reading legislation. It also equips them with the tools to properly read and understand legislation. It should be required reading for even those who draft: it gives them valuable insights as to the needs of their audience; it helps them anticipate how to structure legislation; and it shows them how to use the principles of plain-language drafting to better give effect to the objectives and purposes of the proposed legislation.

Co-ordinated implementation of plain language drafting principles by government departments

In Kenya, any moves to introduce plain language principles into legislative drafting are being undertaken in an uncoordinated manner. The main institutions engaged in professional legislative drafting are the Kenya Law Reform Commission and the Legislative Drafting Department in the Office of the Attorney-General. Drafts are usually prepared by government departments, but they do not have full-time professional legislative counsel on their staffs and thus rely on outside consultants for legislative drafting services.

In addition to creating a drafting manual for use by all drafters of legislation, Kenya could take a leaf out of the [Victorian Law Commission Report](#) that set the stage for implementing plain language principles in legislative drafting. The Kenya Law Reform Commission, whose functions include considering proposals for the reform of the law, could undertake a review of the manner in which legislation is drafted with a view to proposing the implementing plain language principles in the drafting process.

Such a review would give the Chief Parliamentary Counsel the basis for reforming the way legislation is drafted, whether by counsel in her department, the Law Reform Commission, or outside consultants engaged by different departments. Until such time as all persons engaged in legislative drafting in Kenya have adopted the principles of plain language, it should fall on the Chief Parliamentary Counsel to firmly take hold of and guide the process.

Conclusion

The benefits of plain language drafting are being enjoyed in jurisdictions as diverse as Australia, South Africa, New Zealand, Canada, Hong Kong, and Papua New Guinea. By simplifying legislation and by streamlining the process by which it is drafted, these jurisdictions have witnessed an improvement in the quality of legislation and, generally, a better understanding of the purposes of specific pieces of legislation.

Kenya is going through one of the most trying transitions in its history. In the midst of a political maelstrom, Kenya is attempting to implement a new Constitution while building the foundations for the successful devolution of power from the national government to county governments. The Legislative Drafting Department is at the centre of the implementation of the Constitution and the devolved system of government. For these to succeed, it would be best if it adopted the principles of plain language drafting as well the suggested tactics and devices.

An examination of the legislation and drafting processes of the Commonwealth of Australia and Western Australia, should serve to persuade the Chief Parliamentary Counsel of the benefits of breaking from the traditional way of doing things in favour of plain language drafting principles.

The Challenges of Transitional Law – the Canadian Experience

Ruth Sullivan¹



Abstract:

This article traces the evolution of Canadian transitional law from its origins in British common law to its current rather distinctive approach, which reflects the influence of two Canadian scholars: Elmer Driedger, who proposed refinements to the traditional common law analysis of transitional problems, and Pierre-André Côté, who exposed the Supreme Court of Canada to a European, civil law based analysis of transitional law. Recent Supreme Court of Canada case law draws clear distinctions between retroactive applications, retrospective applications, immediate applications and interference with vested rights and it attaches a distinct presumption to each category. This case law establishes a clear and coherent lexicon that can be used in talking about transitional problems. However, in the view of the author, the set of presumptions it establishes will not deliver anything like predictable solutions to transitional issues. The article ends with some recommendations about when to include transitional provisions in Acts and regulations.

Introduction

In Canada, as in other jurisdictions, the law governing the temporal application of legislation has been partially codified in Interpretation Acts. However, this did not displace the common law, which has evolved in a distinctive way in Canada due largely to the efforts of two scholars: Elmer Driedger and Pierre-André Côté. Elmer Driedger published his views on transitional law in a 1953 essay,² in his treatise on statutory interpretation, *The*

¹ Legislative Counsel, Department of Justice (Canada).

² E.A. Driedger, "The Retrospective Operation of Statutes" in *Legal Essays in Honour of Arthur Moxon*, ed. J.A. Corry (Toronto: University of Toronto Press, 1953) 1).

Construction of Statutes,³ and most importantly in a 1978 law review article.⁴ In the late 1980's Pierre-André Côté wrote a series of articles on transitional law⁵ and continued to develop his views on this subject in the 2nd, 3rd and 4th editions of his treatise on statutory interpretation, *Interprétation des lois*.⁶ While Driedger based his analysis primarily on British and Canadian case law, Côté also took into account European theories of transitional law grounded in the civil law tradition. In hearing appeals from common law provinces, the Supreme Court of Canada relied mainly on British precedents and became familiar with Driedger's analysis of those precedents. In hearing appeals from Quebec, it was exposed to Côté's scholarship and adopted a European-based analysis.

In this article, I begin by tracing the evolution of Canadian transitional law through five stages. Stages 1 and 2 are grounded in British case law, which remained influential even after the Supreme Court of Canada became the final appellate court of Canada. Stages 3 and 4 review the scholarship of Driedger and Côté, respectively. Stage 5 reflects a recent attempt by the Supreme Court of Canada to integrate the work of these scholars into a single framework.

The second part of the article considers the potential of the new framework to bring certainty and coherence to the temporal application of statutes and regulations. The article ends by noting the value of including transitional provisions in legislation.

The evolution of Canadian transitional law

Stage 1 The common law used the terms “retroactive” or “retrospective” interchangeably, although “retrospective” was the preferred term. These terms were used to describe any new law that

- changed the past legal effect of past events or circumstances,
- changed the future legal effect of past or ongoing events or circumstances, or
- interfered with vested rights.

Stage 2 The common law adopted a distinction between retroactive or retrospective application on the one hand and interference with vested rights on the other. *West v. Gwynne* is a leading case on this distinction.⁷ The issue in the case was whether new legislation

³ E.A. Driedger, *The Construction of Statutes* (Toronto: Butterworths, 1974); *Supplement to The Construction of Statutes* (1976); *The Construction of Statutes*, 2nd ed. (Toronto: Butterworths, 1983).

⁴ E.A. Driedger, “Statutes: Retroactive Retrospective Reflections” (1978), 56 *Can. Bar Rev.* 264

⁵ “La position temporelle des faits juridiques et l’application de la loi dans le temps” (1988) 20 *Rev. Juridique Thémis* 207; “Contribution à la théorie de la rétroactivité des lois” (1989) 68 *Can. Bar Rev.* 60; “Le juge et le droits acquis en droit public canadien” (1989) 30 *Cahiers de Droit* 359; “L’application dans le temps des lois de pure procédure” (1989) 49 *Revue du Barreau* 625.

⁶ P.-A. Côté, *Interprétation des lois*, 4th ed. (Montréal: Les Éditions Thémis, 2009).

⁷ [1911] 2 Ch. 1.

governing the terms of a certain class of leases applied to a lease that was signed before the new legislation came into force. Buckley J. wrote:

During the argument the words “retrospective” and “retroactive” have been repeatedly used, and the question has been stated to be whether s. 3 of the *Conveyancing Act, 1892*, is retrospective. To my mind the word “retrospective” is inappropriate.... Retrospective operation is one matter. Interference with existing rights is another. If an Act provides that as at a past date the law shall be taken to have been that which it was not, that Act I understand to be retrospective. That is not this case.⁸

While section 3 of the *Conveyancing Act, 1892* could be condemned for interfering with vested rights, its application to leases already in existence was not retrospective (or retroactive). A retrospective (or retroactive) application is one that changes the past legal effect of past events or circumstances. The *Conveyancing Act, 1892* changed only the future legal effect of the lease and in doing so interfered with vested rights.

The distinction between retrospective (or retroactive) application and interference with vested rights was also adopted by Canadian courts. In *Gustavson Drilling (1964) Ltd. v. M.N.R.*, for many years the leading Canadian case, Dickson J. wrote:

... [the] enactment in the present case, although undoubtedly affecting past transactions, does not operate retrospectively...; [it] does not reach into the past and declare that the law or the rights of parties as of an earlier date shall be taken to be something other than they were as of that earlier date.⁹

The new legislation in *Gustavson Drilling* changed the law that permitted the deduction of exploration expenses from income earned from oil and gas operations. Under the previous law, a company could carry the exploration expense forward for a number of years. Under the new legislation, the appellant lost its entitlement to make this deduction. In the view of the Court, applying the new legislation to the appellant did not change the past effect of the expenses incurred; it only changed it for the future. Therefore applying the new legislation to the appellant was not retrospective (or retroactive). Furthermore, in this case the new legislation did not interfere with vested rights. As Dickson J. put it, “No one has a vested right to continuance of the law as it stood in the past.”

Stage 3 In his 1978 article “Statutes: Retroactive Retrospective Reflections”, Driedger introduced a distinction between “retroactive” and “retrospective” application:

A retroactive statute is one that operates as of a time prior to its enactment. A retrospective statute is one that operates for the future only. It is prospective, but it imposes new results in respect of a past event. A retroactive statute *operates*

⁸ Ibid. at 11-12 (C.A.). The judgment of Cozens-Hardy J. was to the same effect.

⁹ [1975] S.C.J. No. 116, [1977] 1 S.C.R. 271 at 279-280.

backwards. A retrospective statute *operates forwards*, but it looks backwards in that it attaches new consequences *for the future* to an event that took place before the statute was enacted. A retroactive statute changes the law from what it was; a retrospective statute changes the law from what it otherwise would be with respect to a prior event.

...

[T]he test of retroactivity is different from that of retrospectivity. For retroactivity the question is: Is there anything in the statute to indicate that it must be deemed to be the law as of a time prior to its enactment? For retrospectivity the question is: Is there anything in the statute to indicate that the consequences of a prior event are changed, not for the time before its enactment, but henceforth from the time of enactment, or from the time of its commencement if that should be later.¹⁰

Driedger also noted that, unlike the presumption against retroactive application, which applies to all legislation regardless of its purpose or effect, the presumption against the retrospective application is limited. It does not apply to legislation that

- confers a benefit,
- is purely procedural, or
- is enacted to protect the public (as opposed to punish an individual).

A retroactive application does not just look back on a past event (*retro spectare*), but also *acts* on the past by replacing the past legal effect with a different effect. Since altering the law for the past as well as the future is a greater violation of the rule of law than altering it for the future only, Driedger's distinction makes sense. However, the downside is that it attaches to "retroactive" the meaning that the common law cases assigned to "retrospective".

While some Canadian courts adopted Driedger's terminology and analysis, others were unaware of it. As a result, equivocation on the term "retrospective" was (and continues to be) a major source of confusion in Canadian transitional law. In some cases it is used as a synonym for "retroactive"; in other cases it is used in Driedger's sense. It is often not possible to tell which sense of "retrospective" is intended.

Stage 4 In a series of cases from Quebec, the distinction between the retroactive and the immediate application of legislation, originating in European legal scholarship, was introduced into Canadian law. In the third edition of *The Interpretation of Legislation in Canada*, Côté wrote:

The term "immediate effect" originates in the theories of Paul Roubier. It contemplates the hypothesis of a new statute applying to a legal situation under way at the moment of its commencement. The new statute has an immediate application when it governs

¹⁰ Above, note 3 at 268-69.

the future development of the legal situation underway without affecting those elements which have already taken place...¹¹

As Côté goes on to explain, a legal situation consists both of the facts that give rise to a legal effect and the legal effect itself. A legal situation is therefore ongoing if

- the events or circumstances that trigger the operation of the law have not all occurred when the new legislation comes into force, or
- the legal effects triggered by a past event or circumstance are still ongoing when the new legislation comes into force.¹²

In Roubier's theory, there is no presumption against the immediate application of legislation. An immediate application is objectionable only if it interferes with vested rights.

The European analysis was adopted by the Supreme Court of Canada in two decisions. In *Quebec (Attorney General) v. Expropriation Tribunal*,¹³ the issue was whether new legislation, requiring for the first time the consent of the Tribunal to discontinue an expropriation, applied to an expropriation initiated but not discontinued before the legislation came into force. In *Venne v. Quebec (Commission de la protection du territoire agricole)*,¹⁴ the issue was whether a prohibition on alienating¹⁵ agricultural land without the approval of the Commission applied to a conditional contract to sell agricultural land. Although the contract had been entered into before the new legislation came into force, the condition precedent to the transfer of title had not yet been fulfilled.

It was argued in both cases that applying the new legislation would be retroactive. However, the Court found that because the legal situation was ongoing when the new legislation came into force, its application was immediate and therefore unobjectionable in the absence of any interference with vested rights.

Stage 5 Driedger's distinction between retroactive and retrospective is not the same as Roubier's distinction between retroactive and immediate. An application is immediate if either the facts that trigger a legal effect or the legal effect itself are ongoing when the legislation comes into force. It follows that, on Roubier's approach, it is not objectionable to change the future legal effect of past events or circumstances unless the change interferes with vested rights. For Driedger, by contrast, such a change is presumed not to be intended unless the legislation confers a benefit, is purely procedural or was enacted to protect the public.

¹¹ P.-A. Côté, *The Interpretation of Legislation in Canada*, 3rd ed. (trans.) (Scarborough, Ontario: Carswell, 2000) at 152.

¹² *Ibid.*, at 153-54.

¹³ [1986] 1 SCR 732.

¹⁴ [1989] 1 S.C.R. 880.

¹⁵ "Alienation" was defined in the Act as any conveyance of property.

In a subsequent appeal from Quebec, *Épiciers Unis Métro-Richelieu Inc., division “Econogros” v. Collin*, the Supreme Court of Canada attempted to integrate the Driedger and Roubier approaches. LeBel J. wrote:

The principles of retroactivity, immediate application and retrospectivity of new legislation must not be confused with each other. New legislation does not operate retroactively when it is applied to a situation made up of a series of events that occurred before and after it came into force or with respect to legal effects straddling the date it came into force (Côté, *supra*, at p. 175).¹⁶ If events are under way when it comes into force, the new legislation will apply in accordance with the principle of immediate application, that is, it governs the future development of the legal situation (Côté, *supra*, at pp. 152 *et seq.*). If the legal effects of the situation are already occurring when the new legislation comes into force, the principle of retrospective effect applies. According to this principle, the new legislation governs the future consequences of events that happened before it came into force but does not modify effects that occurred before that date (Côté, *supra*, at pp. 133 *et seq.* and pp. 194 *et seq.*).¹⁷

Integration is achieved here by limiting the scope of an immediate application to situations in which the facts necessary to trigger a legal effect have not all occurred when the new legislation came into force and by limiting the scope of a retrospective application to situations in which the legal effect has already been triggered and is now being changed for the future.

The following chart attempts to capture in visual form the state of transitional law as set out in *Épiciers Unis*.

