

면지

Preface

November 15, 2018

The Korea Legislation Research Institute (KLRI), the only government-funded research institute established in the Republic of Korea especially for legislative research so as to assist the government in formulating national legislative policies and promote the improvement of juristic culture, has been analyzing and introducing various legislative theories and practical studies that have been discussed in other countries while proposing practicable legislative alternatives.

The International Association of Legislation (IAL), which held an international conference jointly with the KLRI, is an academic society established under the banner of “good law as the basis for liberty and prosperity.” The purpose of the association is to strengthen global cooperation in order to improve legislation around the world. Its members are mainly academic associations and groups in Europe and North America. In Asia, the KLRI is the first and as of yet, the only member of the IAL. Every year legislation experts from the member organizations gather at the IAL conference to present and discuss the research outcomes of legislative improvement. In addition, these professionals are actively contributing to legislative development in their countries.

In 2014 jointly with the IAL, we at the KLRI held an international conference with the theme of “Innovation of Legislative Processes” for the first time in the Asian region, as part of our programs for evaluation and research on legislation. The 2014 international conference served as a venue for international research exchange among the legislation experts from Korea and eleven other countries including the Netherlands, Sweden, Germany, Britain, Australia and the United States. During the conference, they shared the experiences and achievements in improving legislative processes to be more transparent



Innovation of Legislative Process

and reasonable, and discussed future directions. Based on the discussions made at the forum, we might see various implications in the qualitative takeoff for evaluation and research on legislation in Korea and in the improvement of legislative procedures as well.

This book contains extended and revised versions of the papers presented at the 2014 international conference. We sincerely hope that this book will benefit academic exchange among experts and researchers in the field of legislation around the globe as well as the efforts of each country in improving its legislative process.

November 2018

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Innovation of Legislative Process

01.

Advanced tools
for legislation

Timothy Arnold-Moore

01 Advanced tools for legislation

*Dr. Timothy Arnold-Moore**

Exploring the possibilities and limitations of advanced tools for editing and managing legislation.

I Introduction

Collections of legislation contain some of the most important documents in any country. The nature of legislative drafting processes and the documents they result in create requirements for unique and specific sets of tools for managing and publishing them. The characteristics of the drafting and enactment processes, the documents produced by them, the financial and intangible benefits of improving the drafting and publishing processes, and the availability of legislative material justify a significant investment in such purpose-built tools.

The fact that the legal community benefits most directly from delivering better publishing outcomes does not undermine the broader community benefit of such an investment:

“It cannot be doubted that dissemination by publication of accurate copies of statutory enactments is beneficial to the community as a whole; and this is not the less so because at least in many

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instances the ordinary member of the public either does not attempt to, or cannot by study, arrive at a true conclusion of their import, or because the true understanding is largely limited to persons engaged professionally, or as public servants in the field of any particular enactment or otherwise interested in that field ... To state that the publication also provides many professional men with the tools of their trade does not seem to me in any way to detract from the benefit that accrues to the community from the fact that the law does not remain locked in the bosom of the Judiciary.” per Russell LJ *Incorporated Council of Law Reporting for England and Wales v. A-G* [1992] Ch 73; [1971] 3 All ER 1029, 1034.

This paper seeks to demonstrate the desirability of such tools, describes a number of such tools, and the benefits that they can provide to both drafting offices and consumers of legislative material. As a commercial provider of such tools, I must declare something of a conflict of interest here. However, the views in this paper borrow widely from others within the legislative drafting community, broader government policy positions, and legal academia.

II Objectives for IT systems supporting drafting and publishing legislation

Why legislation is different

A legislation drafting and management system on the face of it looks like a typical office document authoring, management, and delivery application. But there are a number of factors related to legislation that distinguish it from typical office environments. These include:

- **Time factors:**

- **The longevity of the documents:** Some legislation being managed today was drafted hundreds of years ago – portions of the *Magna Carta* (1215) are still part of the law in many English-speaking countries. By contrast, most office documents are created for immediate use. Few are retained for more than a year or two.
- **Frequently amended:** The vast majority of legislation made is amending legislation –

that is, the wording of the legislation describes textual changes to existing legislation. While these amendments have the force of law, users of legislation care more about the wording that results from applying the amendments to the existing substantive provisions (referred to as “consolidating” the amendments, hence the term “consolidation” to describe these documents) than the actual text describing the amendment. As a result, there are often multiple versions of the substantive legislation with a series of versions each valid at a different time. Users of legislation require immediate access to the most current consolidation of a piece of legislation, but they also need access to past versions – when preparing legal advice or hearing a case about a past incident – and, to the extent possible, future versions – when preparing advice about future activity. Office documents rarely exist long enough for anything but the latest version to be of interest. The time period of validity of most office documents is rarely as clearly defined as for legislation.

● **Nature of documents:**

- **Consistent naming and formatting:** Legislation in most English-speaking jurisdictions, follows largely the English tradition breaking Acts into numbered sections, subsections, paragraphs, and subparagraphs each with distinctive numbering conventions, typographic markers, and consistent nomenclature (known as “paragraphing”), and grouping the sections into chapters, parts, subparts, divisions, subdivisions, and under various unnumbered or unnamed headings. While some of the typographic markers have changed subtly over the years and vary from jurisdiction to jurisdiction, the structure is largely unchanged and remarkably uniform across most English-speaking jurisdictions. Civil law jurisdictions have a little more variability, but the concept of Articles broken up into sub-articles, clauses, and paragraphs, or grouped in parts and chapters is common to most civil law jurisdictions. Office documents vary much more widely in structure both within a corpus and between corpora.
- **The importance of the documents:** The documents recording the legislation of a country are amongst the most important documents in the land. This importance justifies

particular care in ensuring the highest quality of print production when rendering the documents. The main driver for office documents is efficiency. Providing that the documents look sufficiently professional, minor variations in typography can be overlooked. While efficiency and timeliness are important for legislation, presentation is particularly important and variations in typography, however small, may be noticed and trigger unnecessary delays in the legislative process. This leads to a justified culture in drafting offices of exacting standards and a focus on minute detail.

- **Time pressures placed on the drafting offices:** While the predictability of a legislature varies from jurisdiction to jurisdiction, and parliament to parliament (sometimes depending on election results within a jurisdiction), most drafting offices have periods when they are working on an urgent draft right up until tabling in the legislature. Committees may work on amendments and these amendments need to be consolidated so that the Bill for third reading can be presented very quickly. The results of amending legislation need to be available as soon as possible after enactment, making, or commencement. Therefore, drafting offices are under considerable pressure to prepare paper and electronic versions of a Bill or Act very quickly.

- **Nature of the creation process:**

- **Highly regulated enactment process:** While the exact process of enactment varies between monarchies and republics, bicameral or unicameral legislatures, legislative traditions, and between regulation and legislation, the common thread is that legislation only comes about if the required procedures for making it are followed. Until then, it is merely a wish of its sponsor. Many drafting offices also have a formal internal sign-off process to ensure quality before documents are sent out of the office to the legislature or government departments.
- **More fluid drafting process:** By contrast, the initiation of a drafting project is often quite informal. In Westminster governments, government Bills often require Cabinet approval to begin drafting or to table a Bill. Typically, a request for a draft regulation is less formal. Even in jurisdictions requiring Cabinet approval to draft, the process may be

initiated in anticipation of receiving that approval. Instructions may be received once or continually during the drafting process with drafts flowing out, instructions (and possibly proposed drafts) flowing in. Different drafters may work on a project at different times or be called to review some or all of a draft. Significant flexibility is required during the stages leading up to tabling for enactment.

- **The unique relationship between the drafters and the legislature:** The drafters provide legal advice to the legislature and owe fiduciary duties, including a duty of confidence, to their clients – the sitting members, the Ministers, and their staff. The documents, while being drafted, are highly confidential and may contain politically sensitive (and occasionally militarily sensitive) information. Once the drafts are tabled, they are public documents. In a normal office environment, most documents either stay sensitive throughout their life cycle or are designed from the beginning for public distribution.
- **Split functions of drafting offices:** Drafting offices such as Parliamentary Counsel or Legislative Counsel have existed for many years solely to draft bills and associated material and regulations and other subordinate legislation for the government. However, there is an increasing and logical trend for such offices to take over the role historically taken by a government printing office of publishing legislative material. Such offices are uniquely positioned to maintain many of the products useful to the broader public for its own internal use (including up-to-date consolidations required for preparing amendment Bills or draft Regulations). A culture of providing a discrete and largely confidential service to the Government does not always sit well with the more public service of publishing.

Resulting internal considerations for legislative tools

Since the structure of documents is regular and both the documents and the structure are long-lasting, a significant investment in tools to create and manage legislation is more easily justified than with most office documents. This investment can take the form of:

- purchasing specialized licensed software,

- customizing that software for particular tasks,
- migrating from one format to another (and the resulting checking of that data required), and
- the investment in training staff to use the new tools (with the inevitable dip in productivity immediately after such tools are introduced).

If an office drafts 100 Bills and 1000 subordinate instruments in a year, a tool that can save 1 hour in the preparation time of each document has a fairly simple cost-benefit analysis. Saving an hour of the legislature's time saves the cost of the legislature salaries and those of all their support staff and infrastructure along with the lost opportunity cost of what might have been achieved with that hour on some other useful project. Saving a week or a day or an hour in making a consolidated Act available to the public is much harder to measure in financial terms, but ready access to timely legislative information can significantly reduce the costs and improve the timeliness of the provision of legal services. I'll leave a formal analysis to the economists, but the cumulative cost of maintaining up-to-date paper libraries of legislation in government departments, law libraries, and legal offices in a small jurisdiction such as Tasmania was conservatively estimated at well over \$5 per person living in the jurisdiction per year. Clearly, a significant investment in high-quality tools to support the legislative process and deliver legislation and related materials to the widest possible audience in a timely manner is justified.

With a large number of drafting projects typically managed by a drafting office with complex stages and strict quality assurance and legislative processes, it becomes necessary not only to perform all of the required steps, but also to prove after the fact that those steps were followed. The value of this governance in financial terms is hard to quantify, but an efficient and effective workflow management system and archiving process can reduce the cost of compliance to a drafting office significantly as well as improve their standing with their constituents.

Tracking each and every process also facilitates better management practices within an office as management can more easily monitor the work-load on staff and better distribute and prioritize tasks to ensure the most efficient delivery of their services. In jurisdictions where individual members consume government drafting resources or government departments are

required to account for the burden they impose on the drafting resources, such tracking allows management to 1) quickly determine (and manage) overly demanding clients, 2) account for costs, and 3) justify changes in resourcing.

Resulting external considerations for legislative tools

External considerations for legislative tools are typically grouped around either:

- **Governance:** ensuring the right steps are followed by the right people and proving that they have been after the fact; or
- **End user demands:** availability and suitability of the legislation for different uses and purposes.

The value of governance and business process tracking or workflow management extends well beyond the office also. The legislature and the legal system also need confidence that the legislative materials they are dealing with are correct and up-to-date. The ability to demonstrate that correct processes were followed to create legislation, apply amendments, and make them available is of significant value beyond the drafting office.

End users often request (or demand) additional formats, information, or metadata related to legislative documents. This often requires a change in the underlying source format of the legislative documents. The importance of the documents creates an impediment to changing the format of the documents. Every time the source format of the document collection is changed, the results have to be checked. The cost of this checking depends on the degree of change. Migrating from one version of Microsoft Word to another may require little checking of the document contents, but may involve significant changes to macros and other customizations. Migrating from paper or pre-existing electronic formats to XML requires significantly more effort to migrate, but has the advantage that further data migration is unlikely to be required in the foreseeable future. A proprietary format, such as a native word processor format, requires update when there are changes to the software version, software component, or house style for formatting the legislation. By contrast, a structured XML format

is independent of the software version or software component used for the relevant task, be it authoring or formatting the legislative documents. Changes in formatting across the entire collection can be managed largely with changes in the stylesheet sets (that define the formatting of particular structures within the legislation collection). Such a migration also “future proofs” the data collection as new stylesheets can be added to generate the next desired format whether it be the latest version of a popular word processing package, the latest new enhanced HTML, or formats for new devices such as eBooks which may not have existed when the data was originally migrated.

Potentially onerous tasks for drafting offices

External consumers of legislation often wonder why more isn’t done with these high-value documents by the legislative drafting offices. While I have written about constitutional reasons for avoiding some categories of “value adding” by particular government offices elsewhere¹⁾, I suspect the reasons are more mundane and obvious.

Data migration is hard and expensive in any context.²⁾ In addition, because of the importance of the documents, it is also more resource intensive in a legislative environment. The converted results of legislative documents require extensive checking against the original or, input, documents. This review process is required when systems are updated or prior to publication.

Subject classification of legislative documents is extremely useful to consumers of legislation, particularly those with limited familiarity with the corpus. While it supports a conventional “browse by subject”, it can also be used to support faceted browsing of search results³⁾ and to create usable subsets of legislative materials for use by particular government departments or user communities.

Cross-references to other provisions within a legislative document, other documents, or

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- 1) Arnold-Moore, T “Public access to legislation and the democratic process” [2004] 5 *RegelMaat* 162.
 - 2) Ebrahim, Z & Irani, Z “E-government adoption: architecture and barriers.” (2005) 11 *Business Process Management Journal* 589.
 - 3) See Arentz, W, *Searching and classifying non-textual information* 2004 Doctoral Thesis, Norwegian University of Science and Technology; Arentz, W “Multidimensional visualization and navigation in search results” (2004) 3213 *LNCS* 620.

provisions within the legislative corpus are common.⁴⁾ Ideally, these links will be marked appropriately in source documents so that web navigation of the legislation collection supports hypertext link behavior corresponding to the cross-reference wording.

Government is eager to be seen as reducing the regulatory burden on business and citizens.⁵⁾ This leads to a need for governments to monitor progress in increasing the efficiency of or reducing regulation. One way of reporting this progress is to simply count pages of regulation by department or agency and score them on reducing the page count. Other, more sophisticated, methods count regulatory complexity. This task is often pushed to the legislative drafting office as they manage a complete collection of the regulations and have the most immediate knowledge of changes in the collection. Regardless of the method used to measure regulatory complexity, some effort is required to classify which regulations are managed by which agency and to compile the measures across the regulations.

To summarize how these tasks are onerous on a drafting office:

- **Creating numerous formats at time of publication:** While it is desirable to make a wide variety of formats available for government and public consumption (including HTML for easy browsing on electronic tools, PDF for faithful reproduction of authorized paper publications, XML for longevity and future formats, and eBooks for tablet and smartphone delivery), labor intensive processes to create them at crucial times are difficult to justify.
- **Adding subject metadata to documents:** Assigning a controlled or open vocabulary of subjects to legislative documents (or provisions within them) is a complex manual task

⁴⁾ See Arnold-Moore, T *Information systems for legislation* 1998 Doctoral Thesis, Royal Melbourne Institute of Technology, s. 2.2 citing Corbett, M "Indexing and searching statutory text" (1992) 84 *Law Library Journal* 759; Hoey, M "The discourse properties of a statute" in Walter, C *Computer power and legal language* (1988), Quorum Books: New York; Turtle, H "Text retrieval in the legal world" (1995) 3(1) *Artificial Intelligence and Law* 5.

⁵⁾ See Gore, A *From red tape to results: creating a government that works better and costs less* (1993) National Performance Review: Washington; Keyworth, T "Measuring and managing the costs of red tape: A review of recent policy developments" (2006) 22 *Oxford Review of Economic Policy* 260; Lodge, M & Wegrich K "Crowdsourcing and regulatory reviews: A new way of challenging red tape in British government?" (2014) *Regulation & Governance* (<http://onlinelibrary.wiley.com/doi/10.1111/rego.12048>).

typically performed most consistently by highly trained law librarians. To require this analysis to be performed manually by drafting office staff, in addition to all of the other tasks that they need to perform in a timely fashion, at the time of tabling or publication is likely to slow the publishing process down or lead to low quality classification of the documents.⁶⁾

- **Encoding cross-references:** In order to support hypertext linking of cross-references in the text, the source format of the legislation (whether it is XML, Microsoft Word, or something else) needs to capture hidden information about the cross-reference such as the identifier of the referenced document and, if a reference to a provision within that document, the identifier of the provision. Managing and updating this markup in a document through the drafting process can be difficult in the face of the renumbering that often occurs when a heavily amended Bill is made into an Act, so this is often left to be accomplished at the time of publishing (if performed at all). Doing this manually can be incredibly resource intensive, again, typically at the time of publication when time is least available.
- **Tracking regulatory complexity:** As documents are added to the collection or amendments applied, legislative drafting offices are often asked to maintain statistics on regulatory complexity or page counts by responsible department or agency. These statistics are onerous to create from scratch but can be incrementally updated as changes are made and published. This creates yet another task at the time of publication for the drafting office.

This is a list of a few of the requested services that I am aware of. Despite the demands to do more, it is hard to require already stretched drafting offices, with significant time pressures, to perform extra tasks particularly at time-critical stages during drafting. The point at which many tasks are requested to be performed on legislation tends to coincide with the time that the drafting office or publishing team are under the most pressure to get material out to the legislature, a printer, or a website. These are the points in the process when time is least

⁶⁾ Although I don't describe the process here in further detail, the NIR project has designed tools to address this problem – see for example Biagioli, C *et al.* "Automatic semantics extraction in law documents" in *Proceedings of the 10th International Conference on Artificial Intelligence and Law*. ACM, 2005.

available and when quality assurance processes are most important. Drafting offices are understandably reluctant to add any complexity or additional tasks at the time of tabling or publication that don't directly reduce the risk of error or improve the confidence in the correctness of the documents.

While all of these tasks can be incorporated into the legislative drafting and publishing environment effectively, careful choice of source format, drafting tools and processes, and targeted investment in customization are needed to make any or all of them feasible without a significant investment in human resources.

Any such additional work imposed for purely publishing purposes needs one or more of the following:

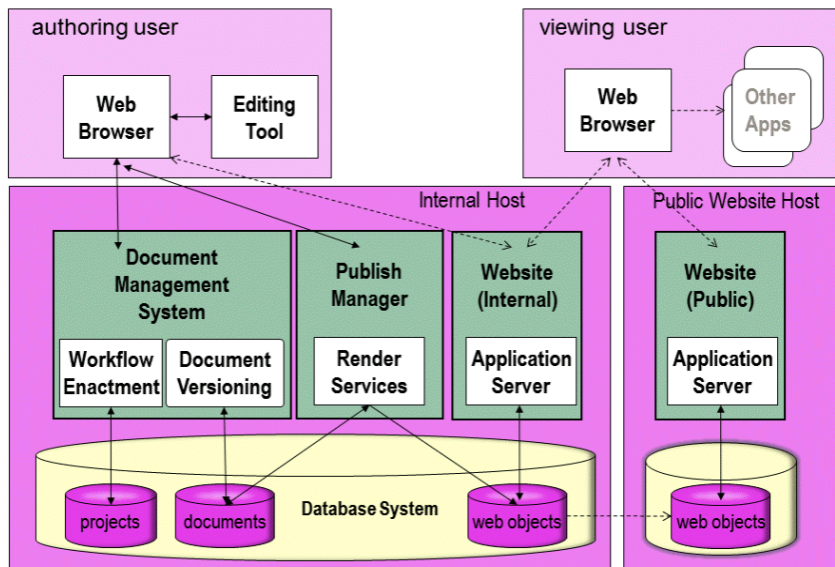
- a champion in the office who sees the value and can convince other staff members that the extra effort is justified;
- a tangible benefit for the drafting office staff – such as time saving for the staff or the office elsewhere in the process; or
- a top-down direction with the appropriate commitment of extra required resources.

The demands, features, and considerations noted above add to the complexity of constructing tools to support legislation drafting and publishing but also justify a considerable investment in such tools. These tools require both unique features and novel development techniques to ensure a lasting and usable system and to meet the demanding requirements of a legislative drafting environment.

III Typical components of an IT system for legislation

Let us consider what components typically make up a system for managing legislative drafting and publication. For this purpose, I am largely ignoring the infrastructure around paper publishing of legislative materials for two reasons. Firstly, any jurisdiction considering a large information technology (IT) project to support legislative drafting and publishing either already has an existing infrastructure for paper publication that can be provided with source documents simply by delivering PDF documents to the existing infrastructure (possibly reducing or re-deploying any existing infrastructure required to prepare the formats of these documents). Secondly, an effective electronic publishing capability can significantly reduce the demand for traditional printed resources⁷⁾ as users can print on demand the versions of legislation they need in paper at a particular time and have all the benefits of interactive browsing and searching of the whole collection for minimal communication costs when a paper copy is not needed. A complete solution needs to consider the print production requirements and manage any change around these processes appropriately.

⁷⁾ The recent scheme to deploy iPads (see *The Telegraph* 2 Apr 2013 “90 MPs get free iPads for working on ‘paperless select committees’”; *The Independent* 27 Aug 2014 “MPs each get through a computer a year. Now they want iPads”; See also “Select Committees becoming paperless offices (2013)” (<http://www.parliament.uk/site-information/foi/foi-and-eir/commons-foi-disclosures/other-house-matters/select-committees-becoming-paperless-offices/>)) has reportedly resulted in huge savings in print costs.



[Figure 1] Typical architecture for legislative drafting and publishing system

Figure 1 above shows the architecture of a typical system to support legislative drafting and publication. Each of these components is described in more detail as follows:

- **Editing Tool:** A tool used by drafters and drafting office support staff to create new draft legislation and update existing consolidated legislation (reprints). In an XML environment, this is typically a structured editor such as PTC Arbortext®ⁱ Editor (used in New Zealand, Canada, and some U.S. states), JustSystems XMetal®ⁱⁱ (used in South Australia, U.S. House, Canada, and some U.S. states), Adobe® FrameMaker®ⁱⁱⁱ (used in New South Wales, Queensland), or $Xygen$®^{iv} (used in some U.S. states). Some jurisdictions use a word-processor based structured editor (some U.S. states), a word-processor with automated translation (Tasmania, Papua New Guinea, Singapore [Microsoft Word], or Ireland [OpenOffice®^v]), or manual translation (not necessarily within the office). Far more common is a purely word processor authoring environment – typically Microsoft Word (as used in Ontario, Victoria, Australian Federal).
- **Document Management System (DMS):** A DMS includes the following components:
 - **Workflow Enactment:** This infrastructure takes formal definitions of work processes

(drafting projects) and presents tasks to drafters and other staff based on the status of each instance or project. Other capabilities typically include reporting (static) and monitoring (dynamic) functions, alerts and escalation (to ensure deadlines are met), and records management/archiving.

- **Document Versioning:** The legislative drafting process is a set of business processes designed to deliver documents. In the process, many versions of the documents are produced and refined before delivering the final version. Once enacted, documents are amended, so a series of versions of in force legislation also needs to be managed.

Typically, a DMS is highly customized with configuration for specific workflow definitions and management of particular versions needed at specific stages in the legislative process (e.g., first reading version, third reading version, copy for Assent, etc.). Typical software used in this environment includes PTC Arbortext Adapter[®] to Documentum^{®vi}, TeraText^{®vii} DMS, or Microsoft SharePoint^{®viii}.

- **Application Server (Website):** Invariably, a large IT project to support legislative drafting and publishing includes either an internal or publicly accessible website or both. This requires an application server to support HTTP requests, provide browse and search logic, and access the various components and different versions of legislation provided by the website logic. This is typically Microsoft IIS or a Java[®]-based platform such as JBoss^{®ix}, WebLogic^{®x} or WebSphere^{®xi} although TeraText provides an application server used widely for legislative websites.
- **Database System:** Most document management systems rely on an underlying database management system either a traditional database system such as Oracle[®], DB2[®], or SQL Server[®], or a NoSQL database system such as TeraText or SOLR[™]. In some cases, the file system provides the database system possibly augmented by a **Search Engine** to support text searching. Different components may use different database systems. The **Workflow Enactment** requires a database to store information about current and completed projects. The **Document Versioning** needs to store document metadata including version information and relationships between versions as well as the document content (sometimes stored

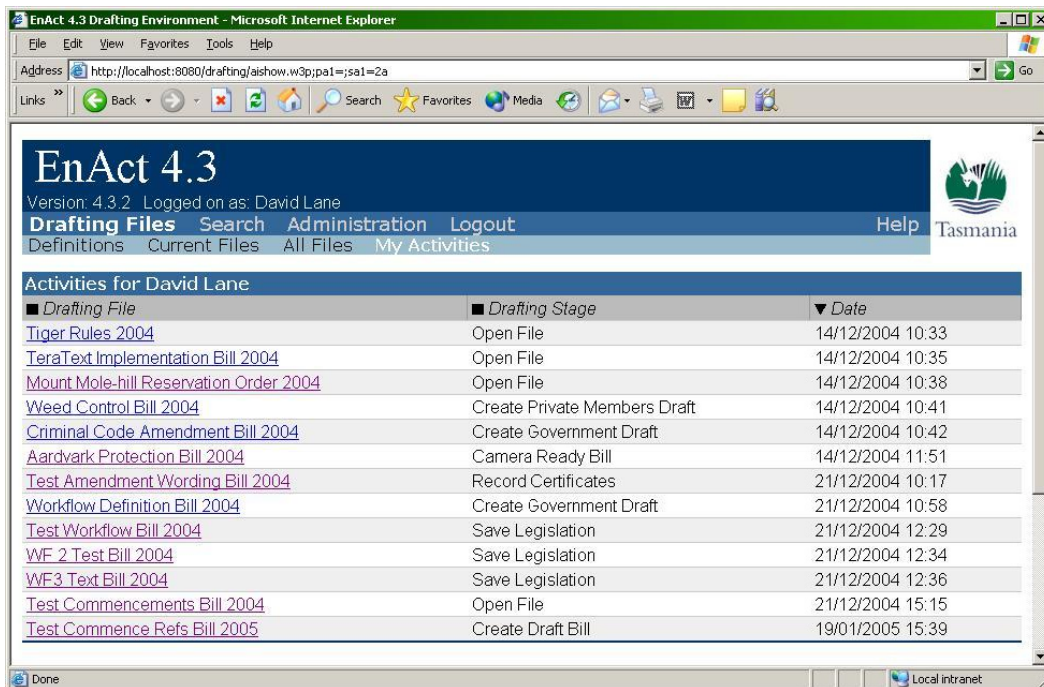
separately on the file system). The **Website Application Server** typically needs a repository of web objects to be delivered to the public – this may access the document version repository directly although this is more commonly a separate repository optimized for web delivery and may also be file system-based.

- **Render Services:** Certainly in an XML authoring environment but also in most other environments, it is necessary to provide a service to take the source format of the legislation to produce whatever other additional formats are required. In the case of XML, PDF rendering is important for producing print versions (if only for the legislative process), and HTML and other formats are important for web delivery including eBook and word-processor formats. For XML to PDF, commercial products such as PTC Arbortext Advanced Print Published (APP), Antenna House, Inc.’s Formatter, or RenderX, Inc.’s XEP Engine are used. In environments where a word processor format is the authoritative source, either the word processor itself or third party tools may be used to generate PDF, HTML, and eBook versions. In the former case, the Editing Tool fills a dual role. Adobe FrameMaker is designed to perform both functions for XML source material.

The indispensable components are the **Editing Tool** and the website **Application Server**. Low technology replacements for the other components are available but may involve reduced capability.

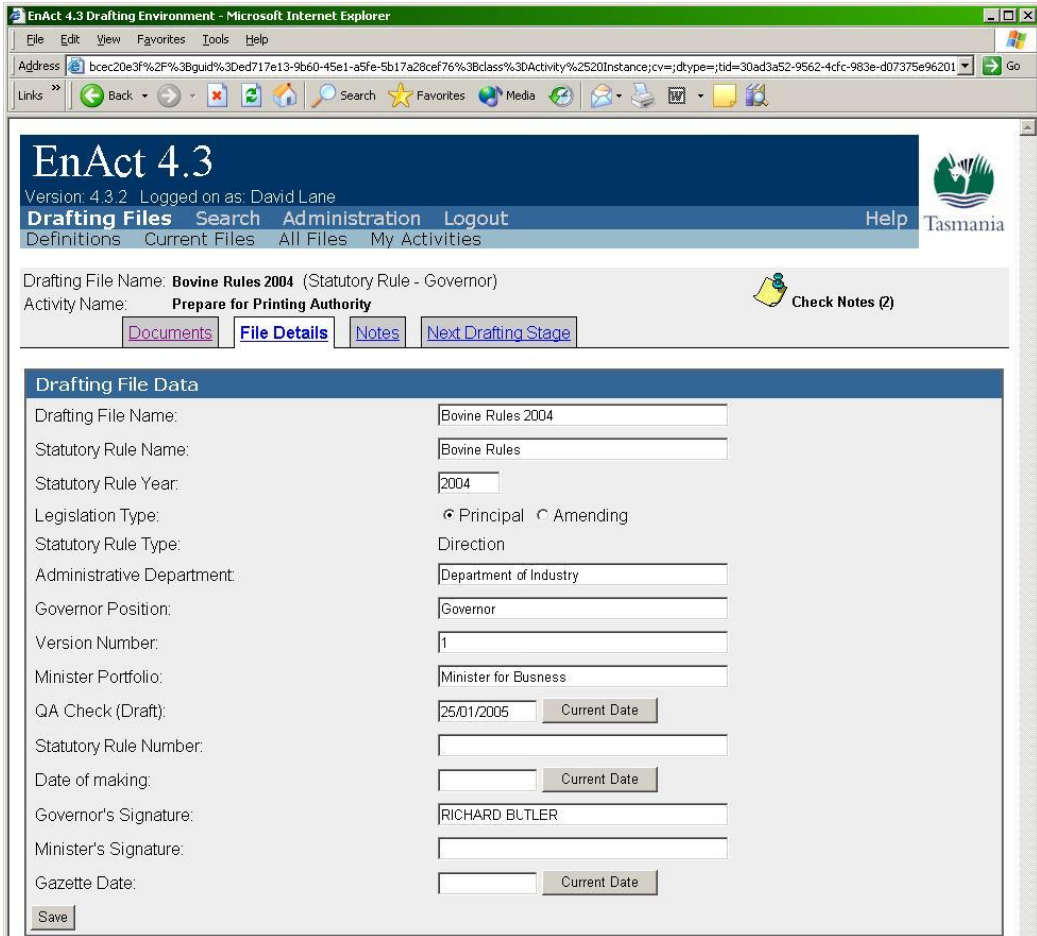
Some example pages from the Tasmanian EnAct Legislation document management system appear below. I have deliberately chosen to use earlier versions of the EnAct system to demonstrate that this functionality has been available for some time. Similar functionality using more sophisticated user interfaces, more modern web technologies, and more recent versions of software are available.

Figure 2 shows a list of Bill projects allocated to the user currently logged into the EnAct system. Note the title of the draft piece of legislation, the stage at which the drafting has progressed, and the date and time of the last change to the task. The list is sorted in ascending order of the last modify date.



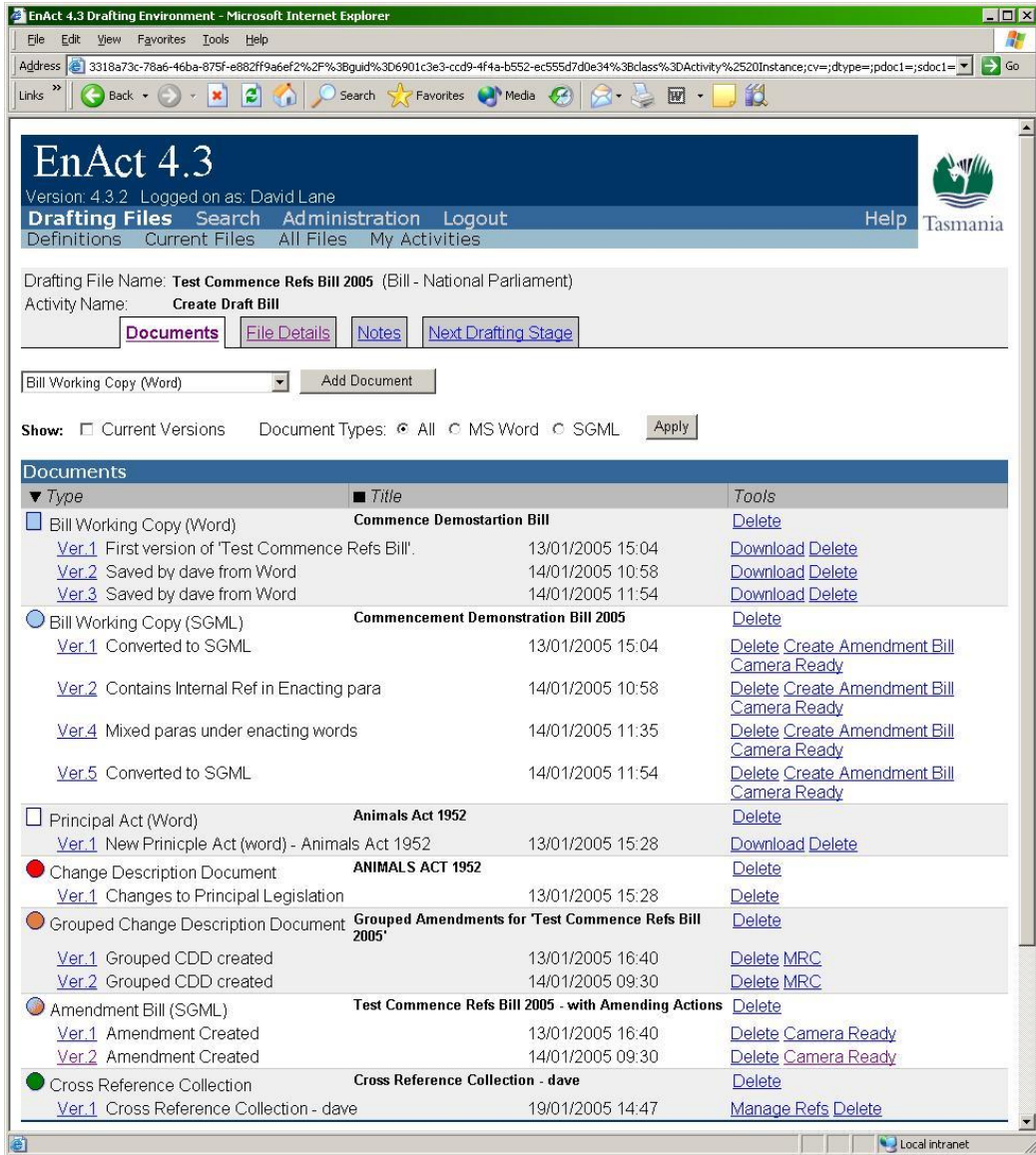
[Figure 2] User worklist in the EnAct system

Figure 3 shows a page for updating the metadata for a particular Bill project. What is displayed on this page depends on the stage of the project with different fields either locked or made available to complete as the project progresses. The project shown is a regulation at an advanced stage being prepared to send to the government printer (Printing Authority of Tasmania).



[Figure 3] Updating project metadata in the EnAct system

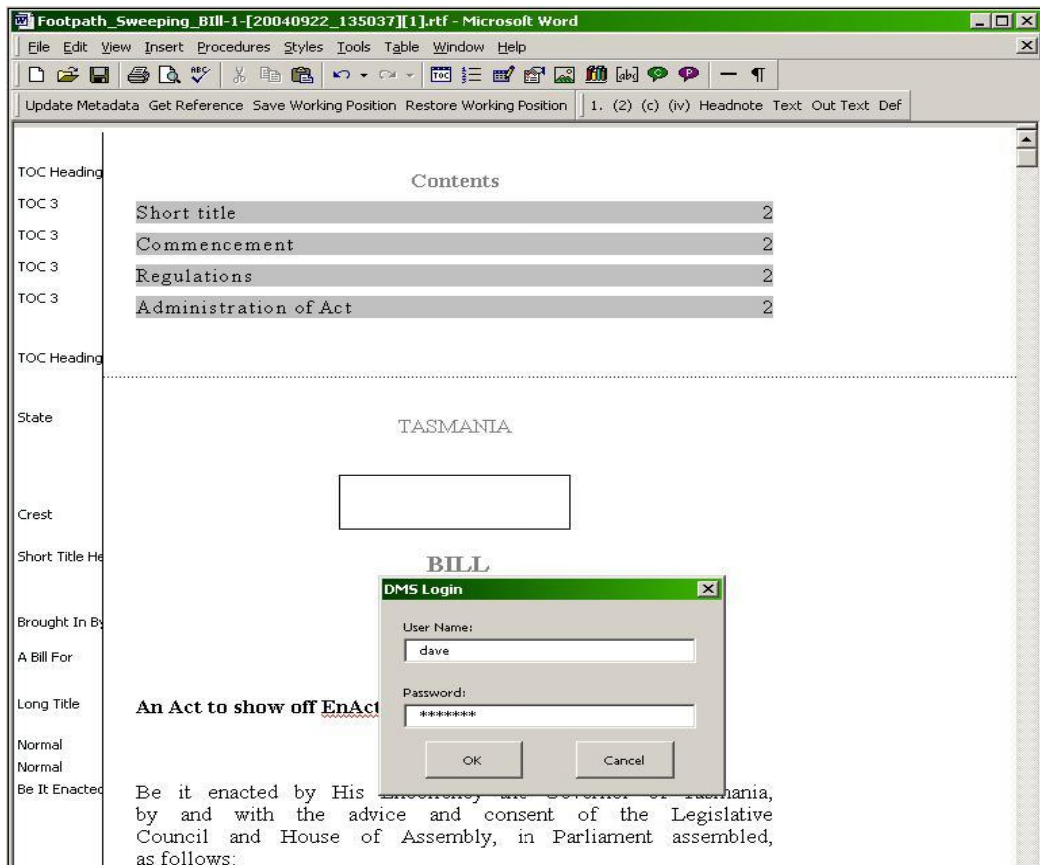
Figure 4 shows a page displaying the different documents and versions of documents associated with a particular drafting task. This page shows both Microsoft Word and SGML versions of the draft amending Bill together with the change-tracked Principal Act (the Act being amended). The document types peculiar to the EnAct system are the grouped and raw Change Description Documents (used to manage automatic generation of amendment wording) and the cross-reference collection (used to manage the creation and insertion of standardized cross-references into legislative documents).



[Figure 4] Display of document versions in a Bill project in the EnAct system

IV Example custom tools for authoring and editing

It is rare for a drafting office to take an Editing Tool without customizing it to adapt to the house style and processes of the drafting office. For XML structured authoring environments, this is necessary to provide a formatted view (WYSIWYG⁸⁾) of the documents while drafting. For word processor environments, this may extend to defining a set of styles to use. For both, this may include a variety of custom macros and functions from globally replacing acronyms to popping up the name of the person allocated on today's tea roster. We focus now on some specific customizations to support the legislative drafting process.



