

**Boston University**

**OpenBU**

**<http://open.bu.edu>**

---

Seidman Research Papers

Workshops, Notes and Papers

---

# Comments on the Research Report Concerning the Legislative Drafting Act

---

<https://hdl.handle.net/2144/34846>

*Boston University*

## COMMENTS ON THE RESEARCH REPORT CONCERNING THE LEGISLATIVE DRAFTING ACT

-oOo-

1. **Form and structure.** (a) **Structure.** (i) In general. The form of the report does not follow the problem-solving methodology; mainly, it omits the 'Explanations' section. Instead, it puts together in the 'difficulties' section not only the difficulties, but some of their explanations. For example, you state as a 'difficulty' that Bhutan now has no formal set of rules. True; but surely that is part of the explanation for the perceived problems in getting drafting accomplished. The result is that your report has no separate section entitled 'explanations' and hence no systematic search for causes (such as the ROCCIPI agenda attempts to provide); and therefore, you can have no assurance that you have considered all the possible causes of the existing problematic behaviours which your solution must overcome.

(ii) Introduction and conclusion to the Report. Your second paragraph, p. 1, summarizes the paper, but not really accurately (the paragraph says that "Second, the Research Report discusses the causes of these problematic behaviours."). No such discussion appears in the paper; you jump directly from difficulties to proposed solutions. Either in this paragraph or in a succeeding one, you should also briefly describe the methodology used. In a revised version which contains an 'Explanations section, you should tell the reader why you use the problem-solving methodology: It ensures that your proposed solutions rests on logic and facts (reason informed by experience). Why do you begin with the social problem (or difficulty)? Why will the Report discuss explanations? Your report should tell the reader about that very briefly. --

You have not provided a general conclusion at the end of the entire report. You should, for that will enable the reader to understand how, given the available facts and logic, the report demonstrates that your proposed solutions seems the best possible.

(iii) Mini-introductions and conclusions. The major sections need both mini-introductions and conclusions. The mini-introduction tells the reader what to expect in the section, and ties the material to be presented into the general logical structure of the problem-solving methodology. The mini-conclusion summarizes what has been said in the section, and leads into the following section.

(b). Sentences. See comments in purple ink on pp. 1 and 2.

2. **Research.** As can only be expected at this stage, the report lacks much factual evidence. For the final research report, you should collect as much additional information as you can find. Anecdotal evidence -- for example, description of particular cases -- serves better than no evidence at all. A few horror stories about bills that get badly drafted, or never get drafted, or get drafted ridiculously by foreign so-called 'experts', would help the reader understand the need for the bill.

The following comments relate to further details relating to the logic and facts you have included in specific parts of the Report.

3. **Introduction.** See comment on the last paragraph of the Introduction above. You probably should include here a brief statement of where this bill fits into the larger problem confronted by Bhutan, i.e., the importance of creating a legal order and developing the rule of law in a country with a tradition of governance that did not include much formal law. As Bhutan enters the 'global village,' an adequate legal framework will help to strengthen the benefits to all citizens, while reducing the dangers of arbitrary decision-making, and especially corruption, which have plagued other countries.

4. **Difficulty.** As noted, as written, your difficulty section includes explanations and difficulties all mixed together. You might try to follow the suggested outline, MANUAL, Chapter 4, pp. 35-36. That prescribes that after the mini-introduction, you should describe the *superficial manifestations* of the difficulty -- here, the difficulty Bhutan confronts in getting bills and regulations drafted, the lack of prioritization, overlapping and inconsistent laws, the difficulties in translating them, and, apparently, the absence of participation, transparency and accountability in the drafting process.

You do discuss whose and what behaviours comprise these difficulties, but very sketchily. Here, you should include a careful, detailed description of how, today, ministries get bills drafted, prioritized and translated. Do not simply say 'the ministries' behave in this way. Every ministry consists of many officials. In some ministries, there exist legal divisions; what do these divisions now do in connection with drafting? In other ministries, who does the drafting? How are foreign consultants selected? etc. You do not discuss really discuss the difficulties the High Court encounters in the legislative process, but only state that its members 'review' the bills. What do they review the bills for? legal consistency with other laws? Adherence to the rules of drafting? Sound substance? What difficulties do they experience in carrying out these tasks?

**5. Explanations.** As mentioned, these presently appear jumbled together with the difficulties. For example, you state in para. 1, p. 1, that "The High Court is involved in reviewing the bill. . . ." In Para. 6 you state that the present system produces 'inconsistent' bills. You explain that in para. 9, in terms of the time available. (Here you surely need some estimate of the percentage of a judge's time spent in reviewing bills).

In this section, it would help if you systematically consider the ROCCIPI categories to think of all the hypotheses ('educated guesses') they suggest to explain each set of role occupants' problematic behaviours, and include at least the more significant ones in the Research Report.

Rule: You state that there exists no formal set of rules. Today, does any law at all control the drafting process? However insufficient, some rules -- either written or by convention -- probably do control the process. For example, some convention or rule seems to require the ministries to forward their bills to the High Court for review. Otherwise, why would the judges spend their scarce time reviewing them? In the same way, do any rules require ministry officials to prepare initial instructions for drafting bills? or hire consultants? Do they have complete discretion in deciding what or who should prepare bills? For each set of role occupants, you should try to find out what existing rules -- in writing or by convention -- determine how each set of role occupants behaves in preparing legislation.