Retroactive	Prospective	
retroactive application: new legislation is applied so as to change the past and future legal effect of past events or circumstances (strong presumption)	retrospective application: new legislation is applied so as to change the future effect of past events or circumstances that had already produced legal effects (weak? variable? presumption)	immediate application: new legislation is applied so as to change the future legal effect of ongoing events or circumstances (no legal effect has yet been triggered) (no presumption)
Interference with vested rights		

¹⁶ This and subsequent references to Côté in this passage are to P.-A. Côté, *The Interpretation of Legislation in Canada*, 3rd ed. (Scarborough, Ontario: Carswell, 2000).

¹⁷ At para. 46.

the application of new legislation interferes with an existing interest or expectation that is recognized by the courts as a vested right (variable presumption)
Survival
former law (common law or legislation) continues to apply to a past or existing situation even though it has been repealed or replaced

Have we achieved certainty and coherence?

On paper, this integrated analysis is certainly coherent and it reflects real differences in the degree of interference with the rule of law. If litigants, courts and commentators were to consistently use the *Epiciers* glossary in their analyses of transitional issues, it would be a major step forward. We could at least know what a person meant when classifying a given application as “retroactive,” “retrospective” or “immediate”. However, important as they are, it appears that coherent classification and a consistent vocabulary are not enough to produce predictable outcomes.

The difficulty lies in identifying the events or circumstances that are relevant for purposes of temporal application and determining when legal effects begin. Consider the following example.

2000: X does something that constitutes an offence under subsection 203(2) of the *Criminal Code*. At that time, a person guilty of that act or omission is liable to a term of imprisonment not exceeding 5 years. Under the *Parole Act*, a person is eligible for parole after serving half their sentence.

2001: New legislation comes into force providing that a person who violates subsection 203(2) is liable to a term of imprisonment not exceeding 12 years. The *Parole Act* is amended to provide that a person must serve two-thirds of their sentence before applying for parole.

2002: X is convicted and sentenced. Would sentencing him or her to a sentence of 10 years be a retroactive, retrospective or immediate application of the 2001 amendment?

It is possible that the maximum punishment for an offence is a legal effect that occurs the moment the offence is committed. If so, applying the 2001 amendment would be retroactive. But could one not argue that the legal effect of X’s act or omission is not determined until he or she is tried and either acquitted or convicted and sentenced? If so, applying the 2001 amendment would be immediate.

2003: New legislation comes into force providing that a person convicted under subsection 203(2) of the *Criminal Code* may not apply for parole until three quarters of their sentence has been served.

2008: X applies for parole having served half his or her sentence. Which parole rule applies? Is the relevant fact the act or omission that constitutes the offence (2000), the conviction and sentencing (2002) or the serving of the sentence (2002 to 2012)? There is no self-evident answer to this question.

Given the difficulty of applying transitional rules of general application, even clear ones, there is much to be said for including transitional provisions in legislation that changes existing law. Even if the *Interpretation Act* and common law rules appear to govern a particular transitional question, there is no guarantee that the courts will arrive at the answer anticipated by the legislative counsel given the complexity of transitional issues, the confused terminology and the uncertainty about when a set of facts can be said to have produced legal effects.

The application of new legislation is particularly difficult to predict when it is possible to interpret the legislation as applying either to an event that has already occurred (for example, signing a contract, getting married, becoming a citizen) or to an ongoing state of affairs (for example, a contractual relationship, a civil status). If the former interpretation is adopted, application of the new law will be considered retroactive or retrospective; if the latter interpretation is adopted, application of the new law will be considered immediate. If new legislation lends itself to this sort of competing analysis, transitional provisions are advisable.

Finally, if new legislation is intended to declare the law in order to clarify the meaning or application of a provision that has already been interpreted by the courts, a transitional provision should be included if the declaration is meant to apply to past facts. And such a provision is essential if it is meant to apply to pending appeals. In common law Canada, at least, the courts resist the retroactive application of declaratory provisions, even when the legislature's wish to correct a judicial misinterpretation is relatively clear.¹⁸

¹⁸ See, for example, *Caressant Care Nursing Home of Canada Ltd. v. London and District Workers' Union*, [2005] 32 Admin LR (4th) 129; 197 OAC 238(Ont. Div. Ct.) and *Idle-O Apartments Inc. v. Charlyn Investments Ltd.*, 2010 BCCA 460.

Legislation as Policy-making in Presidential and Parliamentary Systems



Edward L. Rubin¹

Abstract:

This article considers the effectiveness of legislation in accomplishing its goals and the general neglect of this aspect during the enactment process in the United States and elsewhere. The author proposes a new way of thinking about modern legislation, legislation as the basic mechanism by which modern democracies govern themselves and carry out collective action. (Part I). He then argues that this conception opens up a “policy space” where improving the effectiveness of legislation is possible (Part II). Finally, he proposes some pragmatic measures by which such an improvement can be achieved (Part III).

Introduction

Nothing is more important to our concept of government and the success of our society than the quality of the legislation we enact. Legislation is the basic expression of our democratic policy-making process; when we say that the people rule, what we mean is that they elect the public officials who enact legislation. And legislation is the essential function of modern government; it is the way that we direct and manage the complex social, economic and technological systems that constitute modern society. Legislation, therefore, is the way that we, as a people, act collectively to control and improve the world in which we live. The quality of the legislation we enact determines whether we, as a society, will prosper or decline, and possibly whether we will survive or perish.

Although the quality of legislation is of such crucial importance, scholars rarely discuss the way that it is designed and society in general rarely pays very much attention to this issue.

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We have, at present, no coherent theory about the way to enact effective statutes and no public discourse on the subject. There are at least three explanations for this rather startling lacuna:

- first, we do not understand the true character of modern legislation;
- second, we do not believe that the process of designing legislation can be improved; and
- third, even if we did believe that we could improve the process, we would not know how to do it.

This article will consider these three issues in turn. In doing so, it will propose a new way of thinking about modern legislation (Part I), argue that the conception opens up a “policy space” where improvement is possible (Part II), and propose some pragmatic measures by which such an improvement can be achieved (Part III). In an effort to avoid American parochialism (a vice to which the author must plead guilty) the article will consider parliamentary as well as presidential systems.

I. The Character of Modern Legislation

In a modern administrative state, legislation is policy making.² That is, the purpose of legislation is to manage our society and provide the best possible life for its citizens. This would appear to be obvious and non-controversial; who could doubt that contemporary statutes are expected to produce socially beneficial results? People may disagree about the strategy for doing so, of course. To progressives, conservative efforts to punish crime more severely may appear misguided, while conservatives may feel the same way about progressive efforts to increase the regulation of workplace safety conditions. But supporters of each proposed statute will insist that their proposal will improve the quality of people’s lives.

A possible objection to this view of modern legislation is that the proposals advanced by contesting political parties rest on different normative premises. For most modern legislation, this is not an accurate characterization. Progressives do not want crime to increase and conservatives would not object to a reduction in the industrial accident rate. Their disagreements are based on two types of arguments, both empirical rather than normative. First, each side may feel that the other side has adopted the wrong strategy; progressives may doubt that harsh penalties reduce crime, while conservatives may doubt that regulation is an effective method for preventing industrial accidents. More refined views on each side may concede that stricter penalties will lead to some reduction in crime

² See Edward L. Rubin, *Beyond Camelot: Rethinking Politics and Law for the Modern State* (Princeton University Press: 2005) at 191-226. The discussion in this section of the article is based on the more extensive discussion in the book.

or that regulation may produce some decrease in the accident rate, but will question whether these results are worth their cost. More specifically, progressives would argue that the incremental reduction in crime cannot justify the increase in prison expenditures, while conservatives would argue that the incremental reduction in industrial accidents cannot justify the expenses that are imposed on private firms by the regulatory process.

To be sure, normative judgments may be embedded in these more thoughtful cost-benefit assessments. Conservatives may find crime more offensive than progressives, as an indication that society is becoming permissive and disordered, while progressives may view industrial accidents as another example of the mistreatment of the working classes by the property-owning elite. Concerns about such subjective reactions have led some scholars to question the accuracy of cost-benefit analysis.³ But while these judgments may undermine our ability to quantify the cost of various social ills, they are unlikely to reverse our qualitative judgments about their detrimental nature. Progressives may not react as strongly to crime as conservatives, but they certainly do not approve of it, and conservatives may not see industrial accidents as elements of a more general pattern of capitalist oppression, but they do not thereby regard them as desirable.

In general, the era of High Modernity (the last two centuries) is characterized by a broad moral consensus that the goal of government is to improve the material lives of its citizens, a worldview that inheres in the instrumental, rationalized character of modern institutions.⁴ The purpose of administrative governance, by general agreement, is to achieve such improvements; the disagreements that animate political controversy involve the relative assessment of the severity of various problems and the methods by which those problems can be solved. Thus, it can be said that the content of modern legislation will be politically contested, but the basic purpose or structural role of that legislation is a matter of agreement and a defining feature of our modern era.

The view of legislation in modern democracies, however, particularly in presidential regimes, but to a lesser extent in parliamentary regimes as well, has not caught up to its reality. We continue to regard legislation as the declaration of norms, the way that a democratic society determines its basic commitments. This more heroic conception of legislation not only exercises an unquestionable appeal, particularly to legislators, but it is reinforced by small but significant dollops of reality. Every once in a while, modern legislatures are in fact called upon to make genuine normative judgments. During the past several decades, for example, many Western democracies have de-criminalized abortion and

³ See, for example, Frank Ackerman and Lisa Heinzerling, "Pricing the Priceless: Cost-Benefit Analysis of Environmental Protection", 150 U. Pa. L. Rev. 1553 at 1566, 1578-80 (2002); Martha Nussbaum, "The Costs of Tragedy: Some Moral Limits on Cost-Benefit Analysis", 29 J. Legal Stud. 1005 at 1028-36 (2000).

⁴ See Anthony Giddens, *The Consequences of Modernity* (1990); Jürgen Habermas, *The Theory of Communicative Action*: vol. 1: Reason and the Rationalization of Society (Thomas McCarthy, trans., 1984). Max Weber, *Economy and Society*, Guenther Roth & Claus Wittich, eds. (1978) at 800-95, 956-1003.

homosexuality by statute, while criminalizing spousal rape. At present, they are being called upon to permit same-sex marriage. Legislation of this kind is normative in the basic, definitional sense that it declares something right instead of wrong or wrong instead of right. While empirical data is not entirely irrelevant to such determinations, it is not essential. An opponent of homosexuality will not be convinced to decriminalize it by evidence that the criminal prohibitions have been ineffective; laws of this sort are seen primarily as expressions of social condemnation, not as means of reducing the frequency of the criminalized activity.

The tendency to over-emphasize this kind of legislation is understandable, since it was the dominant mode in the era that preceded High Modernity. At that time, statutes were largely designed to declare rights and wrongs, that is, to place the authority of the state behind its normative judgments about proper and improper behavior. Criminal law is clearly the most characteristic case, and was generally regarded as the essence of law.⁵ Civil law, more often left to common law or custom, was also largely normative, however; it defined tortious conduct, determined people's rights to property, and established rules for entering into contracts or bequeathing property through wills. While these latter statutes can be regarded as empowering people, rather than prohibiting them, as H.L.A. Hart famously observed,⁶ they were assimilated into the normative structure by being viewed as establishing the right and wrong way to carry out particular functions. Even statutes that appear more regulatory from the contemporary perspective, such as sumptuary laws, were essentially normative in concept. Thus, the reason why Parliament in Tudor England forbid anyone below the rank of earl to wear sable fur, or anyone under the rank of knight to wear a silk shirt, unless he owned land that produced at least £ 20 a year in rents,⁷ was not so much to produce particular social results but rather to enforce social norms.

The normative character of pre-modern legislation is explicable in both conceptual and political terms. Conceptually, legislation was perceived as enacting or extending natural law, the rules that God established regarding human relations.⁸ This is not to say that all statutes were perceived as having been ordained by God; Aquinas, for example, was quite clear that most governmental enactments are of purely human origin.⁹ Rather, the notion is that statutes fit within the framework of natural law, and generally codified customs that

⁵ Classic works of jurisprudence can often be read as taking criminal law as the paradigmatic case. See, for example, Hans Kelsen.

⁶ H.L.A. Hart, *The Concept of Law* (1961).

⁷ Jasper Ridley, *The Tudor Age* (2002) at 132-35.

⁸ Janet Coleman, "Property and Poverty" in J.H. Burns, ed., *The Cambridge History of Medieval Political Thought, c. 350-c. 1450*, at 607, 616-20 (1988); John B. Morall, *Political Thought in Medieval Times*, (1958) at 45, 74-75, 120-24; Kenneth Pennington, *Law, Legislative Authority and Theories of Government, 1150-1300* in Burns, above at 424.

⁹ St. Thomas Aquinas, *Summa Theologica* 997-98, 1014 (Fathers of the English Dominican Province, trans., 1981) (I-II, Q.91, A. 3; I-II Q. 95, A. 2).

reflected the cumulative results of human reason, the same God-given reason that enabled humans to perceive God's natural law.¹⁰ In political terms, the principal goal of government in the pre-modern era was to establish and maintain civil order and to protect the polity from external threats, while economic policy and social welfare was generally left to private institutions such as landowners or the Church. Thus, the government's legal enactments were seen as a means of defining the right and wrong behavior that would contribute to such civil order, not as managing the society or providing services for its members.

It is hardly surprising that this concept of legislation has survived into contemporary times. After all, the concept prevailed in the Western World for close to a millennium, its linkage to natural law and human reason granted it a normative luster, and its purposes and practices were readily comprehensible. The problem is that it is no longer accurate. We no longer believe in either natural law or the intrinsic rationality of cumulative action,¹¹ and government is no longer restricted to the enterprise of maintaining civil order. Rather, we believe that we must construct our own goals through the democratic process, and that those goals are basically concerned with economic and social welfare. Modern legislation is necessarily shaped by this conception of society and government. To reiterate, it is primarily instrumental, not normative. It builds on the broad consensus that has produced the modern administrative state, and it is designed to manage that state by producing beneficial results through collective action.

Unfortunately, in establishing the procedures by which legislation is designed and drafted in contemporary democratic legislatures, we have failed to take full account of these momentous changes. We are still designing legislation as if it were a normative declaration, rather than an instrumentality for managing society and thereby optimizing the material well-being of its citizens. Most notably, legislatures fail to frame their issues in instrumental terms, to employ the methodology of policy analysis that applies to such inquiries, and to gather sufficient empirical data to inform their efforts. The failure is particularly notable in presidential systems like the United States, but it also occurs on occasion in parliamentary systems such as the Canada and the United Kingdom.