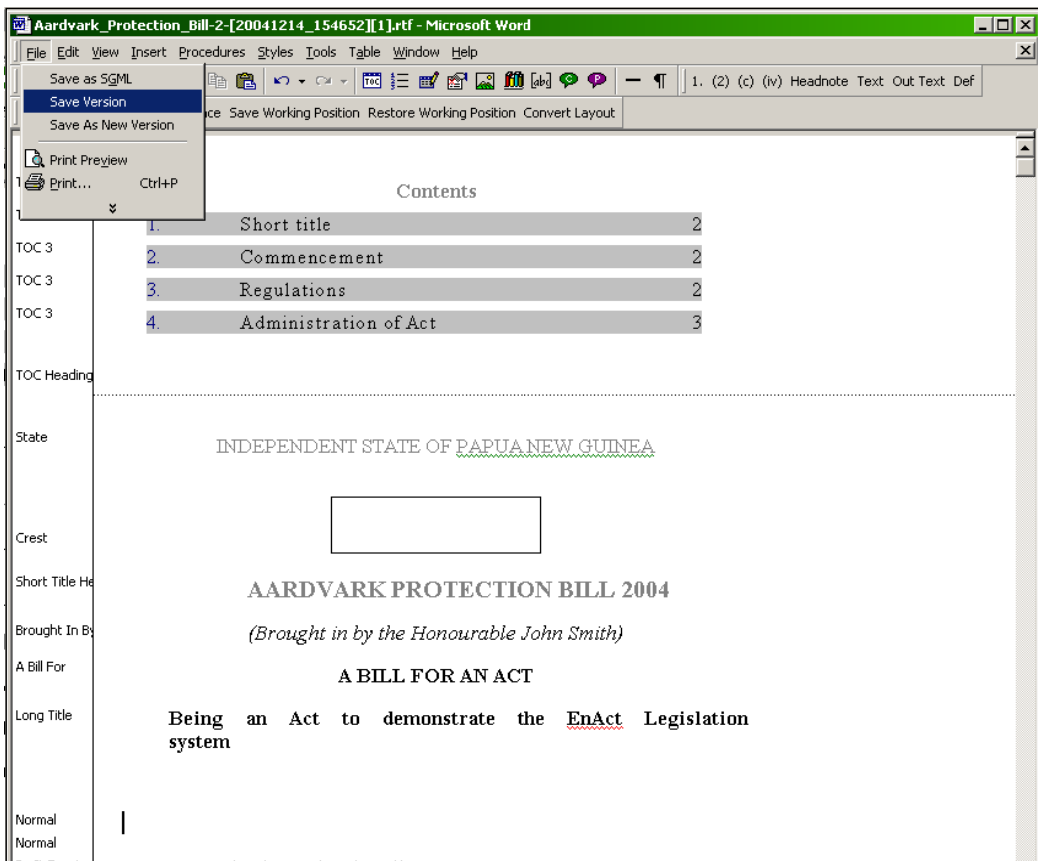
[Figure 5] Login from Microsoft Word in EnAct system

8) WYSIWYG: What You See Is What You Get

Editor customization for version management

Where a Document Management System is involved, it is desirable to access some or all of the DMS functionality directly from the Editing Tool. Figure 5 shows the login screen which is displayed the first time a DMS function is accessed from the EnAct Editing Tool (Microsoft Word).

Figure 6 shows some customized Save Options in the EnAct system. Note the non-standard “Save as SGML” which automatically converts the strongly styled Microsoft Word document into XML (SGML) conforming to a custom EnAct document type definition (DTD), and the more generic “Save Version” and “Save as New Version” functions which overwrite the latest version or create a new version respectively.



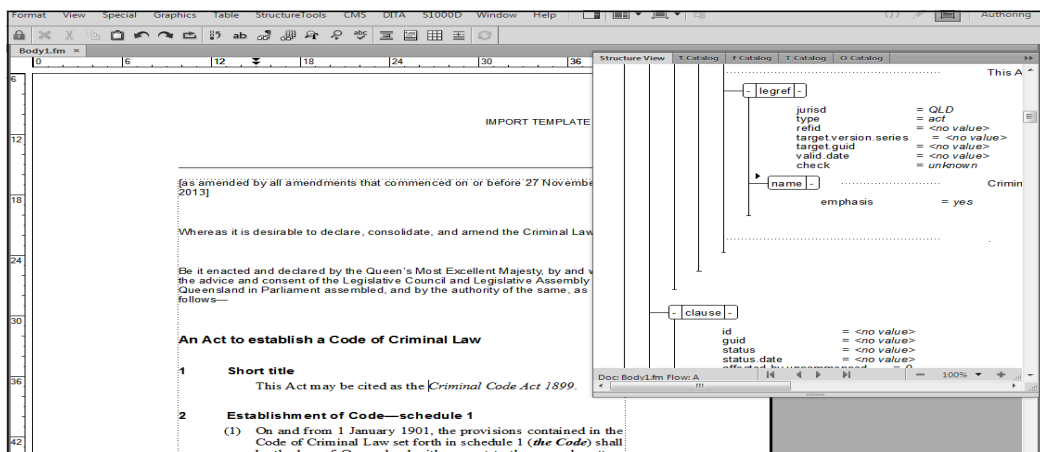
[Figure 6] Save options from Microsoft Word in EnAct system

Where a chosen Editing Tool also supports the generation of other formats (such as Adobe FrameMaker which produces PDF and XML versions in addition to the native FrameMaker format), additional functions can be added to generate special versions with particular templates for introduction, consolidation of amendments on the floor, and Assent and similar.

We have experienced significant success using the HTTP- and XML-based protocol, SOAP, as a generic integration framework as it is accessible from a wide variety of programming languages and has been used by us to integrate Adobe FrameMaker, Microsoft Word, XMetal, and WordPerfect^{®xii} platforms with little or no change to the basic API⁹⁾ for the particular Editing Tool or supported formats.

Editor customization for specialized link management

The normal method for managing cross-reference markup in an XML environment is simply to populate any identifier attributes manually so that hypertext links can connect the cross-reference wording to the appropriate target document or provision. Figure 7 shows manual insertion of cross-reference markup in Adobe FrameMaker which is the default way of managing cross-references in most structured authoring environments without any customization (particularly references to other documents or provisions within other documents).



[Figure 7] Manual insertion of cross-reference markup

9) API: Application Program Interface

| Search Results | | | | | | |
|--|---------------|----------|-----------------------|----------|--------------|---------|
| Title | Add Reference | Add File | Repeal Revoke Rescind | Commence | Camera Ready | Publish |
| Colonial Courts of Admiralty Act 1890 (Adopted) (No. 27 of 1890) | | | | | | |
| Schedule 2 - Enactments Repealed | | | | | | |
| Companies Rules (Chapter 146) | | | | | | |
| Schedule 2 - FORMS | | | | | | |
| Schedule 1 - LIST OF FORMS | | | | | | |
| 113. Dispensing with taxation of small bills | | | | | | |
| 110. Liquidator's certificate as to special terms of remuneration to employee | | | | | | |
| 109. Issue of allowance or certificate of taxation | | | | | | |
| 108. Supply of copy of bill of costs to liquidator | | | | | | |
| 106. Submission of bill of costs by employees to liquidator for taxation | | | | | | |
| Constitution of the Independent State of Papua New Guinea (Chapter 1) | | | | | | |
| 187C. Constitution, functions, etc., of Provincial Governments and Local-level Governments | | | | | | |
| 209. Parliamentary responsibility | | | | | | |

[Figure 8] Using the legislation repository for link target identification in EnAct

| | | | |
|---|---|------------------------------------|---------------------------------------|
| Print View | Lookup Component | Lookup Legislation | Turn History Notes on |
| Electricity Commission Act 1961 (Chapter 78) | | | |
| Requested: | 28/01/2005 13h | | |
| Consolidated as at: | 28/01/2005 13h Bookmark this page | | |
| Previous Version | Next Version | | |
| Valid for: | 01/07/2001 00h- | | |

7. Vacation of office

The office of a member of the Commission becomes vacant—

- (a) if he becomes bankrupt, applies to take the benefit of a law for the relief of bankrupt or insolvent debtors, compounds with his creditors or makes an assignment of his remuneration for their benefit; or
- (b) if he resigns his office by writing under his hand addressed to the Minister, and the resignation is accepted; or
- (c) if he is absent, except on leave granted by the Minister, from all meetings of the Commission held during a period of three months; or
- (d) if in any way, otherwise than with the approval of the Minister or as a member, and in common with the other members, of an incorporated company consisting of not less than 25 persons, he—
 - (i) is concerned or interested in a contract or agreement entered into by or on behalf of the Commission; or
 - (ii) participates or claims to participate in the profit of any such contract or agreement or in a benefit or emolument arising from any such contract or agreement.

[Figure 9] Identification of individual provisions for link generation

By contrast, the EnAct system makes use of the legislation repository with a custom web interface to identify link targets. Figure 8 shows a search result in the EnAct legislation collection. When a title or provision is selected, Figure 9 allows the user to display that provision. Clicking on the red number adds that particular target to a list of target provisions maintained for each project. Figure 10 shows the result of clicking on (a), (b) and (d) in Figure 9 to select the particular targets below the section level. The “Add >>” button allows a user to select candidates for inclusion in a particular set of reference wording. Items under “Reference Wording” allow the user to customize the wording generated including or excluding the title of the Act, choosing the long or short form of reference wording, and selecting the connecting conjunction. The “Add Reference To Collection” button adds that wording to the collection so it can be inserted complete with all identifiers into a draft document.

Calculate References View References

Calculate Cross References

Return to Document List

Title: Cross Reference Collection - dave

Add the references you wish to calculate:
(Note: the reference wording generated will contain the references in the order which they are added)

| | | |
|---|-----------------|---|
| Electricity Commission Act 1961 : Section 7 (a) | Add >> Clear | Electricity Commission Act 1961 : Section 7 (a) |
| Electricity Commission Act 1961 : Section 7 (b) | | Electricity Commission Act 1961 : Section 7 (b) |
| Electricity Commission Act 1961 : Section 7 (d) | | |

Delete Items Delete All Items

Reference Wording

Without Title With Title Full Reference
 Use "or" instead of "and" Make first letter upper case Calculate

Reference Text

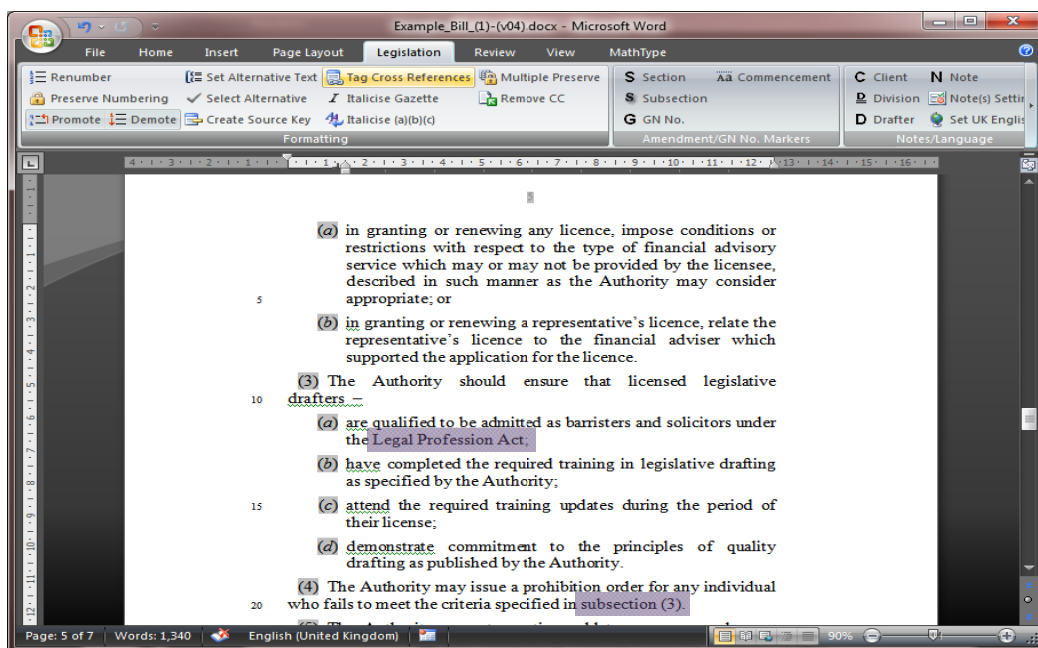
Sections 7(a) and (b) of the Electricity Commission Act 1961

Add Reference To Collection Clear

[Figure 10] Turning identified provisions into standardized reference wording with markup

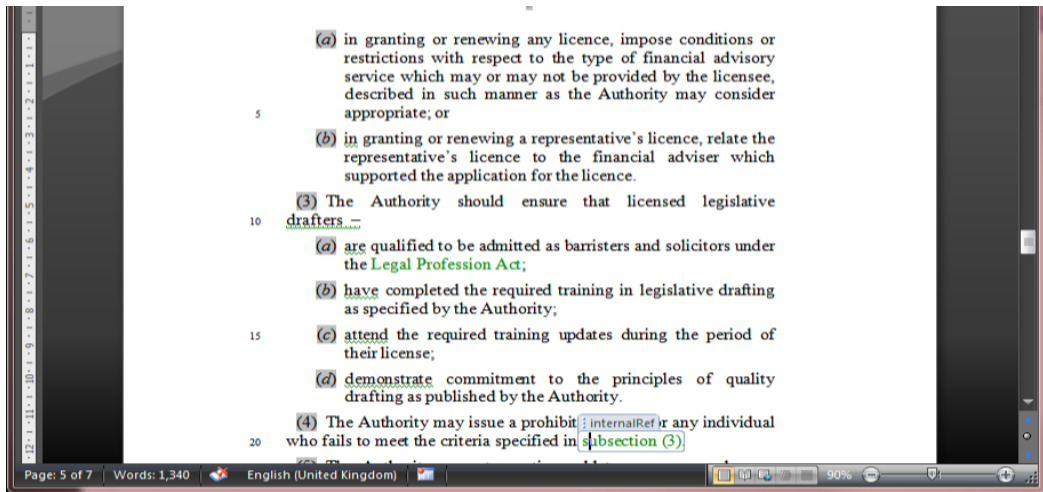
While this approach allows for standardized wording and insertion of required identifiers without exposing the user to the detail of the underlying markup, there is still some manual effort required.

An alternative approach has been used in Singapore and Queensland,¹⁰⁾ where the users simply type the wording for the cross-reference without disrupting the flow of drafting – see Figure 11. I have highlighted the text in this fragment that corresponds to cross-references. A user then clicks the “Tag Cross References” button which sends a copy of the document to the server which searches for known document titles and patterns of wording that reflect reference wording and attempts to resolve them against the collection, populating all the necessary identifier attributes and inserting them into the draft document (in this case a Microsoft Word document using content controls) and styling the references green (for the drafting only) to show that the reference has been successfully resolved – see Figure 12.



[Figure 11] Automatically recognizing reference text – part 1

¹⁰⁾ Similar approaches are outlined in the work of AustLII (e.g., Greenleaf, G *et al.* “Public access to law via the internet: the Australasian Legal Information Institute” (1995) 6(1) *Journal of Law, Information and Science* 49) and NIR (e.g., Biagioli, C *et al.* “Automatic semantics extraction in law documents” in *Proceedings of the 10th International Conference on Artificial Intelligence and Law*. ACM, 2005).



[Figure 12] Automatically recognizing reference text – part 2

While this approach cannot be perfectly accurate (the most common error is marking references to provisions in other documents as internal references), a success rate above 99% has been experienced in practice and either of the approaches described above can be used to correct the small percentage of incorrectly identified references manually. The success rate experienced in a particular jurisdiction will depend on the regularity of the cross-reference wording used; however, accuracy below 90% would be unlikely.

Because it is relatively easy to markup cross-references in this way, including internal cross-references (references to other provisions within the current document), this approach can be applied repeatedly throughout the drafting process with little imposition on the system users. It also delivers a substantial benefit to the drafting office because draft Bills (and sometimes draft Regulations) typically don't get renumbered during their passage through the legislature. New provisions inserted through committee amendments and on the floor are numbered like inserted provisions in enacted legislation. It is only for the third reading, or assent copies, that the provisions are renumbered. If the references are correctly tagged in this way, automatic renumbering can also resolve the reference wording correctly to ensure that the appropriate target provision is represented in the reference wording.

This is an example of a “win-win” automation tool for the drafting office and external

consumers of legislation as it provides added utility to both external and internal users, and imposes little, if any, additional burden on the internal users.

Editor customization for automatic amendment wording

The ability to automatically generate reference wording is a necessary prerequisite for the more difficult task of automating amendment wording generation. Since at least 80% of legislation is amending legislation (legislation that changes existing law rather than creates new substantive law), improved tools for drafting amendments have larger potential for productivity gains than tools to support substantive law drafting.

Since the goal of amendment drafting is to produce a cohesive and correct law as amended (the consolidation) and the actual wording describing the amendment is a fleeting artifact, it makes sense to start the amendment drafting process by marking the proposed changes on the appropriate version of the Principal Act or regulation. Figure 13 shows a provision of a Principal Act ready for amendment.

Obligations of licensees

74F. A licensee -

- (a) must not make bets except in accordance with the licence; and
- (b) must not, as a licensee, make bets on horse races or greyhound races; and
- (c) must not conduct betting or business under the licence on Good Friday or Christmas day or at other times notified to the licensee in writing by the Supervising Agency; and
- (d) must, for verification purposes, make a recording of all bets made by telephone under the licence in such manner as the Supervising Agency from time to time directs, the costs of such verification to be at the expense of the licensee; and
- (e) must keep such betting, accounting and other records in respect of the licensee's betting and business under the licence as the Supervising Agency from time to time directs; and
- (f) must furnish to the Supervising Agency such returns in respect of the licensee's betting and business under the licence as the Supervising Agency from time to time directs.

[Figure 13] Principal Act before amendment

Figure 14 shows two amendments marked on this Principal Act, the first a textual amendment substituting old wording for new wording, the second is a substitution of a whole

XML element—a paragraph.

Figure 15 shows a screen shot of the EnAct system using custom buttons and styles to mark up changes in Microsoft Word. The current version deployed in Singapore uses standard Microsoft Word change tracking to identify the inserted and deleted text and provisions.

Figure 16 shows the process by which this markup is converted into amendment wording. First the XML version of the Act to be amended is checked out of the repository. The system turns this into a Microsoft Word document for editing (although this could be done using a structured XML editor and custom or tool-based change markup). The user then marks up the proposed changes to the Principal Act either using custom buttons and styles or using the native change tracking. The system then generates a Change Description Document (CDD) from this change tracking. The CDD is an XML encapsulation of all the information needed to reproduce that amendment when applied to that XML version of the Principal Act including all of the necessary context required to generate accurate reference wording. The CDD is then used to generate an XML amendment document (which can be exported as a Microsoft Word document for further editing if required).

Obligations of licensees

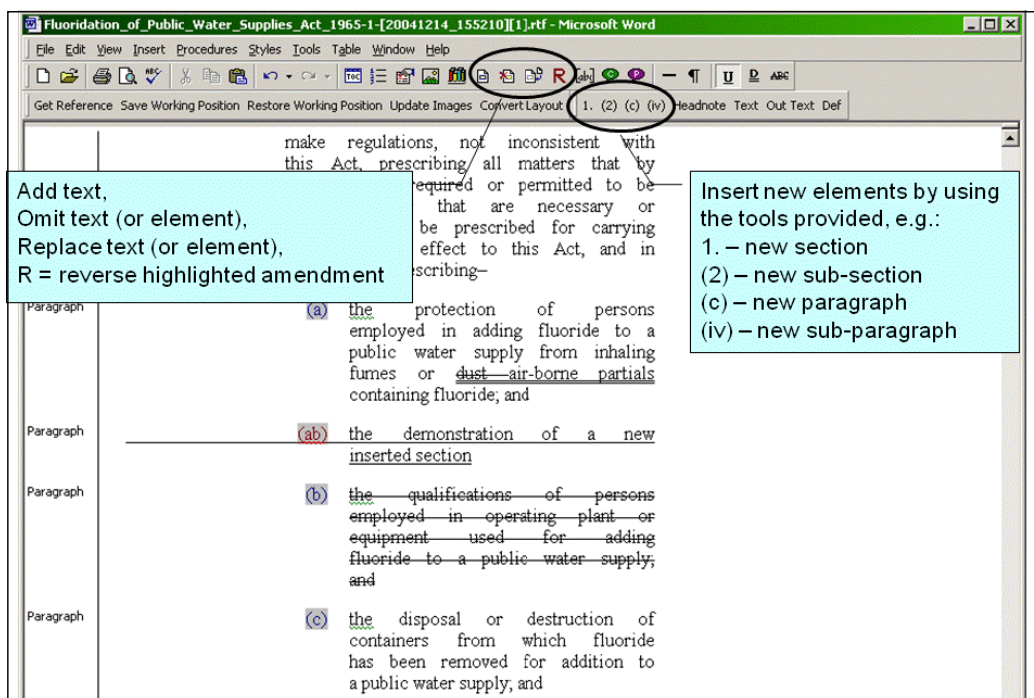
74F. A licensee -

- (a) must not make bets except in accordance with the licence; and
- (b) must not, as a licensee, make bets on horse races or greyhound races; and
- (c) must not conduct betting or business under the licence ~~on Good Friday or Christmas day or at other times~~ at any time notified to the licensee in writing by the Supervising Agency; and
- ~~(d) must, for verification purposes, make a recording of all bets made by telephone under the licence in such manner as the Supervising Agency from time to time directs, the costs of such verification to be at the expense of the licensee; and~~
- (d) in respect of any bet made other than in person, must electronically record the bet for verification purposes -
 - (i) by a device approved by the Supervising Agency; and
 - (ii) in a manner directed by the Supervising Agency; and
- (e) must keep such betting, accounting and other records in respect of the licensee's betting and business under the licence as the Supervising Agency from time to time directs; and
- (f) must furnish to the Supervising Agency such returns in respect of the licensee's betting and business under the licence as the Supervising Agency from time to time directs.

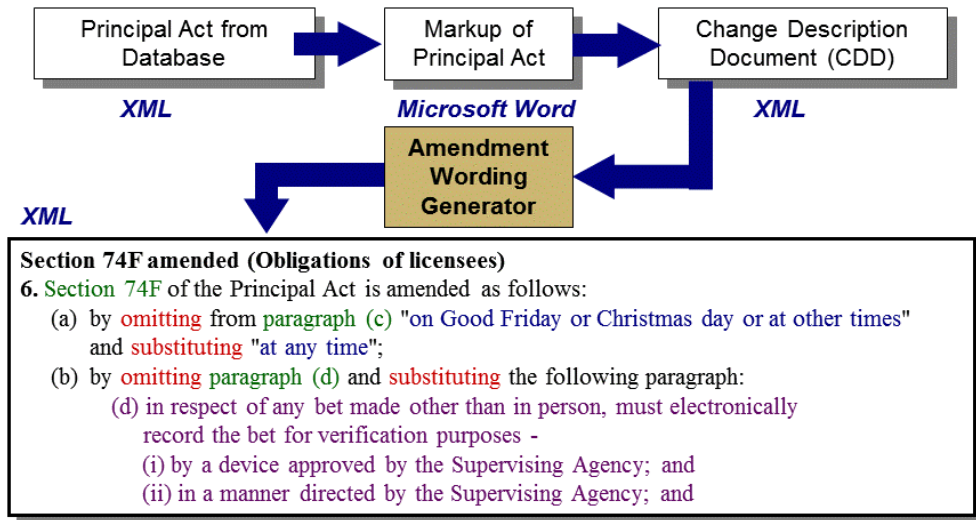
[Figure 14] Principal Act with change-tracked amendments

This process has the advantage that the user focuses on the wording of the resulting consolidation rather than the fleeting amendment wording. It also generates very standardized amendment wording and reference markup. In addition, this process aids external users in interpreting the amendments consistently (although, as will be seen in the next section, that becomes of less importance).

In Tasmania, users mark the changes using direct styling of strike-through and underline but in Singapore users make use of the change-tracking capabilities of Microsoft Word (these weren't available with the required capability in the versions of Microsoft Word that were used for the first version of the Tasmanian EnAct system).



[Figure 15] Marking changes using custom buttons in EnAct



[Figure 16] Generating the amendment wording

V Example custom tools for publishing

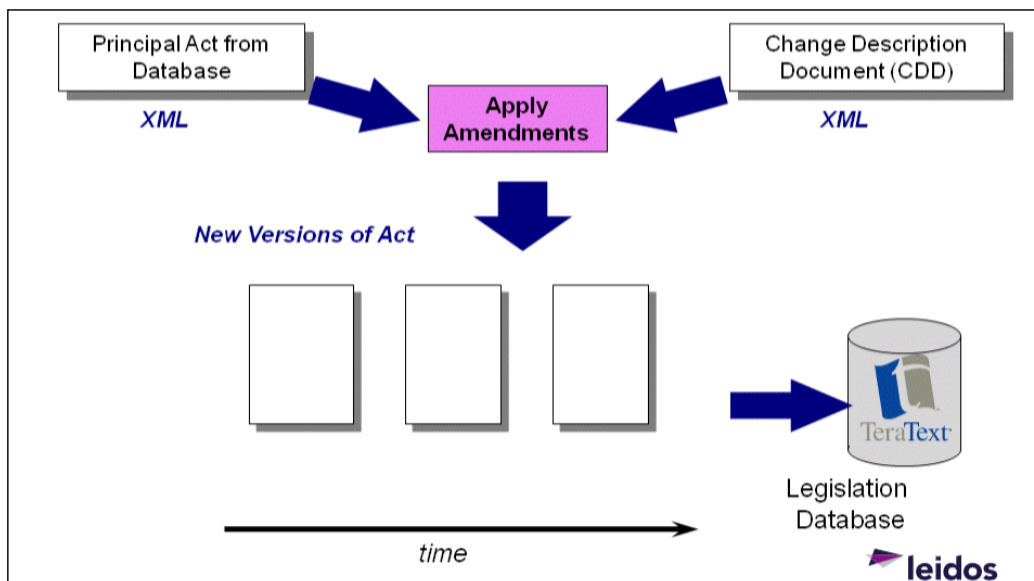
Automatically applying amendments

If the approach above is applied to generate amendment wording, the Change Description Document, or CDD, can be associated with the amending Bill as it progresses through the enactment stages and, once the Bill becomes an Act and the commencement details are known, the CDD can be used to automate the application of the amendment against the previous version of the Principal Act to create one or more new versions of the Act.

This new version of the Act can then be saved in the document repository and the appropriate web objects created to support point-in-time access to the different versions of the legislation.¹¹⁾ Although not applied commercially, it is also possible to extract these CDDs from an amending Act created without using the automatic amendment generation.¹²⁾

¹¹⁾ Arnold-Moore, T "Automatic generation of amendment legislation" in *Proceedings of the 6th International Conference on Artificial Intelligence and Law*. ACM, 1997.

¹²⁾ Arnold-Moore, T "Automatically processing amendments to legislation" in *Proceedings of the 5th*



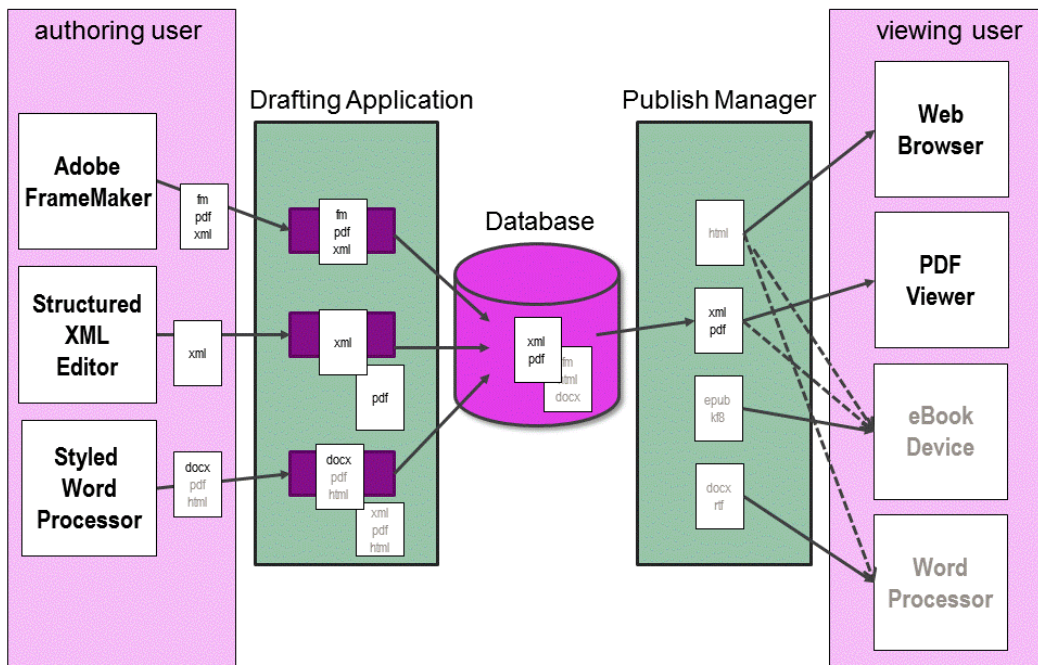
[Figure 17] Applying marked changes to produce new versions of the Principal Act

Managing and creating multiple versions

Figure 18 shows a diagram of the various formats that might be useful and how they might be generated. Working back from the desired public website, users want to be able to access HTML (and possibly XML) using standard web browsers (e.g. Safari^{xiii}, Chrome^{xiv} and Internet Explorer[®]). They might also wish to download a PDF version of the relevant legislation to faithfully reproduce the printed page. For reuse of the content, a Microsoft Word version (whether RTF or OOXML/docx) is also desirable and users of eBook readers have better functionality from ePub^{SMkv} or similar eBook formats.

Where the Editing Tool is Adobe FrameMaker, the Editing Tool can generate FrameMaker, PDF, and XML formats directly which can be saved and managed by the drafting Application. If necessary, the related Adobe FrameMaker Publishing Server can generate Microsoft Word (RTF) and ePub versions from the FrameMaker version without user intervention or stylesheets can be created to generate these from the XML automatically.

International Conference on Artificial Intelligence and Law. ACM, 1995.



[Figure 18] Managing and creating various formats for publishing

Where the Editing Tool is a standard structured editor (such as <oxygen/>, ArborText Editor, or XMetaL), the format saved from the Editing Tool is custom XML. Generating PDF for proof-reading and enactment processes requires a separate Render Service. In this circumstance, Adobe FrameMaker document types would be unlikely to be provided but the other formats could be generated automatically by applying stylesheets to the XML.

Where the Editing Tool is Microsoft Word, the format saved from the Editing Tool is Microsoft OOXML format (or RTF). This format can be converted to custom XML (or SGML) providing the styles are tightly controlled and managed within the Microsoft Word environment. In the absence of custom XML, Microsoft Word can generate PDF and HTML directly. If custom XML is used, ePub, and possibly PDF, can be generated using stylesheets and a separate Render Service respectively.

All of these processes require considerable customization – Adobe FrameMaker requires read-write rules to be defined specific to your custom XML DTD, the other structured editors

require stylesheets to specify the formatting within the Editing Tool as well as for formatting the custom XML to the output formats. The Microsoft Word approach requires considerable styling and macros to make it easier for users to generate content that can be easily converted to a custom XML DTD as well as configuration of the conversion utility. Stylesheets are required for rendering that XML to the other formats. If native Microsoft Word is the source format, there is still processing needed of the HTML that is produced by Microsoft Word to make it usable in a generic public website.

Except for the native Microsoft Word source model, each of these models assumes a considerable data migration phase to get the legislation corpus into a custom XML DTD. The native Microsoft Word source model may require some minimal document cleanup but there is likely to be a more comprehensive on-going data migration cost every time a new version of Microsoft Word is deployed in the drafting office.

However, each of these different models has been successfully deployed in a drafting office to manage the publication of legislation and related materials with sufficient automation to ensure that the effects can be achieved with minimal additional effort by the drafting office.

VI Conclusion

In this paper, we have demonstrated that the unique nature of legislative documents and the processes by which they are created establishes an environment in which special-purpose tools deliver real benefit to both the drafting office that prepares them and the external consumers of legislative documents and related material.

In 1799, Justice Lawrence argued for publishing the results of legislative deliberations more broadly:

“The proceedings of Courts of Justice are daily published (...). The general advantage to the country in having these proceedings made public, more than counterbalances the inconveniences to the private persons whose conduct may be the subject of such proceedings. The same reasons

also apply to the proceedings in Parliament: it is of advantage to the public, and even to the legislative bodies, that true accounts of their proceedings should be generally circulated.” per Lawrence J, *R v Wright* (1799) 8 TR 293, 298: 101 ER 1396, 1399.

In 2000, New Zealand Parliamentary Counsel Office extended this argument suggesting a broad government obligation to make up-to-date legislation available on the web without cost:

“Legislation confers rights, benefits, and privileges, and imposes obligations. It is a fundamental principle that ignorance of the law is no excuse for a failure to comply with the law. People cannot be expected to know their legal rights or comply with the law if the law is not easily accessible. It is for the State to ensure that it is. Technology has now advanced to a point where access to up-to-date legislation can be provided free via the Internet.” New Zealand Parliamentary Counsel Office (2000) *Public Access to Legislation Project: Summary of business case*

The tools and techniques described in this paper demonstrate that governments can go well beyond this modest objective to deliver better and more effective tools to support the legal profession and improve the cost and efficiency of legislative and broader legal services to the community.

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Innovation of Legislative Process

02.

Alignment of
the Government
Legislative
Process for the
Quality of Laws

IkHyeon Rhee

02

Alignment of the Government Legislative Process for the Quality of Laws

President, Korea Legislation Research Institute

IkHyeon Rhee

I Meaning and Importance of Legislative Process

1. Overview

People prefer immediate results over complicated or tedious legislative processes. This finding is not a criticism directed toward Korea's National Assembly, but rather it was identified in a research carried out on the U.S. Congress, which emphasizes process more than anywhere else in the world.¹⁾ Even in the United States, it is evident that the public does not possess strong trust in the Congress—with one of the reasons behind this being the complicated and tedious legislative process implemented. In line with this, the most difficult tasks faced today by public officials are developing policies and receiving approval from the National Assembly. Again, the blame can be put on the existence of too many obstacles to overcome within the entire process starting from the government to the National Assembly. Recently, it has come to people's attention that the public welfare bills designed to stabilize the livelihood of the populace are just sitting on the desks of the National Assembly, and this has brought about many criticisms toward the legislature. These events then pose the crucial question: *Do we really need complex legislative processes that we cannot even understand?*

¹⁾ William N. Eskridge, Jr., Philip P. Frickey, Elizabeth Garrett, *Legislation and Statutory Interpretation*, Foundation Press, p. 71.

Normally, a legislative process means the procedures of enactment and amendment; therefore, the National Assembly becomes the center of discussion. However, this article will limit its reach to governmental legislative process.

Korea centers on the presidential system. According to the Constitution, the government itself has the right to submit a legislative bill, and even though the number of legislative bills from the government does not exceed that of the National Assembly, it is not an exaggeration to say that the government plays a leading role in terms of content. Also, subordinate rules, presidential decrees, ordinance of the Prime Minister, and departmental orders, are greater in number and are as important as the laws. As society becomes more complex and administrative needs become more specialized, it is more difficult for the law to regulate every sophisticated social phenomena. Thus, the scope of the work that the law delegates to its subordinate rules evolves. This means that in many cases, the law decides on the general scope while the subordinate rules deal with the specifics. The subordinate rules start and end within the government, and the governmental legislative process has its own characteristics that are different from the procedures of the National Assembly, which is what a political procedure contains. Therefore, it is necessary to separate the governmental procedure from the entire legislative process and to have a separate discussion.

There are multiple descriptive and normative theories on the legislative process. Most of them deal with the parliamentary process, which is a political process. However, these theories can be also applied to governmental legislative process. This article will provide an overview of the general theories on the legislative process and perspectives on the governmental legislative process. In relation, the article will also discuss the problems and areas for improvement.

2. Theories Concerning Legislation

Numerous theories on the legislative process can be categorized into different perspectives. However, there are three categories in general: pluralism and interest group theories, proceduralist theories, and institutional theories.²⁾

²⁾ William N. Eskridge, Jr., et al., p. 48.

1) Pluralism and Interest Group Theories³⁾

These theories pay attention to the role of interest groups in the legislative process. The members of a society tend to form groups with people in order to share profits. The members share the same tendency in the political decision-making process—as people form interest groups for political activities. Pluralism theorists argue that the dynamics of interest groups lead to pluralism, and the stakes of adjusting a process among interest groups decide the policy. As people have different opinions depending on an issue, individuals simultaneously become a part of multiple interest groups. The best idea is chosen in the end, similar to how the best product is selected through competition within the free competitive market. An individual simultaneously becomes a member of several interest groups, wherein the most effective and outstanding view is selected after free competition, thus meeting the public interest. However, in reality, pluralism and interest group theories have limitations because a small but well-organized interest group can influence the public opinion and lead the political process without incorporating the voices of all interest groups.

Public choice theory, which is one of the theories of pluralism, applies a microeconomic model to the political decision-making process. Similar to the practical human activity that economics presumes, the theory assumes that the legislative process is a selection process for legislators or groups to pursue their benefits. Hence, it argues that the members of the National Assembly, who would desire for a reelection, are affected by the demands of interest groups that have influence over the reelections. Thus, they proceed with legislation or force government officials in order to win, which would eventually leave government officials without a choice but to submit to the members. In extreme cases, the public choice theory suggests that legislators play a half-hearted, passive role of gathering and representing the benefits of interest groups rather than actively taking an independent role. Public choice theory has been criticized for treating the National Assembly members as subordinates of interest groups and oversimplifying the complex legislative process. The members of the National Assembly are influenced by complex factors, which lie beyond the simple motive of earning

³⁾ William N. Eskridge, Jr., et al., pp. 48-60.

the support of voters by offering the voting public with a bill that they want. Money and organization are not always directly connected to political influence. As the legislative process is dynamic and influenced by political parties, the public choice theory is criticized for viewing the legislative process as inactive and for oversimplifying the members' motives to be too personal for lawmaking. In modern politics, a party plays an important role. Under the control of party leadership, the legislative process is influenced by a system to exclude benefits of a single party member or those of constituents. Also, public choice theory poses that the National Assembly members' preference on lawmaking is an external factor. However, this assumption is unrealistic, and no empirical research supports this argument.⁴⁾

Explaining the role of interest groups and describing the motive of National Assembly members' engagement in political activities within the scope of personal gain, such as reelection, provides a better account on real politics than describing it through a normative explanation which states that public welfare is what they pursue. However, this explanation still cannot escape the criticism that the complicated process and motives are oversimplified. Most empirical researches show opposing results to the conclusion of public choice theory. In the light of Korea's realistic politics, the members of the National Assembly move in strict order under the leadership of the party or the wing rather than at personal stake. Therefore, explaining the legislative process and finding alternative solutions through the perspectives of public choice theory carry limitations.