In the context of the 'cage of rules' that shape the relevant role occupants' behaviours, you should examine all the interrelated non-legal factors that influence the way each set behaves. For example, just to take the ministry officials as one set of role occupant:

Opportunity and capacity. You only state that some ministries lack legal divisions, some lack lawyers. You state nothing about the capacity even of the ministry officials (legally-trained or not) to draft. Have any received any kind of training in legislative theory and methodology? in the techniques of drafting unambiguous, clear bills? You state nothing about the capacity of line ministry officials to design legislation likely to ameliorate perceived social problems, or try to explain why the line ministries do not carry out necessary social science research. You say nothing about the lamentable quality of some of the foreign consultants ministry officials seem to choose, some of whom do not even know how to write a competent legislative sentence. (Explaining those ministry officials' problematic behaviours in this kind of detail suggest the kinds of detailed measures your bill will need to include to ensure they behave more effectively to ensure the drafting of better bills.)

Communication. Probably this will not suggest fruitful hypotheses; it will likely remain an 'empty box'. As noted above, there exists precious little law to communicate to

officials; they probably do know what conventions -- sometimes contradictory, and in any case giving them much discretion -- now exist.

Interest. You say nothing about incentives for officials assigned to drafting projects. Must they undertake drafting in addition to their regular work? In annually evaluating their overall work, do their superiors take into account the quality of their drafting efforts?

Process. You describe the drafting process, but only very sketchily. If you examined the actual process as it exists you probably will find that the drafters receive very few inputs from affected parties or even knowledgeable officials; and that the conversion processes are sadly insufficient (for example, foreign consultants do the drafting (the conversion process of deciding what to include in the bill)). The drafters probably deliver it to the Ministry with no real explanation of its details, which means neither the Minister, the Cabinet nor the legislators have the necessary facts concerning Bhutan's unique circumstances, to assess whether the bill will likely resolve the social problem it seeks to address.

Ideology. Why have ministries so far done so little about developing stronger drafting procedures? Do they all understand the necessity for introducing an adequate legal structure to solve the emerging problems imposed by Bhutan's entry into the changing 'global village'?

Likewise, you need to examine the detailed causes suggested by the ROCCIFI agenda to explain the problematic behaviours of the other relevant role occupants: The High Court? The Ministry officials' behaviours in deciding which bills to draft, and how to get them drafted? etc.

Only when you *systematically* analyze detailed causes of each set of relevant role occupants' specific problematic behaviours involved can you come up with *the bill's detailed* measures required to alter or eliminate those causes, thus facilitating those role occupants to behave in more desirable ways.

**6. Solution.** This section also should follow the Outline set out in Chapter 4, pp. 37 ff. First, you should list some alternatives -- for example, these might include:

- \*placing the new drafting office (CDO) under the Cabinet rather than the Legislature;

- \*placing the skilled drafters in the CDO rather than in the line ministries' legal divisions;

- \*creating drafting groups for specific bills with CDO drafters and line ministry officials working together;

\*requiring research reports to justify bills and to keep the legislature and the CDO and the Cabinet informed about the facts upon which a bill rests.

Second, you need a much more detailed description of your preferred solution.

Third, you need to demonstrate that the measures included in your bill will overcome the causes of the problematic behaviours you have described in the explanations section. (That is, you need a 'reverse ROCCIPI' analysis). For example, your preferred solution needs to include measures to improve drafting capacity in the CDO and the ministries. It should specify detailed steps for improve the process by which an idea emerges as a bill. It should show that the CDO will have the capacity adequately to review bills. In other words, looking at each of the causes of the problematic behaviours of each set of relevant role occupants, you need to show that the bill will deal with them.

Fourth, you need a social cost-benefit analysis of your proposed bill's measures, including the costs and benefits of institutionalizing an on-going training programme to strengthen officials' drafting capacity.

Fiftrth, you need a social impact statement. It should weigh the socio-economic costs: the costs of introducing an effecting legislative drafting training programme, of requiring that drafters accompany their bills with research reports that provide the facts legislators need to assess the bills' likely impact, and so forth. Against these costs, the solutions section should summarize the main benefits to the legislative process in terms of their improved capacity and the strengthening of the rule of law; and how all these may contribute to ensuring more equitable treatment of the vulnerable elements in the population.

7. Your last section is labelled "Justification". The logic of problem solving holds that the difficulty-explanation-solution agenda itself constitutes the outline of the justification for the bill. For example, some of the items in your 'Justification' sections are really cost-benefit analyses of sorts; they belong better in the Solutions section than in a separate section entitled Justification -- which has no perceivable organized plan, but rather a series of justifications that occurred to the author. Better by half to follow the prerscribed outline.

**Conclusion.** Without *detailed* descriptions of the behaviour that comprises the difficulty, and *detailed* explanations, it is difficult to come up with *detailed* proposals for solution. Considering the very short period you had to work on this, it is not a bad start -- but it needs considerable work.