The consequences of these failures are extremely serious. As stated above, legislation is the basic mechanism by which modern democracies govern themselves and carry out collective action. If we lack a methodology for making it effective, then our governmental system is seriously impaired in its ability to perform this basic function. And, to go further, our increasingly complex and interdependent world relies on the coordination and support that only government can provide. We are far past the point where government was necessary

¹⁰ *Ibid.* at 1024 (I-II, Q. 97, A. 3). See Otto Gierke, *Political Theories of the Middle Age* (1938) at 73-79.

¹¹ Of course, some scholars maintain this belief, see, for example, John Finnis, *Natural Law and Natural Rights* (1988); Robert George, *In Defense of Natural Law* (1999); Jacques Maritain, *The Rights of Man and Natural Law* (Doris Anson, trans., 1971), but it is no longer the dominant view, as it was before the advent of High Modernity.

only to maintain civil order and protect the polity from outside threats. The collapse of traditional society and of the private institutions that provided basic services, such as education and social welfare, and that enabled that society to function (whether justly or unjustly) have left us with the need to provide an increasingly broad range of services and functions through our own conscious and collective actions. Consequently, we depend on effective government, and effective government depends on effective legislation.

II. The Policy Space for Effective Legislation

A basic reason for these our failure to develop a truly modern approach to legislation, as suggested above, is social nostalgia, the irrational but puissant affection for past practices that often acts as an impediment to change.¹² One would imagine, however, that after two centuries of High Modernity, this inclination would have faded, particularly with respect to such an important issue as the proper design of legislation. It has been sustained, however, by a second and more distinctly contemporary belief: that legislators are uninterested in designing effective legislation.

The best-known version of this belief, at present, is public choice theory.¹³ An extension of microeconomics to the political realm,¹⁴ public choice is explicit in its assertion that legislators are only concerned about maximizing their chances of re-election.¹⁵ But this approach only follows on and amplifies the more general view that legislators are concerned exclusively with politics in general. Their decisions, if not driven by their personal desire to be re-elected, are dominated by more general considerations about supporting their party, their social class or their economic interests. At no point, according to this generally and deeply-held view, will they be motivated to design effective legislation, that is, legislation whose basic purpose is to improve the material well-being of the citizens. The lugubrious conclusion is that any recommendation to improve the legislative process will ineluctably fall upon deaf ears.

This view of modern legislators, however satisfying for those who dislike the administrative state, and however convincing to those appalled by the current antics of the U.S. Congress, is unconvincing. To begin with, there is extensive biological, psychological, sociological, anthropological, and game theoretic evidence that people are partially motivated by the

¹² See Rubin, above n. 2 at 1-6.

¹³ See generally James M. Buchanan & Gordon Tullock, *The Calculus of Consent* (1962); Anthony Downs, *An Economic Theory of Democracy* (1957); Dennis C. Mueller, *Public Choice III* (2003). For discussions of this field's relationship to law, see Daniel A. Farber & Philip P. Frickey, *Law and Public Choice: A Critical Introduction* (1991).

¹⁴ See Mueller, *ibid.*, at 1-2 ("The basic behavioral postulate of public choice, as for economics, is that man is an egoistic, rational, utility maximizer").

¹⁵ See, for example, Morris Fiorina, *Congress: Keystone of the Washington Establishment* (1977) at 38; David Mayhew, *Congress: The Electoral Connection* (1974) at 13-17.

desire to cooperate, to help each other and to contribute to the common good, in addition to being motivated by self-interest.¹⁶ As a matter of theory, this more realistic account of human behavior indicates that a policy space always exists for legislation, that at least some legislators will be motivated to enact good public policy with respect to virtually any legislative enactment. As a matter of empirical observation, this account has been repeatedly confirmed in the specific case of legislators by scholars who interview them personally, interview their staffs, observe them in action, or analyze their votes,¹⁷ and by studies that measure the role of ideology in legislative decision making.¹⁸ Moreover, even if legislators are exclusively motivated by the desire to be re-elected, their constituents may be motivated by considerations other than self-interest,¹⁹ including public regarding considerations, which means that the re-election oriented legislators would adopt public-regarding positions in response to these constituents. In other words, there are convincing reasons to conclude that the design of modern legislation often occurs in the policy space created by the legislators' own motivations or the motivations of their constituents.

Even if we ignore this evidence, however, and assume that both legislators and constituents are predominantly motivated by self-regarding considerations, the assertion that legislators are exclusively concerned with re-election cannot be directly derived from this assumption. While scholars who write about legislators often seem to conflate the failure to be re-elected with death or with an immediate loss of personal wealth, this is obviously not the case. One

¹⁶ See, for example, Robert Axelrod, *The Evolution of Cooperation* (1984) (game theory); C. Daniel Batson, *Altruism in Humans* (2011) (individual psychology); Christopher Boehm, *Moral Origins: The Evolution of Virtue, Altruism, and Shame* (2012) (biology); Samuel Bowles & Herbert Gintis, *A Cooperative Species: Human Reciprocity and Its Evolution* (2011) (biology); Joseph Henrich & Natalie Henrich, *Why Humans Cooperate: A Cultural and Evolutionary Explanation* (2007) (sociology); Martin A. Nowak, *Super Cooperators: Altruism, Evolution, and Why We Need Each Other to Succeed* (2011) (biology and game theory); Tom Tyler, *Why People Cooperate: The Role of Social Motivations* (2010) (social psychology); Colin M. Turnbull, *The Forest People* (1962) (anthropology).

¹⁷ See, for example, Bernard Asball, *The Senate Nobody Knows* (1978) (account of Senator Edmund Muskie); James D. Barber, *The Lawmakers: Recruitment and Adaptation to Legislative Life* (1965); Elizabeth Drew, *Senator* (1979) (account of Senator John Culver); Christopher J. Deering & Steven S. Smith, *Committees in Congress*, 3rd ed. (1997) at 78-95; Richard Fenno, *Congressmen in Committees* (1973); Martha Derthick & Paul J. Quirk, *The Politics of Deregulation* (1985); Steven Kelman, *Making Public Policy: A Hopeful View of American Government* (1987) at 58-66; Arthur Maass, *Congress and the Common Good* (1983).

¹⁸ See Kenneth T. Poole & Howard Rosenthal, *A Political-Economic History of Roll-Call Voting* (1997); R.T. Carson & Joe A. Oppenheimer, "A Method of Measuring Personal Ideology of Political Representatives" 78 *Am. Pol. Sci. Rev.* 163 (1984); Robert Higgs, "Do Legislators' Votes Represent Constituency Preference? A Simple Way to Evaluate the Senate", 63 *Pub. Choice* 175 (1989); Joseph P. Kalt & Mark A. Zupan, "The Apparent Ideological Behavior of Legislators: Testing for Slack in Political Institutions", 33 *J. L. & Econ.* 103 (1990); John R. Lott & Stephen G. Bronars, "Time Series Evidence on Shirking in the U.S. House of Representatives", 76 *Pub. Choice* 125 (1993); Joseph P. Kalt & Mark A. Zupan, "Capture and Ideology in the Economic Theory of Politics", 74 *Am. Econ. Rev.* 279 (1984); James B. Kau & Paul H. Rubin, "Self-Interest, Ideology and Logrolling in Congressional Voting", 22 *J. L. & Econ.* 365 (1979).

¹⁹ See, for example, Alberto Alesina & Howard Rosenthal, *Partisan Politics, Divided Government and the Economy* (1995); Thomas Frank, *What's the Matter with Kansas: How Conservatives Won the Heart of America* (2004) at 67-77; V.O. Key, *The Responsible Electorate* (1966).

of the great virtues of a functioning democracy is that people who lose their political office suffer no disadvantages beyond the loss of the office itself.²⁰ They are not executed or imprisoned by their successors, they are not socially ostracized, and they are not precluded from earning an income.²¹ In fact, unless one has lost one's seat due to scandal, being a former legislator is generally a position of honor in our society.²² The most frequent reason why Members of the U.S. Congress leave their position, for example, is that they voluntarily retire,²³ which suggests that life after Congress holds relatively few terrors for the average Member.

Nor can the prevalence of strategic behavior among legislators, the bread and butter of political science literature about legislators,²⁴ be taken as evidence of self-interested behavior. Both legislators and their constituents disagree about what they think is good for the country, often more intensely and more fractiously than they disagree on the basis of self-interest.²⁵ People who want something on behalf of others as well as for themselves will typically engage in instrumental behavior in order to get it. All the log-rolling, vote-trading, procedure-manipulating, opponent-misleading behavior that is such a staple of the scholarly literature about legislation will occur regardless of legislators' source of disagreement.²⁶ The sense that such behavior is cynical and corrupt, rather than an understandable effort to implement one's public policy goals, is merely an unsubstantiated assumption.

Suppose, however, we ignore all the evidence about the multiplicity of human motivations and the behavior of legislators as a means of satisfying those multiple motivations, and we accept the premise that legislators are primarily motivated by the desire to be re-elected. It will nonetheless be true that most legislation will be located in the policy space, for the simple reason that the legislators' votes on that legislation will not affect their re-election. Most legislation has fairly low political salience. Electoral campaigns may focus on minute

²⁰ See Alexander Baturo, "The Stakes of Losing Office: Term Limits and Democracy", 40 *Brit. J. Pol. Sci.* 635 (2010); James D. Fearon, "Self-Enforcing Democracy", 126 *Q.J. Econ.* 1661 (2011).

²¹ See Peter F. Drucker, *The New Society* (1951) at 210-12; Hugh R. Trevor-Roper, *The Last Days of Hitler* (1947) at 3-10.

²² See Rebekah Herrick & David L. Nixon, "Is There Life After Congress? Patterns and Determinants of Post-Congressional Careers" 21 *Legis. Stud. Q.* 489 (1996).

²³ Sean Theriault, "Moving Up or Moving Out: Career Ceilings and Congressional Retirement" 23 *Legis. Stud. Q.* 419 (1998).

²⁴ See, for example, R. Douglas Arnold, *The Logic of Congressional Action* (1990); John W. Kingdon, *Agendas, Alternatives, and Public Policies*, (2nd ed. (2003)); Gary Mucciaroni & Paul J. Quirk, *Deliberative Choices: Debating Public Policy in Congress* (2006); John Ferejohn, "Logrolling in an Institutional Context: A Case Study of Food Stamp Legislation" in Gerald C. Wright, Leroy N. Rieselbach & Lawrence C. Dodd, *Congress and Policy Change* (1986) at 223; Thomas Stratman, "Logrolling in the U.S. Congress", 33 *Econ. Inquiry* 441 (1995).

²⁵ See notes 17-18 (citing sources regarding attitudes of legislators) and note 19 (citing sources regarding attitudes of citizens).

²⁶ See, for example, William Riker, *The Art of Political Manipulation* (1986); Kau and Rubin, above n. 18.

details of the candidates' personal lives ("my opponent was arrested for driving without a license," "my opponent's company was cited for improper disposal of chemical waste"),²⁷ but they tend to deal with public policy in generalities. A member of the progressive party will be accused of soft-headed, budget-busting profligacy, a member of the conservative party will be accused of being an anti-environmental, anti-consumer tool of big business interests. It is possible to combat such charges by being consistently moderate, but trying to do so by pointing out an individual vote that went in the other direction is unlikely to be an effective response.

This will tend to be true in both presidential systems and parliamentary systems, for different but related reasons. In the U.S., incumbents tend to be re-elected, a trend that seems to become more pronounced as time goes on.²⁸ This is not to say that they can freely declare themselves to be Communists or atheists, and a juicy scandal will generally end of the political career of even the most politically secure Member of Congress.²⁹ But Members generally have a good deal of leeway; they can adopt whatever positions they choose on all but a few issues without seriously impairing their chance of re-election. Even if they come from a hotly contested district or state, most of the issues that the Members of Congress consider will have only a marginal effect on their re-election. The classic examples are bills that have no direct impact on their constituencies – a farm bill for a representative from an urban district, a mass transit bill for a representative from a rural one.³⁰

In a parliamentary system, the legislators' positions on proposed statutes tend to be determined by their party affiliation. This will tend to modify the effects of regionalism that are so prominent in presidential systems. Because the political consequences of a farm bill may be important for the party as a whole, an urban representative cannot ignore them; either the party will dictate her vote on the bill or her nomination and re-election will depend

²⁷ See Stephen Ansolabehere & Shanto Iyengar, *Going Negative: How Political Ads Shrink and Polarize the Electorate* (1996); Emmet H. Buell, Jr. & Lee Sigelman, *Attack Politics: Negativity in Presidential Campaigns Since 1960*, 2nd ed. (2009); John Geer, *In Defense of Negativity* (2006) at 64-84, 111-35; Richard R. Lau & Gerald M. Pomper, *Negative Campaigning: An Analysis of U.S. Senate Elections* (2004); Darell M. West, *Air Wars: Television Advertising in Election Campaigns, 1952-2008*, (2009) at 45-73, 135-38.

²⁸ See David Mayhew, "The Case of the Vanishing Marginals", 6 *Polity* 295 (1974); Mark J. Hetherington & Bruce A. Larson, *Parties Politics and Public Policy in America*, 11th ed. (2010) at 154; Gary Jacobson, *The Politics of Congressional Elections* (2001) at 21-30; Stephen Ansolabehere & Alan Gerber, "Incumbency Advantage and the Persistence of Legislative Majorities", 22 *Legis. Stud. Q.* 161, 166-67 (1997); Gary W. Cox & Jonathan N. Katz, "Why Did the Incumbency Advantage in U.S. House Elections Grow?", 40 *Am. J. Pol. Sci.* 478, 492 (1996); Robert K. Goidel & Todd G. Shields, "The Vanishing Marginals, the Bandwagon and the Mass Media", 56 *J. Politics* 802 (1994).

²⁹ See Susan Davis, "Public Shows Little Patience for Bizarre Antics of Lawmakers", (July 13, 2012) (<http://www.usatoday.com/news/washington/story/2012-07-14/antics-prompt-resignations-from-congress/56205160/1>) (last accessed March 9, 2013) listing recent resignations from Congress due to sexual improprieties) (accessed July 14, 2012).

³⁰ See Edward V. Schneier & Bertram Gross, *Legislative Strategy: Shaping Public Policy* (1993) at 150: "There is a marked tendency toward neutrality and inactivity on the part of groups that are not directly affected by a given issue."

upon her party's general performance at the polls, including its performance in rural districts. On the other hand, this also means that legislators are more insulated from all but a few highly salient issues among their own constituents. Because legislators' positions depend on their party affiliation, citizens will tend to vote for the party rather than the person.³¹ This means that the few issues that have national significance will determine people's votes, leaving the party and its members relatively free from political control on other issues.