2) Proceduralist Theory⁵⁾

Like pluralism theories, the proceduralist theory states that members of the society have a tendency to form groups to pursue self-gain, which they believe is inevitable. This theory poses that systematic control, such as the representational system or checks and balances, must be present to prevent seeking personal interest and the negative effects that an interest group may bring. In particular, unlike other political procedures, the legislative process has predominant

4) Steven P. Croley, *Regulation and Public Interests: The Possibility of Good Regulatory Government*, Princeton University Press, Princeton and Oxford, 2008. (The Author proposes ___)

5) William N. Eskridge, Jr., et al., pp. 65-73.

features, including the fact that the procedure is a complicated process that has several important steps that may rescind or change the essence of a bill. This is called ‘vetogates’ because a bill may be repealed at these important steps or points.⁶⁾

Some scholars who follow the proceduralist theory argue that the legislative process should be complex and difficult. They believe that by making the procedure more complicated, bad laws are prevented. Even though the process is strenuous, it would also be troublesome to enact necessary laws. Also, at the same time, the negative effect caused by procedural complication is less harmful compared to bad laws. Not only do scholars consider the public’s demand or interest groups as negative, but they also suggest solutions that may have only worked in past night-watchman states (Nachtwächterstaat), not in modern states where an active role of the state is required.

Some scholars from the proceduralist school of thought view the legislative process as a necessary process for public welfare. In other words, the legislative process is a process that makes the members of the National Assembly discuss and deliberate; facilitates communication with voters; and enables decision-making based on information rather than giving an arbitrary resolution. Emphasis is placed on discussion and deliberation for good lawmaking. Through the process of discussion and deliberation, public opinion on social issues is thus formed, and thoughts can transform. Through the process of discussion and deliberation, the members of the National Assembly can amend or repeal the laws based on information. Therefore, the process of discussion and deliberation itself has meaning. Henry Hart Jr. and Albert Sacks had said, “A procedure that is soundly adapted to the type of power to be exercised is conducive to well-informed and wise decisions. An unsound procedure invites ill-informed and unwise ones. The best criterion of a sound legislation is whether it is the product of a sound process of enactment.”⁷⁾

Of course, the legislative process does not start discussing and deliberating on a bill on its own. Also, discussion and deliberation do not guarantee productive and positive results.

⁶⁾ William N. Eskridge, Jr., et al., p. 66.

⁷⁾ Henry Hart, Jr. and Albert Sacks, *The Legal Process: Basic Problems in the Making and Application of Law*, 154, 695 (William N. Eskridge, Jr., et al., p. 70).

However, the legislative process exists at minimum, and its existence has meaning—it provides an opportunity to talk to people and opens the possibility of discussion and deliberation. Jeremy Waldron stated that at least, part of the authority and legitimacy of the law lies in the point that a number of National Assembly members engage in discussions with different opinions and pass the law after a collective decision-making process. Waldron stated that the dignity of the legislation process is the result of the legislative branch's capability to act harmoniously in a political environment.⁸⁾

Legislative process can work as a tool to absorb and refine uncontrolled social energy into the established system which may otherwise appear as physical power. The unproductive, complicated, and tedious legislative process may cause public distrust; however, the procedure should not be removed, nor should discussion and deliberation be weakened because of discontent with the legislative process. It is important to provide the necessary conditions for the legislative process to function productively and positively.

3) Institutional Theory⁹⁾

Institutional theory emphasizes the importance of an institutional structure that can limit decision-making and the actions of the members of the National Assembly. Political outcome depends on the decisions and actions of many political players, including the members of the National Assembly, government officials, and the president. These players act either simultaneously or consecutively. They make choices while paying attention to the reactions of others. Also, each player recognizes such interdependence. Thus, the fact that these players predict each other's reactions before making further decisions complicates the entire process. In the case of lawmaking, the legislative process is a process in which players—including members from both the ruling and the opposing party, the president, government officials, etc.—move around with the prediction of the other player's strategy within the institutional frame of the constitution and the law. Institutional theory states that in case of lawmaking, the

⁸⁾ Jeremy Waldron, *The Dignity of Legislation*, pp. 165–167.

⁹⁾ William N. Eskridge, Jr., et al., pp. 73–81.

players take into consideration the executioners and analysts of law—including the administrative officials and the court.

Also, institutional theory points out a problem in the majority decision-making process that the democratic society uses and pluralism and proceduralist theories follows. The two theories mentioned in previous sections suggest that if no agreement is made through discussion and deliberation, then the majority decision-making process takes place. The theories view the results from the process as rational. However, institutional theory suggests that this would not always be the case. In some circumstances, the majority's decision cannot be made. Thus, institutional theory poses that organizational guidance on conduct is necessary. In reality, each individual acts as a member of a group, where he or she plays a certain role, making the theory convincing.

Institutional theory explains the legislative process of the modern party state (Parteienstaat), as well as foreseeing and describing whether a specific bill will be approved or modified. However, the theory is limited as it only describes the reason why the procedure is necessary and provides normative guidance on how to improve.

3. Legislative Process and the Quality of Legislation

1) Grounds for Justification of the Legislative Process

The spectrum of functions and roles of the legislative process is broad. The complicated procedure can be used as a method to protect the profit of the establishment by complicating the law itself. However, it can also be used as a method to prevent bad legislations that are intended for specific benefits. In fact, during the 18th session of the National Assembly, 11,191 bills were submitted. By the end of August 2014, 9,842 bills have been proposed to the 19th National Assembly. While a great number of bills are being proposed,¹⁰⁾ several bills have become the media's target of criticism because of the considerable number of problems that they have. However, most of the proposed bills were unable to pass the legislative process and were thus discarded.¹¹⁾ This shows that the legislative process itself plays a role in blocking the passage

¹⁰⁾ See the National Assembly System of Bills.

of bad bills. When the aforementioned theories are comprehensively considered, three conclusions are derived: first, the legislative process should be able to provide an opportunity to discuss and deliberate on a bill; second, it should incorporate the opinions of various social groups; and third, it should offer a range of information on the related bill to enable a rational decision-making based on such information.

For the legislative process to have an opportunity to discuss and deliberate, the contents of a bill must be disclosed, be accessed by anyone, and be presented with ample time. For various interest groups to submit their opinions, the contents of a bill must be made public and anyone should be able to express their ideas. Under the representative political system, the elected members of the National Assembly and the president represent the intent of the public. However, the representative system is not capable of speaking for every sophisticated social phenomena as new issues constantly emerge. Thus, incorporating the public's idea in the legislative process for a specific issue or a bill is necessary to supplement the limitations of the representative system, as well as to enable lawmaking to correspond with actual situations. However, as recent radical arguments in the legislative process demonstrate, balance should be maintained to keep the essence of the representative system. In order to make decisions based on information, scientific and empirical data that support the contents of a bill should be provided, and discussions should be held based on that data. After having an adequate discussion on the issues, a decision should be made based on a prearranged method to proceed with a bill. If one insists on his or her opinion and refuses to negotiate without any new issues or facts, each phase of the legislative process only becomes a measure to stop the bill that one disapproves of, instead of becoming a measure for a better legislation.

Therefore, a prearranged agreement with regard to a specific legislative process, a focus point for each phase, and a decision-making method is necessary. All these proceedings and conducts must be adjusted with the goal of producing a good legislation.

¹¹⁾ According to the National Assembly System of Bills, the number of automatically discarded bills at the end of a member's term is 3,574 for the 17th and 7,220 for the 18th National Assembly session.

2) Criteria for Good Legislation

While discussing the reason for excessive legislations that are appearing in Europe, Svein Eng stated that the often-proposed criterias used to identify good and bad legislations can be divided into three categories: Moral Criteria, Political Criteria, and Legal Criteria. Moral Criteria considers legislation as the representation of social values and assesses legislation in accordance to core values, such as fairness and justice. Political Criteria, on the other hand, recognizes legislation as a measure to form a society based on political ideology and evaluates legislation in accordance to a specific political ideology. Legal Criteria believes that legislation has a legal purpose such as the realization of a European community law or a materialization of constitutional values. Svein Eng argued that practical disharmony should not occur and placed emphasis on legislation without means-end flaw in case of technical flaws, purposes, and measures. He gave specific examples for technical flaws: logical inconsistencies, difficult language, too casuistic or determinate legislation, too general, indeterminate or discretionary legislation, and lack of system.¹²⁾ England has made and used the guidance for Good Law,¹³⁾ which states that a Good Law is a law that is necessary, clear, coherent, effective, and accessible.

First, legislation should not only reflect the social community's values, but it also should retain a connection with ideology from a specific political era and have a system as the law. Thus, to be a good legislation, an appropriate system should be implemented because the law and its technical components must not have any flaws. Legislation itself should not oppose to the constitution or the higher laws, and it should make an effort to creatively realize the constitutional values. It should also be congruent with the existing legal system and have no flaws in technical aspects such as terms, systems, or expressions.

Second, the purpose and the means should be appropriate. It is easy to lose balance in context of the entire law if the legislation is too focused on a current issue.

¹²⁾ Svein Eng, "Legislative Inflation and the Quality of Law," *Legisprudence: A New Theoretical Approach to Legislation*, edited by Luc J Wintgens, Hart Publishing, Oxford-Portland Oregon, 2002.

¹³⁾ <https://www.gov.uk/good-law-the-challenge>.

Third, legislation is a process for preparing the standards that can be applied for both the present and the future. It is absolutely critical for the law, which is the result of legislation, to have universality and generality. However, the starting point of a legislation often falls under the resolution process of current issues. In this regard, timeliness is required for legislation. Moreover, it is required to adjust the priority of national policies. In the past, people had more interest in executing the laws fairly than in the legislation itself, but good results cannot be expected out of a wrong legislation.

II Governmental Legislative Process

The Constitution (Article 52), the Administrative Process Law (Article 41 and 45), and the Presidential Decree: Lawmaking Work Operation Regulation regulate the governmental legislative process.

The governmental legislation process, in a broader sense, encompasses all enacting and amending procedures. It includes lawmaking and amending procedures, enacting and amending procedures of the presidential decree, enacting and amending procedures of the ordinance of the Prime Minister, and enacting and amending administrative procedural bylaws such as directives and regulations. However, because administrative bylaws have issues in their enactment procedure as well as in other areas, we will exclude administrative bylaws and focus on the enactment procedures of the laws and subordinate legislations.

Unlike subordinate legislations, the law includes one more step in advance because the government is required to develop an annual plan on governmental legislation before a specific legislative process is initiated. Once the writing task takes place for the law, there is no difference in the governmental procedure between the law and the presidential decree. As for the ordinance of the Prime Minister and departmental decree, after an examination from the Legislative Office is finished, there is a difference in timing for completion, which depends on each department's declaration. As a whole, the government legislation goes through the following steps: development of governmental legislation plans (only applicable to a bill),

drafting of a law, coordination and consultation among departments, preannouncement of the legislation, examination and review by the Legislative Office, commencement of the Cabinet Council (for the law and the presidential decree), and approval from the president (for the law and the presidential decree). In the following section, each legislative step will be examined in detail.

1. Government Legislative Plan

The Republic of Korea is a nation based on the presidential system, but its government also has the right to propose a bill (Constitution Article 52). The Legislative Office controls and adjusts government legislative plans (Lawmaking Work Operation Regulation Article 4). The Legislative Office notifies each department by October 31st of each year, requesting for contents, reason for necessity, and timeline of proposed bills for the following year. Each department submits them by November 30th. Then, the Legislative Office collects all the requirements and reports to the Cabinet Council while each department proceeds—or should proceed in principle—with the enactment and amendment processes of a bill based on the government legislative plan. Each department can request for a change on the existing plan if needed, and the Legislative Office reports the status to the Cabinet Council and controls the implementation of the plan (Lawmaking Work Operation Regulation Article 5 and 10). The Legislative Office also reports the government legislative plan to the National Assembly.

The government legislative plan allows the government to predict legislation demands that it may face every year and conduct ample review on the legislation by evenly distributing them out throughout the year. It also attempts to propose budgeting bills during regular sessions, and other bills during provisional sessions of the National Assembly. Thus, bills that accompany a budget may be inter-locked with a budget review. However, it is difficult to precisely predict the demands as they change frequently. Also, it is quite difficult to evenly spread out the demands because each department follows a similar process for proposing and proceeding with a legislation as necessary, even though it is the government who proposes the legislation as a whole.

According to the 2014 government legislative plan, as of end of August, a total of 365 bills were scheduled: 165 in the provisional sessions and 200 in the regular sessions of the National Assembly.¹⁴⁾ Even though the sessions are currently being held regularly, the number of bills that were proposed to the regular session has surpassed the number of bills proposed to the provisional session. Such phenomenon is not confined to this year alone. The government legislative plan has the purpose of evenly distributing limited legislative assets, and the Legislative Office is in charge of compiling and accommodating the plan. However, there is no measure to compel the execution of the plan, and the government cannot distribute it by compulsion. Thus, for now, the Legislative Office stays within the boundary of collecting the plan from each department.

2. Drafting

The sources of government legislative demands are diverse. The president's campaign promises to become an important source of government legislation during the early phase of the presidential term. Numerous bills are proposed to the National Assembly in the name of major government projects and presidential election pledges. Unpredictable incidents, such as the Sewol ferry tragedy, natural disasters, or other social issues, accompany the legislative demands in many cases. Technology advancements or the entering of a Free Trade Agreement (FTA) also involves high demands for legislation. Thus, it is impossible to foresee the demands. Unlike the laws themselves, the subordinate laws in many cases, such as presidential degrees, ordinances of the Prime Minister, or departmental decrees, are entrusted by the laws. It is unlikely that a subordinate law is not enacted or amended when the superior law is. Because of the modern administrative characteristics, oftentimes laws only include references, and the actual and specific contents are delegated to subordinate laws, meaning the administration. Even when they are not delegated, subordinate laws are necessary to execute the laws. Consequently, the government possesses significant discretion over the enactment of subordinate laws. In fact, when no legal delegation or no new legislation demands exist, only subordinate laws can be amended to execute major policies. This is evident in the fact that after

¹⁴⁾ The 2014 government legislative plan of the Legislative Office

the launch of the current presidential administration, about 110 governmental projects were executed solely by amending subordinate laws, and without amending the laws.¹⁵⁾

In any case, various causes are present for legislative demands. Thus, the work to enact, amend, and draft takes place under the orders of the head of each department, which is inspired by either the upper-level or the working-level officials. The drafting progresses under each department's responsibility. The governmental body can hire an external agency with expertise for a totally new legislation or for bills with many complicated contents.. However in many cases, a department does the legislation by itself. As the society becomes more intricate and sophisticated and as external agencies begin to obtain legislative capabilities, it is predicted that more of such cases—wherein the governmental body hires external agencies—will be seen. In 2014, the Ministry of Government Legislation established the Legislation Support Division, which assists the legislative process upon a department's request. As of August 2014, a total of 123 bills had been assisted by the Ministry of Government Legislation.¹⁶⁾ The assistance stays on the level of merely providing legislative advice on each issue rather than on the entire legislation.

All officials can be called to be experts on specific policies as they have the most information related to such policies and the keenest eyes on the issues. However, the problem is the fact that not many government officials have majored in law, and even if some have , they are not legislation experts. Thus, it is easy to set aside legislative problems. Limitations still exist even if the officials receive help from the legislation office within a department. The Ministry of Government Legislation provides the standards and checklists for legislation review and conducts the reviews in a formal setting to a certain degree, but the actual reviews on the legislation itself is still limited.

3. Departmental Consultation

Each department needs to consult with the head of a related organization from the beginning

¹⁵⁾ Statistical data is provided by the Legislative Office.

¹⁶⁾ Statistical data is provided by The Ministry of Government Legislation.

of drafting, and once a bill is proposed, it should notify the head of a related organization regarding the status of the bill, and receive feedback (Legislation Operational Regulation Article 11, Section 1). If the contents of the bill affect the administration and the budget of a local government, the department must then send the same message to the local government and ask for their feedback. Even after a bill has already been consulted, if it deals with the rights and duties of the people, or if contents closely related to the lives of the people are added, or if the intent or the major contents are modified, the bill must be consulted again (Legislation Operational Regulation Article 11, Section 2). If a bill deals with finance, then a financial estimation report must be attached (Legislation Operational Regulation Article 11, Section 3). If the departments have a disagreement on a bill, especially when the disagreement is on legal principles, they may request the Legislation Policy Council within the Legislative Office to mediate. If the disagreement concerns policies, then the departments may ask the Office of Government Policy Coordination to resolve the issue (Legislation Operational Regulation Article 11, Section 2). The Legislation Policy Council is comprised of general officials from the Senior Executive Service of the Ministry of Strategy and Finance, the Ministry of Justice, the Ministry of Security and Public Administration, the Office of Government Policy Coordination, the Fair Trade Commission, as well as the Ministry of Government Legislation; including the general officials from the Senior Executive Service of the department that proposed a bill; and related organizations. The chairman is the Vice Minister of the Ministry of Government Legislation. Before a bill is submitted to the Council, a working-level consultation—consisting of officials from the main department, related organizations, and the Ministry of Government Legislation—may be organized for a pre-review or a preliminary consultation. As of 2014, 20 working-level consultations have been held for the modification of 20 bills.¹⁷⁾

The interdepartmental discussion process among related departments is the most difficult process that takes the most time out of the governmental legislative procedure. In particular, the department must consult with the Ministry of Security and Public Administration when the organization needs organizational expansion or new personnel. The department must also

¹⁷⁾ Statistical data is provided by The Ministry of Government Legislation.

coordinate with the Ministry of Strategy and Finance when a budget is necessary. Recently, each department has been paying close attention to a bill if it contains specific matters in order to check consistency with a policy. Interdepartmental discussions are quite difficult because each department attempts to apply its own policy, including environmental impact assessment from the Ministry of Environment; the usage of national land from the Ministry of Land, Infrastructure and Transport; and gender equality from the Ministry of Gender Equality & Family. The effort that each department puts into the interdepartmental discussions may seemingly show signs of departmental egotism. However, the departments try to understand each other in any case and emphasize cooperation with a national perspective as they attempt to exchange opinions by installing a Senior Executive Service. Yet, departmental egotism is still a challenge to overcome. As interdepartmental discussions do not have a set deadline, and as each department has a rationale and basis in the law for its own stance, it has become one of the most difficult processes within the legislative process.

4. Notice and Comment

Notice and comment begin once the discussion of related departments has concluded. In principle, under the Administrative Procedure Act, notice and comment are required to amend or repeal a rule. In exceptional cases— in which an emergency legislation is necessary because notice is unnecessary, or it is difficult because of the nature of legislation, or when notifying the public would bring harm to public safety and welfare—the APA allows omission of notice and comment (APA Article 41, Section 1). Such exceptional cases include situations in which there is an immediate need to protect public rights, in which unexpected special circumstances arise, in which the content of legislation is unrelated to the public’s everyday life such as rights or duty of the public, or in which there’s a simple change in expression and phrasing. In the event when a related department does not conduct notice and comment but the Legislation Minister determines that a notice and comment are necessary, the Minister may recommend the agency to conduct a notice and comment, or he may notify the public himself.

Even for a bill with notice and comment, another notice and comment are necessary if important edits are prescribed by presidential decrees, such as adding contents directly related

to the life of the public. The methods to conduct notice and comment are legislative-intent and the main contents or the full text must be published via the official gazette or an official report, the Internet, newspapers, and through broadcasts. Such notice and comment must be also submitted to a standing committee of the National Assembly. Also, organizations that are recognized to have relations to the proposed bill—including major administrative institutions, local governments, and other organizations—should be notified through announcements or by other medium. Through the use of such methods, an extensive collection of public opinions via an electronic public hearing can be conducted in regards to the announced bill. When requests for viewing or copying of the full text of the announced bill are received, such requests must be fulfilled unless special reasons exist. The period of the notice and comment must be set by the time the notice is made public. If no special circumstances exist, it is set at a minimum of 40 days (20 days for local laws and regulations).

Anyone can submit comments on bills under notice and comment. At the time of the announcement of a bill, an administrative agency must publish the institution to which the comments are submitted, the period of comment submissions, and other necessary information. The administrative agency must notify each person who has submitted a comment of the results of the submitted comments.

The Minister of Government Legislation checks the operational history of the notice and comment system of a related agency that has proposed a bill, and recommends improvements when needed. In addition, the Minister reviews the submitted comments received during the notice and comment period. If there are comments that the official of a related agency of the proposed bill did not incorporate in the bill, the Minister may recommend to incorporate comments with regard to legal principles or the legislative system that the Minister deems to be advisable. In order to encourage the public's participation in the legislation process and to incorporate various legislative opinions of the public, the Ministry of Government Legislation requires establishment of a system under which the information of a bill at each legislation phase and explanatory statements for first-time legislation or amendment are published. It also makes it easy and convenient for anyone to use the system and submit opinions on regulations or bills. The Ministry requires the notice and comment procedure of local laws or regulations

to use the same system through the application of the Legislation Operational Regulation. Public hearings are not required, but hearings can be held if necessary.

5. Review by the Regulatory Reform Committee

Upon the completion of the interdepartmental discussion, as well as notice and comment, a review by the Regulatory Reform Committee is usually conducted. Under the Framework Act on Administrative Regulations, a regulation is defined to limit the rights and impose the duties of the citizens (including foreign citizens to whom domestic laws are applicable) in order to realize specific administrative goals that were set by the State or local governments. It includes matters of laws, ordinances, and rules (Framework Act on Administrative Regulations Article 2, Section 1, Subsection 1). The regulations must be based on the laws, but specific contents may be delegated to a subordinate legislation (Framework Act on Administrative Regulations Article 4). The enactment and amendment of legislations often deal with cases that concern limiting citizens' rights or imposing duties on citizens, as well as cases whose goals are difficult to achieve through a budget or by advertisements. Thus, drafting a legislation is almost always related to regulations. Subsequently, a review by the Regulatory Reform Committee is a necessary process.

The Regulatory Reform Committee is a state-ministerial-level committee under the President that has been established based on the Framework Act on Administrative Regulations Article 23. The Regulatory Reform Committee discusses and deliberates on the following matters: the direction of regulatory policies, research and improvements on the regulatory system, review on a new establishment and the reinforcement of a regulation, review on existing regulations, establishment and execution of comprehensive plans to modify regulations, registration and publication of regulations, collection and reflection of opinions on regulation improvement, check and evaluation on each administrative agency's system to improve regulations, and other matters that the Chairperson of the Committee determines to have a need for review and adjustment. The Committee is comprised of more than 20 but less than 25 members, including two Chairpersons who are appointed by the President. It has an

expert committee and subcommittees. The Regulatory Reform Committee is under the President, but practical support and operation are by the Office of the Prime Minister.

For the head of major administrative agencies to enact or strengthen a regulation, a self-assessment on regulation impact should be conducted—including the necessity of a regulation, the possibility of achieving the goals of a regulation, and whether there are elements of anti-competition. From such assessment, a report on regulation impact should be made and published during the notice and comment period to allow the head to hear the public’s opinion on the regulation. In case of the laws, including regulations, a review by the Regulatory Reform Committee should be requested after reviewing the public’s opinion and before requesting a review from the Ministry of Government Legislation. Within 10 days after receiving the request, the Committee decides whether the regulation under review is important after considering its impact on the public citizen’s daily life, society, and economic activities . Upon deciding that a regulation is important, the regulation reviews must be completed within a 45-day period after the date of the initial review request. This period may be extended up to 15 days at most. The Committee may enact a new regulation, withdraw reinforcement, or recommend an improvement. The head of major administrative agencies may request for a re-review when he or she has any objections to the results of the Committee’s review.

The review process of the Regulatory Reform Committee has been recognized by public officials as one of the most difficult processes within the governmental legislative procedure. The criteria of the Regulatory Reform Committee comes down to the validity of regulations. However, it is difficult in practice because “validity” does not have an objective standard, and it is not easy to accept the determination in the end. Oftentimes, legislation is delayed because of the long period of time spent on the regulation review.

6. Review by MOLEG

Upon the completion of review by the Regulatory Reform Committee, a review by the Ministry of Government Legislation (“MOLEG”) is conducted in the final step. The review by MOLEG must come after an interdepartmental discussion, notice and comment, as well as a

regulation review. Thus, it means that the review by MOLEG is conducted after the content of a proposed bill is finalized (Legislation Operational Regulation Article 21).

The focus of the bill's review that is conducted by MOLEG includes the following: constitutionality, legality, consistency with the current legal system, consistency with the governmental policies, and its own system and wording. The results of the review can be divided into three general branches: passage of the original bill, passage of the amended bill, and non-passage (return). It is uncommon to not pass a bill, but it is common to delete certain articles within a bill. In most cases, the original bill is not passed or returned; rather, certain articles and phrasing are reconsidered in almost all of the bills.

The review made by MOLEG determines whether the proposed bill corresponds with the Constitution, the upper laws, and the basis of governmental policies; that is, it determines the issue of whether it is possible or not to legislate, rather than a departmental issue. Thus, when MOLEG determines that a bill violates the above laws and basis, it must be returned even if the bill has passed the interdepartmental discussion, notice and comment, as well as the regulation review by the Regulatory Reform Committee. However, it is not easy for MOLEG to return a bill that has already completed notice and comment, received and incorporated public comments, as well as completed interdepartmental discussions and regulation review. In that case, the bills proceed with the legislative procedure even if they contain some issues.

In cases of ordinances of the Prime Minister and departmental ordinances, they are issued through publication on an official gazette after it has been reviewed by MOLEG. In cases of presidential decrees and the laws, they are submitted to the State Council for deliberation after the deliberation of the Vice Minister.

7. Deliberation by the State Council

Under Article 89 Section 3 of the Constitution, a bill and a proposed presidential decree must go through deliberation conducted by the State Council. As most issues are resolved before the proposal is submitted to the State Council, it is not common for the proposal's contents to be amended through a discussion during the State Council deliberation. When a proposal is

submitted as a major discussion issue, it may go through a practical discussion and deliberation; however, this system is rarely used. Customarily, the Vice Minister's deliberation is conducted before the deliberation of the State Council, but it should be noted that the former is not a requirement. However, in practice, almost all of the proposals go through the Vice Minister's deliberations. Thus, unless it is an exceptional case in which the proposal is discussed during the State Council deliberation, the Vice Minister's deliberation realistically serves as the last step of the governmental legislative procedure.

The deliberation of the State Council starts upon the presence of majority of the members and closes with a final decision when two-thirds of the votes are in favor of the proposal under deliberation (State Council Deliberation Regulation Article 6 Section 1). Nonetheless, in practice, it is run by a unanimous voting system.

8. Signature and Promulgation

The contents of a proposed legislation that were deliberated by the State Council are finalized when it receives the approval of the Prime Minister, a related member of the National Assembly, a related department, and the President. In case of a bill, the legislative procedure is completed upon submission to the National Assembly. In case of a proposed presidential decree, the legislative procedure is completed upon publication on an official gazette.

In case of a bill that has been submitted as a governmental proposal, the National Assembly, in principle, focuses on and passes the original bill as it has already completed the related interdepartmental discussions and the deliberation of the State Council. However, recent departmental discussions have become difficult. Thus, in some cases, departments make concessions in the discussion and obtain departmental benefits through the National Assembly deliberation. Previously, it was uncommon to amend bills during the deliberation process of the National Assembly. However, fewer numbers of original governmental proposals have been passed in the National Assembly recently. In many cases, bills are passed after being absorbed into alternative standing committees.

III Problems of Governmental Legislative Procedure

The legislative procedure may be justified when it can contribute to a qualitative improvement of a legislation. To improve the quality of a legislation, the legislative procedure must conduct discussions and deliberations on a proposed bill, ensure participation of the public and related experts, and ensure decision-making based on available information.

In case of governmental legislation, the necessity of such legislation is already evinced compared to that of the National Assembly legislation because in case of the laws, the public's attention shown during the presidential election becomes the foundation of governmental legislation in the form of election promises or governmental projects. Therefore, the governmental legislative procedure focuses on making a necessary legislation or an already-promised legislation that is consistent with the Constitution and Korea's legal system, rather than on filtering out unnecessary legislations.

From this perspective, the current governmental legislative procedure cannot be described as having no limitations. First, it has limitations in coordinating with societal and political priorities and with legal matters. In addition, it takes a long time to complete because of the interdepartmental discussion process and review by the Regulatory Reform Committee.

1. Insufficient Coordination with Policy Priorities

Since the establishment of the government, the current governmental legislative procedure has largely kept its framework without making significant changes. However, the need to improve the framework in order to reflect the current administrative needs has been arising because societal interest and legislation demands have been increasing. Approaching legislation as a part of the political process that effectively distributes limited resources is necessary. As the current government has to pass necessary legislation within a limited time period of its term, coordination with its priorities is necessary. Based on public opinion shown during the election process and through other mechanisms, policy priorities are arranged, and the budget and priority of legislative activities are arranged subsequently. The current

government also has a necessity for legislation to execute election promises with regard to major governmental projects and the normalization of abnormality. However, when viewed comparatively, supplementing organizational matters is also necessary.

As seen above, in the case of the United States, the Office of Management and Budget (OMB) is directly under the Executive Office of the President of the United States. OMB engages in a pre-review of not only the governmental legislation, but also in almost all of the federal programs with the perspective that the legislation is the President's priority. In the case of the Republic of Korea, the Ministry of Government Legislation (MOLEG) is partially in charge of such function. MOLEG is the major administrative agency under the Prime Minister. Based on the supervisory power of the governmental affairs of the Prime Minister, MOLEG engages in general adjustments through the government legislative plan and its capacity to review the laws as well as subordinate legislation. However, its coordination of legislation with policy priorities is limited because it is on the level of the Vice Minister's organization, and it does not have the capacity to make an overall adjustment. In the past, social attention was on the fair and just execution of the laws. On the other hand, the attention is currently moving towards lawmaking. The fact that most policies cannot be executed without the support of a legislation, the need for governmental coordination with legislation is evident.

Change in power between two parties with different ideologies may also trigger another perspective for coordination between the direction of governmental policies and legislation. This is intensified upon the specialization of administration as there is tension between the expert perspectives of the government bureaucracy and political decisions. The administration is based on legislation and is distributed to a number of departments for execution. It is desirable to execute government affairs flexibly and consistently; however, they cannot be easily consolidated as numerous legislations are enacted under different purposes and are executed by different departments. Although regulation reforms that each government emphasizes are viewed every time there's a change in the power of government, each department has its own good logical reasons and legitimacy to keep the current regulations, even if it agrees theoretically. From the perspective of the ones with ruling power of the nation, one may significantly liberalize even at the sacrifice of each department's benefit. Within the

perspective of coordinating policy priorities in the scope of the entire government, recent examples of unusual consequences show that the government starts with the legislative procedure to propose a bill, then switches to a legislation by a member of the National Assembly; or it starts out as a governmental bill then pro-actively prompt for an amendment during a review by the National Assembly.¹⁸⁾

2. Insufficient Coordination with Legality

As seen above, MOLEG comes in at the final step, which is after the content of the policy are finalized. The critical issues upon the review of MOLEG are: whether the bill violates the values of the Constitution, whether the bill deviates from the delegated scope of the upper laws and regulations, and whether the bill is consistent with the current legal system and in line with the bill's system and phrasing, including the issue of using easy legal language. The problem is that the review by MOLEG comes in at a time when the content of the policy is finalized, the interdepartmental discussion regarding a specific draft is completed, and notice and comment and regulation review are completed. At this stage, either public agreement regarding the bill or policies in the government as a whole would have been completed; thus, expectations and trust in the content would have formed to a certain degree. It is not easy to ask for a policy's foundational change based on legal principles; therefore, even if the content is amended, only insignificant and tangential content may be amended; more so for significant contents, the legislation may proceed even if there are legal problems. The result would be a production of bad laws, which may cause bigger problems in the execution phase. Furthermore, the function and the role of MOLEG remain at reviewing errors and omissions, or reviewing the phrasing system. Moreover, the purpose of requiring a review by MOLEG in the complex legislation procedure is defeated.

There is no need for the government to linger over the number of amendments made to the laws. What the government should focus on is how to draft the necessary legislations well.

¹⁸⁾ Introducing issues that should be introduced as governmental bill as a bill of National Assembly is called "roundabout legislation." The Ministry of Governmental Legislation promotes decreasing the number of roundabout legislation as one of its "normalization of abnormality."

There are not as many governmental legislation as the legislation proposed by members of the National Assembly; however, its importance as to the amount and quality of the content is high, and it becomes a reference to other legislation. Thus, meticulous and thorough legislation is necessary. With this, a common argument is that departments determine policies while MOLEG examines legal principles and compares the functions of departments; thus, MOLEG is often compared to a mother giving birth and a midwife. However, determination of policies is followed by an authoritative distribution process for limited resources and a choice of purpose and method that the Constitution and the laws allow. Thus, policy determination is directly related to legal principles, and policy and legality are not completely separate. It is not appropriate to compare the function of MOLEG to a midwife as it is necessary for MOLEG to have a more aggressive and proactive role.

3. Inefficient Departmental Discussion

Each department is an organization that wholly conducts the tasks of the country in its related fields. It can be stated that each department is the most knowledgeable about its related field and possesses most of the information. Given the complexity of the modern society, each department's task cannot be completely independent from one another. Because the legislative procedure is justified by the creation of good laws, it is followed by hearing each department's opinion for the said creation.

The problem is that interdepartmental discussions are too prolonged or that no reasonable adjustments are made. Prolonged discussions cannot always be looked upon negatively; however, it is not easy to deduct more productive bills from department concessions because departments approach with the prospective of departmental benefits or they view concession as losing .

Because individual discussions with each related department have to be conducted, and since interdepartmental interests may be mutually contradictory, it is even more difficult to come to an agreement through a discussion. There may be a case where a discussion with another department may succeed, but a third department may have a different opinion. When

opinions are in conflict, the fact that there is no agreed method for decision-making adds difficulty to the process. Even with different opinions, it is necessary to proceed with the necessary legislations when all issues are brought out and enough discussions are made. To do so, a decision must be made in any form; however, no agreed method exists. Thus, if a department objects, then the entire procedure is stopped or delayed for an extended amount of time. To resolve this problem, extending mutual understanding, exchanging human resources, or conducting collaborative work have been attempted. Yet, interdepartmental discussion still remains to pose itself as a challenge. Recently, more legislations start as a plan of governmental legislation before moving into legislation promoted by a member of the National Assembly. An interpretation of such phenomenon suggests that this is used as a way to avoid interdepartmental discussions.

Currently, when an interdepartmental discussion cannot be concluded because there's an issue on legal principles, MOLEG mediates the issue while the Office of the Prime Minister mediates the issues on policies. However, no decision-making method exists when different opinions remain unresolved.

IV Improvement Measures

1. Strengthening the Control Tower Function

By strengthening the control tower function, it is possible to improve unsatisfying conditions of the adjustment done to the priorities in policies, legislation by request of the government and active modification following a departmental profit during the National Assembly review process, and the control of interdepartmental discussions. With this, however, it is hard to expect each department to yield its profits to others. The legislative process is a political process, and limited assets shall be distributed with authority; therefore, the control tower function needs to be strengthened.

The Office of Management and Budget (OMB) is the office within the Executive Office of the president of the United States, assisting the president in checking whether the budget and

each department's program, policy, and procedure are aligned with the policy that the president is pursuing. OMB was established in 1921 and was originally called the Bureau of the Budget as a part of the Department of the Treasury. In 1939, it was moved to be under the Executive Office of the President to enhance the integration of national politics; and in 1970, it changed its name to Office of Management and Budget. One of the main functions of OMB is to monitor and supervise the bills, including the subordinate ones to match the president's budget program and the executive branch's policies. OMB's Legislative Reference Division is in charge of overseeing the bills. It listens to comments from all relevant departments and works as a central clearing agency that coordinates and draws an agreement among the departments on the government level. It also writes an overall opinion about where the president should sign the bill that has been passed to the National Assembly.

Establishing an agency like OMB directly under the president is perhaps not a realistic solution; however, it is possible to have a secretary designated for legislation in the Office of the President. The fact that most of the agenda in the State Council deliberation are proposed bills shows that the government operation cannot be separated from the enactment and the amendment of the law. Thus, on the level of the president's government operation, coordination must be conducted.

To enhance the control tower function, it is necessary to reconsider the status of MOLEG. MOLEG oversees the government legislation (Government Organization Law Article 23, the Ministry of Government Legislation organization). In addition, MOLEG should not just be the window of the National Assembly, but an actual partner that can represent the government in the realm of legislation. In this regard, some criticize that MOLEG should not be an agency that is on the vice minister level.

Because the government legislation must go through the National Assembly, to move the bill with the government's intent, it is crucial to have close coordination with the ruling party. The current government legislative procedure does not have an established system for coordination with political parties. Neither the Minister for Political Affairs nor the Minister for Special Affairs exist anymore, and the expert member sent to the ruling party no longer exists.

Coordination with the parties is necessary during certain phases of the government legislation procedure, and the revival of an expert member system is needed.

2. Change in the Ministry of Government Legislation's Review Method and Its Role Expansion

The current ex-post review method that MOLEG is currently conducting is far from the effective legislation from the legal perspective. At present, MOLEG is the organization that oversees legislation within the government. With this, it needs to have a role like the Bill Team of England, a country where the government has the right to propose a bill.

The Bill Team must not only have expert knowledge in bill drafting, but also an understanding of the overall legislative procedure and understanding of each phase's characteristic. In addition, it must have a great understanding of the policies of legislation that it attempts to enact or amend. Legislation experts cannot and should not be experts in all policies. However, at the minimum level, they must understand the policies that the bill tries to convey from the beginning phase, and maintain a close cooperative relationship.

First, the phase in which MOLEG becomes involved in the governmental legislation has to be the beginning phase, not the current phase after the policies are set. It is necessary to check whether the policy under consideration is applicable under the Constitution and the current legal system, and if so, where the legal limits of selectable policy mechanism lies.

Second, it is necessary to switch from the current system in which the competent department drafts a bill, to a new system where MOLEG takes charge of drafting a bill. That is, role division is necessary so that each department determines the policies while MOLEG takes care of drafting provisions based on such policies. In the long term, the review task should change to provide support in advance of legislation—which is MOLEG's current measure. In the past, if MOLEG's role were described as a midwife who helps mothers in giving birth, the new role and new function can be described as a relationship between an owner of a premise and an architect.

Third, there is a misunderstanding that the review by MOLEG only consists of a review of legal principles; that is, a review of style, system, and phrasing, rather than that of bill contents. However, policies and legal principles cannot be separated that clearly. Judgment of policies is a judgment of validity. Thus, some say that MOLEG, which determines permissibility under the laws, should not issue judgments on policies. Nonetheless, making legal judgments on policy measures is reasonable, and in this perspective, MOLEG should be able to make judgments regarding the contents of legislation.

3. Improvements on Interdepartmental Discussion Methods

It may be said that interdepartmental discussion is difficult and tedious; the core problem is when opinions conflict and there is no agree method to resolve the issue, not when departments do not have different opinions. The approach to interdepartmental discussions also poses another issue.

First, the discussions must be based on facts and data. A department's argument must be supplemented by experiential and specific data, and the grounds for discussion must be the introduced data. An argument without necessary data and specific reasons is more of a measure to halt legislation that is disadvantageous to the related department in the discussion process. The political process of the National Assembly may allow such discussion measure; however, the governmental legislation should at least discourage such discussion.

It may not be appropriate to set a time for discussion; however, limitation imposed on time is necessary. For example, in cases in which a discussion is inconclusive within a set time period, extension of time should be exceptionally allowed. If discussion is still inconclusive within the extended time period, then the issue may be transferred to a mediation mechanism.

Third, in cases in which sufficient discussion and issues occur, it is necessary to let them decide with the agreed decision-making measures. Once all issues and arguments concerning the issue and the necessary data are introduced and discussed, it must proceed with a decision: whether to repeal the bill, or for related departments to engage in a majority vote or an agreed method to decide.

In addition, currently, the time of discussion may be lengthened if there is an individual discussion with related departments. Thus, it may be more efficient to individually discuss each issue; however, depending on the case, it may be more efficient to discuss together on a certain date in one place.

It may be a secondary problem, but the approach to the discussions influences the actual discussions significantly. In practice, a considerable number of officials complain about the unnecessary delay in legislation. Their complaint states that the delay is caused when a department that receives an interdepartmental discussion request reviews the matter poorly in the first place, and then reviews earnestly after a review by MOLEG or right before the review by the State Council, which includes the vice minister meeting. To prevent this kind of inappropriate approach, alternatives may be suggested such as setting a time limit on discussion and pre-arranging a method by which different opinions can be resolved.

V Conclusion

The legislative procedure is justified by the premise that it contributes to good laws. Nonetheless, the legislative procedure itself does not guarantee good process of legislation. The justification only comes from the fact that the existence of the legislative procedure allows a number of citizens to participate and that it increases the possibility of improving original bills through a discussion and deliberation process based on information and expert knowledge. Upon such fact, even with the inefficient side of the procedure, the complex legislative procedure is justified.

Recently, societal attention to legislation has significantly increased. Today, the phrase “excessive legislation” exists because of the increase in the number of legislation and the growing attention and participation of the public. However, because of extreme arguments introduced in the process, many of the legislative procedures stop their process. There is criticism that legislation for the public falls into pieces in the legislative procedure, and government operation faces difficulty because of the non-passage of legislation required for

government operation.

The legislative procedure for good legislation should not serve as a mechanism to halt necessary legislation or to speak for particular benefits. The author hopes to deeply reflect upon and improve the conditions of the legislative procedure that enables incorporation of different opinions guaranteeing of sufficient discussion and fast legislation.

Innovation of Legislative Process

03.

Technology &
Legislative Drafting
In The United States

Sean J. Kealy

03 Technology & Legislative Drafting In The United States

Boston University School of Law

*Professor Sean J. Kealy**



The Massachusetts State House
Boston, 1787

Technology has had a profound impact on legislative drafting in the United States over the past 25 years. In the early 1990s, many American legislative staff were still drafting bills on a typewriter, as their predecessors had done 90 years before. At that time they were also

* Professor Kealy delivered this keynote speech in September 2014 at a conference on legislation held in Seoul, Korea. The conference was sponsored by the International Association of Legislation (IAL) and the Korean Legislative Research Institute (KLRI).

amending bills with a pen; as had been the practice since the 1600s. Since then, there have been tremendous changes: computers, sophisticated word processing, data bases of legislative documents, internet research and drafting sessions conducted remotely have all changed the way a legislature does business and the way we go about drafting a bill.

I began thinking about this topic a few years ago when I heard IAL's president, Wim Voermans give a presentation in Cape Town, South Africa. He talked about how the first automobiles looked like the horse carriages that came before. With time, and new technological advances, however, cars began to look completely different to serve new purposes and to maximize the new technology.

We now have new and amazing new technological tools at the disposal of legislatures—those very traditional and slow to change institutions. This raises several questions: what technology has made an impact on legislatures? How has that technology changed the process of drafting and passing legislation? and will legislatures change to maximize the technology available to them?

I The impact of technology on an ancient process

These questions are especially pertinent in the United States. Some of our legislatures have been operating for a very long time— in fact, my home state of Massachusetts' legislature, which is called the Great and General Court of the Commonwealth, has been meeting continuously since 1629. In America we also have a very complicated legislative structure:

We have 51 legislatures, and with only one exception, they are all bi-cameral. The House of Representatives and the Senate in each legislature have their own rules, traditions, and customs. To become law, a bill must go through a complex process involving several substantive and financial committees in each chamber, floor debate and amendment, often a conference committee between the chambers, executive amendments and possibly a veto, and then veto override procedures by the legislature. This is a complicated process that someone from a parliamentary system may rightly view as “messy” and “disorganized.” There are

many points in this process where a bill may be amended, and what the president or governor or their executive agency requests for legislative language is rarely, if ever, passed in that form. In addition, in our system, only a fraction of the bills come from the executive. Most are drafted by or at the request of individual legislators. And the number of bills is enormous. In Massachusetts, a state of 6 million people, and with 200 members of the legislature, there will be over 6,000 new bills filed in January in anticipation of the new legislative session. 1,100 more bills will be filed in Utah's legislature, which represents about 2.9 million people.

These are hyper traditional organizations that do not change quickly or easily. In Massachusetts, one of the hotbeds of technological innovation in the United States, bills are still printed on paper—blue paper if they originate in the Senate and tan paper if they originate in the House. Those paper bills are carried, often with handwritten notations, between the two chambers by young men and women called pages. When I worked in the Senate we had stacks of blue “An Act” paper, so called because of the pre-printed first words at the top of the page. In the mid 90s, we would type the bill title and language onto the page; by the 2000's we would send the blue paper through the printer and hope we had aligned the bill language properly.

When I first started with the legislature, one of the largest offices on our floor was the Legislative Documents Room. Every legislative document was printed many times and stored in small numbered mailboxes, in magnificent varnished shelves that must have been 150 years old, in case a legislative staff member, lobbyist, activist, or member of the public came in and asked for a copy of a bill or report by its number. By the early 2000's, however, nearly every legislative document was posted on-line and easily accessible through a computer. And yet the Legislative Documents Office persisted. It lasted another 8 or 9 years, with its staff of 5 or 6 people spending their days reading the newspaper, watching a small television and hoping someone—anyone— would come in. Finally, the legislature closed this office, and this year is finally transforming the unused space into a new hearing room.

II My Survey

To prepare for this presentation, I surveyed members of the two professional and non-partisan drafting offices in Congress and similar drafting offices in each state. I received responses from Congress and nearly 20 state legislatures spread throughout the country. The respondents were a very experienced group— they had a combined 517 years of legislative drafting experience, with an average career of nearly 23 years.

This short survey asked the following questions:

- How satisfied are drafters with the technology in their office and for their legislature?;
- What technological change has made the greatest impact—either positively or negatively — on their work?;
- Has technology changed the way they draft or assess legislation?;
- Has technology changed the legislative process in a positive or negative way?; and
- Has the legislature, as an institution or in part, resisted technology based changes?

The respondents stated that most of the technological changes have had a positive impact. They are able to work more quickly, are more efficient, and they are more confident in their work product. This group reported significant drawbacks as well, particularly the perception that drafting can be done in a very short period of time and the loss of face to face meetings to discuss important policy details. I will deal with each of these aspects and what they mean for the potential future of legislation.

III How satisfied were drafters with their technology?

In regard to the first questions; how satisfied are drafters with the quality of the technology both in drafting offices and for the legislature in general, on a scale of 1 to 10, with 1 being

poor and 10 excellent. The responses showed a very high level of satisfaction with the technology—much higher than I expected. All together, the average rating for the quality of technology in the drafting office was 8.37 and only nominally lower for the legislature as a whole at 8.32. Not surprisingly, the drafting offices in Congress, with all of their resources, reported the highest score of 10. Only three states gave their technology scores as low as 6.

I was surprised by how high the scores were, given the state of the US economy over the last several years, which has had a particularly dramatic effect on the annual budgets of the states. The states have had little money to preserve existing programs, so I expected that technological advancements would have been delayed, causing lower scores. In fact, several states reported major technological upgrades over the past few years, although a few reported that they will be getting new technology now that the economy has improved.

I was also surprised to see the scores for the drafting offices and the legislatures as a whole being so similar. This was due in part to my own experience in the Massachusetts Legislature, where the drafting offices had much better access to on-line research than lawyers working for individual lawmakers or committees. Three states did report that they had better technology than the rest of the legislature, but two states reported that they had slightly worse technology than the legislature as a whole. It should be noted that these two states were the two states that reported the greatest dissatisfaction with their technology.

In some ways, however, the results were not surprising. The people responding were the most senior members of their offices, and probably who made the decision to purchase the technology they had. If I heard from more younger drafters, they may have taken a more critical view of the technology at their disposal. In addition, many of these older drafters knew what life was like before computers and e-mail, so all of the cumulative changes led them to give higher score, whereas young drafters, who have never known a world without laptops and video conferencing, would take a dimmer view of what legislatures have to work with. In fact, I had one state with two responders: one senior drafter and one with only 1.5 years of service. While the experience drafter gave their legislature's technology an 8.5, the new drafter only gave a 6.

IV What technological change (if any) has made the greatest impact (either positively or negatively) on your work? and Has technology changed the way you draft or assess legislation?

The answers to the questions, “what technological change (if any) has made the greatest impact (either positively or negatively) on your work?” and “has technology changed the way you draft or assess legislation?” were varied:

Computers: one state did not have computers at all as late as the year 2000, and another state got their first computers in 1995.

Laptops: one drafter particularly appreciated the ability to work from home.

The internet: one experienced drafter suggested that the internet has had the greatest impact with more thorough legal research and the ability to quickly and thoroughly assess legal issues and craft legal opinions. In addition, drafters can easily research related laws and see how other states have dealt with similar problems. The ability to search existing law electronically helps greatly with consistency, cross-referencing and indexing statutes. The internet not only gives greater resources to the legislative staff, but dramatically improves transparency for the public in that they can easily see where a bill is in the system and what changes have been made to a bill.

E-mail: the ability to deliver bills and amendments electronically. Also the ability for outside actors such as agencies, civil society and lobbyists to offer input on bills.

Local area networks: for moving documents through the system and allowing a secure system for drafters, policy makers and the clerks to draft and re-draft legislation. One state reported that they are now able to do far more work with fewer staff members.

Drafting platforms: software that create a mostly paperless system and eliminates the need for literally cutting and pasting paper during the amendment process. Some of these are developed for the individual legislature’s needs and some are commercial programs that are

later tailored to the legislature's specification. For example the US House and a few state's drafters are now using XML to draft, amend and tag legislation rather than using traditional word processing systems. This speeds up the "mechanics of drafting," allowing more time for research and other time consuming aspects of drafting and allows collaboration across a variety of devices and systems within government. This movement will continue to improve in the next few years; several legislature report working on even more powerful programs that will make amendments a redline of current laws for enhanced readability, and automatic engrossment. Other states report desiring these systems, but are held back by the cost, which can be in the millions of dollars.

Session management systems: In only the last 15 years, several states report having added searchable databases with a variety of legislative materials such as: bill requests, legislative language, correspondence, memos, research, speeches and talking points. These replace forms, files of paper, notebooks and file cards. Drafters now can create a legislative record, and track legislation with a great deal of ease.

V Has technology changed the legislative process in a positive or negative way?

Next I asked, "Has technology changed the legislative process in a positive or negative way?" Overall, the responses were very positive, with most drafters citing improved efficiency, speed, accuracy and far less paper than was needed in the future. Others cite increased productivity that allows fewer staff members to complete more work in a shorter period of time. The fact that legislative materials, including floor debate, hearings and legislative history materials, are now more available to the public was also mentioned by multiple states as a positive change.

One state offered that they expect the technological changes to be positive, but for the time being, the new technological and old paper based systems are operating in tandem. Old habits die hard.

The responses, however, were not uniformly positive. One state reports that technological advancements have reduced the “analytical quality of requests submitted to the drafting office.” Presumably with 1st drafts that are copied from other states or drafted as a response to a news report from earlier that morning. Similarly, one drafter complained that technology allows other legislative actors to become sloppy in their requests for legislative materials.

Another office complained that the new technologies cause more and more drafting to be done by e-mail, rather than bringing multiple actors together to discuss and negotiate what the policy and legislative language should look like.

The most common complaint was that legislators now had an expectation that legislative drafting can and will be done very quickly. This creates an expectation of “instant gratification” for drafting requests, whereas legal research, thorough analysis and careful legislative drafting still require a fair amount of time. A very interesting comment came from one longtime drafter who pointed out that the younger legislators prize expediency and want to use technology to speed up the legislative process. In contrast, older legislators don’t want to use technology, but want to rely on the deliberative nature of the legislature to slow down the process.

I was surprised that none of the drafters included what I think is a very serious problem that was identified by my friend and colleague Toby Dorsey identified in a recent law review article. Toby wrote of outside actors, particularly special interests, will “draft”—often poorly because it is language they are submitting to many legislatures— legislation for their financial and ideological benefit and e-mail the language to their allies in the legislature. These legislators will then forward the language to the professional drafting offices to “check for technical problems” or to put the language in “proper form” without any analysis or further thought given to the proposal. This reduces the drafting offices to mere technicians—and is a true waste of their abilities.

VI Has the legislature, as an institution or in part, resisted technology based changes?

Next I asked “Has the legislature, as an institution or in part, resisted technology based changes?” I asked this question based on my own experience with the Massachusetts Legislature. I spent 9 years working with legislators and senior staff, and the way they sometimes approached technology was at times comical—at times frightening. My friends and I watched on—and laughed—the first time a laptop computer or an iPhone made its way onto the floor of the Massachusetts House or Senate and the members gathered around it, acting as though they were looking at an artifact that had been dropped from Mars. I also saw an older legislative drafter become befuddled and angry when he was forced to start using the “track changes” and “comment” functions on Microsoft Word rather than marking up a bill with his beloved red pencil.

Therefore, I was surprised that most respondents said that there had not been much resistance to technological changes. A few states reported that certain legislators had resisted at first when they were given a laptop or asked to change how they acted to accommodate the new technology, but that the resistance was short lived. One drafter was especially philosophical stating, “technology always meets with resistance” but that progress was being made. Other states reported that the changes were incremental and that slowly—but surely, the legislators and staff were adjusting to the new technology.

A few states reported that resistance was mostly on financial and there would be greater technological advances if not for the difficult fiscal situation many states still find themselves in.

Maybe the technological advance that has met with the most resistance in a few states is the webcasting of committee hearings and floor debate. This rings true with my own experience. At one point, my employer wanted to audiotape committee hearings to create a legislative record. This proposal met so much resistance from other committee members and leadership that it was never implemented. Legislators are constantly worried that they will misspeak and be embarrassed and will oppose any measure that increases this possibility. In one state,

legislative business may be seen on the web in real time, but it is not archived. That state's governor, however, has begun recording the committee and floor debates and archiving them independent of legislative authority.

VII Where do we go from here?

a. Change the legislative process to meet the new technology

So, now that new technologies have become so integrated into the legislative process, what will happen in the future? The final question of my survey was, "If you could change any part of the legislative process, the legislature as an institution, or legislative drafting by utilizing modern technology, what would it be?"

Here, the respondents were surprisingly reluctant to offer suggestions. Many simply replied, "none" or "not sure." Others suggested that they would simply seek to keep modernizing systems. A drafter stated that while their legislature readily adopts to new technology, the legislators would resist changes to procedural changes. One respondent gave a similar, but a more philosophical answer: "Technology should respond to and support the legislature and its process and needs and not be a means of changing these or the driver of change."

I disagree. Technology has already changed the way legislatures operate in significant ways and will continue to do so in the near future. For all of the good and valuable contributions these tools offer, legislators and their staff must be aware of and guard against the problems these tools can also create.

For example, having special interests drafting and electronically submitting legislative language directly to a legislator, which is then forwarded to the professional drafters for "cleaning up," is a significant problem. It has become too easy for a legislator to "draft" and promote legislation without the careful design and assessment that a professional drafting office can provide.

Another example is that as we move closer to a paperless process, legislatures will need to adapt new policies and procedures to back up what is increasingly done electronically. Obviously, technology is vulnerable to hacking, viruses and malfunction. Legislatures should plan to create divisions or repurpose existing offices to archive legislative business in paper form, what one respondent called a “bible copy” that can be used as the official record if the computers fail.

Maybe the greatest threat to the legislative process going forward is the very thing that makes technology so appealing—its efficiency. One respondent stated, “the efficiency of technology is at odds with the deliberation and delay that is so valuable in the legislative process.” Although new efficiencies are welcome in true emergencies; those are few and far between. The vast majority of bills benefit from the slow, deliberative process where research and careful analysis is prized.

The existing legislative rules and procedures that slow down the process to respond to the problems of the 18th and 19th centuries: slow travel to the capitol; slow communication; representatives who may not have been educated or even illiterate; and the ability of powerful political factions that could force through legislation with out proper scrutiny from other legislators and the public.

The process must now be changed with technology firmly in mind. The rules must slow down the process to allow a drafter the time for proper research, analysis, and careful drafting.

Perhaps these rules could dictate a certain amount of time between 1st and 2nd reading that will give the drafter time to do their job properly.

Perhaps the rules should dictate that for bills scheduled to be reported from a committee, there must be at least one face-to-face meeting of stakeholders to work out policy and drafting issues, rather than relying on a string of e-mails.

Perhaps the rules should dictate that instead of “reading” the bill to the legislators on the floor, bills and amendments must be posted on-line for a certain period of time to provide transparency for legislators, the media, and the public.

b. Use the technology to aid underprivileged countries

Technology has also opened a new and exciting avenue for legislative drafting. Legislation to date has been an isolated and often a purely local endeavor. Policy, and the laws that reflect the policy, have always been formulated in the parliament building, or in the short space between the executive's mansion and the legislature. Legislators looking for ideas might look to other states or countries for recently passed or revised laws, but there has been little opportunity for collaboration.

This situation is changing in a very positive way. For the last several years I have been involved with the African Parliamentary Knowledge Network (APKN). Founded at a 2008 continent wide conference held in Cairo, Egypt, this Network seeks to create opportunities to offer support and information for the benefit of African parliaments that are attempting to assert their important role after decades of dominance by “Big Man” presidents.

For the last several years, my students and I have supported this valuable work through my School's Africa i-Parliaments Clinic. For each clinic, we solicit projects from parliaments around Africa—typically a model bill that has been drafted by an international organization, or by the President's office, which members of parliament wish to see redrafted to reflect parliamentary priorities. We work on these projects, utilizing evidence-based legislative methods, with the client and with several volunteer drafters, parliamentarians, and experts from every part of Africa. We operate with the guiding principle that only the client parliament can decide for itself what is the best policy or legislative language—all in an effort to empower, and not replace, parliament through international assistance.

The tools are commonplace now, but extraordinary too: e-mails, video conferencing, cloud based services such as Google Drive to store and share materials and to revise legislative language together in real time. New African drafters and students at African universities can participate and learn alongside my law students. The clients receive the legal and policy support they desire and the rest of the Network gets a chance to offer their experiences and learn from the client parliament.

There are so many places where a desire for democratic institutions must be fostered and assisted. Some legislatures have been very generous in this endeavor. The European Parliament and the Parliament of Great Britain in particular have lent their resources and expertise to the APKN effort. In addition, the Parliament of Scotland has built a partnership with the nation of Malawi to provide links between their parliaments and civil society in each country.

Still, there is so much more that can be done. I ask all of the members of this great organization to consider how else we can use the technological marvels currently available to us to support the work of our brothers and sister drafters working in emerging and fragile democracies around the world

Innovation of Legislative Process

04.

Rationalization of
Government
Legislation
Procedures

WanSik Hong

04 Rationalization of Government Legislation Procedures*

Professor, Konkuk University Law School

WanSik Hong

I Introduction

While most states form and operate state agencies under the principles of democracy and rule of law, the systems of norms and legislative procedures in each state have their own unique characteristics. Despite the fact that the systems of norms and legislative procedures reflect the history and characteristics of their respective states, the system, where the assembly that acts as the representative apparatus of citizens creates laws, the executive branch executes laws, and the judicial branch interprets and applies laws, possesses a global universality. The Republic of Korea also operates under this principle of separation of powers between the three branches, and the checks and balances between the national assembly and the executive branch applies to the legislation of laws as well. While the Republic of Korea maintains, as a matter of principle, a presidential system of government, the power to submit bills is possessed by both the government and the members of the National Assembly. While the government of the United States, which also has a presidential system of government, does not have the power to submit bills, the Republic of Korea has maintained in its Constitution, since its original constitution of 1948, that the government also has the power to submit bills, along with the members of the

* The statistics and contents of this article were updated and supplemented based on the following articles: Hong, Wan-shik, The Problems and Proposals for Improvement in the Current legislation procedure, Legislation Research, Issue No. 37, 2009; Hong, Wan-shik, Rational Means of Control of Legislation by the Members of the National Assembly, Justice, Issue No. 106, 2008; Hong, Wan-shik, Study on the Practice of regulatory examination, Judicial Affairs Deliberation, 2014.

National Assembly.

The Republic of Korea has a diverse set of legislative procedures for legislative drafts that are formed and submitted to the National Assembly by the government, and especially important among these are the regulatory examination and legislative examination systems. In order to newly establish or reinforce a regulation, the heads of central administrative agencies should prepare a regulatory impact report through self-examination, hear opinions through advance announcements, and prescribe the period of existence and period of re-examination on the regulation, after which a request for examination must be submitted to the Regulatory Reform Committee. As such, government-submitted bills whose contents comprise newly establishing or reinforcing a regulation must, as a matter of principle, receive regulatory examination. Furthermore, all bills must undergo legislative examination by the Ministry of Government Legislation. That is, the Regulatory Reform Committee is responsible for regulatory examinations of government-submitted bills, while the Ministry of Government Legislation is responsible for legislative examinations. However, regulatory examinations and legislative examinations differ in terms of their applicable Acts, implementing agencies, examination procedures, and examination criteria. And as discussed below, while the Ministry of Government Legislation performs examinations of government-submitted bills, the Standing Committee of the National Assembly conducts deliberations on both government-submitted bills and bills submitted by the members of the National Assembly. Government-proposed bills that aim to newly establish or reinforce regulations, and are about to be submitted to the National Assembly, must undergo both regulatory examinations and legislative examinations, while bills not concerned with regulations only have to go through legislative examinations. However, even if a bill aims to newly establish or reinforce regulations, it does not have to go through regulatory examination if it is proposed by a member of the National Assembly, and is only required to undergo a legislative examination by the Standing Committee of the National Assembly.

II Importance of Legislation

From daily lives of citizens to the political system of the state, important matters are regulated by laws, and these laws must be abided. Under the principles of separation of powers and the rule of law, administrative work is the act of executing laws, while judicial work is the act of interpreting and applying laws; therefore, the critical importance of the law in the workings of the state need not be re-emphasized.

Traditionally, the study of law has been about legal interpretation, which basically seeks to interpret ‘already existing laws’. However, if laws were better perfected in their legislative phases, and had their errors removed, interpretational difficulties and confusion would decrease in both the judiciary’s work of interpreting and applying laws and the executive’s work of interpreting laws to execute them, and generally, the application of laws would be more objective and clear.¹⁾ The work and role of lawyers is usually limited to activities relating to legal interpretation and litigation. It has been thought that legal theory is mainly about legal hermeneutics, while legal practice is mainly related to litigation work. However, it is desirable that a lawyer not limit his role to the interpretation of ‘already existing laws’ but expand his role to the ‘work of making laws’.²⁾ If a lawyer believes that only ‘politicians’ can make laws, and lawyers are called upon only to interpret and apply laws that are already in place, he is voluntarily limiting his scope of responsibility as a lawyer. Therefore, the declaration that the “basic virtues of a lawyer” includes “the historical calling to facilitate upstanding legislation through sound oversight and acting as a check on legislation by the government and National Assembly”³⁾ is indeed a significant one.

The work of legislating a law is significantly more important than the administrative work of executing that law or the judicial work of interpreting and applying that law. If there is an insufficiency or error while legislating a law, execution of said law will be difficult, and it will

1) Chung, Ho-young, *The Theory of the National Assembly Act*, Bobmunsa 2012, page 81.

2) Hong, Wan-shik, *The Constitution and Legislation*, Legislative Administration Academy Textbook Volume 1, Korea Bar Association, 2014, page 5.

3) *Materials for the 22nd Conference of Attorneys*, 2013. 8. 26, pages 13–14.

be difficult to correct such legislative insufficiencies and errors, even through litigation. Therefore, the importance of the National Assembly, the branch of government that legislates laws, is emphasized, and like the constitutions of other liberal democratic states, the Constitution of the Republic of Korea also provides, in Article 40, that, “[t]he legislative power shall be vested in the National Assembly,” and thus empowers the National Assembly, which is a representative apparatus, to legislate laws. While the National Assembly is vested with various powers and functions, the power and function of legislating is indeed the most essential. Since the state apparatus is thus organized, operated, and controlled by laws such as the National Government Organization Act and the Court Organization Act, the legislative process, which is the process of making laws, should be rational and transparent. When one looks at the fact that many laws have been judged to be unconstitutional or to be inconsistent with the Constitution ever since the Constitutional Court began to perform its practical function under the current constitutional system, it is clear that appropriate control needs to be exerted during the legislative process in order to prevent unconstitutional laws from being made. Especially, ever since procedural problems during the legislative process started to be considered as being subject to adjudication in jurisdiction disputes, the idea that the legislative process itself needs to be justified and rationalized has been pointed out.

III Current State of Legislation

As of May 31, 2016, there were 1,343 laws currently in force, along with a total of 2,822 Enforcement Decrees and Enforcement Rules, making the total number of current laws 4,165.⁴⁾ And nationwide, the number of Ordinances and Rules of Metropolitan Municipalities was 47,635 and 24,056, respectively.⁵⁾ Therefore, there are indeed many laws, administrative laws and municipal ordinances, and besides these, there are many subordinate rules within administrative agencies and municipal organizations. As such, one may reasonably raise a

4) Legislation statistics of the Ministry of Government Legislation, <http://www.moleg.go.kr>, visited on 2016. 6. 24.

5) And nationwide, the number of Ordinances and Rules of Metropolitan Municipalities was 47,635 and 24,056, respectively.

doubt as to whether this many laws, administrative laws and municipal ordinances are necessary and well made. The number of decisions of unconstitutionality and inconsistency with the Constitution issued by the Constitutional Court between September 1, 1988 and March 31, 2016 was 663.⁶⁾ Given that this many laws were found to be unconstitutional, it is possible to raise the question of whether other laws are indeed without problems.

During the 18th National Assembly, 13,913 bills were proposed, of which 7,220 were automatically discarded upon the expiration of their terms. And in the 19th National Assembly, 17,822 bills were proposed, of which 10,190 were automatically discarded upon the expiration of their terms.⁷⁾ Despite the fact that many laws are already in force, many legislative bills were continuously proposed, and a staggering 10,190 bills were automatically discarded in the 19th National Assembly. In addition, many of the laws passed by the National Assembly were found to be unconstitutional or inconsistent with the Constitution. A system is therefore necessary to screen legislation with overly strict regulatory provisions and to examine and evaluate whether proposed legislation is indeed necessary and suitable, and whether it is unconstitutional.

[Table 1] Comparison of bills by the National Assembly Members and the Government from the 1st to 19th National Assembly⁸⁾

| Session (Year) | Overall bills | Bills brought by the Members of the National Assembly | | | Bills brought by the Government | | |
|---|---------------|--|------------------|-----------------|------------------------------------|------------------|-----------------|
| | | Number Brought | Number Passed | Passage Rate | Number Brought | Number Passed | Passage Rate |
| Constitutional National Assembly (48-50) | 234 | 89 | 43 | 48% | 145 | 106 | 73% |
| 2 nd (50-54) | 398 | 182 | 77 | 42% | 216 | 137 | 63% |
| 3 rd (54-58) | 410 | 169 | 72 | 43% | 241 | 85 | 35% |

⁶⁾ Case statistics of the Constitutional Court of Korea, <https://www.ccourt.go.kr>, visited on 2016. 4. 24.

⁷⁾ Bill statistics from the Bill Information System of the National Assembly, <http://likms.assembly.go.kr/bill>, visited on 2016. 6. 24.

⁸⁾ Material based on the National Assembly activity materials published by the National Assembly Secretariat in 2004, and re-arranged by reflecting the legislation statistics from the Bill Information System of the National Assembly Secretariat on the processing of legislative bills, at <http://likms.assembly.go.kr/bill>.

⁹⁾ The number of bills brought by the members of the National Assembly that passed in their original

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| Session (Year) | Overall bills | Bills brought by the Members of the National Assembly | | | Bills brought by the Government | | |
|---|---------------|--|---------------------|-----------------|------------------------------------|--------------------|-----------------|
| | | Number Brought | Number Passed | Passage Rate | Number Brought | Number Passed | Passage Rate |
| 4 th (58-60) | 322 | 120 | 31 | 26% | 202 | 44 | 22% |
| 5 th (60-61) | 296 | 137 | 30 | 22% | 159 | 40 | 25% |
| Supreme Council for National Reconstruction (61-63) | 1,162 | 554 | 514 | 93% | 608 | 501 | 82% |
| 6 th (63-67) | 658 | 416 | 178 | 43% | 242 | 154 | 64% |
| 7 th (67-71) | 535 | 244 | 123 | 50% | 291 | 234 | 80% |
| 8 th (71-72) | 138 | 43 | 6 | 14% | 95 | 33 | 35% |
| 9 th (73-79) | 633 | 154 | 84 | 55% | 479 | 460 | 96% |
| 10 th (79-80) | 129 | 5 | 3 | 60% | 124 | 97 | 78% |
| Legislative Council for National Integrity (80-81) | 189 | 33 | 33 | 100% | 156 | 156 | 100% |
| 11 th (81-85) | 489 | 202 | 83 | 41% | 287 | 257 | 90% |
| 12 th (85-88) | 379 | 211 | 66 | 31% | 168 | 156 | 93% |
| 13 th (88-92) | 938 | 570 | 171 | 30% | 368 | 321 | 87% |
| 14 th (92-96) | 902 | 321 | 119 | 37% | 581 | 537 | 92% |
| 15 th (96-00) | 1,951 | 1,144 | 461 | 40% | 807 | 659 | 82% |
| 16 th (00-04) | 2,507 | 1,912 | 514 | 27% | 595 | 431 | 72% |
| 17 th (04-08) | 7,489 | 6,387 | 1,352 | 21% | 1,102 | 563 | 51% |
| 18 th (08-12) | 13,913 | 12,220 | 1,663 | 14% | 1,693 | 690 | 41% |
| 19 th (12-16) | 17,822 | 16,729 | 2,414 ⁹⁾ | 14% | 1,093 | 379 ¹⁰⁾ | 35% |

version was 1,646, and number passed in a revised version was 768, for a total of 2,414 laws.

- ¹⁰⁾ The number of bills brought by the government that passed in their original version was 129, and number passed in a revised version was 250, for a total of 379 legislations.

The Constitution of the Republic of Korea has vested the government as well with the power to submit bills, and the government, by taking advantage of its policy expertise, enormous data, and the strength of its bureaucratic organization, has played a leading role in submitting bills. Recently however, there has been a notable increase in the number of bills submitted by the members of the National Assembly.

A look at the statistics of legislation passing in the 18th and 19th National Assemblies on [Table 1] shows that a total of 2,353 bills were passed in the 18th National Assembly (1,663 member-proposed + 690 government-proposed), and a total of 2,793 bills (2,414 member-proposed + 379 government-proposed) were passed in the 19th National Assembly. Therefore, the 19th National Assembly passed 440 more bills than the 18th National Assembly. And despite the fact that more bills were passed overall in the 19th National Assembly than in the 18th National Assembly, the number of government-proposed bills that were passed was the lowest since the 14th National Assembly (1992-1996). The fact that only 379 (803 including alternatives) government-proposed bills were passed in the 19th National Assembly, compared to 690 (1,288 including alternatives) in the 18th, shows that the government possessed insufficient capacity for communication and legislative efforts during the 19th National Assembly. That is, the government during the 19th National Assembly had an insufficient capacity for legislative cooperation with not only the opposition, but also with the ruling party.

[Table 2] Comparison of Passage Rates for Bills from the 16th to the 19th National Assemblies
(Unit:%)

| Type of Proposal and Passage Rate | 16th | 17th | 18th | 19th |
|---|------|------|------|------|
| Passage Rate for Member-Brought Bills | 27 | 21 | 14 | 14 |
| Passage Rate for Government-Brought Bills | 72 | 51 | 41 | 35 |
| Overall Passage Rate for Bills | 38 | 26 | 17 | 16 |

One can see that, in the 16th and 17th National Assemblies, the number of member-proposed bills significantly increased as compared to that of government-proposed bills; of a total of 2,507 bills proposed in the 16th National Assembly, 1,912 were proposed by members, making up 76% of all proposed bills, while in the 17th National Assembly, 6,387 bills out of a total of 7,489 bills, or 85%, were proposed by members of the National Assembly. Out of the total 13,139 bills brought to the 18th National Assembly, 12,220 bills, or 93%, were proposed by members, and out of the total of 17,882 bills brought to the 19th National Assembly, 16,729 bills, or 94%, were proposed by members.

However, as can be seen in [Table 2], the passage rate for bills has been decreasing for both member-proposed bills and government-proposed bills since the 16th National Assembly. The overall passage rate for bills has also been gradually decreasing, and the overall passage rate for bills in the 19th National Assembly was about 16%. However, the actual number of bills passed has been increasing (16th:945, 17th:1,915, 18th:2,353, 19th:2,793), while the passage rate has been gradually decreasing, suggesting that the main reason behind the change in the passage rate is the rapid increase in the number of bills submitted.

IV Comparison of the Respective Legislation Procedures for Members of the National Assembly and the Government

1. Introduction

The determination of how to distribute legislative power to which government apparatus is made by the constitution of each country. The legislative power includes the power to submit bills, the power to deliberate on and pass bills, and the power to promulgate or veto bills, etc.; the power to deliberate on and pass bills is possessed by the legislature while the power to promulgate or veto bills is possessed by the executive branch. There are cases, like that of the United States, where only the legislature possesses the power to submit bills, and there also are cases, like Korea, Germany and Japan, where this power is shared between the legislature and the executive branch. Furthermore, while the legislature possesses the power to legislate laws,

the executive branch has the power to legislate administrative laws, and municipal assemblies and municipal governments possess the power to legislate municipal laws such as ordinances and rules.

While the legislative power is thus distributed by the constitution of each country, the principle of separation of powers, representative democracy, and a system where the legislature, which is the representative apparatus, exclusively possesses the power to legislate laws that limit rights, impose obligations or for other important matters, pursuant to the principle of statutory reservation (reservation to the legislature), are common principles found in the constitution of every country. That is, for important matters, the executive branch cannot legislate as it wishes, and only the legislature, which represents the people, may legislate on such matters. According to such principles, while the government has the exclusive power to conduct deliberations on, vote on, and promulgate administrative laws, the government does not have the power to deliberate on and vote on bills, and only possesses a partial power to promulgate bills to be laws or veto such proposals.

The current Constitution provides in Article 52 that, “[b]ills may be introduced by members of the National Assembly or by the government.” While the exact locations of the provision are different, the textual provision itself, which is, “[b]ills may be introduced by members of the National Assembly or by the government,” has remained identical since the original Constitution and up to the current Constitution. There is also an argument that, since vesting the executive branch with a power to submit bills under a presidential government is an unusual arrangement, the executive branch’s power to submit bills should be removed. That is, since a system where the executive branch possesses a power to submit bills can be found only in a parliamentary cabinet form of government, only members of the National Assembly should be given the power to submit bills, consistent with the characteristics of the presidential government system. However, because this system has been reinforced with long-standing experiences in the areas of constitutional politics and legislative politics, it is now perceived as part of Korea’s constitutional and legislature system. While the Constitution has thusly bestowed both the members of the National Assembly and the government with the power to submit bills, specific regulations on the procedure of submitting bills do not exist in the

Constitution. While Articles 52 and 53 provide provisions regarding legislative procedures, these only provide the rights and procedures for the President's request for reconsideration and the promulgation of legislation. This attitude of the Constitution may be interpreted as signifying that the specifics related to deliberating and voting on bills submitted by members of the National Assembly, in addition to the government, should be formed at the discretion of legislators. Specifics as to whether to determine in a single statute the procedures for deliberating and voting on bills submitted by members of the National Assembly and those submitted by the government, whether to provide identical or different legislative procedures, and what criteria should be used for examination, etc., may be statutorily determined by the legislating National Assembly unless the Constitution provides explicit provisions. In particular, determining whether identical or different formulation procedures should be provided for bills submitted by members of the National Assembly versus those submitted by the government may be said to be subject to the judgment and discretion of the legislature. As a result, the formulation procedures for bills submitted by members of the National Assembly and those submitted by the government came to have different applicable statutes and procedures. The procedural requirements imposed on the various agents of bills, namely the government and the members of the National Assembly, are evaluated and acknowledged as sufficiently reasonable and natural, given the statuses and natures of these different constitutional apparatuses.¹¹⁾ While some have pointed out that the existence of asymmetry between the respective legislative procedures for the National Assembly and the government in several areas, including regulatory examinations, etc., is undesirable, some have also argued that, given that the National Assembly's legislative procedures for bills brought by members of the National Assembly are relatively simple compared to the government's legislative procedures, which are studded with many complex procedures, such overall asymmetry throughout the whole system of legislative procedure must be corrected.

¹¹⁾ Kwon, Young-seol, Problems in and Tasks for National Assembly Legislations in Korea, Forum for Legislative Advancement, The 2nd Asian Forum of Legislative Information Affairs, 2012.6.28., page 11.