Let us now assume, however that people are predominantly motivated by self-regarding concerns, that those concerns consistently translate into legislators' desires to maximize their chance of re-election, that their re-election is being contested, and that their votes on legislation will have strong effects on their chances of prevailing in those hard-fought contests, perhaps due to the role of special interest groups. There is, nonetheless, an extensive policy space for virtually every bill that they consider. It consists of the bill's specific provisions, the actual legislative measures that will determine whether the bill, if enacted, will achieve its goals or serve the interests of the public. This is the real terra incognita of the legislative process. It is simply invisible to virtually all the people who write about the subject.

Somehow, a bill appears and then the fight begins, the knives are drawn, the game is on, the wolves attack. All these vivid and engaging descriptions of the process function to suppress discussion of the way the bill is actually written because complex, verbal material is not produced on the battlefield or the playing field. It emerges from the age-old, virtually unalterable process of a person sitting at a desk, generally indoors, and using a stylus, a quill pen, a ballpoint pen, a typewriter or a laptop to record words in communicable form. Even detailed histories of specific legislation, like Eric Redman's account of the National Health Service Corps³² or the Charles and Barbara Whalen's account of the Civil Rights Act³³ fail to describe this process.

This recondite and unexplored process of actually writing the legislation exists largely in the policy space. No matter how responsive legislators are to their constituents, no matter how completely they are motivated by the desire to be re-elected, the design of the bill will remain in the policy space because the voters generally align themselves in support or opposition on the basis of the bill's general goals, not its particular provisions.³⁴ Perhaps

³¹ This may be true in presidential systems as well. See Theresa E. Levitan & Warren E. Miller, "Ideological Interpretations of Presidential Elections", 73 *Am. Pol. Sci. Rev.* 751 (1979); Steven Rogers, "Accountability in State Legislatures: Collective Performance and State Legislative Elections" (working paper, on file with the author).

³² Eric Redman, *The Dance of Legislation* (rev. ed., 2001)

³³ Charles & Barbara Whalen, *The Longest Debate: A Legislative History of the Civil Rights Act of 1964* (1985).

³⁴ There are exceptions, of course. A particularly notable one was the *American Patient Protection and Affordable Care Act (PPACA)*, Pub. L. No. 111-148, 124 Stat. 119 (2010) (to be codified in scattered

using the term “democracy” to describe our government misleads us into imagining the Athenian Assembly or a New England town meeting with the citizenry debating the content of particular enactments.³⁵ Modern politics is not so fine-grained, and the modern voter is not so heavily engaged. There is a good deal of evidence to suggest that voters base their votes on the personality of the candidates or a highly generalized impression of their political orientation, rather than on more specific assessment of their positions on particular issues, to say nothing of particular statutory provisions.³⁶

Economists describe people’s refusal to learn about the details of their decisions as rational ignorance, a calculation that any marginal gain in the decision’s quality is not worth the expenditure of time required to obtain more information.³⁷ Legislators’ and constituents’ lack of concern about the specifics of the legislation they support or oppose, however, is entirely rational, whether ignorant or not.³⁸ The reason lies in the adversarial nature of politics.

Suppose, for example, a legislator who strongly favors environmental protection is sponsoring a bill to limit natural habitat destruction. It is likely that her opponent will oppose this legislative effort on the ground that it will be deleterious to the economy. In that

sections of the U.S. Code). At least four issues in the bill – the “public option,” the “individual mandate,” the extent to which benefits were provided for abortions, and the voluntary end-of-life consultations, or “death panels” -- became issues in the public debate. See Lawrence R. Jacobs & Theda Skocpol, *Health Care Reform and American Politics* (2010) at 78-82 (public option); 84 (death panels); 90-91 (individual mandate); 118 (abortion). But the *PPACA* was the most controversial statute of the decade at least, and it included many other major issues that did not emerge into public consciousness, such as medical insurance reform, expansion of Medicare benefits, family eligibility for young adults, and increased coverage of wellness care. By comparison, none of specific provisions in the second most important legislative enactment of the Obama administration, the *Wall Street Reform Act* (Dodd-Frank), Pub. L. No. 111-203, 124 Stat. 1376 (2010) (to be codified in scattered sections of 12 U.S. Code), played a significant role in the public debate.

³⁵ For a more extensive discussion of this point, see Rubin, above n. 2 at 110-43; Edward L. Rubin, “Getting Past Democracy” 149 U. Penn. L. Rev. 711(2001).

³⁶ See Warren E. Miller & J. Merrill Shanks, *The New American Voter* (1996) at 326-413 (voters base their decisions on the candidates’ general perceptions of the issues); Benjamin I. Page & Robert Y. Shapiro, *The Rational Public: Fifty Years of Trends in Americans’ Policy Preferences* (1992) (voters decisions are stable, long-term preferences on major issues); Donald R. Kinder, Mark D. Peters, Robert P. Abelson & Susan T. Fiske, “Presidential Prototypes”, 2 Pol. Behav. 315 (1980) (voters base their decisions on the personalities of the candidates); Levitan & Miller, above n. 31 (voters base their decisions on party affiliations); Rogers, above n. 31 (voters base their decisions on general performance of candidate’s party).

³⁷ IIs Birchler & Monica Bütler, *Information Economics* (2007) at 233-4; Silvain Bromberger, “Rational Ignorance”, 74 Synthese 47 (1988). For applications to politics, see, for example, Roger D. Congleton, “Rational Ignorance, Rational Voter Expectations and Public Policy: A Discrete Informational Foundation for the Fiscal Illusion”, 107 Pub. Choice 35 (2001); César Martinelli, “Rational Ignorance and Voting Behavior”, 35 Int’l J. Game Theory 315 (2007); Mancur Olson, “Rational Ignorance, Professional Research, and Politicians’ Dilemmas” in William H. Robinson & Clay H. Wellborn eds., *Knowledge, Power and the Congress* (1991) at 130. For applications to law, see, for example, Shawn Bayern, “Rational Ignorance, Rational Closed Mindedness, and Modern Economic Formalism in Contract Law”, 97 Cal. L. Rev. 943 (2009); Mark A. Lemley, “Rational Ignorance at the Patent Office”, 95 Nw. U. L. Rev. 1495 (2001).

³⁸ See Page & Shapiro, above n. 36. For evidence that voters are in fact very ignorant, see Larry M. Bartels, “Uninformed Votes: Information Effects in Presidential Elections”, 40 Am. J. Pol. Sci. 194 (1996).

common situation, environmentally oriented voters will support the legislator and the bill she is sponsoring, regardless of its particular provisions. What else can they do?³⁹ Their indifference to the particular provisions of the bill does not depend on the level of knowledge they possess. It is true for the uneducated sentimentalist who doesn't want brown-eyed, furry animals to be killed, and equally true for the NRDC analyst, who almost certainly knows more about the bill than the legislators who are voting on it. Only a provision that undermines the effect of the bill in its entirety would induce either of these voters to abandon their support for the legislator.

III. Toward a Methodology for Modern Legislation

Once we recognize the existence of a policy space for legislation, it becomes possible to consider the question that the modern character of legislation presents: if legislation is no longer a process of framing normative declarations, but rather a process of managing a complex society for the benefit of its citizens, can we develop a better legislative methodology? That is, can we design statutes in a manner that takes cognizance of their role in modern government?

The existing methodology, the product of tradition rather than conscious planning, is derived from the pre-modern, normative conception of legislation. Not surprisingly, it displays serious defects when applied to the complex tasks that a modern legislature confronts. As just stated, it has continued into modern times due to the general assumption that legislation is all politics and legislators do not care about the quality of the legislation they produce. Once we disabuse ourselves of this unrealistic fatalism, we can begin to think about the possibility of developing new approaches.

In a companion article that is currently in process, I suggest a new approach to drafting legislation in a presidential system, specifically the United States. To summarize, the suggestion is that modern legislation, being policy making, should be modeled on the well-known process for designing social policy. Its basic elements are to state the problem, generate alternative solutions, evaluate each plausible alternative, choose the most promising on the basis of empirical data, implement it, evaluate the results and, if those results are less than excellent, feed the information about the shortfall back into the process as a new problem statement.⁴⁰ There has certainly been a substantial amount of criticism and

³⁹ See David S. Lee, Enrico Moretti & Matthew Butler, "Do Voters Affect or Elect Policies: Evidence from the U.S. House", 119 Q. J. Econ. 807 (2004). The authors conclude that politicians cannot make credible commitments to moderate their views. Voters therefore must choose between opposing views, which function essentially as a pair of fixed positions, rather than being able to influence the views of those they vote for.

⁴⁰ See, for example, Eugene Bardach, *A Practical Guide for Policy Analysis: The Eightfold Path to More Effective Problem Solving*, 3rd ed. (2009); John Friedman, "Planning in the Public Domain: From Knowledge to Action", in William N. Dunn, *Public Policy Analysis*, 5th ed. (2011) at 137-179; Stuart S. Nagel, *Handbook of Public Policy Evaluation* (2002); Malcolm K. Sparrow, *The Regulatory Craft: Controlling Risks, Solving*

re-evaluation of this procedure,⁴¹ but it is sufficiently well established to serve as a starting point. It can be modified, of course, but any different approach to policy making should be based on specified shortcomings of the standard model and follow an equally conscious and theoretically supportable procedure.⁴²

In the remainder of the article, I attempt to demonstrate the way that a process of this sort could be institutionalized by the U.S. Congress.⁴³ In fact, this could be accomplished without major revision of existing Congressional practice. The major change would be to add a preliminary step. At present, the legislative process begins when a member of Congress introduces a fully drafted bill, which can come from, or be drafted by, anyone at all, including the member's staff, a lobbyist, a private firm or an independent individual. There is so little structure or scrutiny at this stage that it is generally and rather accurately described as placing the bill "in the hopper."⁴⁴

Instead of beginning with a fully drafted bill, however, the legislative process should be initiated by a problem statement. Like fully drafted bills, the statement would be assigned by the House or Senate parliamentarian to a committee. The committee, if it chose to go forward, would then be required to hold its first set of hearings on the problem statement

Problems and Managing Compliance (2000); Edith Stokey & Richard Zeckhauser, *A Primer for Policy Analysis* (1978).

⁴¹ Charles Lindblom, "The Science of Muddling Through", 19 *Pub. Admin. Rev.* 79 (1959) Charles E. Lindblom, *The Intelligence of Democracy* (1965); Charles E. Lindblom, "Still Muddling, Not Yet Through", 39 *Pub. Admin. Rev.* 517 (1979). See Herbert Simon, *Administrative Behavior*, 4th ed., (1997) at 88, 118-122 (rationality in decision making is bounded by information shortages and cognitive limitations.)

⁴² One such procedure, for example, is social learning, which involves a collaborative relationship between the policy analyst and the intended beneficiaries. See, for example, Chris Argyris & Donald A. Schön, *Organizational Learning: A Theory of Action Perspective* (1978); Paul R. Lawrence & Jay W. Lorsch, *Developing Organizations: Diagnosis and Action* (1969). This approach is connected with a recent movement in Anglo-American legal scholarship called New Public Governance: see for example Ian Ayres & John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (1992); Neil Gunningham et al., *Smart Regulation: Designing Environmental Policy* (1998); Michael C. Dorf, "Legal Indeterminacy and Institutional Design", 78 *NYU Rev.* 875 (2003); Jody Freeman, "Collaborative Governance in the Administrative State", 45 *UCLA L. Rev.* 1 (1997); Charles F. Sabel & William H. Simon, "Destabilization Rights: How Public Law Litigation Succeeds", 117 *Harv. L. Rev.* 1015 (2004); Susan Sturm, "Second Generation Employment Discrimination: A Structural Approach", 101 *Colum. L. Rev.* 458 (2001).

⁴³ For general descriptions of the legislative process in Congress, see William McKay & Charles W. Johnson, *Parliament and Congress: Representation and Scrutiny in the Twenty-First Century* (2010); Walter Oleszek, *Congressional Procedures and the Policy Process*, 8th ed. (2011); Steven S. Smith, Jason M. Roberts & Ryan J. Vander Wielen, *The American Congress*, 7th ed., (2011) at 217-48; John V. Sullivan, "How Our Laws Are Made", HR Doc. 110-49, 110th Cong, 1st Sess. (2007) (report of the House Parliamentarian); Charles Tiefer, *Congressional Practice and Procedure: A Reference, Research, and Legislative Guide* (1989).

⁴⁴ See McKay & Johnson, *ibid.* at 387; Oleszek, *ibid.* at 93; Nelson W. Polsby, *Congress and the Presidency*, 4th ed., (1986) at 138-139; Edward V. Schneier & Bertram Gross, *Legislative Strategy: Shaping Public Policy* (1993) at 94-95; Barbara Sinclair, *Unorthodox Lawmaking: New Legislative Processes in the U.S. Congress*, 3rd ed. (2007) at 11, 43-44. The bill is then assigned to committee by the chamber's parliamentarian, a non-partisan official appointed by the chamber. See McKay & Johnson, *ibid.* at 387; Oleszek, *ibid.* at 97-102; Sinclair, *ibid.* at 11-12, 44; Tiefer, *ibid.* at 111-13.

and would only proceed to draft the actual language of the bill, or consider drafts submitted by others (such as the administration or an interest group) after that first set of hearings. This would bring the actual drafting process into Congress itself and enable one or both Houses to use something akin to modern policy analysis in carryout out that function.

The other major recommendation is that the committee considering the legislation obtain empirical information, during its first set of hearings, from some neutral source such as the Congressional Research Service. By thus recognizing the empirical nature of most modern legislative design issues, this would again bring legislative drafting practice into line with the methodology of policy analysis.

The legislature's role in a parliamentary system is not as extensive as its role in a presidential system since bills are generally drafted by the administration, not the legislature.⁴⁵ Given the administration's more instrumental orientation, administrative drafting incorporates a modern, policy-based approach to legislative drafting that is absent from presidential systems. This does not mean, however, that the drafting process in a parliamentary system cannot be improved, as a general matter, nor does it mean that the legislative branch has no role to play in improving it.

Although a parliamentary legislature necessarily enacts government bills, it is not regarded as the proverbial "rubber stamp." As the group of public officials – the only public officials at the national level – elected by the people, it is expected to play at least some direct role in the legislative process other than mere approval. That role can be defined as quality control. The modernity of the terminology is intentional; although the parliamentary system dates back to the thirteenth century, its role and meaning, like the meaning of law in general that was discussed above, must be redefined in terms of modern administrative governance if the institution is to remain relevant and effective.⁴⁶

Quality control is supportive but evaluative. It accepts the basic premise and plan of the function that it is reviewing, but tests actual operations against that declared premise and plan. Importantly, it addresses both procedures and results, with the balance between the two depending on the relative expertise and information available to the primary actor and the

⁴⁵ For general descriptions of the legislative process in the U.K. Parliament, see P.S. Atiyah, *Law and Modern Society* (1995) at 182-192; Peter Leyland, *The Constitution of the United Kingdom: A Contextual Analysis* (2012) at 134-141; McKay & Johnson, *ibid.* at 381-477. For a general description of the Canadian Parliament, see Patrick Malcolmson & Richard Myers, *The Canadian Regime*, 4th ed. (2009) at 116-134; Audrey O'Brien & Marc Bosc, [House of Commons Procedure and Practice, 2nd ed.](#) (2009); Privy Council Office, Government of Canada, [Guide to Making Federal Acts and Regulations](#) (Canada): [hereinafter cited as Privy Council].