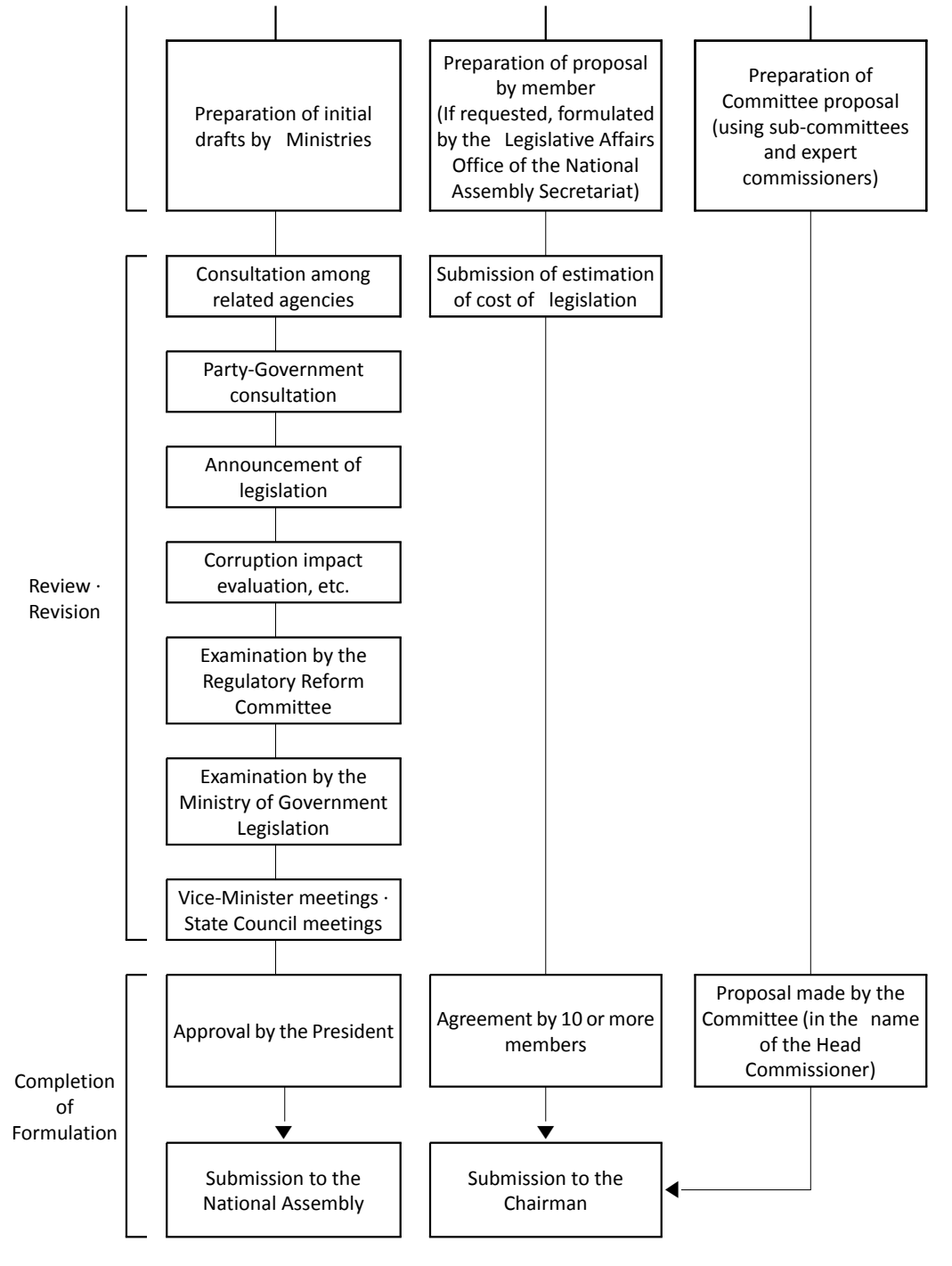
2. Differences in the Formulation Procedures of Legislative Drafts

The overall legislative process may be roughly categorized as thus: members of the National Assembly and the government are responsible for the formulation of bills, the National Assembly is responsible for deliberating and voting on bills, and the government is responsible for promulgating bills as statutes. Since Article 52 of the Constitution, as stated above, vests in both the National Assembly and the government the power to submit bills, the agents that formulate bills are also divided into the members of the National Assembly and the government. Depending on the agent of formulation, bills may be distinguished into two categories: National-Assembly-proposed bills, and government-proposed bills; while differences do exist in terms of the methods and procedures of legislative formulation given the different natures of these agents of formulation, the process of deliberating, voting and promulgating is identical for both types of bills after they are submitted to the National Assembly. As such, distinguishing between the legislative procedures of member-proposed bills and government-proposed bills, and the discussion of the differences thereof, concerns the differences between the processes of formulating bills for the entire legislation procedure.

[Table 3] Comparison Between the Formulation Procedures for Bills

| | <Government-Submitted Bills> | <Bills Submitted by Members of the National Assembly> | <Bills Submitted by Committees of the National Assembly> |
|------------------|--|--|--|
| Initial Drafting | Establishment of legislation plan | Recognition of legislative necessity by public opinion · civic petition, party policy apparatuses and members of the National Assembly | Standing Committee (Special Committee) recognizes the need for legislation, or the Chairman engages the competent Standing Committee |
| | Investigation and research by expert research agencies and policy propulsion teams | Investigation and research by assistants of members of the National Assembly and outside experts | (Public hearing) |

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The initial drafting stage of a bill transpires as follows: for government-proposed legislation, the competent Ministry first recognizes the need for the legislation, and thereby establishes a legislative plan at the start of every year. And to make progress with this plan, an investigation or study is conducted directly or through an expert research agency, and the results are arranged to assist in the formulation of an initial draft of the legislation. While there are cases where a given piece of legislation is concerned only with the area of competency of a single Ministry, in cases where the content of the legislation is concerned with the areas of competency of multiple Ministries, consultation is needed in the formulation phase. Once a bill to be submitted by the government is formulated, it may be submitted to the National Assembly after going through the procedures of consultation with related agencies, consultation between the party and the government, announcement of the legislation, examination procedures including regulatory examination, analysis of gender-specific impacts, corruption impact evaluations and the like, examination procedures at the Ministry of Government Legislation, Vice-Minister meetings and deliberative procedures at State Council meetings, and finally, approval by the President. Of course, while there are cases where some of these procedures are omitted depending on the nature of the legislation, they still differ significantly, in terms of procedure, from bills drafted by members of the National Assembly, which do not have to undergo such procedures. That is, bills drafted by members of the National Assembly are conceived through public opinion and or civic petition, policy research by party policy apparatuses or recognition of need by members, etc. Investigation and research for formulating bills is either conducted directly by the office of the sponsoring member or through an outside expert, and the results are used to prepare the initial draft of the bill. While preparation of the initial draft is sometimes conducted by the Legislative Affairs Office of the National Assembly upon request by the member, this is not a mandatory legislative procedure.

3. Formulation Period of Government-Submitted Bills

As such, differences exist between the respective formulation procedures for government legislation and National Assembly legislation during the formulation phase of the bills. As stated above, for government legislation, established legislative procedures, such as

consultation with related agencies and regulatory examination, etc., exist, through which initial drafts of bills are examined and revised, producing diligently examined and high-quality bills for submission to the National Assembly. However, as can be seen in [Table 4], much time is needed for the government to prepare bills to be submitted to the National Assembly, as there are many procedures to be followed.

[Table 4] Time Needed for Each Phase of Legislation for Government-Submitted Bills

| Phase of Legislation | Time Needed |
|---|---|
| Formulation of legislative bill | About 30 ~ 60 days |
| Corruption impact evaluation | About 15 ~ 30 days |
| Consultation with related agencies and party-government consultation | About 30 ~ 60 days |
| Legislation announcement | About 40 ~ 60 days |
| Regulatory examination | About 15 ~ 20 days |
| Examination by the Ministry of Government Legislation | About 20 ~ 30 days |
| Deliberation at the Vice-Minister meeting | About 7 ~ 10 days |
| Deliberation at the State Council | About 5 days |
| Approval by the President and submission to the National Assembly | About 7 ~ 10 days |
| Deliberation and vote by the National Assembly, and delivery of the promulgated version to the government | About 30 ~ 60 days (except for long-term pending) |
| Submitted to the State Council | About 5 days |
| Promulgation | About 3 ~ 4 days |

※ While time spent may differ depending on the type and contents, etc., of the legislation, the amount of time spent for legislative process within the executive branch is usually between 5 to 7 months. Refer to the Ministry of Government Legislation homepage (www.moleg.go.kr).

In contrast, for member-proposed bills, such phases for review and revision are omitted. That is, after preparation of the initial draft of a bill, there is no mandatory phase for examination and revision until submission to the National Assembly, except for estimating the cost of the legislation. In the light of the relative simplicity of the procedures for member-proposed legislation compared to those for the government-submitted legislation, and in the light of the resulting time and effort savings, proposal by a member of the National Assembly may be preferred, and this has been pointed out as the reason behind the increase of

hasty and ill-prepared bills.¹²⁾ Such omissions of the review and revision procedure for member-proposed bills, in contrast to government-submitted bills, is the most significant characteristic of legislation by members of the National Assembly, and the advantages and disadvantages of legislation by members of the National Assembly may be seen as being rooted in this procedural characteristic. Due to this procedural difference between legislation by the government and legislation by the National Assembly, the government often submits bills through members of the National Assembly, and such bills are called ‘contract legislation’, ‘circumvention legislation’, and ‘procedural-evasion legislation’. That is, since bills submitted by the government need to go through complex and time-consuming legislative procedures, the member-proposal method, which only requires simple and expedient legislative procedures, is used to propose legislation.

V

Regulatory Examination of Government-Submitted Legislative Bills

1. Regulatory Policy Agencies

In 1970’s, the United States and European countries began to actively engage in national efforts to reform regulations, and Korea has been actively implementing government-level efforts for regulatory reform since 1990’s. Korea’s initial efforts for regulatory reform include the ‘Committee for Relaxation of Economic Administrative Regulations’ in early 1990, the ‘Civilian Advisory Committee for Relaxation of Administrative Regulations’ at the end of 1991, the ‘Committee for Relaxation of Economic Administrative Regulations’ of the Economic Planning Board in 1993, the ‘Administrative Reform Committee’ in 1993 that was under the President’s direct control, the ‘Corporate Activity Regulation Deliberation Committee’ of the Ministry of Commerce, Industry And Energy in 1993, the ‘Combined Deliberative Committee on Administrative Regulations’ of the Ministry of Government

¹²⁾ Kwon, Young-seol, Problems with, and Tasks for, National Assembly Legislation in Korea, Forum for Legislative Advancement, The 2nd Asian Forum of Legislative Information Affairs, 2012.6.28., page20.

Administration in 1994, and the ‘Inspection Group for Relaxation of Economic Administrative Regulations’ in 1994 that was under the President’s direct control. Growing out of these temporary and limited regulatory reform apparatuses, the Regulatory Reform Committee was established in April 1998 pursuant to the Framework Act on Administrative Regulations that was enacted in March 1998, and has been conducting overall management of regulatory reform work thus far.

2. Framework Act on Administrative Regulations

1) Enactment and Revision of the Framework Act on Administrative Regulations

The 「Framework Act on Administrative Regulations」, which is the framework Act on regulations, was enacted and promulgated on August 22, 1997 and went into force on March 1, 1998. Afterwards, the 「Framework Act on Administrative Regulations」 was amended several times. First, the amendment of December 29, 2005 (enforced on June 30, 2006) mandated reporting to the National Assembly a list of regulation work, provided for the determination of the period of existence for regulations at least 3 months prior to the start of the period of existence in order to establish an effective method of supervision by the National Assembly regarding the increase of regulations, and required public announcement of an advance regulatory impact analysis report in cases where new regulations are established or existing regulations reinforced in order to examine the justifiability of the regulation and to hear the opinions of citizens, including those who are directly related to the regulation; through these methods, the amendment sought to improve and supplement some insufficiencies that manifested during the operation of the system. And the amendment that was made on January 25, 2010 (enforced on January 25, 2010) polished the texts of the statutes, including concurrent indications of Chinese-character versions of some of the terms used in the texts, refinement of difficult terms to allow easier understanding, and compliance with grammatical and textual rules, etc., and did not make any substantive change in regulatory policies. Furthermore, the main substance of the amendment that was made on July 16, 2013 (enforced on August 17,

2013) was to newly establish a legal basis for the reexamination-based sunset law. The heads of central administrative agencies were required to establish a period of existence or a period of reexamination (refers to the period that applies to regulations for which regular examinations on their state of enforcement are needed to determine whether measures such as repeal or relaxation, etc. are needed) for all new, reinforced, and existing regulations that do not have a clear reason for continued existence, and prescribe this period onto the corresponding regulatory statutes, etc. The most recent amendment was made on May 18, 2015 (enforced on May 18, 2015), and incorporated measures to relax regulations on small and medium enterprises. The Framework Act on Administrative Regulations provides that, in cases where a regulation is newly established or reinforced, the categories of the regulatory impact analysis conducted by the head of the competent central administrative agency should include a comparative analysis on the costs and benefits borne by the regulated group and citizens in general; the aforementioned amendment clearly mandated that consideration of the regulation's impact on small and medium enterprises be included in the categories of the regulatory impact analysis. The purpose of the said amendment was to alleviate the burdens of small and medium enterprises due to regulations and to enhance fairness between large corporations and small and medium enterprises, and as such, the heads of central administrative agencies were required to consider the impact of enforcing regulations on small and medium enterprises as defined under Article 2 of the 「Framework Act on Small and Medium Enterprises」 when conducting their regulatory impact analysis, in order to lessen the gap between large corporations and small and medium enterprises, and thereby enhance the competitiveness of small and medium enterprises.

2) Major Contents of the Framework Act on Administrative Regulations

The 「Framework Act on Administrative Regulations」, which is the framework statute on administrative regulations, consists of 5 Chapters and 37 Articles. Chapter 1 contains the General Provisions, Chapter 2 provides principles for newly establishing and reinforcing regulations, Chapter 3 is concerned with revisions to existing regulations, Chapter 4 provides for the Regulatory Reform Committee, and Chapter 5 provides the Supplementary Provisions.

Article 2 provides definitions of administrative regulations, regulatory impact analysis, etc. In particular, Article 2, Subparagraph 1 provides a conceptual definition of administrative regulations: “‘Administrative regulations’ (hereinafter referred to as ‘regulations’) means restrictions on the rights of citizens (including foreigners subject to Acts of the Republic of Korea) or duties imposed thereon by the State or local governments to accomplish a specific administrative objective, which are prescribed by Acts and subordinate statutes, Municipal Ordinances or Municipal Rules;.”¹³⁾ Article 4 provides the principle of regulation by Acts, which requires regulations to be based on Acts, and Article 5 provides the principle of regulation, that the State or local governments shall respect the freedom and creative initiative of citizens and shall not infringe on the essential purport thereof in establishing a new regulation, and that the State or local governments shall make sure to establish effective regulations in order to protect the lives, human rights, public health, environment, etc. of citizens and ensure the safety of foods and medical goods. And while the registration of regulations is provided for only in Article 6, the review and examination of regulations are provided for in Articles 7 through 22. As for the Regulatory Reform Committee, an agency directly under the President’s control and is responsible for regulatory policies, it is provided for in Articles 23 through 33.

¹³⁾ Article 2, Subparagraph 2 of the ‘Act on Special Measures for the Deregulation of Corporate Activities’ also provides conceptual definitions related to regulations, and provides a conceptual definition of an administrative regulation: “The term “administrative regulation” means that the State, a local government, or a corporation, an organization, or an individual exercising the administrative power or delegated or entrusted with it under the Acts and subordinate statutes, intervenes directly or indirectly in corporate activities for the purpose of achieving specific administrative objectives.” Since this is also a definition of ‘administrative regulation’, it is thought that holding on to the same definition is appropriate, unless there is a reason to define the concepts differently. Furthermore, if the Act on Special Measures for the Deregulation of Corporate Activities is not being used and has almost become a dead law, legislative work is needed to adjust and combine these two Acts.

3. The Act on Special Measures for the Deregulation of Corporate Activities

1) Establishment of, and Amendments to, the Act on Special Measures for the Deregulation of Corporate Activities

Since it was first established in 1993, the 「Act on Special Measures for the Deregulation of Corporate Activities」 was amended several times. The amendment on April 10, 1997 required that the costs of construction for electrical facilities that supplied electrical power to industrial complexes be entirely borne by the provider of the electrical power, abolished or relaxed provisions that were not closely related to the protection of the safety of citizens and the environment, including various obligatory employment requirements, etc., and relaxed various unnecessary administrative regulations on business in order to enhance the competitiveness of firms. The amendment that was made on March 31, 2005 relaxed the regulations related to factory building sites in order to enhance corporate competitiveness, and supplemented policy devices for deregulation through means such as shortening the processing period of approvals for factory construction. The amendment that was made on August 3, 2007 was an amendment to the 「Act of Special Measures for the Deregulation of Corporate Activities」 of 1997, and deleted exemption clauses regarding the regular inspections of presses and lifts, occupational education requirements for safety managers under the 「Occupational Safety and Health Act」, and the obligation to submit hazardous risk prevention plans for manufacturing, since allowing exemptions in these cases led to an increase in industrial accidents, thereby resuming safety inspections and education.¹⁴⁾ The amendment of January 27, 2010 deleted the provision that

¹⁴⁾ Please refer to pages 3 and beyond of the Examination Report on the Partial Amendment of the Act on Special Measures for the Deregulation of Corporate Activities, June 2007, Industry and Energy Committee. (1) Resumption of regular inspections on presses and lifts: after the abolishment of regular inspections of presses and lifts, accidents attributable to the said machines have increased due to difficulties in assuring safety in the course of use, and a cost-benefit analysis on inspections has shown that the benefit is more than 5 times greater than the cost. (2) Resumption of regular instructions for safety and health management personnel, etc.: due to the abolishment of initial training and supplemental trainings (every 2 years) for safety management personnel, etc., investment in safety management at places of business has decreased, and personnel in charge of safety and health management possess insufficient capabilities for performance of their duties, leading to a result where one cannot expect actual disaster-prevention effects, and here too, the benefit outweighs the cost by

prohibited administrative agencies from issuing corrective orders to passenger vehicle enterprises and freight transportation vehicle enterprises. The amendment on April 14, 2011 required the texts of the statute to be written in Korean (Hangul), changed difficult jargon to easier terms, and re-arranged long and complex sentence structures. The amendment on February 3, 2015 (enforced on February 4, 2016) deleted Article 55-5, which concerned the deregulation of contract authorizations for hazardous works¹⁵⁾, and there by empowered the Minister of Employment and Labor to conduct safety and health examinations during contract authorizations for hazardous and risky works.

2) Major Provisions of the Act on Special Measures for the Deregulation of Corporate Activities

The 「Act on Special Measures for the Deregulation of Corporate Activities」 purports to determine matters related to the deregulation of corporate activities and special measures thereof, and thereby promote smooth corporate activities and contribute to the sound advancement of the national economy. Chapter 1 of this Act provides the General Provisions, Chapter 2 provides for the Deregulation of Establishing of Businesses and Factories, Chapter 3 provides for an Exemption from Obligatory Employment, Chapter 4 is on the Deregulation of Exportation and Importation, Chapter 5 is about the Exemption from Inspection, etc., while Chapter 6 provides for the Elimination of Entry Restrictions, etc. Of all the Articles, about 30

more than 5 times. (3) Resumption of the obligation to submit hazardous risk prevention plans for manufacturing: as the obligation to submit hazardous risk prevention plans for manufacturing was exempted, disaster prevention measures have been insufficiently established and implemented prior to the installation of hazardous equipment, which has led to increasing risks at places of business. In fact, places of business that have submitted hazardous risk prevention plans were discovered to face an accident rate that is 20~30% lower than that of non-submitted sites.

- 15) "The hazardous and risky works, for which approval by the Minister of Employment and Labor is required under the 「Occupational Safety and Health Act」 and the Enforcement Decree of the said Act, are works that need strict safety and health management, such as gilding, smelting heavy metals, etc., which may easily lead to exposure to hazardous chemical substances. Despite that, if the current law is followed, the Minister of Employment and Labor is prevented from exercising the power to conduct safety and health examinations for the purpose of determining whether an approval should be granted for a contract for hazardous works, raising a concern that contracts for hazardous work at small businesses with insufficient safety management will be approved unguardedly." Ministry of Government Legislation, Reasons for the Major Contents of Amendments to the Act on Special Measures for the Deregulation of Corporate Activities.

remain deleted here and there.

4. Systematic Nature of Regulation Statutes

As stated above, the main Acts concerned with regulations are the 「Framework Act on Administrative Regulations」 and the 「Act on Special Measures on the Deregulation of Corporate Activities」. The relationship between the 「Framework Act on Administrative Regulations」 and the 「Special Measures on the Deregulation of Corporate Activities」 is such that, the former is a general Act on regulations, while the latter is a special Act specifically concerned with, among all regulations, regulations on corporate activities. This general-special relationship between the two Acts is expressed in the conceptual definitions of administrative regulations within the two Acts. The 「Framework Act on Administrative Regulations」 defines an “administrative regulation” as restrictions on the rights of citizens (including foreigners subject to Acts of the Republic of Korea), or duties imposed thereon, by the State or local governments to accomplish a specific administrative objective, which are prescribed by Acts and subordinate statutes, Municipal Ordinances or Municipal Rules¹⁶⁾, while the 「Act on Special Measures for the Deregulation of Corporate Activities」 defines an “administrative regulation” as a situation where the State, a local government, or a corporation, an organization, or an individual exercising administrative power, or delegated or entrusted with it under the Acts and subordinate statutes, intervenes directly or indirectly in corporate activities for the purpose of achieving specific administrative objectives¹⁷⁾. Therefore, the conceptual definition of an administrative regulation in the 「Act on Special Measures for the Deregulation of Corporate Activities」 is limited to situations involving “...interven[tions] directly or indirectly in corporate activities”. In particular, the provisions in Article 3 of the 「Act on Special Measures for the Deregulation of Corporate Activities」 define the relationship with other Acts and subordinate statutes, under which this Act applies with priority over other Acts and subordinate statutes, except the 「Framework Act on Administrative Regulations」. This systematic problem between the two Acts manifested in a situation where the Regulatory

¹⁶⁾ Framework Act on Administrative Regulations, Article 2, Subparagraph 1.

¹⁷⁾ Act on Special Measures for the Deregulation of Corporate Activities, Article 2, Subparagraph 2

Reform Committee, which was established pursuant to the 「Framework Act on Administrative Regulations」, and the Deliberation Committee for Regulations on Corporate Activity, which was established under the 「Act on Special Measures for the Deregulation of Corporate Activities」, coexisted for a time, both as committees for deliberation and reformation of regulations, without special provisions regarding the relationship between their work. Logically, the Regulatory Reform Committee, which was established under the 「Framework Act on Administrative Regulations」, should deliberate on and analyze the matters related to administrative regulations, while the Deliberation Committee for Regulations on Corporate Activity, which was established under the 「Act on Special Measures for the Deregulation of Corporate Activities」, should deliberate on and analyze the matters related to economic regulation of corporate activities. However, the relationship between the two Committees was insufficiently defined. Separately from this, as the 「Act on Special Measures on the Deregulation of Corporate Activities」 was amended (Statute No. 7442, promulgated on March 31, 2005 and enforced on July 1, 2005), and as the Minister of Industry and Energy was entrusted with making efforts to resolve the difficulties faced by corporations due to administrative regulations, a Committee for Adjustment and Deliberation of Corporate Difficulties, which “adjusts, and deliberates on, the difficulties faced by corporations, with reference to the opinions of interested persons and experts”, was also established. That is, the Regulatory Reform Committee, the Deliberation Committee for Regulations on Corporate Activity, and the Committee for Adjustment and Deliberation of Corporate Difficulties, etc., were established in an unsystematic manner. Eventually, as the Ministry of Public Administration Security abolished on May 27, 2008 about 273 government committees, which counted for about half of all government committees, the Deliberation Committee for Regulations on Corporate Activity and the Committee for Adjustment and Deliberation on Corporate Difficulties were also abolished. In terms of legislation, the legal basis for these two Committees disappeared as the Act on Special Measures for the Deregulation of Corporate Activities was amended on March 15, 2009. The Committee for Adjustment and Deliberation on Corporate Difficulties was based not only on an ‘Act’ but a ‘Presidential Decree’. In other words, it is inappropriate that the basis of establishment of the Committee was not the 「Act on

Special Measures for the Deregulation of Corporate Activities」 but the Enforcement Decree of the 「Act on Special Measures for the Deregulation of Corporate Activities」. Furthermore, it is also necessary to critically reflect on the fact that, for the Deliberation Committee for Regulation on Corporate Activity and the Committee for Adjustment and Deliberation on Corporate Difficulties, their natures and the division of work and mutual relations between the two Committees was not clear. Furthermore, the provisions of Article 3 of the 「Act on Special Measures for the Deregulation of Corporate Activities」 defines its relationship with other Acts and subordinate statutes, where this Act applies with priority over the provisions of other Acts and subordinate statutes that prescribe administrative regulations, while in cases where a regulation is relatively more relaxed by amendment of another Act or subordinate statute than is relaxed by the provisions of this Act, then the provisions of the said other Act or subordinate statute shall apply. Based on this provision, many Articles and clauses of this Act provide provisions that exempt, lessen or do not apply the various obligations and burdens required by other Acts and subordinate statutes.

VI Legal Principles for Regulations

1. Principle of Regulation by Acts

Regulations are prescribed by legislation made in the National Assembly, Enforcement Decrees, Enforcement Rules and Subordinate Provisions legislated by the executive branch, and Municipal Ordinances, Municipal Rules and subordinate provisions, etc. that are legislated by municipal entities. Therefore, the legal bases of regulations are multidimensional, and regulatory reform should reform or abolish all Acts and subordinate statutes that prescribe unnecessary and unreasonable regulations. This is because the executive branch (government, local government), whether central or local, is the state apparatus that implements execution based on legislation made by the legislative branch (the National Assembly, local assemblies). If so, regulatory reform should be implemented, at all levels of the National Assembly and the government and municipal entities, through the legislation (enactment, amendment, repeal) of

Acts and subordinate statutes, administrative laws (Enforcement Decrees · Enforcement Rules, etc.) and municipal laws (Ordinances, Rules, etc.). Things that the President may directly do for regulatory reform are amending and repealing Enforcement Decrees and Enforcement Rules. While the President may submit bills to the National Assembly, the legislation of laws is a power vested in the National Assembly. In other words, while the President may pursue regulatory reform through the government and the ruling party, he or she cannot achieve regulatory reform unless the National Assembly legislates regulatory reform. As Article 4 of the 「Framework Act on Administrative Regulations」 prescribes the principle of regulation by Acts, light regulations are prescribed by administrative laws while significant regulations are prescribed in Acts and subordinate statutes; therefore, it may be said that the National Assembly, not the President, holds the key to regulatory reform. Rule of law means that all works of the state must be implemented pursuant to law. Therefore, pursuing deregulation means ensuring deregulation policies are reflected in legislation. A situation where the standards for policies that exert significant impact on citizens' fundamental rights and their economic lives are determined without a legislative basis, and where said standards change, constitutes a significant threat to a democratic rule-of-law society¹⁸⁾, and therefore, regardless of whether a policy reinforces or relaxes regulations, it must be based on an Act or subordinate statutes. This is the basic meaning of the principle of regulation by Acts.

2. Principle of Regulatory Clarity

Regulations should be based on Acts and subordinate statutes, and when an Act or statute establishing a regulation is being legislated, the principle of clarity must be complied with. Article 4 (Principle of Regulation by Acts), Subparagraph 1 of the 「Framework Act on Administrative Regulations」 provides that, “regulations shall be based on Acts, and the contents thereof shall be provided in clear and unambiguous language.” That is, regulations should be prescribed in a specific and clear manner. The principle of clarity is a legal principle that serves as a basic foundation for the rule of law. As such, the principle of clarity should also

¹⁸⁾ Sun, Jeong-won, Regulatory Reform and Responsibility of Government – Regulatory Reform Failure in the Construction Industry and the Mission of Public Law –, Study of Public Law, Volume 30, Issue No. 1, 2001, page 400.

be adhered to for legislative purposes.¹⁹⁾ In other words, since the law is a standard for legal application by administration and jurisprudence, it should be clear and specific.²⁰⁾ All legal rules must be provided in relation to their constituent elements and legal effects, must be able to be understood by observers, and should be clear enough so that administrative agencies and the courts do not interpret or execute them arbitrarily.²¹⁾ While the principle of clarity is a basic requirement for all legislation, it is especially necessary for legislation that restricts fundamental rights, i.e., legislation that establishes regulations. If an observer cannot discern from the apparent meaning of the text the rule of which acts are prohibited and which are permitted, legal security and predictability will not be secured, and arbitrary execution by law enforcement agencies will be made possible.²²⁾ The Constitutional Court also emphasizes observation of the principle of clarity of regulations, stating that, “[a]n Act should prescribe in clear language in order to provide fair notification to the subjected persons as to the contents of the regulation, and thereby provide guidance on a future course of action, because only then can discriminatory or arbitrary legal interpretations be prevented; if citizens cannot discern from the apparent meaning of the Act’s text which acts are prohibited and which are permitted, legal security and predictability will not be secured, and arbitrary execution by law enforcement agencies will be made possible.”²³⁾ That is, the principle of clarity allows observers to become aware of the prescriptions of the Act in advance, and thereby provides a criteria for action in daily life, while providing enforcers of the Act with objective criteria for judgment, thereby preventing arbitrary legal interpretations and executions.²⁴⁾ As such, regulations should not only be based on Acts, but they should also be clear in their prescriptions. The point of ‘clarification and elaboration of criteria determinations’ as a major goal of regulatory reform²⁵⁾ is not different from the idea that the principle of clarity should be

¹⁹⁾ Hong, Wan-shik, A Study on the Principles of Legislation, Ministry of Government Legislation, Government Legislation Affairs, 2006. 2, page 80.

²⁰⁾ Criteria for Deliberation of Bills, Ministry of Government Legislation, 2006. 12, page 21.

²¹⁾ Schneider, Hans, Gesetzgebung, 3. Aufl., 2002, S.46.

²²⁾ Constitutional Court cases 89HeonGa113 of April 2, 1990; 94HeonBa15 of August 29, 1990; 96HeonGa15 of November 28, 1996; 95HeonGa16 of April 30, 1998.

²³⁾ Refer to Constitutional Court Cases 2001HeonBa91 of December 18, 2003; 99HeonBa34 of June 28, 2001; 95HeonGa16 of April 30, 1998; 98HeonBa37 of February 24, 2000; 2000HeonBa57 of July 18, 2002.

²⁴⁾ Chung, Jong-seop, Elements of Constitutional Law, Pakyoungsa, 2014, page 166.

applied to regulations. Regulatory clarity means that the prescriptions of the regulation are clear enough to prevent multiple interpretations and applications. This means that the Act should clearly prescribe what is regulated and how, thereby allowing persons obligated to comply with the regulation to know in advance the contents of the regulation so that the criteria for the actions of individuals and corporations are determined, while at the same time providing implementers and enforcers of the regulation an objective criteria of judgment regarding the subject and contents of the regulation so that arbitrary implementation and execution is prevented. That is, since a complex and overly burdensome regulatory system allows arbitrary interpretations by administrative agencies and expands the room for discretionary judgments, it will not only lead to civic petitions by citizens and decreased work efficiency, but also heightens the possibility that public officials in charge of regulations will engage in corruption. This ultimately leads to a result where the principle of administration by Acts, which is the basic foundation of rule of law, is undermined.

3. Regulations and the Principle of Supplementing

The principle of supplementing means that, the power to do work that an individual may do of his or her own volition, and with his or her own ability, should not be deprived from the individual then designated as an activity of the community.²⁵⁾ Intervention by a unit of a higher level in the affairs of a unit of lower level is permitted only for a supplementary purpose. According to the principle of supplementing, the priority of action always rests on the ‘untere Instanz, kleinere Einheit’ (translated in English as ‘lower entity’), and the higher entity may intervene, in a supplementary capacity, in matters which the lower entity cannot handle by its own ability.²⁷⁾ It is believed that the principle of supplementing also provides a useful criterion for distinguishing between the functions and roles of the government and civilians. Since the government may not deprive civilians of the work which they can do well and designate that work as its own work, the government may only perform a supplementary and secondary role

25) Hahm, In-seon, *The Law and Economics of Regulatory Reform*, Study of Public Law, Volume 31. Issue No. 5, 2003, page 198.

26) Hong, Seong-bang, *Constitutional Law*, Hyeonamsa, 2004, page 168.

27) Heo, Young, *Constitutional Theory and the Constitution (I)*, Pakyoungsa, 1988, page 319

with regard to civilians. Especially in the field of economic activities, the Constitutional Court of Korea has been issuing decisions in which the freedom of individuals and society is respected as a matter of basic principle, while intervention by the state is permitted on an exceptional basis. As for the scope of the application of the principle of supplementary nature, the past view held that it applies in the field of economy, education, culture and social welfare; recently however, the tendency to consider the principle of supplementing as an even more comprehensive and general principle for the division of roles between the state and society and therefore should expand the scope of its application to all works of the state, has been gaining momentum.²⁸⁾ According to the Constitutional Court, the ideal of a liberal democratic state is to respect each individual and accord the maximum respect for his or her freedom and creativity, so the activities of these subjects of fundamental rights should be guaranteed pursuant to their rights of self-decision and liberty, and the state may intervene on an exceptional basis and only in cases where absolutely necessary, in order to supplement these rights. This constitutional principle of supplementing also applies to the field of the economic lives of citizens.²⁹⁾ In a system based on respect for individuals' economic liberty and creativity, state intervention is an exception.³⁰⁾ Beneath the perceptive paradigm, that views government regulations as a form of artificial solution based on the authority of the government for problems that the market cannot solve itself and views deregulation as a means through which government failure is minimized through the restoration of market functions and civil society is allowed to voluntarily construct the socio-economic order,³¹⁾ lies the principle of supplementing. That is to say, when enhancement of efficiency through government regulation is compared to that through the operation of the market, the market proves to be more efficient. On one hand, there are fields that require regulations, such as regulations on monopolies, the prevention of corruption, consideration for the disadvantaged, etc., while on the other hand, there are fields that need the voluntary governance of the market, rather than state intervention through regulations.

²⁸⁾ Herzog, Roman, *Der überforderte Staat*, FS zum Peter Lerche zum 65. Geburtstag, 1993, S.26.

²⁹⁾ Constitutional Court 1989. 12. 22. 88HeonGa13.

³⁰⁾ Constitutional Court 1991. 6. 3. 89HeonMa204.

³¹⁾ Kang, Shin-il/Choi, Byung-seon, *Measures for the Enhancement of Efficiency of Government Functions for a Small Government*, Korea Economic Research Institute, page 48.

VII Regulatory Examination of Bills

1. Procedural Characteristics of Bills Submitted by the Government

As stated above, in cases where the government submits a bill, various procedures, including regulatory examinations and legislative examinations, are undertaken. That is, bills submitted by the government undergo the establishment of legislative plan, preparation of the bill, (party-government consultation), consultation with Ministries, announcement of the legislation, corruption impact evaluation, analysis of gender-specific impacts, statistical impact analysis, regulatory impact analysis, legislative examination by the Ministry of Government Legislation, the council of Vice Ministers, the State Council, Ministries of related State Council members, and finally, the approval of the President, before being submitted to the National Assembly.

The legislative plan system is a system where a plan is established from the overall perspective of the government in order to consider and adjust the time period for pursuing the legislation so that the bill is not submitted at certain points in time, such as regular National Assembly sessions, in order to facilitate the timely progression of the bill. As for bills, central administrative agencies, which are the competent Ministries responsible for policies, formulate proposals with regard to the areas of their responsibility. When a competent central administrative agency formulates a bill, it must consult with the other Ministries related to the contents of the bill. In cases where it is necessary, party-government consultation is conducted. Legislative announcement is a system for gathering citizens' opinions with regard to the enactment, amendment and repeal of laws. The Ministry and offices concerned with the bill issue a draft after revising or supplementing the original version of the bill. In cases where a bill that restricts the rights of citizens, or imposes obligations on citizens, is about to be enacted or amended, a regulatory examination by the Regulatory Reform Committee must be received after attaching a regulatory impact analysis report, etc. After going through these phases, the competent central administrative agency finalizes the bill. Once the competent central administrative agency finalizes the bill, it requests that the Ministry of Government Legislation

examine the bill. The Ministry of Government Legislation not only examines the expressions and other formalistic elements of the bill, but also examines substantive matters, such as problems in terms of legal principles and the justifiability of the provisions, etc., and revises and supplements the original version. After going through an examination by the Ministry of Government Legislation, the bill undergoes deliberation by the Vice Minister council and the State Council, and after going through State Council deliberation, the legislative bill is signed by the President, after which the Prime Minister and related members of the State Council countersign, and it is then submitted to the National Assembly with the approval of the President. In the government legislative procedure, the role of regulatory examination is very significant and important. This is because bills that do not pass examination by the Regulatory Reform Committee cannot receive legislative examination by the Ministry of Government Legislation. For such reasons, there are arguments that the Ministry of Government Legislation infringes upon the powers of the National Assembly and the government, and therefore undermines the principle of representative democracy and distorts the government legislative procedure, and that the Ministry should therefore be abolished;³²⁾ however, this is unrealistic. This is because the regulatory examination system has its legal basis in the Framework Act on Administrative Regulations, which was enacted by the National Assembly; furthermore, it has played an essential role in regulatory policy since 1998, and is also a system which reflects the global trend in terms of comparative law.

2. Regulatory Review of Bills Submitted by the Government

The head of a central administrative agency must, in order to establish or reinforce a regulation, request an examination by the Regulatory Reform Committee. Since regulations must be based on Acts, the form of regulations is an Act as a matter of principle; however, there are cases where a regulation is prescribed through a Presidential Decree, Ordinance of the Prime Minister, Subordinate Ordinance, and notifications commissioned thereof. Since the purpose of this article is to compare the regulatory examination and legislative examination of

³²⁾ Kang, Jeong-min, Problems in, and Measures for, Improvement in the Regulatory Reform Examination Process, *Solidarity for Economic Reform*, 2013. 5, page 11.

bills, only the regulatory examination of bills will be considered. As stated above, the government receives a regulatory review in order to submit a bill. Article 10, Clause 1 of the Framework Act on Administrative Regulations provides that, “[t]he head of a central administrative agency shall request an examination by the Committee if he/she intends to establish a new regulation or reinforce existing regulations. In cases of a bill, the request for an examination shall be made prior to filing a request for an examination of the bill with the Minister of Government Legislation,” and therefore provides that legislative bills concerned with regulations must be submitted to the Regulatory Reform Committee to receive regulatory examinations. That is, a legislative examination by the Ministry of Government Legislation is received only after a regulatory examination by the Regulatory Reform Committee.

First, prior to receiving a regulatory examination by the Regulatory Reform Committee, self-examinations at each Ministry are conducted. Each Ministry possesses a self-organized regulatory examination division, and should determine whether bills submitted by each Office and Bureau are subject to regulatory examination. In cases where a bill is subject to this system, the competent public official who formulated the bill should submit regulatory examination materials, including a regulatory impact analysis, to the division of the Ministry responsible for regulations. Each Ministry should conduct a regulatory impact analysis and announce the results of the analysis through legislative announcements. The head of a central administrative agency should, when requesting an examination to the Regulatory Reform Committee, attach the main points of ① the regulatory impact analysis, ② the self-examination results, and ③ the opinions submitted by administrative agencies and related persons, etc. The Regulatory Reform Committee should, within 10 days of receiving a request for examination, conduct a preliminary examination to determine whether the regulation at issue is a significant regulation. When the regulation is a significant regulation, the examination must be completed within 45 days after receiving the request for examination, although the period of examination may be extended once by a period of 15 days or less, by decision of the Committee. When retraction or improvement is recommended for a newly established or reinforced regulation, the period for processing should be prescribed, and the contents of the regulation, the examination opinion, and the recommendation for retraction or improvement must be given to

the relevant Ministry. The relevant Ministry should submit the outcomes of processing to the Regulatory Reform Committee, within the period of processing. The Ministry may, in cases where there is an objection or a special circumstance which leads to a judgment that it is difficult to implement a measure as recommended, request a re-examination by the Committee. As for the re-examination, it must be completed and the outcome notified, within 15 days.

3. Insufficient Regulatory Examination for Bills by Members of the National Assembly

Government-submitted bills and member-submitted bills differ in the formulation phase. Government-submitted bills have to undergo, before submission to the National Assembly, consultation with related agencies, regulatory examinations, legislative examinations, examinations by the Vice Minister council, the State Council, etc., where positional differences between the Ministries are tuned, consideration for unconstitutionality or practical effectiveness is made, and potentially problematic elements are excluded. In contrast, members of the National Assembly may propose a bill merely with an agreement of 10 or more members, and do not have to undergo an obligatory review and revision process, unlike bills submitted by the government. In cases of bills proposed by members, legislative announcement is not required prior to submission to the National Assembly, and procedures for legislative announcement are encountered after being submitted to the National Assembly. While the period of legislative announcement is at least 10 days, it may be shortened in special cases.³³⁾ There are many cases where consultation with the government, opinions of related and interested persons, and review by experts is not reflected. It is therefore pointed out that some bills by members of the National

³³⁾ Article 82-2 of the National Assembly Act provides provisions on legislative announcements. It is provided that, in cases where legislation requires urgency or where legislative announcement is either unnecessary or is deemed difficult due to the nature of the legislation or some other reason, legislative announcement may be omitted, therefore providing exceptions for legislative announcements. To summarize, legislative bills submitted by the government are preceded by a legislative announcement of 40 days or more before being submitted to the National Assembly (Administrative Procedure Act, Article 43), and after submission to the National Assembly, is again accompanied by a legislative announcement of 10 days or more. As for member-proposed bills, no legislative announcement is necessary prior to submission to the National Assembly, and they only need a legislative announcement of 10 days or more after submission to the National Assembly.

Assembly are proposed without sufficient review and preparation.³⁴⁾

An especially important difference between the respective legislative procedures for government-submitted bills and member-proposed bills is the existence or nonexistence of regulatory examination procedures. As stated above, while government-submitted bills must undergo regulatory examination, member-proposed bills do not undergo regulatory examination. The passage rate for member-proposed bills is ever decreasing, compared to the passage rate for government-submitted bills.

As such, the proposal procedure for member-proposed bills, which provides a relatively lax procedure compared to government-submitted bills, needs to be improved. There is also an argument that expanding the scope of regulatory impact analysis to legislation by members of the National Assembly is necessary to make Korea's regulatory management structure more systematic.³⁵⁾ During the 19th National Assembly, the members proposed 16,664 bills, and more than ten-thousand bills, excluding 2,305 that passed, are set to be discarded due to expiration of the term. If regulatory examination or legislative examination is incorporated in the examination procedure for bills proposed by members, then the proposal procedure for bills by members will be improved.

4. Problems with Regulatory Examinations of Bills and Measures for Improvement

On a large scale, two problems may be pointed out in regulatory examinations as a legislative procedure. The first is that regulatory examinations do not exist in the proposal process for bills prepared by members of the National Assembly, and the other is that the regulatory examinations during the submission process for bills by the government is insufficiently effective. With regard to the former, arguments are being made for the introduction of a

³⁴⁾ Refer to Hong, Wan-shik, Measures for the Procedural Rationalization of Legislation by Members of the National Assembly – With a Focus on Phases Prior to the Submission of the Bill, Final Report for the Research Commission by the National Assembly Research Service, 2008. 12. pages 99–101, etc.

³⁵⁾ Lee, Hyuk-woo/Kim, Joo-chan/Kim, Tae-yoon/Yeo, Cha-min, Study on the Necessity of Regulatory Impact Analysis for Legislation by Members of the National Assembly, Regulatory Study, Volume 20, Issue No.1, 2011. 6, page 57.

regulatory examination system or a legislative examination system. Introduction of a regulatory examination system or a legislative examination system for bills proposed by members of the National Assembly is expected to prevent over-issuance of bills by members for ‘record polishing’, and to contribute to the enhancement of the level of completeness and the responsibility of bills by members.³⁶⁾ According to a survey of scholars and members of the National Assembly with regard to the introduction of a legislative evaluation system, 68.1% were in favor, with 31.9% opposed.³⁷⁾ As a future task for regulatory reform, it is necessary to reflect the opinion that ‘active participation by the National Assembly in regulatory reform’³⁸⁾ is required when improving the legislative process. As for the latter, in order to ensure the effectiveness of regulatory examinations, regulatory examinations and legislative examinations must be combined and their efficiencies must be improved. From now on, it will be necessary to prepare measures that incorporate a regulatory examination system, or a legislative examination system, in the proposal process for bills by members, and measures to conduct regulatory examinations on government legislation with expediency and effectiveness.

³⁶⁾ Kang, Won-taek, Two-Year Evaluation on the First Half of the 17th National Assembly: Achievements and Tasks, How and What Should be Changed in the Operation of the National Assembly?, Solidarity for Participatory Democracy, Legislative Overwatch Center, 2006, page 5; Park, Young-do, Systemization of Legislative Evaluations as Legislative Management, academic seminar materials for the Korean Society for Legislative Studies, 2006, 12, page 1; Lim, Joong-ho, Improvements to the Legislative Process and the Direction of Advancement, the Current State of the Legislative Process and Measures for Improvement, Legislative Affairs Office of the National Assembly / Korea Public Law Association, 2005.11, page 41; Chung, Ho-young, Study on the Law and Economics Approach Method for Legislative Evaluations, Doctoral Dissertation at Chungang University, 2004, page 48; Chae, Soo-geun, Legislation by Members of the National Assembly and Estimation of Cost of Legislation, The Role and Responsibility of the National Assembly for Legislation, Legislative Affairs Office at the National Assembly / Korea Administrative Law and Practice Association, 2005.5, page 53; Choi, Yoon-cheol/ Hong, Wan-shik, Study on the Introduction of a Legislative Evaluation System, Ministry of Government Legislation, 2005.11.

³⁷⁾ Chun, Hak-seon/Hong, Wan-shik/Heo, Dong-won, Study on the Method of Consultation between the Legislative Branch and the Executive Branch on Bills by Members of the National Assembly, Ministry of Government Legislation, 2007. 11, page 77.

³⁸⁾ Shin, Jong-ik, Evaluation of Implementation of Regulatory Reform and Tasks Heretofore, The Regulatory Reform White Paper for Year 2003, Regulatory Reform Committee, 2004, page 618.

VIII Conclusion

Among the bills that the government seeks to submit to the National Assembly, the bills whose contents concern regulations must undergo regulatory examinations conducted by the Regulatory Reform Committee, and while there is no disagreement that regulatory examinations are necessary and important, much time and effort is consumed. Therefore, it is necessary to combine the diverse and complex examination procedures, including regulatory examinations and legislative examinations. From a specific point of view as well, there are many instances where regulatory examinations and legislative examinations are similar. And it is necessary to distinguish between legislative bills that require an in-depth examination and an expedient examination, so therefore, there is need to design a diverse set of legislation procedures suited to the contents and natures of various bills. Since the opinion-hearing processes, such as legislative announcements and public hearings, are conducted again during the legislative procedure at the National Assembly, it is necessary to place a stronger emphasis on their efficiency and expediency during the government legislative process.

The goal of improving the government legislative procedure is to enhance quality and completeness, and the ultimate goal is to make good laws (*Gutes Gesetz*, better regulation). First, since legislative announcements and legislative hearings are perceived as formalistic procedures, it is necessary to take a direction where necessary information is sufficiently communicated to citizens, and the opinions of citizens regarding bills are appropriately reflected. It is necessary to realistically operate such a system, through measures such as recording in the records of legislative examination the reasons for reflecting or not reflecting the opinions that were submitted through legislative announcements or raised at public hearings. Furthermore, as seen above, it is necessary to combine and simplify the multi-phased government legislative procedure in order to enhance the efficiency of the process. The situation is such that, given the considerable level of complexity of the legislative procedure in the government and the dispersed implementations of various impact analyses, etc., the principal agents of legislation, such as each Ministry, etc., are significantly burdened, ultimately leading to frequent delays in legislation, preventing the expedient codification of

policy. Such complex and overlapping evaluations do not provide benefits that are consistent with the original purpose of each evaluation system, but instead causes delays in the legislative procedure, undermining the efficiency of the legislative process. In order to eliminate this problem, it is necessary to systematize the Acts that regulate the government legislative procedure (the Administrative Procedure Act, the Framework Act on Administrative Regulations, the Rules for Conduction of Legislative Works, the Rules for Promulgation of Acts, Etc., the Rules for Conduction of Party-Government Cooperative Works), and to establish an expedient and efficient legislative process through such reformations of the government legislative procedure.

05.

An “ordinary
meaning” for words:
is there such a thing?
Innovations in
drafting

Helen Xanthaki

05 An “ordinary meaning” for words: is there such a thing? Innovations in drafting

*Professor Helen Xanthaki**

I Introduction

There is no doubt that taking into account the semantic field of words as determined and used by the users of legislation could go a long way in assessing disputes on the basis of the users’ understanding of words and text.

What one wonders, however, is whether there is indeed a single, an “ordinary” meaning of words and texts. Latest developments in legislative studies suggest that the pursuit of one “ordinary” meaning of words, sentences, and text is futile. Instead of conducting a text-focused interpretation, one could conduct an audience-centred interpretation that brings to light meaning as perceived by the user. But as there is no ordinary or average user, there is no average or ordinary meaning. My response aims to prove this hypothesis, namely that the diversity of legislative users suggests diversity in the interpretation of legislative meaning.

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II The diversity of legislative audience

The membership and characteristics of the legislative audience have been elusive to drafters for years. The term is used generically to convey the concept of those to whom legislation is addressed. But, who constitute the legislative audience, and what levels of common and legal knowledge to they possess? Perhaps, even before one deals with the membership of the legislative audience, the preliminary question “why bother find out?” needs to be addressed.

Let me start with the latter question: why is the legislative audience relevant in the drafting and interpretation of legislation. I view legislation as one of the many¹⁾ tools available to governments for the achievement of their desired regulatory results²⁾. The achievement of the desired regulatory results is the prevalent measure of policy success.³⁾ And so, to achieve success in regulation, policy makers can use a range of tools: flexible forms of traditional regulation (such as performance-based and incentive approaches), co-regulation and self-regulation schemes⁴⁾, incentive and market based instruments (such as tax breaks and tradable permits) and information approaches⁵⁾, and of course legislation. Legislation is used frequently to get government to their desired regulatory destination.

The diagram⁶⁾ below visualises the journey from legislation to successful regulation⁷⁾ and, in reverse, the journey from successful regulation to legislation.

1) See A. Flueckiger, ‘Régulation, dérégulation, autorégulation : émergence des actes étatiques non obligatoires’ (2004) 123 *Revue de droit suisse* 159.

2) See Better Regulation Task Force (BRTF), ‘Routes to Better Regulation: A Guide to Alternatives to Classic Regulation’, December 2005.

3) See N. Staem, ‘Governance, Democracy and Evaluation’ (2006) 12(7) *Evaluation* 7, 7.

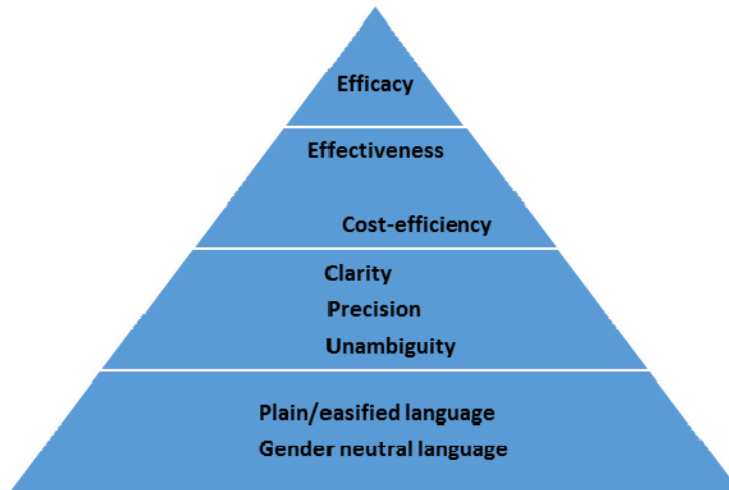
4) See J. Miller, James, ‘The FTC and Voluntary Standards: Maximizing the Net Benefits of Self-Regulation’ (1985) 4 *Cato Journal* 897.

5) See OECD Report, ‘Alternatives to traditional regulation’, para 0.3; and also OECD, *Regulatory Policies in OECD Countries: From Interventionism to Regulatory Governance* (Paris, OECD, 2002).

6) See H. Xanthaki, ‘On transferability of legislative solutions: the functionality test’ in C. Stefanou and H. Xanthaki (eds), *Drafting Legislation: A Modern Approach – in Memoriam of Sir William Dale*, above, n.19, 1.

7) For a thorough analysis of the goals for drafters and the theoretical basis for their universality, see H. Xanthaki, *ibid.*

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Successful regulation, defined as the production of the desired regulatory results, is the goal of regulators and is expressed as “efficacy”.⁸⁾

The term efficacy has in the past been used interchangeably with effectiveness, especially by experts outside the field of legislative studies.⁹⁾ But efficacy and effectiveness are far from synonymous. Efficacy is factual and answers the question whether the regulatory efforts have actually achieved the set regulatory goals. Effectiveness is a qualitative concept and answers the question whether the legislative is capable of producing the desired regulatory results, i.e. whether the text is capable of achieving efficacy. In this sense, effectiveness is just one element¹⁰⁾ of efficacy¹¹⁾: efficacy requires a solid policy, appropriate and realistic policy measures for its achievement, cost efficient mechanisms of implementation, effectiveness of the legislative text,¹²⁾ the users’ willingness to implement, and judicial inclination to interpret according to

⁸⁾ See M. Mousmouti, ‘Operationalising quality of legislation through the effectiveness test’ (2012) 6 *Legisprudence* 191.

⁹⁾ Also see A. Flückiger, ‘L’ évaluation législative ou comment mesurer l’efficacité des lois’ (2007) *Revue européenne des sciences sociales* 83.

¹⁰⁾ See C. Stefanou, ‘Legislative Drafting as a form of Communication’ in L. Mader and M. Travares-Almeida (eds), *Quality of Legislation Principles and Instruments* (Baden–Baden, Nomos, 2011) 308; and also see C. Stefanou, ‘Drafters, Drafting and the Policy Process’ in C. Stefanou and H. Xanthaki (eds), *Drafting Legislation: A Modern Approach* (Aldershot, Ashgate, 2008) 321.

¹¹⁾ See J. P. Chamberlain, ‘Legislative drafting and law enforcement’ (1931) 21 *Am. LabLegRev* 235, 243.

¹²⁾ See C. Timmermans, ‘How Can One Improve the Quality of Community Legislation?’ (1997) 34 *Common Market Law Review* 1229, 1236–7; ‘European Governance: Better lawmaking’, Communication

legislative intent.¹³⁾

In an effective legislative text the observable attitudes and behaviours of the target population correspond to the attitudes and behaviours prescribed by the legislator¹⁴⁾. The “law matters: it has effects on political, economic and social life outside the law – that it, apart from simply the elaboration of legal doctrine”.¹⁵⁾ Effectiveness encompasses implementation, enforcement, impact, and compliance¹⁶⁾. The legislative measure achieves a concrete goal without suffering from side effects¹⁷⁾. And the legislation influences in the desired manner the social phenomenon that it aims to address.¹⁸⁾ An effective law is one that is respected or implemented, provided that the observable degree of respect can be attributed to the norm.¹⁹⁾ Effectiveness is the ultimate measure of quality in legislation²⁰⁾, which reflects the extent to which the legislation manages to introduce adequate mechanisms capable of producing the desired regulatory results.²¹⁾ In its concrete, rather than abstract conceptual sense, effectiveness requires a legislative text that can (i) foresee the main projected outcomes and use

from the Commission, COM(2002) 275 final, Brussels, 5.6.2002; also see High Level Group on the Operation of Internal Market, ‘The Internal Market After 1992: Meeting the Challenge – Report to the EEC Commission by the High Level Group on the Operation of Internal Market’, SEC (92) 2044; also Office of Parliamentary Counsel, ‘Working with OPC’, 6 December 2011; and OPC, ‘Drafting Guidance’, 16 December 2011.

- 13) See D. Hull, ‘Drafters Devils’ (2000) *Loophole*, www.opc.gov.au/calc/docs/calc-june/audience.htm; also see U. Karpen, ‘The norm enforcement process’ in U. Karpen and P. Delnoy, (eds.), *Contributions to the Methodology of the Creation of Written Law* (Baden-Baden, Nomos, 1996), 51, 51; also L. Mader, ‘Legislative procedure and the quality of legislation’ in U. Karpen and P. Delnoy (eds.), *Contributions to the Methodology of the Creation of Written Law*, above, n 35, 62, 68.
- 14) See L. Mader, ‘Evaluating the effect: a contribution to the quality of legislation’ (2001) 22 *Statute Law Review* 119, 126.
- 15) See F. Snyder, ‘The effectiveness of European Community Law: institutions, processes, tools and techniques’ (1993) 56 *Mod L Rev* 19, 19; also F. Snyder, *New Directions in European Community Law* (London, Weidenfeld and Nicolson, 1990) 3.
- 16) See G. Teubner, ‘Regulatory law: Chronicle of a Death Foretold’ in Lenoble (ed), *Einführung in der Rechtssoziologie* (Darmstadt, Wissenschaftliche Buchgesellschaft, 1987) 54.
- 17) See G Muller and F Uhlmann *Elemente einer Rechtssetzungslehre* Zurich, Asculthess, 2013) 51–52.
- 18) See I. Jenkins, *Social Order and the Limits of the Law: a Theoretical Essay* (Princeton, Princeton University Press, 1981) 180; also see R. Cranston, ‘Reform through legislation: the dimension of legislative technique’ (1978–1979) 73 *NwULRev* 873, 875.
- 19) See M. Mousmouti, above, 200.
- 20) See H. Xanthaki, ‘On Transferability of Legal Solutions’ in C. Stefanou and H. Xanthaki (eds.) *Drafting Legislation, A Modern Approach*, above, n 19, 6.
- 21) See Office of the Leader of the House of Commons, *Post-legislative Scrutiny – The Governments Approach*, March 2008, para 2.4.

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them in the drafting and formulation process; (ii) state clearly its objectives and purpose; (iii) provide for necessary and appropriate means and enforcement measures; (iv) assess and evaluate real-life effectiveness in a consistent and timely manner.²²⁾

Leaving cost efficiency out of the equation, since it is an economic-political rather than purely legal choice, effectiveness is promoted by clarity, precision, and unambiguity.

Effectiveness is achieved by means of clear, precise, and unambiguous communication with the legislative audience. Legislation aims to communicate²³⁾ the regulatory message to its users as a means of imposing and inciting implementation. It attempts to detail clearly, precisely, and unambiguously what the new obligations or the new rights can be, in order to inform citizens with an inclination to comply how their behaviour or actions must change from the legislation’s entry into force. The receipt of the legislative message in the way that it was sent by the legislative text is crucial for its effectiveness and, ultimately, for the efficacy of the regulation.

Clarity, or clearness, is the quality of being clear and easily perceived or understood. Precision is defined as exactness of expression or detail. Unambiguity is certain or exact meaning: semantic unambiguity requires a single meaning for each word used, whereas syntactic unambiguity requires clear sentence structure and correct placement of phrases or clauses. Clarity, precision, and unambiguity offer predictability to the law. Predictability allows the users of the legislation, including enforcers, to comprehend the required content of the regulation. Predictability of effect is a necessary component of effectiveness and indeed of the rule of law. Thus, compliance becomes a matter of conscious choice for the user, rather than a matter of the users’ subjective interpretation of the exact content of the legislation and, ultimately, the regulation expressed by the text.

In turn, clarity, precision, and unambiguity are promoted by plain language and gender neutral language. Gender-neutral language is a tool for accuracy: whilst calling for gender neutrality as a rule, it allows for gender specificity in drafting and before the courts where

²²⁾ This is Mousmouti’s effectiveness test: M. Mousmouti, above, 202.

²³⁾ Legislation is communication: see *ibid.*

needed. Gender-specific language serves in parallel with plain language as an additional tool for the promotion of precision, clarity, and unambiguity. The UK has introduced gender neutral language in its legislation for the last decade. Plain language as a concept encapsulates a qualifier of language that is subjective to each reader or user. Eagleson defines plain language as clear, straightforward expression, using only as many words as are necessary.

Plain language has been promoted both in the UK and internationally as the main tool for achieving clarity and in turn effectiveness of legislation. As a result, its contribution to good legislation is crucial, and merits further exploration. Plain language aims to introduce principles that convey the legislative/regulatory message in a manner that is clear and effective for its audience. Plain language encompasses all aspects of written communication: words, syntax, punctuation, the structure of the legislative text, its layout on paper and screen, and the architecture of the whole statute book as a means of facilitating awareness of the interconnections between texts. And so plain language begins to kick in during the analysis of the policy and the initial translation into legislation, with the selection and prioritization of the information that readers need to receive. It continues with choices related to structure during the selection and design of the legislative solution, with simplification of the policy, simplification of the legal concepts involved in putting the policy to effect, and initial plain language choices of legislative expression (for example e, a decision for direct textual amendments combined by a Keeling schedule, or a repeal and re-enactment when possible). Plain language enters very much into the agenda during the composition of the legislative text. And remains in the cards during the text verification, where additional confirmation of appropriate layout and visually appeal come into play. And so plain language extends from policy to law to drafting. The existing concept of plain language relates to a holistic approach to legislation as a text, as a printed or electronic image, and as part of the statute book.

But the blessing of this ambitious mandate constitutes the weakness of plain language as a main contributor to clarity, precision, unambiguity, effectiveness, and ultimately efficacy. Plain language cannot be distilled to the set of rules that must always be followed: the rules are relative and directly affected by the precise audience of the specific legislative communication: mens rea is easily understood by a legal audience but of course it is an unfamiliar term to

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audiences without legal sophistication. The relativity of plain language is expressed by the recent replacement of objective simplification as its goal with the more subjective easification.²⁴ Easification requires simplification of the text for its specific audience, and thus requires an awareness of who the users of the texts will be, and what kind of sophistication they possess.

Answers to these questions were simply not present for legislation until very recently. It was widely accepted that legislative communication involved the drafter (who, at least in the UK, is a trained lawyer with drafting training and experience) and the generic user (who can be anything from a senior judge to an illiterate citizen of below average capacity). The inequality in the understanding of both common terms (whichever they may be) and legal terms renders communication via a single text a seemingly hopeless task.

III The diversity of the legislative audience in its true extent: empirical data

One could argue, rather persuasively, that this is an unsurpassable weakness of legislative texts. As audience diversity is inherent in legislation, this unsurmountable gap of legal awareness and linguistic experiences can lead to the pursuit of “ordinary meaning” in words. But, ordinary for whom? Who are the real users of legislation in the UK today?

Recent empirical data offered by a revolutionary survey of The National Archives in cooperation with the Office of Parliamentary Counsel have provided much needed answers. The survey of 2,000,000 samples of users of www.legislation.gov.uk has identified at least three categories of users of legislation: lay persons reading the legislation to make it work for them, sophisticated non-lawyers using the law in the process of their professional activities, and lawyers and judges. In more detail in the UK there are three categories of users of legislation:

²⁴ See Helen Xanthaki, ‘*Legislative Drafting e lingua: ipotesi di semplificazione del testo normativo*’ in *Studi parlamentari e di politica costituzionale*, forthcoming (together with Giulia Adriana Pennisi).

- a. Non-lawyers who needs to use legislation for work, such as law enforcers, human resources professionals, or local council officials; the ‘Mark Green’ of the survey represents about 60% of users of legislation;
- b. Lay persons who seeks answers to questions related to their personal or familial situation; ‘Heather Cole’ represents about 20% of users of legislation; and
- c. Lawyers, judges, and senior law librarians; the ‘Jane Booker’ persona represents about 20% of users of legislation.

The significance of the survey cannot be understated. The survey, whose data admittedly relate to users of electronic versions of the free government database of legislation only, destroys the myth that legislation is for legal professionals alone. In fact, legal professionals are very much in the minority of users, although their precise percentage may well be affected by their tendency to use subscription databases rather than the government database, which is not annotated and often not updated. Whatever the exact percentages of each category are, there is significant empirical evidence that in the UK legislation speaks to three distinct groups of users, whose legal awareness varies from none, to some, to expert. But is the legal awareness of the users the only parameter for plain language as a means of effective legislative communication?

Legislative texts are not all aimed at the same readers. Their primary audience varies. For example, the main users of rules of evidence the drafter are probably judges and lawyers. So the language and terminology used can be sophisticated: paraphrasing the term ‘intent’ with a plain language equivalent such as ‘meaning to’ would lead the primarily legal audience to the legitimate assumption that the legislation means something other than ‘intent’ and would not easily carry the interpretative case-law of ‘intent’ on to ‘meaning to’. And so rules of evidence are normally drafted in specialist language, albeit with a caveat: a primarily legally sophisticated audience cannot serve as a ‘carte blanche’ for legalese, since non-lawyers may need to, and in any case must, have access to the legislation too. As audiences become more specialized and more educated in technical areas, they expect texts that are targeted to their particular needs. Moreover, since accessibility of legislation is directly linked to Bingham’s

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rule of law, passing inaccessible legislation under the feeble excuse that its primary audience possesses legal sophistication is not easily acceptable. And so there is an argument for either the continued use of legal terminology or for the provision of a definition of the new plain language equivalent referring to the legal term used until now.

But how ‘plain’ can legislation be? Even within the ‘Heather Cole’ persona there is plenty of diversity. There is a given commonality in the lack of legal training, but the sophistication, general and legal, of Heather Coles can range from a fiercely intelligent and generally sophisticated user to a rather naïve, perhaps illiterate, and even intellectually challenged individual. Which of those Heather Coles is the legislation speaking to? It certainly is not the commonly described as ‘the average man on the street’. To start with, there are also women on our streets, and they are users of legislation too. And then, why are the above or below averages amongst us excluded from legislative communication? Since effectiveness is the goal of legislative texts, should legislation not speak to each and every user who falls within the subjects of the policy solution expressed by this specific legislative text? This includes the above average, the average, and the below average people.

This is a rather revolutionary innovation. Identifying the users of legislation has led to not one but two earthquakes in legislative studies and “ordinary words”: yes, the law does not speak to lawyers alone; but the law does not speak to the traditional plain language ‘average man’.

If applied in practice, this new knowledge changes the way in which legislation is drafted and interpreted. First, legislative language is no longer gauged at legal and regulatory professionals. Although great advances have already taken place, legislation now tends to be pitched to ‘Mark Green’: further simplification to the benefit of ‘Heather Cole’ needs to take place with immediate effect. The Office of Parliamentary Counsel are working on this: for example, the term ‘long title’ referring to the provision starting with ‘An Act to···’ is now replaced by the term ‘introductory text’ as standard in the tables of arrangement found on all Acts in www.legislation.gov.uk. Similarly, there is talk of switching from ‘commencement’ to ‘start date’, as user testing has shown that commencement is puzzling to non-lawyers. The

Guidance to drafting legislation reflects the UK government's commitment to legislating in a user friendly manner.

But more can be done. It is time to look at legislation with an innovative lens in order to identify initiatives that can address its inherent limits.

IV What then for “ordinary words”?

Having established the concept of effectiveness as synonymous to good legislation, and the new holistic mandate of plain language in legislation, and armed with the new empirical data offered by TNA and OPC, let us discuss “ordinary words” further.

There seems to be a rather gaping schism between the linguistic perceptions of drafters and interpreters of legislation in the UK today. Drafters seem to be much more aware of the specific parameters of legislative diversity. And drafting has moved a long way to achieve real easification. Awareness of diversity of the legislative users has prompted drafters to start their task by identifying the profile of the main users of the specific legislative text before them. Aware of the analytics of legislative users in abstract, they can achieve a better understanding of whom the text is addressed to, and, perhaps more importantly, which parts of the legislative story is relevant to each user group. They can therefore pitch the text and its provisions to the right level. And, in fact, they could (and should) test the provision by means of representative user groups to verify the level of easification achieved by their draft.

Judges, as interpreters of legislation, seem to be excluded from the debate on easification, legislative diversity, and effectiveness. Discussions on methods of statutory interpretation and the “ordinary meaning” of words remain outside the scope of audience analytics and user diversity.

In view of the novelty of the legislative debate, perhaps this mismatch is explained. But it cannot forgive a mismatch in the meaning of “ordinary words”. Because drafters choose to use words based on the linguistic and legislative characteristics of the user groups of legislation.

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“Ordinary” is not unique. “Ordinary” must be sought within the linguistic eccentricities of the specific user groups of the provision at hand within the legislative text at hand. What is “ordinary” for mortgage lenders is not necessarily ordinary for mortgage recipients. And what is “ordinary” in criminal evidence is not “ordinary” in benefits and pensions provisions.

V Conclusions

This is by no means the end to the pursuit of “ordinary meaning” in words. Far from it. The new empirical data on the analytics of legislative diversity in the UK feeds further breath to what one could view as an archaic debate. The parameters of “ordinary” can now be identified with some accuracy, thus allowing the judge or statutory interpreter to guess what the meaning of the word could be to a legislative user.

But, in order to achieve this enlightened understanding of the true meaning of words, the statutory interpreter must become aware of the debate on legislative diversity, must be privy to the factors of choice used by the drafter and to any user testing results. Purposive interpretation, which puts context to the language of the text, serves equally well as a guidance there.

One wonders where the interpreter could trace these elements of the drafting choices. I would suggest that explanatory notes could be a handy place. Despite erroneous perceptions of the past, explanatory notes are used exclusively by lawyers and judges. They can therefore serve as a source of sophisticated guidance on which user groups were identified, what linguistic and legislative awareness they have, and how this is reflected in the provisions of the text.

I am tempted to say that my layered approach to legislation (where the legislative text is divided into three parts addressing each of the three legislative audiences and answering their specific questions in an easified manner) could be of great assistance for an accurate interpretation of “ordinary words”.

Whatever form guidance takes, wherever it is placed, it must respond to the interpreter’s needs. Which makes a further dialogue on “ordinary” words all the more relevant.

Innovation of Legislative Process

06.

Retrospective
Reflection on
Consolidation of a
Korean Legislative
Evaluation Model

HyunCheol Kang

06

Retrospective Reflection on Consolidation of a Korean Legislative Evaluation Model^{*}

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I Background and Scope of Discussion on the Application of Legislative Evaluation

The field of legislative science is consolidating its position as an academic field that develops general principles and theories in pursuit of enhancing legislation and attempts to define the individual fields needed under those principles. The areas of research in legislative science for this purpose are founded upon academic fields that are capable of further elaboration and materialization of legislative theory and analysis, legislative procedure, legislative technique, etc.¹⁾ Along with this, a recent area of interest in legislative science has been legislative evaluation as part of a methodology for ‘procedures for legislative optimization’ or ‘optimization of legislative procedure’, as institutional devices for the enhancement of practicality and acceptability of legislation, and research and interest in this field has been increasing. In particular, the Korea Legislation Research Institute established a

^{*} This manuscript is an essay that was published in Konkuk University’s Ilkam Law Review Volume 22 in 2012, and based on this, was presented at KLRI-IAL International Conference in 2014

1) Park, Young-do, Elements of Legislative Science (Korea Legislation Research Institute, 2008. Heretofore referred to as Park, Young-do 1) describing legislative science by separating it into legislative theory, legislative analysis, legislative methodology, legislative process, legislative technique, and legislative evaluation.

Legislative Evaluation Research Center after 2007, and has been researching not only legislative evaluation theories but has also been conducting advance and follow-up legislative evaluations on actual cases of legislation, thereby promoting not only academic interest in diverse fields related to legislative evaluation, but also discussions on practical systematization. However, it is difficult to deny that discussions on possibility of systematization of legislative evaluation raise much controversy, even in fields that acknowledge the theoretical justifiability of legislative evaluation.

As for the background of current research and discussion on legislative evaluation, setting aside the necessity for an improved technical analysis and evaluation through the enhancement of legislative expertise, concerns have been raised about the flood of legislation due to overly numerous legislation, even leading to a concern that this phenomenon will lead to a crisis of representative democracy and the actual rule of law, instead of ensuring the basic rights of citizens. This is because legislation is not being coded or systematized through a rational process where they reflect the provisional normative necessities pursuant to policy-making decisions and so go through compromises of social and political forces, but are enacted or amended based on the interests of individual interest groups and social and political forces, leading to a phenomenon where legislation lacks normative power based on universal values. Furthermore, the trend in recent legislation - especially administrative legislation - is the normalization of a series of procedural processes for the medium-to-long-term plans of the state, policy evaluations of these plans, and evaluative feedback, rather than regulating the legal relationships between individual administrative legislation; therefore, judging the justifiability of a legislation based only on individual types of acts and individual provisions alone is becoming a very inappropriate method of legal interpretation. As such, even in the field of legislation, there has been an increasing need for discussion on the comprehensive analysis and evaluation of impacts related to legislation, in addition to the overall process of legislation itself, and the feedback and examination thereof; based on this, a necessity has emerged to evaluate not only the procedural justifiability of the legislative process but also the overall legislation, including the contents of the legislation itself.

This emerges from a phenomenon whereby an exit from the past model, where legal

relations were understood as one-to-one relations of the involved parties, is sought, and a pursuit is made to approach the regulatory relations between laws from a more spatial concept that is more planned and comprehensive. That is, while past laws acted as means for the rights and obligations arising from legal relations of involved parties and as a means to resolve the conflicts arising thereof, today's laws are expected to play a role in promotion and maintenance of common good of the social and national community from a more planned and comprehensive perspective on the future of the state. Therefore, by its very nature, 'Evaluation of Legislation', (Gesetzesevaluation)²⁾ refers to, in that it evaluates all processes of legislative enactment and all parts related thereof, not only evaluation of the legislation itself, but also a comprehensive evaluation of legislators, the legislative process, as well as all the elements that influence legislation. This perspective, in which legislative evaluation includes not only evaluations of the legislative provisions themselves, but also evaluations of legislators and the legislative process for the sake of enhancing the effectiveness and quality of the provisions, requires the inclusion of behavioral evaluations of legislators in relation to legislation and evaluations of legislative process, in addition to evaluations of the specifics of legislation. Conclusively, legislative evaluation directly targets legislation for analysis and is a series of processes where improved legislation is derived through evaluations of the enactors of legislation, the enactment process, and the impacts on diverse fields, to ultimately produce 'Better Legislation' through evaluation and feedback.

In addition, 'Better Legislation' sought out by legislative evaluation means legislation that incorporates the best convergence of the perspectives and positions of observers and legislators. That is, from the perspective of the observer, legislation will be a means through which his or her rights and interests are maximally confirmed and secured, while from the

2) RIA of the United States, GFA of Germany, IA of the European Union, and Policy Evaluation of Japan may be considered as similar systems with identical systematic goals despite their differing targets of analysis, since they are comprehensive evaluations. However, Korea's Regulatory Impact Analysis System has many differences and limitations in that it is a partial analysis system limited to regulations, and such differences and limitations have inspired discussions on the systematization of diverse analysis and evaluations, and in practice, the systematization of evaluation and analysis in diverse areas such as corruption, gender, and small and mid-sized corporations, etc. are being implemented. Discussions on legislative evaluation may be interpreted as an attempt at the systematization of overall evaluations or comprehensive evaluations for overcoming such differences and limitations.

perspective of the legislator, it will be an enduring law of general and abstract effectiveness that can achieve the goal of legislation; with the demands of the two sides thus met, a piece of legislation may be seen as having fulfilled the conditions of 'Better Legislation'. From this perspective, theoretical research on legislative evaluations will be research into its conditions through objective standards and models, and will not be a theoretical outlay based on objective judgments of simple provisional justifiability and validity as before, but will instead be a proposition of the direction to be taken in the future for better laws and better legislation through comprehensive and systematic academic communication, in order to establish standards of economic competitiveness of laws, practicality, effectiveness, influence, cost, familiarity, suitability, consistency with laws, etc. as objective methods of research, which will enable the proposition of objective standards and models, rather than isolated and subjective outcomes or results of individuals or groups.

II Necessity of Legislative Evaluation and Its Application

1. Concepts and Types of Legislative Evaluation

1) Concept of Legislative Evaluation

Originally, 'evaluation' means measuring the value or level of a certain matter, and 'legislative evaluation'³⁾ can be seen as an advance and follow-up evaluation of the value and necessity, etc. of legislation. That is, 'legislative evaluation' means the comprehensive and systematic review and evaluation of promulgated laws or legislative proposals in accordance with certain evaluation criteria, based on a scientific and objective analytical foundation, in

3) This term is a Korean translation of the German term 'Gesetzesfolgenabschätzung' and the Anglo-American term 'Regulatory Impact Assessment', but since these are not identical, it is necessary to distinguish them. Meanwhile, Switzerland and Germany have been using the term 'Gesetzesfolgenabschätzung' since about 20 years ago to refer to specific evaluations of legislation. If one directly translates this term, it will be 'prediction of outcomes of legislation', while 'prediction, evaluation of outcomes of legislation', 'prediction, evaluation of effects of legislation' or 'legislative assessment' etc. are also seen [Choi, Yoon-cheol·Hong, Wan-shik, Research on a Plan for the Introduction of a Legislative Evaluation System (Ministry of Government Legislation, 2005. 11. 30), page 19].

order to make and maintain ‘better legislation’. As such, ‘legislative evaluation’ means a more comprehensive and systematic evaluation that includes various impact assessments, including the current regulatory impact assessment. When referring to ‘impact assessments’ in relation to legislation, that in itself refers to an evaluation that is designed to evaluate in advance the administrative, legal, social, economic and budgetary effects of the legislation in order to effectively achieve the legislative goal; that is, it seems to be premised on advance evaluation as discussed in legislative evaluation.

That is, legislative evaluation is a general concept that refers to the evaluation of the impact of legislation from each policy perspective, whose composite elements include a regulatory impact assessment as required by each individual law, a corruption impact assessment, a gender-specific impact assessment, a conflict impact assessment, etc., and administrative burden, cost estimation, competitive impact assessment, impact on small to mid-sized corporations, etc., which are not required by law but are sometimes required depending on the case.⁴⁾

2) Types of Legislative Assessment⁵⁾

A legislative evaluation system is an application and introduction of policy evaluation theories, which are being theorized and materialized in the field of policy science, to the field of legislative science, and as in policy evaluation, legislative evaluation is also, in much research in the field, divided into advance evaluation, concurrent evaluation and follow-up evaluation, depending on at which point the evaluation is being made.