⁴⁶ For discussions of quality control as a modern management and engineering technique, see Dale H. Besterfield, *Quality Improvement*, 9th ed. (2012); Kaoru Ishikawa, *Introduction to Quality Control* (1990); Douglas C. Montgomery, *Introduction to Quality Control*, 7th ed., (2012).

quality assessor.⁴⁷ The greater the advantage of the primary actor, in terms of both expertise and information, the more the assessor will focus on procedure. The question in such cases is whether the actor employed a decision process likely to produce good results or, alternatively, whether the actor employed a process that made use of its superior expertise and information. As the actor's expertise and informational advantages decline, relative to the assessor, the more the assessor will, or should, evaluate the substantive conclusions that the actor reached. The question in such cases is whether the actor reached the right result, whether its decisions are likely to achieve its declared goals.

A fair synonym for such quality control is monitoring. Thinking about the quality control that a parliamentary legislature might exercise as monitoring is helpful because it mediates between the role of superior and subordinate.⁴⁸ In one sense, a parliamentary legislature is the executive's superior, since the executive must maintain its confidence in order to continue in office. In another sense, however, it is the executive's subordinate because, as long as the executive remains in power, the legislature is supposed to do what the executive tells it to do, at least in general outline.⁴⁹ The concept of monitoring covers both situations. A superior should monitor its subordinates to make sure that they are acting properly. At the same time, it is important, in any democratic system, that those exercising the highest levels of authority be monitored themselves. A good subordinate will do so, and a good system will encourage subordinates to play this role and protect them against the predictable ire of the superiors that they evaluate. This is the reason Aaron Wildavsky titled his book on policy analysis *Speaking Truth to Power*.⁵⁰

In fact, monitoring is carried out on a regular basis, not only by those who have subordinate governmental power, but those who have no governmental power at all, such as private policy organizations and the press. To say that a parliamentary legislature should monitor the executive through quality control, therefore, is to take no position on whether it is superior or subordinate to the executive. It simply recognizes that all decisions, and particularly decisions about matters as complex as those a modern state confronts, should be assessed and reconsidered.

⁴⁷ My further views on this topic appear in Edward Rubin, "The Myth of Accountability and the Anti-Administrative Impulse", 103 Mich. L. Rev. 2073 at 2119-34 (2005).

⁴⁸ See Herbert A. Simon, *Administrative Behavior; A Study of Decision-Making Processes in Administrative Organizations*, 208-22 (4th ed. (1997) at 208-222 (distinguishing between formal and informal channels of communications within hierarchical structures).

⁴⁹ Atiyah, above n. 45 at 182-83; Leyland, above n. 45 at 115-16; McKay & Johnson, above n. 43 at 86. As indicated below, some bills are proposed by the government but are not matters of confidence, and legislators in the majority are free to amend or even reject them. If there is a coalition government, the situation becomes more complex; the present discussions assumes a parliamentary majority for purposes of simplicity

⁵⁰ Aaron Wildavsky, *Speaking Truth to Power: The Art and Craft of Policy Analysis* (1987).

The crucial question, of course, is how a policy-oriented function, in this case quality control or monitoring, is to be institutionalized. It is the institutional grounding of ideas for effective policy making that transforms a recommendation from a theory to a methodology. The primary recommendation of my article about Congress, which is to begin with a problem statement rather than a drafted bill, is inapplicable to major bills in a parliamentary system because these bills are necessarily drafted by the government and come to the legislature as fully drafted proposals.

It is applicable, however, to the relatively small number of private members' bills that will be seriously considered.⁵¹ It is also applicable to statutes on which members of the majority party are free to vote as they wish. If the government is truly not taking a position, then it should not present Parliament with a drafted bill. Rather, it should suggest a problem for Parliament to solve. To present Parliament with a completed bill is to confer authority on the proposal that, according to the government's own views, the proposal does not merit. This is true despite the ability of Parliament to amend the bill; as in the case of a bill that is introduced to Congress, the legislature is then working with a completed draft, which it must amend and revise, rather than considering the underlying issue from the outset. Even if the bill is not a matter of confidence, the standard practices of the legislature in a parliamentary system will confer a certain and perhaps unintended momentum to it if it has been generated by the government. Thus, rather than presenting a completed bill that the parliament is free to amend, the government should pose the problem and allow the parliament to design the bill in the manner recommended for the legislature in a presidential system.

One possible way to implement this idea in a parliamentary system, at least as it operates in the U.K. and Canada, would be that Parliament discusses the problem at the first reading and gives guidance to the committee that will consider the bill.⁵² The committee would then generate alternatives, evaluate them on the basis of empirical evidence, chose the most attractive alternative on the basis of the evidence, and then draft the bill. The draft would then be presented to Parliament at the report stage and be available for amendment prior to the third reading. Implementing a change of this kind would require the development of greater policy making capacities in the legislature of a parliamentary system, but that is precisely the nature of the recommendation. Even in a presidential system like the U.S., reliance on a policy making approach to legislation would require a certain amount of institutional learning and development.

⁵¹ See Leyland, above n. 45, at 140; McKay & Johnson, above note 43 at 392; Malcolmson & Myers, above n. 45, at 127-28.

⁵² In fact, the Canadian House of Commons amended its Standing Orders in 1994 to enable Ministers to move that a bill be referred to committee before the second reading, thereby allowing for more wide-ranging consideration and amendment. See O'Brien & Bosc, above note 45 (under heading "Reference to Committee Before Second Reading"). This comes close to authorizing adoption of a policy analysis procedure at this stage.

Most bills in a parliamentary system, particularly the important ones, are government proposals. These bills are prepared in a variety of ways, but generally by civil servants in the relevant ministry, according to general instructions from the elected representative who is serving as minister.⁵³ The ministerial instructions are often quite general, so that most of the real statutory design, and certainly the part that exists in the policy space, is being drafted by non-political officials who have been appointed on the basis of merit and risen to their current positions on the basis of experience. The task of drafting the actual statutory language is often even more technical; in the U.K and Canada, it is carried out almost exclusively by parliamentary or legislative counsel, a small, apolitical body of trained specialists.⁵⁴ Clearly, this part of the process almost always falls within the policy space. Thus, the bill that arrives on Parliament's doorstep has generally been designed and written by public officials, something that is distinctly not true for the bills that are placed in the "hopper" of the U.S. Congress.

Accepting a government bill, however, does not preclude a quality control or monitoring role for Parliament. This function can be carried out in committee, as in the U.S. Congress, most probably after the second reading, and then promulgated to the full chamber at the report stage and discussed prior to the third reading. Committee consideration can be directed to either the procedure by which the bill was drafted or the substance of the bill itself, depending on the nature of the issue and the sense of the chamber in response to the second reading. A committee that decided to focus on procedure would inquire whether the administrative agents who drafted the bill began with a problem statement, generated a range of alternative solutions, obtained relevant empirical evidence, evaluated the alternatives in light of the evidence, and chose an alternative on the basis of evidence. If so, the bill could be accepted as is, and the committee could report to the House that the bill was properly designed and should be accepted largely or entirely in its present form. If not, they could proceed to exercise quality control on the basis of the bill's substance.

A committee that decided to exercise quality control on the basis a government bill's substance, either because the government's procedures were inadequate or because the subject-matter of the bill was amenable to this approach, could follow a variant of the policy analysis process that a legislature could use in a presidential system for the initial drafting process. It would identify the problem that the bill was designed to solve, generate its own alternatives, gather evidence to evaluate those alternatives, and then assess the government's solution in light of this inquiry. At that point, the legislature might ask the government to revise the bill and defer action until the government responded. Alternatively, it could

⁵³ See Atiyah, above n. 45 at 184-89; Malcolmson & Myers, above n. 45 at 123-25.

⁵⁴ See Atiyah, *ibid.* at 188-90; Privy Council, above note 45, Ch. 2.3 ("The Legislation Section of the Department of Justice is responsible for drafting all Government bills. The Section is part of the Legislative Services Branch and consists of legislative drafters who work with other members of the Branch, including jurilinguists, legislative revisors, editors and computer services staff.").

propose its own amendments. These amendments, whatever their scope, would be generated by the recommended policy process and would thus come to the full Parliament at the report stage with the authority that attaches to effective public policy making.

The legislature's authority to amend bills in a parliamentary system is well established, but the connection between the enactment of major legislation that the government has declared to be a matter of confidence and the continuation of the party in power has generated a rather heightened sensitivity about this possibility. Because rejection of such a bill would generally lead to an election and perhaps a loss of power, the government has tended to view amendments as a hostile act and urges its members in the legislature, most relevantly the backbenchers, to enact proposed bills without amendment.⁵⁵ This may be an overreaction, however, and its basis may be the same survival of the pre-modern, normative concept of legislation that is responsible for American legislative procedure. If a bill is declaring what is right and what is wrong, then amending it implies a normative disagreement with its drafter. That is indeed a rejection of the government position and can readily be regarded as a lack of confidence. But if legislation is viewed in its modern guise, as an empirically based effort to manage and improve society, amendments can be viewed as much less contentious acts. They are not necessarily declaring that the government's basic goal is wrong, but simply that there might be a better way to implement that goal.

Recently, there has been some recognition of this distinction in both the U.K and Canada.

In certain circumstances, the government in the U.K. has submitted draft bills to Parliamentary committees. These are not action items for Parliament, but rather discussion items for the relevant committees, and are intended to give those committees a chance to participate in the process of designing the bill that will ultimately be submitted for action.⁵⁶ The involvement of the people's representatives in the drafting process is seen as an advantage, but the resulting delay has been regarded as an offsetting disadvantage and the device, after reaching the somewhat paltry peak of 12 bills in 2003-04, has dropped back to six or less since then.⁵⁷

In Canada, the current practice by which a Minister may propose a motion that a bill be referred to committee prior to the second reading enables, and indeed encourages legislators to offer amendments to the bill.⁵⁸ It would appear, however, that the government exercises fairly tight control over the extent and content of the amendments that the committee will accept.

⁵⁵ Atiyah, *ibid.* at 184; McKay & Johnson, *above n.* 43, at 391 ("the credibility of the government, the party, and the individual minister has been closely bound up with bills more or less in the form in which they were introduced").

⁵⁶ McKay & Johnson, *ibid.* at 463-65.

⁵⁷ *Ibid.* at 561.

⁵⁸ Privy Council, *above n.* 45, Ch. 2.4. This practice dates from the Standing Order adopted in 1994.

The recommendation here, based on the nature of modern legislation, is that the government could render this device both more advantageous and less dilatory by submitting a problem, rather than a draft bill, to the Parliamentary committee. This would require the government to spend less time preparing the submission to the committee and create less of a sense that the committee's consideration was a delay in the normal course of statutory drafting. At the same time, it would give the committee the chance to use policy analysis to frame its recommendation.

Assuming that the usual parliamentary approach of government drafting remains the norm, the discourse of request for revision or amendment that Parliament adopted could allow it to play a more active role. As noted above, bills are typically drafted by civil servants, acting on the basis of broad policy directives from an elected minister or group of ministers. The legislators could adopt the stance that the civil servants had not served the minister well. Either they had failed to employ standard methods of policy analysis or they had employed these methods poorly and reached dubious conclusions. In requesting revision, the legislators would not be saying that the government had chosen the wrong policy—which would in effect constitute a vote of no confidence – but rather that the civil servants, who remain in place when the government changes and are thus conceptually separate from it, had failed to carry out the wishes of the elected minister and needed to do a better job. To be sure, the government has submitted the bill, and the relevant minister has approved it, but high level policy officials necessarily depend on the research and analysis of others. In advancing their own amendments, the legislators would be saying that they, who are also elected officials, of course, can act in place of the civil servants --not the ministers – by either drafting their own version of the defective provisions or by engaging their own technical experts to do so. This distinction between supreme authority and subordinate implementation is familiar from English history,⁵⁹ and corresponds to current thinking about the theory of democracy as well.⁶⁰

If the legislature in a parliamentary system decided to draft amendments to a government bill, it would need to carry out its own empirical research. This means that it would need to amplify its staff capabilities. Due to the rivalry with the executive that inheres in a presidential system, the U.S. Congress has felt the need to develop its own empirical capabilities, both for the purpose of researching its own legislation and for the purpose of

⁵⁹ In resisting royal commands, Parliament or other forces in society would typically argue that it was not criticizing the monarch, but rather criticizing the officials (often ministers) who served him poorly. The same rationale was used to justify the impeachment of royal officials. As Blackstone wrote, "whatever is exceptionable in the conduct of public affairs, is not to be imputed to the king." William Blackstone, *Commentaries on the Laws of England*, vol. 1 (Cooley ed., 2001) at 246. See Raoul Berger, *Impeachment: The Constitutional Problems* (rev. ed. 1974) at 7-55; Thomas Ertman, *The Birth of Leviathan: Building States and Regimes in Medieval and Early Modern Europe* (1997) at 209-211; Jack Rakove, "Statement on the Background and History of Impeachment", 67 *Geo. Wash. L. Rev.* 682 (1988).

⁶⁰ See Habermas, above n. 4 at 143-271. See also Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (William Rehg, trans, 1996) at 194-237.

evaluating government bills, particularly those with major fiscal implications.⁶¹ Even so, the persistence of the normative concept of legislation has meant that Congress often lacks the empirical data that it needs to fashion effective policy for our complex, technocratic age. Parliamentary systems would need to expand their empirical data gathering capacities by at least an equivalent proportion.⁶² At present, both the Canadian and U.K. Parliaments have staff agencies devoted to investigating the efficiency and fairness of government programs,⁶³ but neither set of agencies is primarily engaged in developing the full range of empirical data that is needed, including data of a sociological and social-psychological nature, for effective modern legislation. In some cases, all that would be needed is the capacity to collect and evaluate existing studies. In other cases, however, original research would be needed because the precise question that is relevant to a proposed bill has not previously been investigated.