Advance evaluation is a procedure of evaluation in advance of a legislative bill that is about to be legislated, and is an evaluation that begins with the phase that clarifies the purpose of legislation and lasts up to the phase where the necessity of legislation is confirmed and

⁴⁾ Kim, Yu-hwan; Kim, Dong-young; Chun, Hoon, Study on Efficiency Enhancements in Government Legislation and Measures for the Enhancement of Support and Adjustment Capabilities for Legislative Affairs for Advancement of the State (Ministry of Government Legislation, 2007. 11. 10)

⁵⁾ Park, Young-do, Theory and Reality of Legislative Evaluation (Korea Legislation Research Institute, 2007. 11. Heretofore referred to as Park, Young-do 2), pg. 129-216 were referred to for types and methodologies of legislative evaluations.

preparation is made for the legislative bill, and provides information on the predicted outcomes of the bill about to be legislated to the final decision maker of the legislation (legislator). Since advance evaluation provides the foundation for the follow-up evaluations that will be conducted after a certain amount of time has passed after the enactment of the legislation, sound implementation of the advance evaluation is necessary. Advance evaluation is a method well suited for making a judgment on whether legislation is necessary and for finding optimal alternative legislation through a comparative evaluation of various alternatives to the legislation.

In addition, concurrent evaluation is an additional advance evaluation based on the legislative form of the initial proposal. That is, concurrent evaluation an evaluation that is conducted during the phase in which the optimal alternative legislative proposal that is derived from an advance legislative evaluation is converted into content that is consistent with the legislative form, and is an evaluation that is conducted throughout, from the preparation of the initial proposal of the legislative bill to the phase where the legislative bill is completed as legislation, and allows an advance review of the future possibility of the execution and observation of the law. The target of review and examination is the legislative bill expressed in textual sentences. Concurrent evaluation is done in order to bring the legislative bill closer to reality, to minimize uncertainty about its side effects, and in order to optimize the legislative bill in terms of legislative form.

Furthermore, follow-up evaluation is a retrospective evaluation based on the effects of legislation currently in force, and is an evaluation on legislation currently in enforcement. That is, it refers to the investigation and evaluation of outcomes that have arisen from legislative provisions, through which the level of achievement of the legislative purpose and the level of acceptability of the legislation among observers is measured. Besides this, cost progression, cost-benefit effects, practicality and side effects are also considered. This is conducted ultimately to confirm the need to amend the legislation and to confirm the scope of the amendment.

However, while evaluating at the phase before making the legislative form of the initial proposal is often an evaluation of policy, since that policy is ultimately to be contained in the

frame of legislation, it may be said that the major contents of advance evaluation and concurrent evaluation do not differ too greatly. As such, the emphasis here is on the issue of the application of legislative evaluations during the actual process of legislation, and since it is difficult to distinguish the advance evaluation, which is a phase prior to preparation of a practical legislative bill, from concurrent evaluation, which is a phase in which the legislative form of the initial proposal is prepared, and since no actual benefit may be gained from such a distinction, advance evaluation will be seen as a concept that comprises both advance evaluation and concurrent evaluation mentioned in many studies.

2. Background of Discussion on Systematization

Currently in Korea, even though the evaluation or analysis with regard to the implementation of policy and legislation exhibit differences depending on the level of expertise of the field, these evaluations and analyses are currently consolidating their positions as an essential procedural element. This can be known even when just looking at the types of evaluations or analyses that have already been systematized, as there are a large number of evaluations and analyses that have already been systematized and are being used. From this perspective, discussions on legislative evaluations must not result in just another systematization of simple evaluations and analyses. That is, the discussion should not just be a simple understanding of administrative departments, their related fields of expertise and a simple reflection of the interests of the interested parties, but a discussion that can create a new overall landscape of legislation in Korea.

In actual fact, discussions of legislative evaluation stem from doubts about the practical effectiveness of various evaluations and analyses introduced into the policy making and legislative processes. That is, the demand and need for modern expertise is increasing not only for policy decision and implementation processes, but also for the legislation and execution processes for policies, and since the systematized evaluations and analyses being used to ensure such expertise and efficiency are merely formalities and their efficiencies are being called into question, new discussion on the issue has been arising. In particular, despite the increase in expert legislation in the process and implementation of legislation, and as the

increase in civic petition legislation due to social and political influences demand suitable social and political evaluation and analysis based on the suitability and efficiency of legislation, the reality is that appropriate systematic devices for this purpose are lacking. One example of systematization designed to supplement this insufficiency is the regulatory impact assessment provided for in the 「Framework Act on Administrative Regulations」. However, this regulatory impact assessment system, despite having some systematic effects on regulatory reform as this systematization had originally envisioned, still faces many limits and has been unable to exit the formality of legislative process.

That is, this system was not instituted with the purpose of achieving procedural expertise and effectiveness in the legislative process, and has been unable to overcome its distortive effect on the system caused by handling only matters related to a specific element – regulation. While the basic framework of the regulatory impact assessment in Korea is based on the RIA (Regulatory Impact Assessment) of Anglo-American legal systems, criticism has been raised that only the formal framework was adopted, while the fundamental elements of the system have been neglected, leading to many limitations in terms of ensuring its suitability and effectiveness in the legislative process. Discussion of the systematization of legislative evaluation is therefore an academic discussion to supplement such deficiencies and to ensure its objectiveness and efficiency in legislation. The goal of legislative evaluation is not to be an analysis or evaluation simply limited to a certain regulation, but to analyze and evaluate overall and comprehensive matters with regard to legislation in order to review its connectivity with the related policy, and thereby propose an objective and scientific basis for the suitability thereof. That is, methods have been devised for preventing comprehensive and general problems identified in the legislative process and for effective follow-up deterrence against said problems, and not only that, due to the emergence of the need for a new understanding due to a functional change in legal rules, the need to enhance the perception of legislative outcomes and justifications through effects, and the emergence of a duty of legislators for the prediction, observation and follow-up improvement, discussions for a system of legislative evaluation has been undertaken,⁶⁾ and since over-regulation on all activities of citizens decreases the

⁶⁾ For more detailed contents on the background of introduction of the legislative evaluation system,

practicality and acceptability, etc. of laws, the newly discussed legislative evaluation process has the emphasized prevention of, and deterrence against, the overflow of rules, as well as the practicality and acceptability of law, and for this purpose, the need for inter-disciplinary research utilizing methods from fields such as law and economics, sociology of law, and rechtspolitik, etc., has been especially emphasized.

3. Necessity of Application of Legislative Evaluation

1) Enhancement of Civil Autonomy through Prevention of Over-Legislation

In Korea, laws of the former Japanese colonial administration had been used for 15 years after the establishment of the Republic of Korea Government, and as the project for the re-arrangement of the current laws began to be implemented in earnest after May 16, 1961, the legal system of Korea gradually assumed its modern form. Since then, many Acts and statutes were enacted, and the number of Acts and subordinate statutes too began to grow at a rapid phase. As of the end of March 2012,⁷⁾ the number of Acts and subordinate statutes alone was 4,607 (1,329 Acts, 1,750 Presidential Decrees, 1,528 Prime Minister and Vice Prime Minister Decrees), while the internal rules of each agency, including instructions, etc., numbered at more than 11,000; this large number of laws has resulted in state involvement, intervention and regulation even in minute corners of the daily lives of citizens and corporate activities, which in turn has restricted the economic autonomy of civilians.

As the rule of law becomes consolidated and as its scope of application widens, it is only natural that the number of laws and regulations increase at an exponential rate. In other words, as the role of the government expands in the modern state, it is only natural that the number of laws accordingly increases. However, taking advantage of such a trend to increase the number of laws and regulations based on political judgments without any restraint or control is very likely to cause problems. Once a law is enacted, it will stand as a law in enforcement until it is

please refer to Park, Young-do, the aforementioned book, pages 13-31.

7) <http://www.moleg.go.kr/lawinfo/status/statusReport>(refer to the legislative statistical data of the Ministry of Government Legislation)

repealed, and will penetrate into even the minute details of the lives of citizens and corporate activities in order to intervene and regulate; furthermore, once enacted, a law is not easily repealed, even if it contains unreasonable elements.⁸⁾

If a legislative evaluation system is introduced under these circumstances, it will act as an apparatus for the justification of legislation, while also facilitating the actual adjustment of legislation in the direction of simplifying the system of rules of Acts and statutes, through an understanding of the effects of legislation based on objective and scientific analysis on legislation, and feed-back of the results thereof to new legislation, thereby preventing, in advance, impulsive and hasty legislation or legislation whose effects are unclear, etc.

2) Enhancement of Legislative Capacity of the State through Scientific and Rational Analysis

The process of legislation itself is a political process, and there are cases where the intervention of political judgment at a higher level than the legislative process is necessary, and it can be thought that the law is, as has been thought so far, the very embodiment of authority or justice itself, vested with legitimacy. However, goal-oriented and effect-oriented legislation, which considers the suitability of legislation, including considerations of the purpose of legislation and of whether each provision may achieve the purpose effectively and efficiently, etc., in the process of establishing laws that exert continuous influence on the rights and interests of citizens, has come to assert an important position.

Legislative evaluation makes possible an objective and scientific analysis on such issues. Legislative evaluation functions as the final bastion that guards formal and content-wise consistency and validity, and functions, with regard to the National Assembly and each cabinet department, as a source of systematic provisions of information related to legislation during the legislative process. That is, it accumulates and provides legislative information and materials that are essential to all persons involved in legislation and their related agencies, thereby

⁸⁾ For the overall legislative process, refer to Hong, Wan-shik, Problems in Legislative Process and Measures for Improvement, *Ilkam Law Review*, Volume No. 11 (Konkuk University Institute of Legal Studies, 2007. 02.)

contributing to the significant improvement of the legislative capacity of the state overall.

If the application of legislative evaluation becomes possible in legislative process, examination of the fulfillment of the legislative goal and the effectiveness of legislation from the perspective of citizens during the legislative evaluation will be conducted and analysis and feedback processes will be institutionalized, which will lead to a significant enhancement in legislative capacity, which will in turn result in better laws and the laying of a foundation for the realization of the rule of law through reasonable and democratic legislation. In addition, through the application of a comprehensive and systematic legislative evaluation, various impact assessment systems will be combined and analysis and review procedures during the legislative process will be objectified and rationalized, which will lead to the systematization and simplification of legislative procedure. Furthermore, the introduction of a legislative evaluation system will not only significantly decrease legislative demand by preventing a considerable number of unnecessary legislation and thereby enhance legislative efficiency, it will also aid in maintaining only essential laws and thereby enhance the effectiveness of legal provisions; it is expected that these altogether will result in a significant enhancement of legislative and related capacities at the overall state level.

3) Creation of High-Quality Legislation with High Effectiveness and Effectualness

As the legislative process has been changing significantly in recent times, legislative situations are also shifting rapidly. First, as society advances, legislation of policies is also expanding. Under these circumstances, our legislative environment is increasingly more likely to produce problematic legislation with legislative qualities below an acceptable standard. More than anything, the government has lost its preeminence in terms of legislative productivity to the National Assembly, with the number of Member-proposed legislative bills increasing at a rapid pace; the problem is, there still are many cases in Korea where legislative support from expert and professional personnel is lacking, producing many Member-proposed legislative bills with a low level of completeness.

Furthermore, due to issues such as the assertive activities of interest groups related to legislation and the mediation of conflicts, etc., the possibility of problematic legislation that is dispositional and inequitable in nature is increasing. In the midst of these circumstances, the convenience of legislative formulation is increasing considerably, thanks to universality of information on legislation, rooted in the advancement of information technology. This set of circumstances signify that unnecessary legislation, favor-oriented legislation, unrealistic legislation, etc. will emerge and cause an overflow of legislation, ultimately leading to a heightened possibility of the deterioration of legislative quality.

If such an inflation of problematic legislation indeed manifests, the effectiveness of legislation will decrease, and sound execution of legislation will also be rendered difficult, ultimately leading to an increase in the costs borne by the state; as such, an effort to systematically evaluate legislation and thereby improve the quality of legislation itself is necessary. Therefore, in order to discover and re-arrange legislation that has become obsolete or contradictory in the face of epochal changes, and in order to ensure legislation consistent with the reality of state budget, government policy and the execution thereof, it is necessary to introduce a legislative evaluation system that can prevent these problems and thereby enhance legislative effectiveness and efficiency, which will ultimately lead to increased level of acceptability of legislation among citizens.

Since a legislative evaluation system is in fact a system that facilitates prudence in legislation through certain procedures and phases, it may be said that its successful introduction will be realistically difficult without designing a system based on a consideration of efficiency in the legislative procedure. A legislative evaluation system can be used as a tool for careful advance and follow-up review of the various impacts and effects of legislation, which will ensure that the intentions of legislators are fulfilled faithfully. In other words, through objective analysis of legislative bills, the effects of the bills can be predicted, and through the feed-back of these predictions to the legislation itself, impulsive, hasty legislation and legislation with uncertain effects can be prevented. In addition, through legislative evaluation, legislators can sufficiently gather the opinions of not only agencies and organizations related to the legislation, but also those of the citizens directly affected by the

legislation; this will heighten the possibility of democratic legislation. Legislation made through such processes are more likely to be received well among those who are subjects of application, therefore increasing the effectiveness of legislation.

Through such a legislative evaluation, which can enhance not only the scientific rationality of legislation but also the democratic nature thereof, high-quality and superior-caliber legislation with high level of effectiveness and efficiency will be made, providing an opportunity to increase the level of trust towards the government and the National Assembly, and significantly enhance the rule of law. More than anything, it can also be expected that an efficient system will be established where the realistic effects, etc. of legislation that is already enacted and being enforced, as well as those currently being legislated, are illuminated through scientific analysis, so as to enable the continuous excavation of problematic legislation and the re-adjustment of such legislation.

4) Enhancement of Legislative Reliability and Stability

Thus far, there are many cases where law was enacted or amended as a result of political considerations and compromises, and as legislation was thus enacted without undergoing a rational analysis of legislative necessity, etc., citizens' trust in laws deteriorated, which ultimately led to a significant obstacle in the realization of the rule of law. However, if legislative evaluation is implemented, it will be possible to persuade the participants in legislation through rational and objective analysis, as well as hear their opinions; at the same time, it would be possible to predict all outcomes of each provision of a legislation, allowing only those that are necessary to be actually legislated.

By doing so, it will be possible to prevent increases in the cost of compliance with legislation caused by unintended or unexpected situations, and to heighten the level of predictability in law; this will lead not only to a higher level of citizens' trust in the law, but will also provide an opportunity to overcome instability due to the frequent amendment of laws and thereby promote legal stability. If a legislative evaluation system is implemented soundly, it will, through evaluation, analysis and feedback on legislation, lay a groundwork for the formulation

and execution of legislation and policies to be implemented not from the perspective of the state, which is the supplier, but rather from the perspective of citizens, who are ‘consumers’, and in addition, it is also expected that it will contribute to the promotion of transparency in the legislative process and the expansion of the disclosure of information through national disclosures of the results of evaluation and analysis.

III Pre-Requisites for Systematization of a Legislative Evaluation System

1. Introduction

While it is said that legislative evaluation systems have been operated with relative success in many developed nations, the legislative environment and the perception of evaluation and analysis are very different in Korea; and given the reality in Korea where expertise related to these matters is relatively less developed, the introduction of a legislative evaluation system will indeed be very difficult to settle successfully without state-level interest and meticulous advance preparation and effort.⁹⁾

This view is held because countries not only have different political structures, but their respective legal system related to legislation, the legislative environment, and persons involved in legislation, such as legislators, etc. have significantly different perceptions, etc., and Korea exhibits a pronouncedly unique set of systematic characteristics and perceptions. Furthermore, the reality is that even in those developed nations where the application of legislative evaluations has become the norm, the concepts of legislative evaluation have not been defined clearly, and not only that, there also are considerable controversies, with regard to

⁹⁾ There is also a view which holds that the pre-requisite conditions for systematization are the enactment of a basis Act, procurement and education of professional personnel, expansion of responsible agencies and related organizations, development of an evaluation model and preparation of guidelines and criteria, and improvement of legislative procedures (Refer to Kim, Gi-pyo, “Study on the Systematization of Legislative Impact Assessment”, Doctoral Dissertation, Kyung Hee University (2011. 08), page 240 and below).

the legislative evaluation of individual laws, as to which criteria and methodological techniques should be applied for each type.

In the case of Korea, where much legislation has been enacted according to political decisions rather than rigorous analysis, and especially given the reality of the operation of various evaluation systems, ample considerations must be made based on the fact that there exists a sense of distrust towards objective and scientific evaluations based on a quantitative cost-benefit analysis, accompanied by a considerably widespread lack of willingness to accept such forms of evaluation.¹⁰⁾ While there are such difficulties in the process of applying legislative evaluations, in case of Korea, it seems to be necessary to earnestly initiate a discussion about systematization, with due consideration for the side effects and problems that arise in relation to the legal provisions and benefits of a legislative evaluation system.

As shown above, if this system is adjusted, supplemented and applied consistently based on the reality in Korea, with due consideration for each foreign country's background of implementing their legislative evaluation systems and the systematic limitations, etc. of the legislative realities of Korea, it will provide a breakthrough opportunity to eliminate numerous pathological phenomena caused by the overflow of regulations and problematic legislation.¹¹⁾ For this purpose, it is necessary for each agency related to legislation to perceive accurately the need for the application of legislative evaluations, and to train legislation evaluation and analysis professionals. Especially now that the law school system has been introduced, legislation-related legal education, including legislative evaluations, must become more vitalized.

¹⁰⁾ In relation to participation by legislative experts, please refer to Hong, Wan-shik, Participation of a Lawyer in the Legislative Process of the National Assembly, *Ilkam Law Review* Volume No. 13 (Konkuk University Institute of Legal Studies, 2008. 02.).

¹¹⁾ As for reports that propose alternative methods, please refer to the Study on the Application of Legislative Evaluations for the Amendment and Repeal of Legislation that Causes Inconvenience to Citizens, by Han, Sang-woo; Kang, Hyun-cheol; Ryu, Cheol-ho (Korean Legislation Research Institute, 2008).

2. Expansion of Sympathy for Legislative Evaluation and the Reinforcement of Cooperation, including Research

An important issue in the application phase of legislative evaluation is that a general perception of legislative evaluation as the most scientific and systematic method for the prevention of problems of over-regulation and for making and maintaining ‘good laws’ must be fostered, and that sympathy must be widespread. With regard to the introduction of a legislative evaluation system in Korea, there are views that professional and scientific analysis will be difficult in Korea, while others hold that legislative procedures will become complex due to the application of legislative evaluation, and that therefore it is too early to apply such a system. As such, it is first necessary to transmit and promote accurate information about the nature and details of a legislative evaluation system.¹²⁾

At the same time, professional research is needed regarding the introduction of a system that is consistent with the realities of Korea, so that the expected benefits of the application of legislative evaluation are more realistically fulfilled. In that process, it will be necessary to systematize the experiences and research of developed nations such as Germany, etc., and the outcomes of recent research in Korea thus far, which have been conducted with the Korea Legislation Research Institute as the focal point, and apply these to the systematization of legislative evaluation. In Korea, it will be necessary to clarify, based on a consideration of what effects may be expected from the application of legislative evaluation, the necessity and background of such an introduction. In particular, it will be necessary during the research process to be clearly aware that a legislative evaluation system is not an omnipotent tool for making good laws, but must realistically face many limitations.

Furthermore, focus must be placed on preparing a set of criteria, means and methods of legislative evaluation that is consistent with the legislative reality in Korea; in addition, this preparation will have to be preceded by efforts to consolidate the frame of the legislative

¹²⁾ The Ministry of Government Legislation, with regard to general information concerning a legislative evaluation system, such as the outline of the system and issues of controversy related to introduction thereof, briefed members of the Advisory Committee for Government Legislation that was held on September 24, 2008, and heard opinions on the direction of the introduction, etc.

evaluation system, such as the preparation of a detailed practical guideline for efficient operation of the system, followed by the implementation of an experimental legislative evaluation, etc. However, for such an effort to succeed, it will be necessary for the entities responsible for practical implementation, including not only related researchers but also academia and related agencies, to cooperate organically with a mutually shared sense of purpose and close coordination, and divide efforts among respective entities in order to successfully apply legislative evaluation.

However, a look at the reality reveals that there are only few people with an accurate understanding on legislative evaluation system, and there are many people who understand it merely as a simple introduction of works related to evaluation and analysis, for which our level of understanding is very low in the field of legislation. As such, it is necessary for more people to perceive that a legislative evaluation system is necessary in our circumstances, and to consider its introduction as necessary; at the same time, related agencies and research institutes, etc. must engage in in-depth research and review based on the premise that this system will be actually introduced.

Furthermore, in order to assure that the level of interest in this field is heightened and that experts are trained as this process progresses, it will be necessary to establish and operate professional programs related to legislative evaluation in not only law schools but also in training institutes, etc., for public officials. Research on a legislative evaluation system must start with establishment of a phase-by-phase strategy for the application of legislative evaluation, and subjects and methods, etc. of research must be determined in accordance with said strategy. Specifically, a macro-scale blueprint for the application of a system based on comparative analyses of the current state of legislation and the outcomes thereof, etc. in Korea and various developed nations must be prepared, and systematic and gradual research based on this blueprint must be conducted. By doing so, it will be possible to ensure that research on all matters related to a legislative evaluation system is conducted with practical effectiveness, in a direction that actually provides aid to legislation-related systems in Korea.

As such, in the current phase, it is necessary to determine a direction of introduction that is consistent with the circumstances in Korea, in order to prepare a blueprint for the application of legislative evaluation, and to conduct cooperation, research and review between the government, academia and research institutes for a considerable amount of time. Along with this, it will be necessary to train competent professionals in the field while widening the scope of sympathy on the necessity of applying legislative evaluation, etc. Ultimately, depending on the level of such efforts, the time for the overall application of a legislative evaluation system may be brought forward, and the successful application of legislative evaluation may be possible.

Among the research related to legislative evaluation, the one thought to be most important is the research into determining the categories and criteria and methods of evaluation that can facilitate the most effective and effectual evaluations for each type of legislation, based on an overall perspective of legislation. And effort is necessary to go beyond a simple analysis of the system and cases in various developed nations; that data must be analyzed with a mind towards the Korean legislative system, its current state, the current state of legislation, changes in the legislative environment, etc. to thereby study the possibility of application in Korea.

In Korea, perception is still lacking regarding the enormous consequences of legal provisions that are, by their nature, applied generally and abstractly. As such, it is necessary to discover individual cases of major laws to analyze quantitatively and empirically the problems of economic and social costs attendant to the law itself and its individual provisions, as well as the limitations of economic autonomy, etc. and to clearly reveal the differences made by the introduction of the system. Ultimately, such points will be shared widely among all persons involved in legislation, facilitating the smooth introduction of a legislative evaluation system.

3. Arrangement of Means to Ensure Reasonable and Professional Analysis

1) Enhancement of a Scientific and Analytical Approach¹³⁾

In order for a legislative evaluation system to be a reliable apparatus that can ensure the quality of legislation, the proportion of scientific and objective analysis must be increased during the process of legislative evaluation. In particular, efforts to measure as much as possible the outcomes of legislation and all costs, etc. attendant to legislation must be reinforced. However, the clear measurement of inputs and outputs related to legislation is indeed a very difficult problem, but measurement should not be given up for that reason; rather, a meticulous evaluation strategy must be prepared, including the implementation of maximum effort to identify the parts that can be measured, and as for parts that cannot be measured, reasonable qualitative evaluations that everybody can sympathize with must be entered.

The issue that one must be most aware of is that it is often thought that the quantification of analysis outcomes can be amply manipulated during the analytical process according to the preferences of the analyzer. A realistic example is the derivation of the concept of regulatory costs; there are many cases where, despite quantification being possible, the perception thereof is lacking or is deliberately excluded from the concept of cost. With regard to the evaluation of the validity of regulation settings and the suitability of regulations, the Constitutional Court holds that balance must be maintained between the public utility that is to be protected and the basic rights that are infringed upon. This means that, even in cases where regulation is introduced out of inevitable necessity, measures must be devised so that restrictions on rights and the liberty of citizens must be minimized, while the purpose of regulation is fulfilled.

An important element for making such judgments is the accurate calculation of costs following the introduction of regulation. All regulations incur costs upon the citizen economy, and said economic costs should include not only the costs of executing the regulation, but also the costs of compliance by the regulated persons and other costs, such as those incurred by side

¹³⁾ For the representative details of a measure established for scientific legislative evaluation, please refer to <http://lerc.klri.re.kr/main.jsp> (Legislative Evaluation Support System of Korea Legislation and Research Institute)

effects, etc. A realistic problem is when a societal controversy arises due to problems with safety, the environment or public health and the competent department responsible for this field first considers the introduction of a regulation for public utility, but in such cases, there is a tendency to limit considerations of the regulatory costs only to the administrative costs that the competent department would bear through its efforts, that is, organizational, personnel and budgetary costs. Therefore, when an issue of social problems related to fire or food safety occurs, emotional public opinion characteristic of Korea and the sensational response of media, etc. work together to produce rather severe policy measures to regulate the problem at hand, and generally in such cases, the primary focus is given not on whether said regulation is consistent with the constitutional principle of proportionality, but rather on the procurement of legislation, the administrative apparatus and personnel, etc. for the establishment of the regulation.

From the perspective of citizens however, the most important cost is not such administrative costs, but rather, the costs that are incurred due to compliance with such regulations. Therefore, even considering all such costs, it will be necessary to exercise caution so as to introduce or reinforce a regulation only when doing so is justified. The problem is that such matters are currently determined by the judgment of competent departments, and a system that can point out this problem as an important problem in the process of legislation is yet non-existent.

Meanwhile, another similar case is erroneous judgment regarding limiting basic rights in relation to regulations. The 「Constitution」 provides that basic rights may be limited by law when necessary for the sake of national security, the maintenance of order or public welfare (Article 37, Clause 2). Here, the ‘maintenance of order’ ultimately refers to the well being and order of the public, and includes the maintenance of basic constitutional order, and as well as the maintenance of rights of other persons and social well-being and (public) order, etc. And in cases where basic rights are limited for the maintenance of order, it should be said that such limitations can be exerted only for the reactive maintenance of the current order, and not for proactive enhancement of welfare.

However, even regulations designed to maintain the current order are in many cases

unreasonable in terms of their specific contents. For example, a look at the regulations for fire-fighting and the prevention of fire reveals that, while they seem to have been considered as minimum necessary regulations for securing safety at the time of their introduction and were therefore introduced as such, in fact, many of these regulations did implement, from the onset of their introduction, criteria that incorporates excessive concerns about safety, and what is more, there are even cases where they exist for the sake of existing as regulations, without much substantial relevance to safety. The problem is that, even if such excessively regulatory provisions are included, such excessive legislations cannot sufficiently ensure safety, and they are often unable to respond expediently to new environments or technological developments. Since such cases become unreasonable regulations and thereby cause inconveniences to citizens and incur significant costs upon corporations and businesses, it is necessary to improve regulations on safety or the environment, etc. by taking the direction of flexibly operating the regulatory system through a method where suitable targets of regulation are centrally determined based on realistic problem situations.

Meanwhile, basic rights may be limited also for public welfare, and ‘public welfare’ implies a proactive ideology, that is, the realization of a modern welfare state, and may be defined as a principle of social justice that guarantees as much as possible the basic rights of each citizen through the mediation of mutual clashes between basic rights. Included in this concept of public welfare is the enhancement of the health of citizens and stability in their livelihood, and while limiting basic rights for public welfare is proactive enhancement of welfare, it should not be misinterpreted to be considered as a means for the promotion of convenience of public officials in their performance of duties, and should be given a limited interpretation as much as possible.

The problem in Korea is that, once an incident transpires, public opinion becomes easily agitated due to that incident, only to be cooled with equal expediency; this so-called ‘kettle public opinion’ often prevents restrained limitations such as those seen above, even when basic rights are being limited for maintenance of order and public welfare, etc.; from now on however, it will be necessary to adjust legal limitations based on the accurate analysis of the issues, even in such cases.

In the case of Korea, work on follow-up evaluations and the improvement of legislation have not achieved much results not because of the lack of perception of necessity, or because of a lack of a comprehensive implementation effort. The problem is that the very decision to implement improvement was de-facto contingent on the decisions of the competent department. Generally, rather than implementing improvements with expediency, each competent department forwards the opinion that, since it is their area of work, they will carefully consider improvement only after mid-to-long-term commissioned research or a review on vaguely defined public welfare measures such as safety, environment and health, etc.; indeed, there were many cases where such delays eventually caused the plan for implementation to dissipate and be forgotten.

As such, from the perspective of competent departments that are charged with the maintenance of order and the promotion of public welfare in their respective area of responsibility, there has been a strong tendency to emphasize the need to maintain regulations, without fully seeing the enormous cost of regulatory compliance borne by regulated persons, and sometimes as a response to agitated public opinion. However, from now on, in order to implement a more rational and professional analysis of costs, etc. based on a scientific and analytical approach, it will be necessary to also consider the preparation of a standard cost model¹⁴⁾ as used in Germany and the Netherlands, etc.

2) Training of Professional Personnel for Legislative Evaluation

Currently, the most necessary element for the successful application of legislative evaluation is the procurement of professional personnel that will conduct legislative evaluations. A problem is that legislative evaluations are difficult to perform only with knowledge in law or with professional expertise in legislation. Since the scope of legislative evaluation inevitably includes evaluations of policies, professionals with diverse experiences and a sense of balance in not only in law or legislation, but also in diverse fields such as administration, policy

¹⁴⁾ In Germany, etc. this standard cost model is used for estimation of bureaucratic costs, and application of this standard cost model is required to be based on internationally acknowledged rules. [Refer to Park, Young-do, Study on the Systematization of a Standard Cost Model for the Advancement of Legislative Evaluation (Korea Legislation Research Institute, 2009),]

making, economic, etc. are required to participate in this process.¹⁵⁾

Therefore, in order to be able to perform scientific and comprehensive legislative evaluations, it will be necessary to procure an educational infrastructure related to legislative evaluations, and to prepare the means to train professional legislative evaluation personnel through a professional educational program, and to assure advance preparations so that sufficient education is carried out. It is worth considering having an agency such as the Ministry of Government Legislation establish an educational institution such as a tentatively named ‘Legislation Education Institute’, staffed by professionals with proficiency in both policy and legislation, and conduct training on legislative techniques for making and maintaining good laws, as well as education for the enhancement of evaluative and analytical capabilities with regard to legislation.

Furthermore, professional organizations that perform academic research in fields related to legislation, such as regulation and public policy, and conduct the training of professionals, as well as law firms that show interest in such issues, must increase in number, and each government department as well must, at least with regard to departments in charge of the implementation of major legislation, prepare means to actively implement education in legislative evaluation, such as opening programs related to legislative evaluation in each field at education and training institutes affiliated with them, so that professionals with practical skills in this field may be deployed. For this system to succeed, professionals with abundant knowledge in legislative evaluation need to be involved from the initial phases of formulation of legislation, and therefore, it will be necessary to establish conditions to enable trained external professionals to be actively deployed as the legislative evaluation experts of each department.

Meanwhile, for the training of professional personnel in the field of legislative evaluation, it seems necessary to establish in laws schools, which were established in March 2009, educational courses on legislative evaluation as an important academic field in the science of

¹⁵⁾ In regard to the right to legislative formulation, refer to Lee, Bal-rae “Nature and Limits of the Right to Legislative Formulation”, *Ilkam Law Review* Volume No. 5 (Konkuk University Institute of Legal Studies, 2000. 12.).

legislation. Currently, areas related to legislation, such as the ‘Practice of Legislation’, are already excluded from test subjects related to entrance to law school, while also excluded from significant attention in the curricula of each university; this is a natural consequence of the current state of our legal academia, which does not pay much deference to legislative science as an academic field. However, since each university with law schools executed in November 2007 the ‘Memorandum of Understanding with Universities with Law Schools’¹⁶⁾ with the Ministry of Government Legislation for the purpose of establishing regular courses of study in practice of legislation and support for instructors, personnel and information exchanges, etc., it seems that during this process the Ministry of Government Legislation will have to exert a considerable effort, including the establishment of educational programs, etc., in order to establish a systematic educational system for legislative evaluation.¹⁷⁾

IV Systematic Methods for Impact Assessment

1. Alternative 1 (Maintenance of the Current System)

An alternative solution while maintaining the current system of department-specific impact assessment (analysis) - review by a generally competent agency (Regulatory Reform Committee, Anti-Corruption & Civil Rights Commission, Ministry of Gender Equality and Family) would be a system where advance deliberation and adjustment with regard to various impact assessments are conducted in the policy-decision phase and the inter-departmental consultation phase, which are phases prior to submission of the legislative bill, followed by the offering of opinions by related agencies on policy and legislation (example : a mandatory deliberation period), based upon which the legislative process will proceed. This is a method which represents a combination of the inter-departmental consultation system and impact assessments, through which the legislative process for later legislative phases can be significantly reduced unless other objections or problems arise, requiring only deliberation by

¹⁶⁾ The Ministry of Government Legislation concluded MOU's with 12 universities on November 27, 2007.

¹⁷⁾ For the overall details of legal education, refer to Lim, Ji-bong “The Desirable State of Our Law Schools”, *Ilkam Law Review* Volume No. 9 (Konkuk University Institute of Legal Studies, 2004. 12.).

the Regulatory Reform Commission and review by the Ministry of Government Legislation, while excluding matters related to impact assessment. In this case, matters related to impact assessment will be considerably judged at the Regulatory Reform Committee, while the Ministry of Government Legislation will conduct a process by which the matters related to the legislation are comprehensively deliberated upon. The premise of this alternative is that guidelines for impact assessment of each phase must be prepared, along with objective review criteria and indices for this purpose, in order to facilitate sufficient review of the contents of impact assessment during the inter-departmental consultation process as well, thereby ensuring faithful implementation of departmental impact assessment phases.¹⁸⁾

In this case, since the outcomes of impact assessment during the research phase of a policy or legislation will be reviewed together with the contents of the said research, the level of integrity of impact assessment will be reinforced. That is, the advantage will be the facilitation of more faithful research and reviews on impact assessments with regard to the process of policy or legislative formulation, which will enable a more expedient legislative process. The disadvantage is that, while the legislative review period may be shortened to a certain extent, the time between the policy phase and submission of legislative bill will be lengthened due to inter-departmental consultations, etc., which raises doubt about practical effectiveness.

As such, this alternative will need to propose a suitable guideline for impact assessments during the formulation phase, as well as a means for the integration of impact assessment reports, and to provide a mandatory provision which provides a mandatory deliberation period and considers that an agreement has been reached with regard to impact assessment outcomes in case said period has elapsed, and to even more clearly specify the categories and contents that need impact assessment, and thereby clarify the procedural progress in administration.

¹⁸⁾ In relation to this, the Ministry of Government Legislation considered whether to apply legislative evaluation for the Project for the Amendment and Repeal of Legislation that Cause Inconvenience to Citizens [Korean Society of Legislation Studies, Measures for the Systematization and Enhancement of Efficiency of the Amendment and Repeal of Legislation that Cause Inconvenience to Citizens (Ministry of Government Legislation, 2010. 8)]

2. Alternative 2 (Adjustment of Authorities)

This is an alternative that expands the scope of regulations under the current Framework Act on Administrative Regulations to all legislation proposed by the executive branch, and is a measure which includes in the legislative impact analysis matters related to overall legislation. This measure can be again divided into two sub-measures. The first measure is a measure in which a single apparatus performs all legislative impact assessments or analyses, in which case all impact assessment systems will be abolished, with a single apparatus responsible for managing all impact assessments and conducting evaluation and analysis. The second measure is a measure where a single apparatus manages impact assessments, with the current impact assessment system still in place, while impact assessment or analysis is managed by a single apparatus.

The first measure is a measure in which a new organization or agency is established to take charge of impact assessments, while all impact assessment systems under current law are abolished, and where said combined organization manages all issues related to impact assessments, and conducts evaluations and analyses thereof. The main agent of assessment will be the responsible apparatus, with actual implementation done through impact assessments by professional research agencies commissioned for such work (initially), and after the impact assessment is settled, professional research agencies will be used during the policy formulation phase at each department, whereby the impact assessment will be conducted prior to the legislative process. The second measure is a measure in which, while the current impact assessment system is maintained, an apparatus or agency capable of the comprehensive and systematic management of an impact assessment system is established in addition to the existing system in order to facilitate systematic management. In this measure, the principal agent of assessment will be the apparatus in charge of impact assessments, and an apparatus responsible for the management of the overall aspects of the governmental impact assessment will be established in order to manage the intermediate and overlapping processes in the departmental legislative process into a single, one-stop method. This measure will be able to provide for the uniformity of criteria and guidelines for assessment, and is a measure in which

all impact assessments are not merely undertaken as formalities, but where the responsible apparatus designates areas that actually need assessment and implements assessment on such areas, thereby preventing overlapping assessments.

The shared premise of this measure is that it will be necessary to estimate, with regard to the legislative process, combining all combinable impact assessments into a single assessment criteria and a set of indices for purpose of operation and management, and that it will be necessary to separate policy evaluations and impact assessments related to legislation.

3. Alternative 3 (Combined Apparatus)

This is a measure in which all agencies related to legislative review are combined into a single agency.¹⁹⁾ This measure signifies that a single integrated venue which can comprehensively manage impact assessment is necessary. This systematic alternative is rooted in the premise that, the current individual impact assessments are implemented through a process in which the responsible department prepares the relevant contents in accordance with the guidelines provided by the agency in charge of assessment, after which the assessment agency reviews the said prepared contents; in such a process, it is difficult for individual departments to understand the details and procedures of all impact assessments that are necessary in the legislative process, rendering fulfillment of the purpose of the impact assessment difficult, and given that related impact assessments lack professional expertise, a single venue capable of general management of governmental impact assessments is necessary. That is, this is a measure where, rather than preparing for all impact assessments and analyses through separate analysis and assessment reports in accordance with analysis criteria and indices as is the case currently, each impact assessment guideline is amended to prepare a comprehensive legislative impact assessment guideline and thereby provide a universal guideline for all impact assessments, so that related departments can prepare combined reports. Instead of separate documents and materials, impact analysis reports or impact assessment

¹⁹⁾ With regard to the systematization of legislative assessment, there is also a view that favors the introduction of a 'legal impact assessment system' prior to the introduction of a 'combined legislative impact assessment system' (refer to Kim, Gi-pyo, aforementioned article, pages 253-256)

reports must be combined into a single integrated format to allow comprehension of the outcomes of all impact assessments and analyses, and it is believed that a measure for combining management, rather than a measure for organizational combination, will be needed through this. Under a circumstance where professional agencies for impact assessment are insufficient, objective and scientific impact assessments will be difficult, and therefore, it will be first necessary to devise measures for its research and management; furthermore, it is thought that the objective presentation of analytical criteria, methods and contents, etc. in order to prepare objective and scientific data based on impact assessments, will be a method of substantiating the systematic validity of the impact assessments. That is, it is necessary to prepare professional and objective measures of the management of impact assessment, so that the substantial content of impact assessments and analyses will be able to actually influence policy and legislation, rather than staying as mere formalities of impact assessments as a procedure.