In short, legislative methodology is important in a modern parliamentary democracy as well as in a presidential one. It is true that in a parliamentary democracy the legislature does not play the leading role in designing legislation. But the notion of leadership needs to be re-examined in the modern governmental context. Canada and the United Kingdom are not autocracies, where one person's sovereign will determines public policy; like other contemporary democratic regimes, its governmental decisions emerge from a complex interplay of forces and result from the interaction of many individuals and institutions. Such a government can only function optimally, or even effectively, if all the institutions that participate in important decisions fulfill their tasks in an intelligent and responsible manner. Moreover, a parliamentary legislature, even in these days of party leadership, remains a

⁶¹ The Congressional agencies include the Congressional Budget Office, the Government Accountability Office (formerly the General Accounting Office), the Congressional Research Service (a branch of the Library of Congress) and the quondam Office of Technology Assessment. For general descriptions, see Bruce Bimber, *The Politics of Expertise in Congress: The Rise and Fall of the Office of Technology Assessment* (1996); Philip P. Joyce, *The Congressional Budget Office: Honest Numbers, Politics and Policymaking* (2011); James A. Thurber, "Policy Analysis on Capitol Hill: Issues Facing the Four Analytic Support Agencies of Congress", 6 *Policy Sci. J.* 101 (1977).

⁶² For a suggestion along these lines, see Tom Axworthy, *Everything Old is New Again: Observations on Parliamentary Reform*, Centre for the Study of Democracy, School of Policy Studies, Queen's University (2008).

⁶³ In Canada, the Auditor General, roughly equivalent to the American GAO, monitors the use of public funds by government agencies, while the Ombudsman's Office responds to complaints and otherwise investigates the way government treats its citizens. See Malcolmson & Myers, above n. 45 at 122 (Auditor General); Wendy Bernt & Stephen Owen, "The Ombudsman in Canada" in *Righting Wrongs: The Ombudsman in Six Continents*, Roy Gregory & Philip Giddings eds. (2000) at 127; Claude-Armand Sheppard, "An Ombudsman for Canada", 10 *McGill L.J.* 291 (1964). In the U.K., the National Audit Office investigates the government's use of public funds and serves, in effect as staff support for the Parliamentary Public Accounts Committee (PAC). See Leyland, above n. 45 at 149-52., while the Parliamentary Ombudsman's Office investigates government treatment of individuals. See Roy Gregory & Peter Hutchesson, *Royal Inst. Of Pub. Admin., The Parliamentary Ombudsman: A Study in the Control of Administrative Action* (1975); Roy Gregory & Philip Giddings, *The Ombudsman, the Citizen and Parliament: A History of the Office of the Parliamentary Commissioner for Administration and Health Service Commissioners* (2002); Mary Seneviratne, *Ombudsmen: Public Services and Administrative Justice* (2002).

repository of public accountability and collective governmental experience. The more effectively it carries out its secondary role, the larger that role is likely to become. If a parliament demonstrates an ability to evaluate, revise and improve government legislation, the government is more likely to rely upon it as an important partner in the enterprise of governance.

Conclusion

The character of legislation in the modern world has, not surprisingly, changed with the transformation of government itself. In the traditional society that preceded the modern era, the primary domestic task of government was to maintain civil order, and the primary role of legislation was to declare proper and wrongful behavior in furtherance of that important but relatively simple mission. As the administrative state has grown in response to the demands of the citizenry, government has become responsible for managing many aspects of our society and providing many services that were provided by private institutions – or not provided because not expected – in traditional society. Consequently, modern legislation is intended to achieve agreed upon but complex goals, and political controversy focuses on the means by which those goals are best achieved. We are more likely to develop effective solutions, and more likely to reach agreement about which solutions are potentially effective, if we can devise a more coherent methodology for the design of modern legislation.

A major impediment to the development of such a methodology is the persistent belief that legislators are not interested in designing effective legislation, and that the legislative process is “all politics.” The pessimistic fatalism of this view has been refuted by numerous studies, but it frequently persists, reinforced by the pre-modern view that legislation is an exclusively normative enterprise. In fact, most matters of statutory design are below the level of political salience, and exist within a policy space where an effective methodology can be deployed. This paper recommends that the tools of policy analysis, already accepted as the conventional approach to implementing legislation at the executive level, can be extended to the process by which legislation is designed. The advantages of doing so are most obvious in a presidential system, where the legislature is responsible for writing statutes, but they apply to parliamentary systems as well, where legislatures that possessed an effective methodology could play an expanded role in requesting that the government revise its bills, or in amending government bills on their own.

Research for evidence-based legislation in African Parliaments: Issues, Challenges and Opportunities

Elizabeth Bakibinga¹



Abstract:

This paper addresses legislative and policy research as they impact on evidence-based legislation and participatory governance. The paper further discusses the practical aspects of developing and enacting evidence-based legislation and addresses critical issues that the majority of African parliaments face. A situation analysis is provided, premised on statistics provided in the World eParliament reports on Africa. Examples of current practices, the roles of various actors in the legislative policy research process and available opportunities are drawn from numerous jurisdictions within and outside Africa. The discussion further lays bare external and internal issues and challenges faced by African parliaments, such as lack of resources, inadequacy of knowledge management systems and the continuous power struggles behind the Executive and Legislative bodies, among others. The paper concludes that legislative counsel need to appreciate pertinent aspects of the policy options surrounding a draft Bill if governments are to achieve evidence-based and effective legislation in Africa.

¹ Vice President, Commonwealth Association of Legislative Counsel and Legal Officer, United Nations Department of Peacekeeping Operations. Paper originally presented at Commonwealth Association of Legislative Counsel- Africa Parliamentary Knowledge Network Conference 'Building Legislative Capacity in Africa' Cape Town, 4-5 July 2012. The views expressed in this paper are those of the author and do not necessarily reflect those of the United Nations or the Commonwealth Association of Legislative Counsel.

Introduction

The need for legislative information and research, especially in developing and transition countries, is growing as policy-making processes become more complex, particularly in the context of globalisation, regional integration and decentralisation. Since the executive branch of governments generally has access to a larger pool of knowledge and expertise than the national legislature, there is a need to address the imbalance in access to knowledge between the executive, legislature and judiciary in order to promote better quality policy-making.²

Participatory governance calls for continuous engagement between the governors and the governed, which in the law making process includes understanding the needs, aspirations and views of the people and subsequently legislating in a responsive manner. Participatory governance in general and specifically, a participatory legislative process, calls for the sharing of knowledge and information as well as the involvement of all stakeholders. Evidence-based practice principles indicate that programmes and approaches must be based on empirically validated theory and research and independent analysis and evaluation.

Ideally, legislation should be fit-for-purpose, the product of a well-diagnosed problem and premised on solutions supported by the best evidence available. By definition, evidence-based legislation is the product of a legislative drafting method that describes whose and what behaviours constitute the problem; explains the behaviours, develops solutions to overcome the causes of problematic behaviours and monitors and evaluates the efficacy of legislation.³ Evidence-based legislation calls for the use of the best available scientific evidence and systematically collected data, when available, by legislatures as a basis for formulating and writing law.⁴

Making the case for evidence-based legislation, S. Kealy opines,

All too often governments enact poorly drafted laws—those with no evidence or no scheme, toothless generalizations, contradictory proposals cobbled together without any logical plan, or simply copying what other countries have done. None of those methods require a close analysis of evidence and, not surprisingly, none of those methods work—except for a rare case of luck. In contrast, Institutional Legislative Theory addresses social problems through an evidence based methodology. That is, by identifying and attempting to systematically change defective institutions—sets of repetitive behaviors that poorly serve the public interest.⁵

² A. Datta and N. Jones; 'Linkages between researchers and legislators in developing countries -A scoping study', Overseas Development Institute, July 2011.

³ See A. Seidman and B. Seidman, "ILTAM: Drafting Evidence-Based Legislation for Democratic Social Change" (2009), 89 *Boston University Law Review* 435. Available at http://www.bu.edu/law/central/jd/organizations/journals/bulr/volume89n2/documents/SEIDMAN_000.pdf

⁴ See Wikipedia at http://en.wikipedia.org/wiki/Evidence-based_legislation.

⁵ Prof. S. Kealy, "A Partnership for Evidence Based Legislation", Presentation at APKN Conference March 4-5, 2009 in Kigali, Rwanda at 4. Available at <http://www.apkn.org/conference-documentation/programme-presentations/kigali-day-2-session-9-sean-kealy-speech.pdf>. ILTAM (institutionalist legislative theory and

The purpose of evidence-based law is to create better law and bring about more well-informed policy and law, informed by reality.⁶ By gathering relevant evidence, legislative staff and policy and law-makers are empowered to make point-on diagnoses and prognoses of problems that plague their societies. Research and evidence-based legislation are closely linked because one cannot competently talk about evidence-based legislation without bringing to mind the process through which such evidence is gathered.

The importance of drafting evidence-based legislation is lauded and appreciated and the practice often reveals that legislative bodies for a variety of reasons frequently engage with stakeholders to produce a legislative product that is informed by the best evidence available.

This paper does not place much focus on the concepts of evidence-based legislation and research but seeks to address in detail critical issues that the majority of African parliaments face, all the time emphasizing the practical aspects of developing and enacting evidence-based legislation.

Policy research and its impact on the Legislative Process

A well informed legislative process hinges on well-executed policy research which involves the systematic collection and presentation of information and provides stakeholders, including decision-makers, with useful recommendations and possible actions for resolving fundamental problems.⁷ To that end, a policy research effort begins with a social issue or question, evolves through a research process where alternative policy actions to deal with the problem are developed and serves to provide options for consideration during policy debates. Policy research is crucial to defining the public policy agenda and in great demand by policy-makers, government, special interest groups, community organizations, policy organizations, policy analysts and advisers, voluntary sector lobbying groups, universities, individuals, private sector and anyone else wanting to influence policy.⁸ Many of them are

methodology) is a problem-solving methodology for drafting which aims at designing an effectively implemented Bill. It prescribes a research report as one of the tools of ensuring quality control in legislative drafting and comprises 4 decision-making steps, which include: (1) describing the social problem the Bill targets, and whose and what behaviours make up the social problem; (2) explaining the behaviours that comprise the targeted social problem (Rules, opportunity, Capacity Communication, Interest, Process And Ideology.); (3) creating a legislative solution and (4) monitoring and evaluating impacts.

⁶ J. Rachlinski, "Evidence-based Law" (2011), 96 *Cornell Law Review* 901.

⁷ A. Majchrzak, Technical analysis. In *Methods for Policy Research*, Sage: Beverly Hills, 1984.

⁸ See S. Dukeshire & J. Thurlow, *Understanding the Link between Research and Policy Prepared by Rural Communities Impacting Policy* (2002), available at <http://www.ruralnovascotia.ca/documents/policy/research%20and%20policy.pdf>; Coastal Communities Network and the Atlantic Health Promotion Research Centre, *A Brief Guide to Understanding Policy Development*. (available at <http://www.ruralnovascotia.ca/documents/policy/understanding%20policy.pdf>) and *Challenges and Barriers to Community Participation in Policy Development*, available at <http://www.ruralnovascotia.ca/documents/policy/challenges%20and%20barriers.pdf>, Halifax: 2002.

not only end-users, they also generate policy options and in doing so contribute to the general policy debate.

Researching for evidence-based law is premised partly in participatory policy-making, which is a general approach to facilitating the inclusion of individuals or groups in the design of policies via consultative or participatory means to achieve accountability, transparency and active citizenship and bring a wider range of information, ideas, perspectives and experiences to the process.⁹ Participatory policy research is necessary to promote and inform policymaking by involving key policy-makers and conducting a formal policy review process, resulting in better informed policies. The patients affected by the healthcare system; the business community which is most affected by tax policies; farmers, students and members of professional association, whose day to day existence is most affected by implemented policies are better-placed informants on the practical implications than anybody else.

Different types of research use different means to systematically collect information such as focused synthesis/review of existing research, secondary analysis, field experiments, qualitative methods, surveys, case studies and cost-benefit analysis.¹⁰ Just as there are numerous research methods, so too there are many sources from which individuals, community organizations and decision-makers can obtain information that may be used in the policy-making process, namely, the media, official statistics, polls, specialized policy analysis units and think tanks, academic community and traditional knowledge as handed down from generation to generation in different communities across Africa.

While conducting research, it is expected that the research process will take place in a transparent manner, lead debate and expose unintended or unanticipated consequences and disentangle the impact of the proposed policy on its subjects and their behaviour and opinions on other policies or policy subjects, as well as the impact of the policy subjects' expressed preferences on policy.¹¹

Research contributes to comprehensive legislation which is progressive, objective, necessary and timely and also, if well implemented, results in smarter interventions. The collection of data, including statistical data, is fundamental for monitoring the efficacy of legislation to have a strong knowledge base that informs legal developments.¹²

⁹ See J. Rietbergen-McCracken, "Participatory Policy Making", available at http://pgexchange.org/index.php?option=com_content&view=article&id=140&Itemid=132.

¹⁰ See S. Dukeshire & J. Thurlow, above n.8

¹¹ Jeremy Pitt; "ICT Innovation for Evidence-based Policy-Making", FP7 ICT Workshop ICT Solutions for Governance and Policy Modelling (2010), available at https://connect.innovateuk.org/c/document_library/get_file?folderId=1943498&name=DLFE-19711.pdf.

¹² United Nations Division for the Advancement of Women, "Handbook for legislation on violence against women", ST/ESA/329 New York 2010 at 23.

The best available evidence on any matter should guide the legislative process. However, the fundamental democratic principle of the legitimacy of public policies involves a broad public discussion with all key stakeholders in making such important changes before sending the new law to parliament.¹³ Policy and lawmakers are expected to widen the pool of available evidence by opening up the process and involving more people in the policy and legislative debate. This would ensure evidence-based solutions to existing problems.

Additionally, with the purpose of holding quality public discussions, it is necessary to provide information on what preceded the drafting of the legislation (the analyses and examples of best practice that are the basis for the new legislation) and who has participated in the drafting. It is particularly important to provide information on the role of the proposed legislation in the overall development strategy in order to consider and assess the scope of the new legislation. Finally, it is necessary to ensure ample time for public discussion in order to reach high quality solutions that match the actual needs of the society and individuals.¹⁴

There is no doubt that the research community of practice is aware of the growing importance of the impact of research on policy debates, most especially in light of evolving trends in globalisation. To that end, the research community is also beginning to respond to the needs of individuals, organizations, and policy makers to carry out research relevant to the policy-making process. It is developing a new “research to action” paradigm, which includes collaboration among academic disciplines and between sectors, and inclusive approaches to research in which the ideas and viewpoints of people in communities are brought together with academic and government perspectives.¹⁵

As a result of governments worldwide recognizing the important role that research can play in policy development, over the years there has been a big push to establish national policy research initiatives. For example, in 1996, the Policy Research Initiative (subsequently renamed Policy Horizons Canada) was created to develop a research strategy for Canada to prepare for the complex public policy challenges Canada was likely to face over the coming years and build a solid foundation of expertise and knowledge upon which sound policy

¹³ T. Farnell, “Croatia - Good practices in Social Dimension implementation in Higher Education” (undated), available at http://www.ehea.info/Uploads/Good-practices%20in%20SD_Croatia.pdf. Due to the lack of data in Croatia, before the project there were few indicators to assess the financial needs of students, the equity-dimension and effectiveness of the then higher education funding system, or the capacity of relevant institutions to adapt best-practice policy models from abroad. In its “Thematic Review of Tertiary Education – Country Note: Croatia” (2007), the Organisation for Economic Co-operation and Development (OECD) had noted this problem, stating that there was an “almost complete lack of information” to assess the equity-dimension of access to higher education in Croatia and therefore emphasised the “urgent need for better data, to enable an assessment of the effect of family income (on access to HE)” and that this should “be treated as a high priority for policy research and development.”

¹⁴ Ibid.

¹⁵ R.F. Lyons, “Building social capital for health: The new ‘research to action paradigm (Unpublished manuscript, Atlantic Health Promotion Research Centre: 1999).

decisions can be based and in so doing, contribute to building a strong and vital Canadian policy research community.¹⁶ Kenya,¹⁷ Uganda,¹⁸ and Ethiopia¹⁹ are examples of some of the countries in Africa where governments have established or supported public funded policy research institutes.

In summary, in evidence gathering, questions arise such as what current theories, prevailing narratives and evidence (including types of evidence and the divergence of the new evidence) are available to convince policy makers.²⁰

Legislative research policy in Africa

A number of processes have evolved over the years to guide research processes for evidence-based legislation and to a great extent each parliament or legislative body employs the system most synonymous with the style of management of the Executive branch of government. Consequently, considerable amounts of back and forth movement takes place between the Executive and Legislative branches of government as both seek to resolve outstanding policy questions, whether they relate to Executive-sponsored Bills or private members' Bills. Traditionally, conducting legislative research and policy analysis has been the preserve of the Executive and government departments and not the preserve of the First Parliamentary Counsel or legislative counsel. In comparison to research conducted by the Legislative branch, legislative and policy research conducted by line or sectoral ministries and departments (the Executive branch) is generated through studies commissioned and executed by private consultants and sometimes by external partners such as development agencies and regional and international organisations. Within legislative bodies, research officers cater for the research needs that may arise in the various sectoral areas that may be the focus of legislative scrutiny.

In Africa, some national and regional parliaments,²¹ supported by the Department for International Development of the United Kingdom and the United States Agency for

¹⁶See http://www.horizons.gc.ca/page.asp?pagenm=hor_index.

¹⁷ The Kenya Institute for Public Policy Research and Analysis (KIPPRA) provides quality public policy advice to the Government of Kenya and other stakeholders by conducting objective research and through capacity building in order to contribute to the achievement of national development goals. See <http://www.kippira.org/About-KIPPRA/about-kippira.html>.

¹⁸ The Economic Policy Research Centre was designed to fill fundamental voids in economics research, policy analysis, and capacity building for effective in-country contributions to Uganda's policy processes. See <http://www.eprc.or.ug/>. The Makerere Institute of Social Research (MISR) was established in 1948 as the research arm of the colonial state. See <http://www.misr.mak.ac.ug/>.

¹⁹ The Ethiopian Development Research Institute is a semi-autonomous research think-tank engaged in: economic research and policy analysis, bridging research and policy, capacity, knowledge dissemination and exchange and consultancy. See <http://www.edri-eth.org/aboutus.php>.

²⁰ D. Start & I Hovland,, "Tools for Policy Impact: A Handbook for Researchers", (Overseas Development Institute: 2004), available at <http://www.odi.org.uk/resources/docs/194.pdf>.

International Development, have undergone reforms and modernisation and adopted evidence-based legislation methodology alongside traditional research methodologies. In addition, 37 parliaments, in collaboration with the Pan Africa Parliament, participated in the Africa i-Parliaments Action Plan, which is an Africa-wide initiative to empower African Parliaments to better fulfill their democratic functions by supporting their efforts to become open, participatory, knowledge-based and learning organisations. The Plan is implemented by the United Nations Department for Economic and Social Affairs.²²

It is not a smooth ride towards enhancing parliamentary capacity as the Executive branch struggles to protect its territory in the public policy arena, most especially in light of the ever-increasing autonomy of legislative bodies across the continent. In a global study covering 10 countries from Sub-Saharan Africa (Benin, Burkina Faso, Ghana, Kenya, Nigeria, Rwanda, Sudan, Tanzania, Uganda and Zambia), among others, one of the key findings was that, although increasing in strength, the legislatures in these 10 countries are still largely relatively weak, with executives often unwilling to cede power.²³

Issues and Challenges

Available literature shows that on the whole, African parliaments continue to embrace ways of delivering on the mandate of an effective legislative process, albeit with persistent challenges.²⁴ Many African parliaments are limited in their operation by lack of funding, time constraints and resource needs. Opening up the law making process to more public participation, though more democratic, attracts extra costs for the already burdened institutions. Participatory policy-making takes more time and can be costly, especially when large groups of stakeholders are involved.²⁵

Research and policy analysis capacities are limited in many parliaments across the developing world. In situations where legislative counsel draft legislation that covers a broad range of policy areas, there may not be much familiarisation with substantive aspects of the policy area under discussion. Will a legislative counsel know when and which questions to

²¹ Benin, Burundi, East African Legislative Assembly, Ghana, Kenya, Madagascar, Malawi, Morocco, Mozambique, Namibia, Rwanda, Southern African Development Community (SADC), Tanzania, Uganda, Zambia and Zimbabwe: see Centre for International Development, State University of New York, "Past Projects, Legislative Strengthening", available at http://www.cid.suny.edu/our_work/past_projects/our_work_projects_Legislative_strengthening.cfm.

²² See <http://www.parliaments.info/rationale/background>.

²³ A. Datta and N. Jones, "Linkages between researchers and legislators in developing countries -A scoping study", Overseas Development Institute, July 2011.

²⁴ See *African Parliaments Between Governance and Government*, M.A Mohammed Salih, ed. (HSRC Press: 2006). I. Rugambwa, *Emerging Library and Research Services for Legislatures in Africa: The Case of the Parliament of Uganda*, (2010), 58 Library Trends, Johns Hopkins University at 517-526.

²⁵ J. Rietbergen-McCracken, above n. 9.

ask in order to be sure that proposed legislative interventions are fit for purpose as per the expectations of the proponents of evidence-based legislation?²⁶

African parliaments need to consider investing in evidence-generating research on the basis of the annual State of Nation Address and other indicators which reflect the likely direction of the Executive's legislative priorities for the year in question. Ideally, the State of Nation Address or its equivalent is expected to provide guidance as to upcoming legislative business on the side of the Executive. It is then incumbent upon legislative counsel and researchers as well as all other stakeholders to draw up tentative legislative work plans or schedules that reflect the programme drawn up by the Executive. From analysis of the priorities set out in the State of Nation Address, which should then be the basis of any collaborative discussions on the available options if legislative intervention is anticipated.

The resultant legislative programme is a potential blueprint for any discussions on the availability of the relevant research or evidence, which would then be available for information and comparison during the drafting process. The questions to consider when embarking on such a venture will be on how to utilise available resources which, where they exist, are normally fragmented and scattered in, legislative policy and research departments across government and external actors, such as public policy think-tanks, non-governmental organisations, concerned citizens' groups, development partners contributing to the development process as well as entities commissioned by lobbyists, among others.

Regulatory impact assessment (RIA) is high on the agenda for some governments in Southern African Development Community (SADC),²⁷ and in Uganda, through the Ministry of Finance.²⁸ This assessment is very useful in that the results feed the legislative process by informing legislative mandates. As part of a general move towards more evidence-based policy making, many governments have chosen to implement regulatory impact analysis as part and parcel of their political system. An RIA sets out findings about the likely impact of regulation in simple language, with which non-specialists (including political decision-makers and members of the public) can meaningfully engage.²⁹ While it may not be possible

²⁶ Smith, above n. 26.

²⁷ Members of SADC are Angola, Botswana, Democratic Republic of Congo, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, United Republic of Tanzania, Zambia and Zimbabwe.

²⁸ RIAs have been used by various governments to guide regulatory and legislative decisions since approximately 1980. The use of RIAs originated in the United States and the European Union, and was championed in the international arena in the 1990s by bodies such as the Organization for Economic Co-operation and Development (OECD), the World Trade Organization (WTO), and the European Commission (EC). In a number of countries, the use of RIA is now well-established as a component of the regulatory process. For example, by 2006, United Kingdom regulators produced 200 RIAs annually, in 2005 the European Commission produced 100 RIAs, and of the 113,798 final rules adopted by the US federal government since 1981, 20,393 or 18% have been accompanied by RIAs.

²⁹ Regulatory Impact Assessments in SADC. Also see Colin H. Kirkpatrick, David Parker, *Regulatory Impact Assessment: Towards Better Regulation?* (Edward Elgar Publishing: 2008).

for legislative counsel alone to keep track of developments and results of the regulatory impact assessment process, their knowledge of the findings of the RIA in turn impacts on how legislative developments materialise by way of amendment of existing legislation or enactment of new pieces of legislation. When conducting research, it is important to establish what did not materialise with interventions that were proposed and/or implemented and why there is need for further legislative intervention by way of enactments.³⁰

Regulatory impact assessment in itself is significant because it provides benchmarks from which the policy review process can draw lessons. While legislative counsel is not mandated to be a policy analyst, circumstances do arise when, by implication or through necessity, legislative counsel, together with the proponent of the Bill in the limited time available during deliberation of the Bill in committee and in plenary, is expected to do a quick impact assessment of each newly- introduced clause for legal and other implications of the proposed amendment. This can be problematic, depending upon how many of the proposals were anticipated before the meeting in question. Worse still, the luxury of consulting and reporting back may not be available, most especially when the Bill is in the final stages of enactment and when the Parliament, faced with a tightly packed legislative calendar, is anxious to pass the Bill. For example, when the jurisdiction for appeal in an administrative process is to be established, and bearing in mind the right to access justice in a timely and user friendly manner, what are the chances of legislative counsel inquiring into whether the proper forum is being selected? In light of case backlogs in the court system and the likely challenges to the court in taking on the additional burden to be imposed by the proposed legislation, the effectiveness of the legislative proposal may have already been negated.

In an era of increased self-publication, legislative counsel in turn access information that cannot be independently verified in a cost-effective manner. Information posted online is not totally dependable or credible because of the ease of self-publication. Local libraries may not have up to date information. In addition, research generated at universities and other institutions of tertiary learning may not be readily accessible to law and policy makers. Most of the dependable and peer-reviewed information is contained in databases that require subscription for online access and this affects access to information in real time. In the case of Global Legal Information Network (GLIN)³¹, one needs to become a member of the network in order have full access to legislative information.

A good number of African parliaments lack adequate legislative knowledge management systems and as such, users may not find the available information dependable and accessible. Knowledge management has not been strong in some parliaments. Documents

³⁰ State Law Library of Montana, *Montana Legislative History Research Guide*, available at <http://courts.mt.gov/library/guides/default.mcp.x>).

³¹ GLIN is a public database of official texts of laws, regulations, judicial decisions and other complementary legal sources contributed by 36 governmental agencies and international organizations, covering 51 jurisdictions. The database, searchable in 14 languages, is accessible online at www.glin.gov.

generated within parliament in the past decades, even the past few years, cannot be found or accessed when required by subsequent parliaments. This means that legislative counsel and researchers will not have access to relevant information, especially crucial legislative history, when required. Legislative history is crucial to the process of analysing regulatory impact assessment as it provides a record of legislative intent and legislative action. The record matters because knowledge of precedent helps in the framing of problems and solutions; the record reveals deliberation and debate and the content helps the user (researcher, attorney, court or academician) discern the original intent and the intent of the amendments.³² One example at the international level that reflects the importance of keeping legislative history arises in matters that concern the interpretation of the *Convention of the Privileges and Immunities of the United Nations, 1946*. A. Miller states,

The examination of the individual provisions commences with their drafting history, which may occasionally illuminate the intent behind a provision and suggest an answer to the questions at hand. However, the drafting history of the Convention is surprisingly scant and consequently at times, of little assistance.³³

Issues concerning access to information greatly affect how legislative counsel and researchers can utilise Information and Communication Technologies (ICTs) to improve on their delivery of services to the parliaments and other actors they serve. Much as the use of ICTs is widespread worldwide and in some areas in Africa, by way of comparison to other parts of the world, the figures for the application of ICTs in African parliaments remain on the low side. In 2010, the *World e-Parliaments Report* indicated that African parliaments are among the parliaments most affected in their ICT deployment by the lack of resources, namely, an appropriate management structure, adequate infrastructure including reliable electrical power, systems for managing documents and capabilities for using ICT-supported methods to communicate with citizens.³⁴

Way forward

Evidence-based law is still developing and the process of enacting evidence-based legislation should be encouraged as there are more benefits to be attained than costs incurred. To guarantee that the relevant infrastructure is put in place, there is a need to institutionalise legislative research within legislative bodies' knowledge management systems and make this information available to users as and when they need it. The same applies to the operations of the Executive branch of government. For example, the Office of

³² C. Smith, above n. 26.

³³ A. Miller, "Privileges and Immunities of UN Officials" (2007), 4 *International Organizations Law Review* 169 at 171.

³⁴ *World e-Parliament Report*, Report of the United Nations Department of Economic and Social Affairs and the Inter-Parliamentary Union through the Global Centre for ICT in Parliament (2010), available at <http://www.ictparliament.org/wepr2010>.

Management and Budget of the United States of America, following the President's Executive Orders that require evidence-based regulations, has institutionalised evidence-based regulation, which calls for those who design new initiatives to build rigorous data about what works and then act on evidence that emerges — expanding the approaches that work best, fine-tuning the ones that get mixed results, and shutting down those that are failing.³⁵

Some parliaments that have already undergone modernisation have in-house legislative research departments which support the process of providing policy research and analysis concerning all Bills, whether sponsored by the Executive or by private members. Those that have not most likely would depend on the research conducted by Executive departments or ministries. The question remains on the utilisation of the existing resources, human and otherwise, to ensure that evidence-based legislation is enacted. Regardless of where the legislative research function lies, it is important to have a streamlined process, which ensures that all actors understand the relevance of conducting research that ensures the enactment of evidence-based legislation. An example from the United States of America shows the establishment of a legislative liaison unit in each department of the Executive branch of government, which dedicates itself to monitoring and fostering legislative developments.

For example, the Chief, Legislative Liaison is directly responsible to the Secretary of the Army for legislative affairs, including formulating, coordinating, supervising, and executing the Army's Congressional policy and strategy. The Chief ensures the overall integration of the Army's efforts with Congress, develops comprehensive congressional engagement strategies for Army senior leaders, and disseminates critical information on all major Congressional activities.³⁶ For other legislative bodies, the solution has been found in establishing in-house research centres.

African parliaments will have to collaborate and jointly invest in access to reputable and dependable information by paying the applicable subscription fees and/or participating in the activities of entities such as GLIN and the African Parliamentary Knowledge Network in order to have easier access to credible and persuasive information. Inter-parliamentary cooperation is viewed as one of the least expensive and potentially most effective ways for legislatures to enhance their use of technology, offering unique opportunities to share resources, overcome lack of know-how and establish common approaches.³⁷ To that end,

³⁵ Office of Management and Budget, "Building Rigorous Evidence to Drive Policy" (available at <http://www.whitehouse.gov/omb/blog/09/06/08/BuildingRigorousEvidencetoDrivePolicy>).

³⁶ United States, Department of the Army, "The Office of the Chief Legislative Liaison", available at <http://ocll.hqda.pentagon.mil/>.

³⁷ Global Centre for ICT in Parliament. World e-Parliament Report. Report of the United Nations Department of Economic and Social Affairs and the Inter-Parliamentary Union through the Global Centre for ICT in Parliament. (2010).

the e-Parliament Framework 2010-2020³⁸ advanced by the Global Centre for ICT in Parliament provides a useful blue print for African parliaments.

Parliaments are likely to benefit from exploiting the possibility of enhancing collaboration between legislative counsel and researchers and where necessary train legislative staff, including legislative counsel, in ways of assessing and lodging the relevant questions and analysing position papers and any other written documents that explicitly argue and aim to persuade concerning the conditions, causes or consequences relating to a problem.³⁹

Legislative counsel who develop functional levels of policy analysis and research ability should be a boost to resource-strapped parliaments in Africa. The work of international organisations and some government entities in this area serve as good examples and can assist legislative staff to comprehend and apply research methodologies to their work. One example to draw lessons from is the Overseas Development Institute which, as part of its Research and Policy in Development (RAPID) programme, has been looking at the links between research and policy for several years and is now beginning a process of identifying, developing, distributing and delivering tools, resources and training support that can help research providers access the policy process through four main themes:

- use of evidence in policy identification, development and implementation;
- improving communication and information systems for development agencies;
- use of better knowledge management to enhance the impact of development agencies; and
- promotion and capacity building for evidence-based policy to improve the use of research and evidence in policy development and practice through research, advice and debate.⁴⁰

In a bid to foster in-house capacity development, parliaments in countries such as Mozambique, Ghana, Nigeria, Uganda and Kenya have established training and capacity building centres, which analysts consider to be ‘*a trial and error*’ undertaking.⁴¹

Nonetheless, this is a step in the right direction, illustrating the growing need and determination of parliaments to enhance their capacity. These parliamentary centres are potential fora through which programmes such as RAPID can be delivered.

Utilisation of synergies remains one of the critical factors to consider when discussing research for evidence-based legislation. Think tanks, academia and local and international

³⁸ Global Centre for ICT in Parliament. World e-Parliament Framework 2010-2020.

³⁹ C. Smith, above n. 26.

⁴⁰ Start & Hovland, above n. 20.

⁴¹ See Z. Nxele, Z. Phakathi, S. Duma & N. Mpondi, *Parliamentary Institutes as Centres of Excellence for Capacity Development, Research, Training, Knowledge and Information Management – Prospects and Challenges: A Literature Review and Lessons from Kenya and Uganda*, KwaZulu Natal Legislature.

NGOs are some of the entities that provide evidence and the necessary critical appreciation on draft policy and legislation and its likely impact. Collaboration in research involves a partnership, alliance or networking, aimed at a mutually beneficial clearly defined outcome based on trust and cooperation.⁴² The extent to which Africa's parliaments depend on these entities remains a question. The collaboration between the Boston University School of Law and African Parliamentary Knowledge Network, which involves Law Clinics designed to assist African parliaments draft and enact more effective legislation by using an elaborate research methodology as a springboard, is one such opportunity. The Parliament of Uganda has a collaborative arrangement with the Uganda National Academy of Sciences (UNAS), the Members of Parliament (MPs)-Scientists Pairing Scheme which seeks to:

- help scientists recognize the potential methods and structures through which they can feed their scientific knowledge to parliamentarians and the Government of Uganda;
- provide an opportunity for MPs to forge direct links with a network of practising research scientists;
- give MPs the opportunity to familiarize themselves with the process of scientific understanding and topical research and ultimately bring this new knowledge into better informed discussions and policy decisions; and
- help practicing scientists understand the pressures under which MPs operate.⁴³

In addition, the Parliament of Uganda has a robust outreach and collaboration programme through which the following are executed:

- a parliamentary research and internship programme,
- participation in a number of parliamentary fora such as the Uganda Women's Parliamentary Association (UWOPA), the Parliamentary Network on the World Bank Uganda Chapter (PNoWB), Uganda Parliamentary Forum for Children (UPFC); the Great Lakes Parliamentary (AMANI) Forum, African Parliamentarians Network Against Corruption (APNAC), Parliamentary Forum for Climate Change (PFCC)-UGANDA and the Association of Parliamentary Libraries in Eastern and Southern Africa (APLESA);
- collaboration with international organizations and parliamentary associations namely, AWEPA is an *Association of European Parliamentarians for Africa* that

⁴² Gov. of Australia (Department of Education, Science and Training), *Review of closer collaboration between universities and major publicly funded research agencies*, (Canberra: 2004), available at ncris.innovation.gov.au/Documents/Res_Collab_Rev.pdf.

⁴³ I. Rugambwa; *Enhancing Democracy and Good Governance*, "The Role of Parliamentary Library and Research Services, World Library and Information Congress", 76th IFLA General Conference and Assembly, 10-15 August 2010, Gothenburg, Sweden.

works for democratization and respect for human rights through supporting the functioning of African Parliaments and the World Bank Institute;

- Partnership with Academia and Civil Society Organisations (CSOs) as well as the National Library of Uganda and the World Digital Library.⁴⁴

Another Africa-wide collaborative not-for profit network is the Africa Economic Research Consortium (AERC), which has research⁴⁵ and training components that bring together 27 universities⁴⁶ in 20 countries, to support a commonly agreed programme of research activities, its dissemination and the training of future potential researchers, that emphasizes the quality and policy relevance of the research.⁴⁷

The role of local, regional and international non-governmental organisations is crucial as some conduct research and analysis in many policy areas, produce reports with policy recommendations, for use in their advocacy, exchange knowledge and good practices, often serve as early warning mechanisms and help monitor policy implementation.⁴⁸

Legislative bodies and policy makers and governments would benefit from interaction with institutions of tertiary education or higher learning to influence the research agendas of these bodies. In effect, it is expected that such interaction would result in the publication of dissertations and theses that provide the relevant information that legislators and policy makers can depend on during the legislative process. This involves encouraging participation in or developing partnerships with academia and credible research institutions

⁴⁴ Ibid. Also see Rugambwa, above n. 24.

⁴⁵ The research entities include: the Economic and Social Research Foundation (ESRF) – Tanzania; Economic Policy Research Centre (EPRC) - Uganda ; Centre for Policy Analysis - Ghana ; Trade and Industrial Policy Secretariat (TIPS) - South Africa ; Macro Economic and Financial Management Institute (MEFMI) - Zimbabwe ; Centre de Recherche en Economie Applique (CREA) - Senegal ; Institute of Statistical , Social and Economic Research (ISSER) – Ghana; Nigerian Institute of Social and Economic Research (NISER)- Nigeria; National Centre for Economic Management and Administration (NCEMA) – Nigeria; Programme de Troisième Cycle Inter-universitaire en Economie (PTCI) - Burkina Faso; Botswana Institute for Development Policy Analysis (BIDPA) – Botswana; South African Trade and Research Network (SATRN) – Botswana; the Namibian Economic Policy Research Unit (NEPRU) – Namibia; Kenya Institute for Public Policy Research and Analysis (KIPPRA) – Kenya and the Centre Ivoirien de Recherche Economique et Sociale (CIRES) - Côte d' Ivoire.

⁴⁶ The universities include: University of Benin (Nigeria); University of Botswana ; University of Cape Coast (Ghana) ; University of Cape Town (RSA) ; University of Cocody (Cote d'Ivoire) ; University of Dar es Salaam (Tanzania) ; University of Ghana ; University of Ibadan (Nigeria) ; University of Liberia ; University of Namibia ; University of Nairobi (Kenya) ; University of Malawi ; University of Mauritius ; University of Swaziland ; University of Sierra Leone; University of Witwatersrand (RSA) ; University of Yaounde II (Cameroon) ; University of Zambia ; University of Zimbabwe ; Addis Ababa University (Ethiopia) ; Egerton University, (Kenya) ; Eduardo Mondlane University (Mozambique) ; Kwame Nkrumah University of Science and Technology (Kumasi, Ghana); Kenyatta University (Kenya) ; Moi University (Kenya) ; Makerere University (Uganda) and the National University of Lesotho.

⁴⁷ <http://www.aercafrica.org/about/network.asp>.

⁴⁸ United Nations Rule of Law Unit, “Non-governmental organisations”, available at http://www.unrol.org/article.aspx?article_id=23.

to guarantee a steady flow of relevant information which policy makers and legislative bodies require. The kind of information that is necessary includes:

- assessments of events or conditions; arguments and critical analysis or arguments;
- review of policy options and technical analysis of the options; specialised topic reports; investigative reports;
- summaries of laws germane to the issue; legal counsel on interpretation of laws;
- summaries of expert opinion, of public opinion, and of political advocacy.⁴⁹

There is need to use information providers in order to build up a body of evidence, and such information providers include experts (representing subject knowledge), advocacy and stakeholder groups (representing organised interests), legal counsel (representing rules and procedures), other officials and associations of elected officials (representing politics), and citizens (representing the opinion or experience of individuals or groups).⁵⁰

Some parliaments have already established the practice of soliciting public comment and contributions to the legislative process. A survey on a number of parliamentary websites shows calls for submissions and invitations to public hearings. Legislative committee hearings across all legislatures tend to be a key mechanism through which researchers' voices can be heard in the processes of law-making and oversight.⁵¹ In parliamentary committee meetings, involving smaller groups of Members of Parliament, experts can also be called to committee meetings allowing Parliament to apply skills that cannot be utilized during plenary sessions.⁵²

A number of think tanks share draft policy and make comments or provide requisite feedback, which gives an opportunity for policy makers and legislative bodies to have the necessary information to inform the process, opening the law-making process to even more public participation. Requesting comments on proposed committee action in the legislative process is very rewarding. Informed, accurate and well-argued positions are very helpful in facilitating the committee process. This outreach must be strategically planned-taking into consideration timing and audience, among others. Circulation of policy briefs to stakeholders for their comments and input provides an example of how evidence is generated and shared to assist regulators and policy makers.⁵³

⁴⁹ Smith, above n. 26.

⁵⁰ Ibid.

⁵¹ Datta & Jones, above n. 23.

⁵² See National Democratic Institute for International Affairs, "Committees in Legislatures-A Division of Labor", Legislative Research Series Paper #2, available at http://www.ndi.org/files/030_ww_committees.pdf.

⁵³ C. Stork and T. Vetter, "Using ICT research to assist policy making and regulation: the case of Namibia" (December 8, 2009), 4th Communication Policy Research, South Conference, Negombo, Sri Lanka, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1553666.

In 2006, research products of Research ICT Africa⁵⁴ in combination with multiple communication strategies were used to assist regulators and policy makers in making informed decisions and led to market liberalization and legislative and regulatory reform in Namibia. The evidence was gathered through household and business surveys, sector performance reviews and telecom regulatory environment assessments.⁵⁵ The Research ICT Africa Network conducts research on ICT policy and regulation that facilitates evidence-based and informed policy making for improved access, use and application of ICT for social development and economic growth. It provides African researchers, governments, regulators, operators, multilateral institutions, development agencies, community organizations and trade unions with the information and analysis required to develop innovative and appropriate policies, effective implementation and successful network operations that can contribute to sustainable development. The network will contribute to the gathering of up to date ICT data and establish repository of information for furthering research and policy formulation. The programme will promote interaction between researchers and their peers at national, regional and international levels to harmonize methodologies, tools and standards for conducting public-interest ICT policy research.⁵⁶

These are all examples of practical ways in which legislative counsel and researchers can utilise external sources of information to provide additional information to parliamentary bodies during the debates.

Lastly, a strategy of knowledge management where staff are required or encouraged to research and write on areas relevant to their work ensures that knowledge is compiled and in one way or another contributes to gathering of evidence that may support legislative interventions. This goes towards a greater aspect of an organisation developing and maintaining a sustainable knowledge management system.

Conclusion

It is an undeniable fact that African parliaments and governments, individually and collectively, stand to benefit from an enhanced legislative research programme. To build

⁵⁴ The network is operational in Benin, Burkina Faso, Senegal, Cote d'Ivoire, Ghana, Nigeria, Cameroon, Namibia, Botswana, Tunisia, Ethiopia, Uganda, Kenya, Rwanda, Tanzania, Zambia, Mozambique and South Africa.

⁵⁵ The example the role of Research ICT Africa in facilitating evidence-based policy making and regulation in Namibia is very informative. It was important to translate this research into useful information and advice for policy makers and regulators by working with journalists providing strategic information to the private sector, researching issues for the regulator and maintaining impartiality. Research results were communicated through various channels, from academic research reports, books, articles in magazines and periodicals, contributions to reviews, policy briefs, media interviews, and information provided for parliamentary training sessions and presentations at workshops.

⁵⁶ Research ICT Africa Network: <http://www.researchictafrica.net/about.php>.

effective legislative institutions, an integrated approach is necessary.⁵⁷ The challenge remains in how the numerous stakeholders can prevail over the numerous limitations and take advantage of opportunities to ensure that more evidence-based legislation is enacted while at the same time safeguarding the autonomy of the legislative bodies and local ownership of policy and legislation. In most cases, the bare minimum of required resources is available and with some adjustments in work process priorities, the speed of reforms and adjustments can be handled.

While legislative counsel cannot fully take on the role of policy analysts and researchers, their ability to appreciate pertinent aspects of the policy options surrounding a draft Bill remains crucial to drafting evidence-based and effective legislation in Africa.

⁵⁷ See Inter-Parliamentary Union, "Parliament and Democracy in the Twenty-First Century: A Guide to Good Practice - An effective parliament: The national level" (2006), available at <http://www.ipu.org/dem-e/guide/guide-6.htm>.