Such discussions on alternatives have proposed doubts about the practicality of discussions of general systematization in terms of theoretical perspectives, and are based on actual practical discussions and the premise of review on the process thereof, and have been conducted with a focus on the possibility of actual implementation. As such, with regard to the process of discussing general systematization, if one sees from the perspective of new discussions on structural systematization, it is indeed felt that these discussions can be a very limited discussions on systematization, given that the fundamental purpose of systematizing legislative evaluations is to make legislation scientific, and to objectify it. However, despite such limitations, given the circumstances in Korea where legislative evaluation is not a perfect new system but is one already adopted into our legislative discussions in many forms and styles and its fundamental nature is not fully realized due to the individualized and fractured systematization process, the discussion is meaningful in that it strives to show that legislative evaluation can exist in a soundly systematized form through systematic adjustment and re-structuring. As such, constructive, progressive discussions and critical approaches regarding each alternative are expected to be meaningful discussions, in that they will contribute to the establishment of an environment for the systematization of legislative evaluation.

V Conclusion

The systematization of legislative evaluation means the construction of measures for the stable and systematic operation of a legislative evaluation system, and from a narrow perspective, signifies legislation of legislative evaluation procedures, etc.; in other words, it means the preparation of a legal basis for legislative evaluations. While not much disagreement exists as to the idea that relevant legal provisions must be enacted in order to systematize legislative evaluations, there are several different opinions as to what form and on what level of provision these bases must be prepared.²⁰⁾

First are the problems of how to establish a legislative evaluation system under the current legislative process. Discussions on the legislative evaluation system began in a background where the role of the state became reinforced and expanded in modern times, necessitating regulation in all aspects of lives of citizens, which has led to an overflow of rules and regulations. In that a legislative evaluation system has been discussed as a possible measure to prevent and deter problems due to such an overflow of regulations, it will be more persuasive to discuss a legislative evaluation system as a measure to amend the problems in the current Korean legislative system and legislative procedure. From this perspective, it will be necessary to discuss from such a perspective how a legislative evaluation system can be consolidated under the current legislative process.

Second, it is necessary to clearly establish the concept of legislative evaluation system.²¹⁾ This is not merely a matter of concept establishment through a simple explanation of meanings, but it also requires a review of how various impact assessment systems currently in force - regulatory impact assessments, environmental impact assessments, corruption impact assessments, gender-specific impact assessments, etc. - and the legislative evaluation system currently being researched, may be harmonized. In other words, since many overlapping

²⁰⁾ Kim, Soo-yong "Concept and Measures for the Systematization of Legislative Evaluation", Legislative Evaluation Studies, Initial Issue (Korea Legislation Research Institute, 2009), refer to page 24 and below.

²¹⁾ Refer to Kim, Soo-yong, Study on Concepts of Legislative Evaluation (Korea Legislation Research Institute, 2008).

impact assessment areas can exist between different impact assessment systems and a legislative evaluation system, this is also a problem mutually connected with the issue of whether other evaluation systems should be combined and unified with legislative evaluation in a wider sense in the background, and whether the current evaluation system and legislative evaluation should exist concurrently, or in a subordinate relationship, for the purpose of systematization.

Third, the method and technique of legislative evaluation must be developed specifically.²²⁾ For this purpose, it will be necessary to conduct comparative analyses on specific cases concerning evaluation methods and criteria in foreign countries that currently implement legislative evaluations. That is, investigations and analyses should be made on what method, criteria, form (legislative evaluation report), etc. are used to evaluate various legislation by countries that currently implement legislative evaluation, in order to develop legislative evaluation methods, criteria and forms well suited to Korea. It is believed that such advance research is also necessary in order to minimize the costs attendant to the introduction of a new system.

Forth, in order to conduct legislative evaluation from diverse perspectives and with diverse methods, research and researchers on adjacent disciplines related to legislative evaluation must be conducted and procured. It is believed that one of the background factors that have enabled European countries such as Switzerland, Germany, France, etc. to implement legislative evaluation is the sufficient availability of research and researchers in adjacent disciplines related to legislation. Given its nature, legislative evaluation critically requires inter-disciplinary research. As such, it is believed that, in order for a legislative evaluation system to become systematized and succeed, a sufficient foundation of adjacent disciplines related to legislation will be important.

Fifth, legislation will have to be discussed after a sufficient period of pilot operation.

²²⁾ As for reports that proposes specific methods of legislative evaluation and evaluation guidelines, please refer to Kim, Soo-yong, Study on Legislative Evaluation Guideline (Korea Legislation Research Institute, 2009); Lee, Soon-tae, et. al. Study on Legislative Evaluation Guideline (Korea Legislation Research Institute, 2010).

Legislative evaluation must be conducted through the use of diverse methods, from diverse perspectives. Under the circumstances of Korea, where research on methodology that may be used for legislative evaluation is not abundant, the systematization of legislative evaluation will require diverse pilot operations for a certain amount of time, as well as feedback on the outcomes of these operations. This is so because it is desirable to systematize legislative evaluation after substantiating its systematic validity and the possibility of settlement through such operations.

Generally, the areas in which legislative evaluation is applied are fields of research for the promotion of rationalizing legislation and enhancing legislative quality through the prediction of commonly generated problems in legislation, the establishment of methodology concerning such problems, and incorporation of consideration for these issues in the process of legislation. As such, discussions on the systematization of legislative evaluation may become, if implemented through partial legislative procedure or improvements in methodology for the temporary and partial resolution of current administrative needs or policy demands, merely another overlapping institution added on top of other systems, so it will be necessary to conduct discussions on introduction of the system from a comprehensive and empirical perspective on legislative procedure and methods.

Keywords: Systematization of legislative evaluation, legislative evaluation, legislative impact assessment, legislative process, legislative science, legislative evaluation model

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[Abstract]

Study on Legislative Evaluation Model of Korean settlement

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Due to the growing demand of legislation in Korea, the number of statutes has been sharply increased. Meanwhile, there are still many unrealistic and low-quality statutes which inconvenience people or burden enterprises because they are not modified timely despite of the rapidly changing society.

Currently, several impact evaluation systems are being implemented including the regulatory impact evaluation similar to a prospective legislation-evaluation and statutory improvement including legislation innovation similar to a retrospective legislation-evaluation.

Legislative Evaluation of Continental Legal System and Regulatory Impact Analysis of Anglo-American Legal System are generally understood as the same. In spite of regulatory impact analysis that has been taken effect since 1997 in our country, legislative evaluation is actively under discussion now. But the concept of legislative evaluation is introduced in variety and the discussion of that have no consideration for current regulatory impact analysis. Above all, the concept of legislative evaluation needs to be established for a systematization.

The purpose of this report is to define the concept of legislative evaluation in comparison with Impact Assessment of EU, Legislative Evaluation of Continental Legal System, Regulatory Impact Analysis of Anglo-American Legal System, Regulatory Impact Analysis of our country.

Four comprehensive and systematic plans should be proposed for the application of legislation-evaluation. First plan is to build a social consensus regarding legislation-evaluation

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and reinforce cooperation in legislation- evaluation research. The second plan is to provide methods for assuring reasonable and professional analysis through strengthening scientific and analytic approach and fostering experts related to legislation-evaluation. The third plan is to organize institutional framework for the application of legislation-evaluation to try applying legislation-evaluation from a national and broad perspective and to decide the main organization like government agency wholly responsible for legislation-evaluation, the type of introduction of system, the object and standard of legislation-evaluation, the direction about mandatory legislation-evaluation and the effect of its result. The fourth plan is to prepare for legal foundation for institutionalization of the application of legislation-evaluation.

To stabilize this application of legislation-evaluation, it is necessary to approach step by step preparing elaborately for concrete matters. The first step is to prepare in advance including doing research on legislation- evaluation. The second step is to gather the opinions of people and form public opinion. The third step is to start a pilot legislation evaluation system. The fourth step is to legislate the ground of application of legislation-evaluation. And the fifth step is to fully implement legislation -evaluation system.

This paper finally suggests that the issue of accumulated statutes will be solved and an advanced legislation-evaluation system which prevents problematic statutes will be provided, drastically contributing to reduce the number of statutes improve the quality of legislation, if a evaluation model is built and the correctness and scope of analysis is enhanced through applying a authentic legislation-evaluation system to current quasi legislation-evaluation systems.

Key Words: evaluation of legislation, Institutionalization of legislative evaluation, Legislative Studies, Legislative Evaluation Model, Regulatory Impact Analysis

Innovation of Legislative Process

07.

Streamlining
the Governmental
Legislative
Procedure

João Tiago Silveira

07 Streamlining the Governmental Legislative Procedure

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I Introduction

This article aims to respond to the following question: “How to streamline governmental legislative procedures?”. Its main focus is therefore to identify topics or measures to improve, rationalize and simplify the procedures to approve governmental legislation. The Portuguese practice shall be specially considered, but other countries’ practices will also be considered when relevant.

In general, parliaments in western countries are the main legislative bodies. However, governments usually have the competence to approve legislation and administrative regulations.

For example, in Portugal the Parliament/*Assembleia da República* is the only entity entitled to approve laws in matters listed in Articles 164 and 165 of the Portuguese Constitution. In other issues both the Parliament and the Government may approve laws (Articles 161-c) and 198-1-a) of the Portuguese Constitution).¹⁾⁻²⁾ The Government and the members of the

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** This article corresponds to an intervention made in the International Association of Legislation/Korea Legislation Research Institute International Conference (18 September 2014) on the subject of “Streamlining the governmental legislative procedure”.

1) In matters listed in Article 165-1 of the Portuguese Constitution, the Parliament may authorise the Government to legislate by means of a law granting such authorisation.

2) On what concerns its internal governance, the Government is the only entity entitled to approve laws

Government themselves may also approve different types of administrative regulations which obviously have to comply with the laws in force.³⁾⁻⁴⁾

In France, the Government may also be authorised by the National Assembly to approve legislation by means of an *ordonnance* as well as in the United Kingdom where secondary legislation/statutory instruments may be approved by the Government under parliamentary bills.⁵⁾

Thus, governments are commonly entitled to enact legislation and regulations. To do so, procedures aimed to set the steps and formalities are provided. This article is aimed at identifying with ways of streamlining said procedure.

The enactment of legislation should not be carried out too often but only when necessary. Therefore, streamlining the procedure to approve a bill is not always a critical concern and it is definitely not as relevant as what regards administrative decisions (e.g., issuing of licenses for economical activities). Notwithstanding, unnecessary steps or formalities in law making may also create burdens which increase costs for people, companies and public entities aimed to deal with legislative procedures.

Several good examples show how streamlining governmental legislative procedure is a relevant concern.

In Portugal the Government has enacted a decree-law (*decreto-lei*) on bullfighting events with several unnecessary provisions. Some of them regulate issues that should be left

(Article 198-2 of the Portuguese Constitution).

- 3) *Decretos-Regulamentares, resoluções, portarias* and *despachos normativos* are different types of administrative regulations approved by the Government. The first is approved by the Council of Ministers, and the President of the Republic enacts it. The second is approved by the Council of Ministers but is not subject to the promulgation by the President of the Republic. The third and fourth types are approved by the ministers or secretaries of state (deputy ministers) and are not enacted by the President of the Republic.
- 4) Other entities are entitled to approve administrative regulations when the law states so. This is the case of municipalities, parishes and other administrative bodies.
- 5) Greenberg, Daniel – Laying down the law, A discussion of the people, processes and problems that shape acts of Parliament, 1st edition, Sweet & Maxwell, 2011, p. 201-215; Mc Leod, Ian – Principles of Legislative and Regulatory Drafting, Oxford and Portland, Oregon, 2009, p. 159; Xanthaki, Helen – Drafting legislation, Art and Technology of Rules for Regulation, Oxford and Portland, Oregon, 2014, p. 257; Zander, Michael – The law making process, 7th edition, Bloomsbury, Oxford and Portland, Oregon, 2015, pp. 105-114.

unregulated or determined by tradition rather than law. Article 26 of Decree-Law 89/2014 of 11 June provides a good example: it states that the participation of a band is mandatory before the show, during parts of it, whenever the director of the bullfight determines so and when the public requires. In addition, it states that a bugle should be kept near the Director of the bullfight.⁶⁾

At the European Union level the already repealed Commission Regulation (EC) 2257/94 of 16 September 1994, published in the Official Journal L 245 of 20 of September 1994 laying down quality standards for bananas, is commonly referred to as an example of what legislation should not include: it stated that bananas should be “*free from malformation or abnormal curvature of the fingers*”. This is obviously an issue that should be left for the market to decide or, at least, objective and clear provisions should define what is a malformation or an abnormal curvature of the fingers.

A good *ex ante* assessment (or just common sense) would be able to avoid such kind of unnecessary governmental legislation. Thus, streamlining governmental procedures to produce legislation is a relevant matter and is worth analysing as to how to achieve such purpose.

II Ways of streamlining governmental procedure

There are many different ways of streamlining the legislative procedures including on what concerns governmental legislation. In this article the following three ways are identified: i) simplifying the procedure to approve governmental legislation, ii) avoiding unnecessary legislation and iii) increasing the level of transparency.

⁶⁾ In Portuguese the wording is as follows:

Artigo 26.º

Bandas de música e cornetim

1 – Nos espetáculos tauromáquicos, com exceção das variedades taurinas, é obrigatória a atuação de uma banda de música antes do espetáculo, durante as cortesias, sempre que o diretor de corrida o determine e, a pedido do público, durante a lide e na volta à arena.

2 – É obrigatória a existência, junto do diretor de corrida, de um cornetim para efetuar os toques tradicionais, que lhe são ordenados por aquele.”

For each of these ways to streamline the governmental legislative procedure specific measures are presented.

1. Simplifying the procedure to approve governmental legislation

An obvious way to streamline procedures to approve governmental laws is to ease the procedure itself. There are acceptable ways of doing so. However, one should always bear in mind that a deregulated way of approving legislation may lead to untested or unnecessary laws which ultimately may increase burdens and red tape. Thus, measures to simplify procedures to approve governmental legislation should be carefully identified in order to target what really is a burden but not what is a proper procedure to assess the need of a new law.

Three examples may help to determine what may be a burden in governmental legislative procedures.

A memorandum to be presented along with the proposed piece of legislation is frequently required to submit a draft for governmental approval. This is useful and should be kept, taking into account that it usually provides information for a proper assessment. However, it may have unnecessary or repeated requirements. For instance, Internal Regulation (*Regimento*) of the Portuguese Council of Ministers approved by the Resolution/*Resolução* 95-A/2015, of 17 December stated in an old version of Article 26-1-b), e) and f) that such memorandum (*nota justificativa*) should include, amongst other information, an overview of the content of the proposal, the current status of the legal framework on the subject and a statement of the grounds for the proposed amendment.⁷⁾ In practice, the text for each of these requirements tends to be the same or very close.

Another example of an unnecessary procedure in Portugal is the signing of a governmental bill by the ministers after its approval by the Council of Ministers. The Portuguese Constitution requires the ministers to sign approved bills prior to sending to the President of the Republic for

⁷⁾ Subparagraphs b) and f) were repealed and the current version of the Internal Regulation of the Portuguese Council of Ministers does not have the same problem. Resolution/*Resolução* 95-A/2015, of 17 December was amended by Resolution/*Resolução* 44/2017, of 24 March and Resolution/*Resolução* 171/2017, of 13 November.

promulgation (Article 201-3 of the Portuguese Constitution). Such signature shall be made by the ministers entitled to deal with the subject of the approved bill. However, they have already assessed whether or not the bill should be approved in the Council of Ministers' meeting and in addition this signature cannot be refused. Therefore, such signature has no added value to the approval procedure and should be eliminated. The same applies to the signature of the Prime-Minister (*referenda*) after the promulgation by the President of the Republic and prior to the publication in the Official Gazette (*Diário da República*). The requirement that the Prime Minister sign the bills approved by the Parliament and the Government after the promulgation by the President is merely a bureaucratic step before publication (Article 140 of the Portuguese Constitution).

Finally, another option for the simplification of the procedure of governmental bills is to consider the use of electronic means by adopting a fully electronic procedure for their approval. This includes electronic procedures as the following: i) e-filing to present drafts to be submitted for governmental approval, ii) electronic sending of an agenda of the meetings where drafts are to be considered for approval and draft versions of the proposed laws, iii) electronic sending of the approved bills to the President of the Republic and iv) the electronic signature of the ministers and electronic promulgation by the head of state after approval.

Electronic procedures have important advantages that must be underlined. In general, they reduce costs, increase efficiency and allow for more secure procedures. In fact, they avoid unnecessary paper copies and allow paperless procedures. In addition, electronic procedures allow a better understanding of amendments and versions of proposed drafts. The tracking of a procedure is easier, and it also provides for more accurate statistical data.

Electronic publication of approved governmental laws in official gazettes should also be considered. This allows for a swifter publication of bills, and they may even be published as soon as they are ready for publication instead of using the traditional publication as an edited "journal format".⁸⁾ In addition, electronic publication in electronic official gazettes is

⁸⁾ <http://eur-lex.europa.eu/homepage.html?locale=en>, www.legifrance.fr and www.legislation.gov.uk are good examples of free of charge web search engines for legislation.

important to provide information to enhanced web search engines which can therefore detect amendments and identify revoked bills in an easier way. Thus, electronic publication helps to provide more accurate and transparent information on which laws are in force.

To sum up, the elimination of some acts and procedures, the use of electronic means and the improvement of publication in official gazettes are possible ways of targeting that goal.

2. Avoiding unnecessary legislation

Unnecessary laws generally mean additional burdens for citizens and companies, and therefore efforts should be made to avoid a legal framework with more laws and regulations than effectively required.⁹⁾⁻¹⁰⁾ Thus, a streamlined procedure on law making should be carefully shaped to avoid unnecessary laws.

On what concerns the criteria to impede unnecessary legislation, some guidelines may be set. In general, a piece of legislation is unnecessary in the following cases:

- If there is not a relevant political decision to be taken or social need to be addressed;
- If the policy measure is already in force by means of a previously approved law or other act;
- If there is no need to adopt the policy measure by means of a law because there are other ways of implementing it, namely by means of self-regulation, agreements between public and private entities and administrative decisions or regulations;
- If different proposals are submitted on closely connected issues, allowing for a single law which addresses all the relevant issues instead of several new laws or amendments to laws.

⁹⁾ European Commission Communication 543 (2010) on Smart Regulation in the European Union (<http://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX%3A52010DC0543>).

¹⁰⁾ Ettner, Diana/Silveira, João Tiago – Programas de Better Regulation em Portugal: o SIMPLEGIS, E-pública, Revista eletrónica de Direito Público, ICJP/CIDP, n.º 1, 2014, /<http://www.e-publica.pt/artigosimplegis.html> in <http://www.e-publica.pt/artigosimplegis.html>; Xanthaki, Helen – Drafting legislation, Art and Technology of Rules for Regulation, Oxford and Portland, Oregon, 2014, pp. 46-48 and 331-351.

In order to avoid unnecessary legislation different ways to block its approval may be taken into consideration.

A member of the government may be appointed to repeal unnecessary proposals. His mission would be to convince or force other members of the government to legislate as little as possible and to push for the use of alternative ways of approving political measures. This member of the government would have the power to impede the approval of a bill if evidence is presented that the measure is not required or if there is an alternative way of achieving the targeted result.

In Portugal the Secretary of the Presidency of the Council of Minister (*Secretário de Estado da Presidência do Conselho de Ministros*) has this authority. He is a deputy minister with enhanced authority, namely because he attends the Council of Ministers and has some ministerial power. He is also entitled to organize the meetings of the Council of Ministers, to ensure that bills are ready to be approved from a juridical standpoint and that the political issues to be discussed on what concerns the proposals have already been agreed or are clearly identified. The law grants him some power to repeal proposals (Article 34 of Internal Regulation (*Regimento*) of the Portuguese Council of Ministers approved by the Resolution/*Resolução* 95-A/2015, of 17 December). In addition, he has *de facto* such authority because he is entitled to prepare the draft agenda for the meetings of the Council of Ministers and the meetings of the deputy ministers (Articles 5-1 and 16 of Internal Regulation (*Regimento*) of the Portuguese Council of Ministers approved by the Resolution/*Resolução* 95-A/2015, of 17 December). He is also entitled to amend the draft proposals submitted for approval and negotiate the text of the drafts with the ministry which has presented the proposal and the other ministries involved (Articles 37-1 and 39 of Internal Regulation (*Regimento*) of the Portuguese Council of Ministers approved by the Resolution/*Resolução* 95-A/2015, of 17 December). Therefore, he has relevant powers to prevent a bill from being submitted for approval or to amend it.¹¹⁾

¹¹⁾ Regarding UK practices and the lack of scrutiny from the Cabinet and Future Legislation Committee see Zander, Michael – The law making process, 7th edition, Bloomsbury, Oxford and Portland, Oregon, 2015, pp. 8-17.

Another alternative would be to appoint a member of the government to assess the legislation prepared by other ministries. This member of the government would have relevant power to decide whether a draft may be included in the agenda of the Council of Ministers or not and therefore to impede or create impediments to the approval of the bill. Again, the Portuguese Secretary of State for the Presidency of the Council of Ministers is entitled to this power and may consider that a bill is not suitable to be included in the agenda of said meetings.

Adopting *ex ante* assessment procedures is also a way of avoiding unnecessary legislation. This may be one of the methods used by the member of the government entitled to verify if a bill proposed by a Ministry is really necessary to achieve the aimed target. However, other public bodies may have the competence to undertake this type of assessment and decide or present an opinion on whether or not the bill should be considered. The type of *ex ante* assessment may be different, being deeper or less detailed on the basis of criteria previously established.¹²⁾⁻¹³⁾ This may be helpful to balance the need for swift approval of urgent legislation with policies aimed at avoiding unnecessary legislation.

¹²⁾ Countries have adopted different approaches on what concerns *ex ante* legislative assessment. See OECD data and information on <http://www.oecd.org/gov/regulatory-policy/betterregulationineurope-theeu15project.htm>. See also De Francesco, Fabrizio – Diffusion of Regulatory Impact Assessment and Standard Cost Model: a comparative analysis, *Quality of Legislation, Principles and Instruments, Proceedings of the Ninth Congress of the International Association of Legislation in Lisbon, June 24th–25th, 2010, Nomos*, pp. 238–250; Garoupa, Nuno – Regulatory Impact Assessment – Economic and Political Dimensions, *Quality of Legislation, Principles and Instruments, Proceedings of the Ninth Congress of the International Association of Legislation in Lisbon, June 24th–25th, 2010, Nomos*, pp. 200–207; Gestel, Rob van/Menting, Marie-Claire – The impact of evaluation of legislation: Going Dutch?, *Quality of Legislation, Principles and Instruments, Proceedings of the Ninth Congress of the International Association of Legislation in Lisbon, June 24th–25th, 2010, Nomos*, pp. 218–237; Issalys, Pierre – Impact Assessment as a means towards Higher Quality of Legal Norms: beware of blind spots, *Quality of Legislation, Principles and Instruments, Proceedings of the Ninth Congress of the International Association of Legislation in Lisbon, June 24th–25th, 2010, Nomos*, pp. 208–217; Morais, Carlos Blanco – Guia de Avaliação de Impacto Normativo, *Direcção-Geral de Política de Justiça/Ministério da Justiça, Almedina, Coimbra, 2010*.

¹³⁾ OECD recommended Member States to “integrate Regulatory Impact Assessment into the early stages of the policy process for the formulation of new regulatory proposals” and that they should “adopt *ex ante* impact assessment practices that are proportional to the significance of the regulation”. See the 2012 Recommendation of the Council of OECD on Regulatory Policy and Governance in <http://www.oecd.org/gov/regulatory-policy/2012-recommendation.htm>

Undertaking meetings of deputy ministers to prepare the Council of Ministers or other member of the government's meetings where legislation is approved is another suitable method of avoiding unnecessary legislation. This procedure allows a means to filter the drafts to be considered for approval by the ministers because a bill will only be considered as ready to be included in the agenda of the Council of Minister if approved in advance by the meeting of deputy ministers. Deputy ministers will assess, discuss, negotiate and agree on a version to be submitted to the Council of Ministers or reject the draft if they considered it unnecessary.

The prior submission of the bill to the deputy ministers' meetings may be set as a general rule but exceptions to this rule based on special circumstances such as the need for an urgent approval should be accepted.

A detailed and updated overview of the drafts being prepared within the ministries is a critical tool to avoid unnecessary legislation. This allows a member of the government specially entitled to do so to impede the preparation or submission of drafts for approval from the very beginning of the drafting process, thus preventing unnecessary actions.

Finally, guidelines may be set to avoid unnecessary legislation such as the following:

- That only one law shall be approved when there are different proposals or drafts being prepared on closely connected issues;¹⁴⁾
- That only one law shall be approved to transpose European Union directives if several

¹⁴⁾ This rule was adopted under the Portuguese SIMPLEGIS programme which was aimed at i) simplify legislation by having fewer laws, making fewer amendments to laws and by having no delays in transposing EU directives; ii) make laws more accessible for citizens and businesses by drafting laws easier to understand, by having greater involvement of citizens in law-making procedures and providing better information about the laws and iii) To achieve a better enforcement of laws by adopting laws that will come with manual of instructions, to ensure that the laws' objectives are achieved and that legislation is evaluated by means of impact assessment.

In 2010 and 2012 the number of laws approved by the Government (decree-laws/decretos-leis) has consequently decreased substantially and the number of repealed laws has increased. For the data see the last report (n. 6) of the Portuguese Observatory on Legislation/ *Observatório da Legislação Portuguesa* in <http://www.fd.unl.pt/Conteudos.asp?ID=1456>. See also Ettner, Diana/Silveira, João Tiago - Programas de Better Regulation em Portugal: o SIMPLEGIS, E-pública, Revista eletrónica de Direito Público, ICJP/CIDP, n.º 1, 2014, /<http://www.e-publica.pt/artigosimplegis.html> in <http://www.e-publica.pt/artigosimplegis.html>

transpositions on closely connected issues are required or will be required in the near future;¹⁵⁾

- That for each law approved, at least a similar one shall be repealed;
- That approved laws shall only provide for secondary legislation or administrative regulations when really necessary for execution;
- That legislative assessments shall be undertaken from time to time in order to verify if a law aimed to repeal unnecessary legislation should be approved.¹⁶⁾⁻¹⁷⁾

3. Increasing the level of transparency

To increase the level of transparency of the governmental legislative procedure, public knowledge of agendas and proposals submitted to governmental meetings to approve legislation/councils of ministers should be provided.

This has the advantage of providing more information to the public and grant additional opportunities to participate in law decision making. However, one shall always bear in mind that the entities and persons more keen on using these kinds of tools and information are well organized lobbies rather than the average person and therefore, there is an obvious risk of reducing the strength of the power to adopt necessary political measures.¹⁸⁾ In addition, some political decisions must be taken without prior public knowledge to produce effective results.

¹⁵⁾ This was also a rule set by the SIMPLEGIS programme. See Ettner, Diana/Silveira, João Tiago – Programas de Better Regulation em Portugal: o SIMPLEGIS, E-pública, Revista eletrónica de Direito Público, ICJP/CIDP, n.º 1, 2014, /<http://www.e-publica.pt/artigosimplegis.html> in <http://www.e-publica.pt/artigosimplegis.html>

¹⁶⁾ Laws aimed at repealing unnecessary legislation were approved under the SIMPLEGIS programme in Portugal and in Italy. See Ettner, Diana/Silveira, João Tiago – Programas de Better Regulation em Portugal: o SIMPLEGIS, E-pública, Revista eletrónica de Direito Público, ICJP/CIDP, n.º 1, 2014, /<http://www.e-publica.pt/artigosimplegis.html> in <http://www.e-publica.pt/artigosimplegis.html> and Pacini/Fabio – The Italian “Legislation-Cutting” Tool, *European Journal of Law Reform* (2016) and Il “nuovo” taglia-leggi: un’occasione mancata?, *Quaderni Costituzionali* (2009). Similar programmes started in 2015–2016 (Portugal) and are currently being executed.

¹⁷⁾ The OECD recommended Member States to “conduct systematic programme reviews of the stock of significant regulation”. See the 2012 Recommendation of the Council of OECD on Regulatory Policy and Governance in <http://www.oecd.org/gov/regulatory-policy/2012-recommendation.htm>

¹⁸⁾ Bergeal, Catherine – *Savoir rédiger un texte normatif*, 4.e édition, Berger-Levrault, Paris, 2001 p. 24.

Thus, providing public knowledge of governmental procedures and drafts to be approved may be considered to increase transparency, but care is advised when adopting such measure. At least, exceptions should be taken into consideration.

III Conclusions

A relevant number of ways and tools to streamline governmental legislative procedures may be considered and be effective. In order to avoid unnecessary legislation: a member of the government may be appointed to repeal unnecessary proposals and to assess the bills prepared by other ministries, *ex ante* assessment procedures may be established, meetings of deputy ministers to prepare the ministers' meetings for the approval of bills may be undertaken, an overview of the drafts being prepared within the ministries should be prepared and regularly updated, and guidelines to avoid unnecessary legislation should be set. However, some other measures should be carefully considered or used in a balanced way. This is the case of measures aimed to simplify the legislative procedure itself (by eliminating acts and formalities or using IT solutions/electronic means) and to provide public knowledge of the governmental procedures and drafts of bills to be considered for approval.

Innovation of Legislative Process

08.

The Legislative
Process and
Good Legislation

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08 The Legislative Process and Good Legislation^{*}

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I Introduction

There is a long history of asking questions about who, in what way and through what process, will establish standards; in other words, there is a long history of asking questions about, and discussing, legislation. However, within the boundaries of the study of law, the legislative domain has been historically treated as a bastard stepchild, or has been wholly disregarded. The study of law has been thought of as finding the meaning behind existing laws (interpretation) and applying them, in addition to researching the methods for doing so. As opposed to being within the realm of standards, legislation has been considered as being within the realm of fact. The general view was that ultimately, legislation is both a political process and its product, and is the standardization of policy, so its study should be considered political science or policy studies. Prof. Mauro Zamboni's statement that, "One of the traditional topics in legislation research is how, as opposed to the opposition encountered after a statute has come into effect, work on clarifying and systematizing the opposition encountered by legislators during the legislative process does not receive much attention," can be understood from such a viewpoint.¹⁾

* This work is based upon the contents of the debate that took place at the 2014 Congress and Conference of the International Association of Legislation held in Seoul, and adds to and expands upon that material.

1) Mauro Zamboni, Conflicts Arising in the Legislative Process, IAL International Conference, September 18, 2014, pg. 276.

However, the idea that the study of law is simply an attempt to find the meaning behind given laws is slowly changing. The gradually spreading idea is that what is actually important is finding out what kind of legislation must be made so that a predictable and meaningful result can be obtained. Even the study of law has begun to pay attention to simultaneous ex post facto control through legislation and anticipatorily reacting through prevention and enhancement. The idea that the problem of legislation is no longer limited to the purview of political science or policy studies, but is also a very important part of the study of law, is taking firm root. The study of legislation that began in the latter part of the 20th century has now become one of the most dynamic areas within the scope encompassed by the study of law. The creation of various European conferences and groups relating to legislation and their vibrant activities, in addition to the creation of the IAL and its expansion overseas, seem to be important examples that show the importance and potential of legislative studies.

The study of law in Korea has also focused on the execution and interpretation of actual legislation, and this tendency still strongly controls the field. The educational methods and content of institutes devoted to the study of law remain stuck within the area encompassed by interpretive legal studies. The questions regarding legislation are only given a cursory examination under the name of rationalizing the legislative process. Furthermore, these discussions center around the domains of public administration science or political science, as opposed to the study of law. But even in Korea, through the interest and efforts of a few pioneering researchers and practitioners over the past 15 years, the questions regarding legislation have begun to take hold as important aspects within the study of law. It is now known that, instead of simply grappling with preexisting 'bad laws', making 'good laws' in the first place is much more important. Legislators have come to realize that optimally protecting and ensuring individual freedoms and rights starts at the legislative step, and that this starting step is the most important one.

II The Fundamentals of Legislation and the Legislative Process

1. Disagreements and Conflicts

Prof. Zamboni's statement that, "Saying that there are conflicts during legislative process is as natural as saying the Pope is Catholic," states the exceedingly obvious.²⁾ Disagreements and conflicts between parliamentary negotiating bodies and their members, and disagreements and conflicts between interest groups and related parties, are inherent within the legislature. For most legislative drafts, it is extremely rare for them to pass through the legislative process and be enacted with the exact same content as when they were introduced. Drafts of new legislation are planned in response to the need for new legislation, and even before they begin the process to become actual legislation, numerous disagreements, conflicts, and modifications to these conflicts are attempted. However, there are many more times that a particular legislative draft has become law through the legislative process, and there are much more specific disagreements and conflicts. While it may seem paradoxical, it seems as though laws that encounter more disagreements and conflicts during the legislative process, and undergo compromises during this process, have a higher chance of becoming 'good law'.³⁾

'Laws' are twofaced, as at the same time a 'law' becomes a restriction for some, it becomes a way to expand freedoms and rights for others (although these others are mostly communities). Disagreements and conflicts cannot help but be an essential part of the legislative process. The disagreements and conflicts that occur during the legislative process must not be condemned as inefficiencies that simply incur social costs. A perfectly orderly legislative process and establishment of laws is difficult to rely on in a democratic society. The important thing is that the principles and methods through which the disagreements and conflicts (the preconditions) that allow 'good law' to come into being are discussed and resolved, and regarding these, the author agrees with Prof. Popelier's opinion that, "when disagreement is appropriately managed, it can become a catalyst for innovation and change. Legislation is born from disagreement, and instead of avoiding disagreement, it must be maintained."⁴⁾

²⁾ Mauro Zamboni, op. cit., IAL International Conference, September 18, 2014, pg. 280.

³⁾ Georg Müller/Felix Uhlmann, Elemente einer Rechtssetzungslehre, 3. Aufl., Zürich 2013. S.25.

2. Dialogue and Compromise

A 'good law' cannot exist where all of the parties involved in a disagreement or conflict agree unconditionally that the law is 'good'. As an end product of a decision-making process, most legislation cannot help but be unsatisfactory for most of the conflicting parties on both sides. Therefore, legislation can be said to contain the parties' reductions of gain. In order to accept the concession and reduction of their own gain, the parties must have, as a prerequisite, an understanding of their opponents. Procedures and systems designed to result in an understanding of, and concessions to, the other side during disagreements and conflicts allow for the conceding party to set the level of concession. Procedures and systems must be prepared that can be seen as an appropriate pathway towards making opposing sides of a disagreement or conflict understand and concede to each other in order to resolve their differences and reach a decision.

A legislative process that allows the parties to a conflict to set their own appropriate level of concession and reducing self-gain is not an 'unsatisfactory' one, but one that allows for the creation of minimally 'satisfactory' laws. A 'good law' can be understood as a law that, at the very least, puts all of the parties in conflict in a state where they are minimally 'satisfied'. In order to obtain 'good laws', appropriate organization and procedures must be prepared that allow for the discussion and exchange of the conflicting parties' intents and gains. Rules regarding parliamentary procedure, the decision making process, and the procedures and assurances for contributing during the legislative process must all be created through democratic methods. In modern countries with political parties, the internal party procedures gathered after confirming the intent of the citizenry and the expansion of democracy within a party are also becoming important elements for obtaining 'good laws'.

4) Patricia Popelier, Legislation and the Management of Conflicts, IAL International Conference, September 18, 2014, pg. 261.

III The Legislative Process Required for Good Legislation

1. Significance

As the legislative process goes through its set procedure, specific legislative organs carry out particular roles during each step.⁵⁾ For each process, problems are identified, a situational analysis is conducted, goals are formed, solutions are found, and value judgments are made regarding possible decisions. And as these processes very often reflect on previous processes, initial purposes, analyses, predictions, and the like become altered or are replaced with alternatives, and in this way are legislative drafts shaped.

In order to obtain good laws, the principles of democracy and a constitutional state must rule over the entire legislative process through methods such as a transparent legislative process, enhancement of democracy by expanding the participatory opportunities for interested parties and responsible parties, in addition to listening to their opinions,⁶⁾ and the pre and post enactment reviews of legislation. If a legislative process based on these principles can be institutionalized and actually implemented, the possibility of agreement between disagreeing and conflicting parties to a law can be improved. Furthermore, the possibility of society being safely and peacefully maintained increases. The actual legislative process does not proceed while observing all of these contentions and principles.

2. Principles That Rule Over the Legislative Process

1) Principles of a Constitutional State

Laws can be seen as the result of members of society intending to integrate themselves with restrictions and a responsibility to obey in order to protect and ensure their rights. It appears to be self-restraint for the self. As such, it must be possible for each member of society to participate in, and be aware of, the process and results of legislative actions. Such realization

⁵⁾ Georg Müller/Felix Uhlmann, a.a.O., S. 72.

⁶⁾ Patricia Popelier, op. cit., IAL International Conference 9.18. 2014, pg.265; Jia'o Tiago Silveria, Streaming the Governmental Legislative Procedure, IAL International Conference September.18. 2014, pg.153.

occurs in modern nations through the principles of democracy and a constitutional state. Compulsions originating from without are simply compulsions backed by cheap strength.

The principles of a constitutional state involve the formation of a state that is both a political community and a centralized authority, and the imposition of a duty upon this state to adhere to its constitution that contains conditions, scopes, and limitations upon the state's wielding of authority, so as to protect freedoms and rights. The state wields a right called 'might' in order to carry out its duty to protect and ensure individual freedoms and rights, and the substance of a constitutional state is that the state is only justified in wielding this might when it wields such in accordance with the laws based on the state's constitution. In the end, the state can only act in accordance with the law, and these actions must only help to protect and ensure the freedoms and rights of the individuals that make up the state. As legally exercised state authority is the wielding of might for an individual's own freedoms and rights, the law is an aggregation of individual will and expressed opinions. Of course individuals must participate as a party to a law's formation and deciding process. Granting rights and imposing responsibilities on a party while excluding that party from the process is against the principles of a constitutional state.

Under the principles of a constitutional state, legislators bear the responsibility of ensuring that, during the legislative process, a law's requirements are clear, concise, and predictable. There must not be contradictions between laws and between sections of the same law, and causing a law to be misunderstood, or give rise to an understanding of the law other than the legislative purpose of the legislators, is contrary to the principles of clear law (Normenklarheit) and truthful law (Normwahrheit), both of which derive from the principles of a constitutional state.⁷⁾

2) The Democratic Principle

The democratic principle is that political order within the state resides within the community, and is built and confirmed by the citizenry bound by it.⁸⁾ A state's political order is defined and realized through laws. As such, the democratic principle is realized when the citizenry directly

⁷⁾ Detlef Martin, "Gute" Gesetzgebungs als Verfassungspflicht oder Verfahrenslast?, DÖV 2015, S. 351.

⁸⁾ Han Suoong, The Study of onstitutional Law, 5th Ed., 2015 Bobmunsa, pg 105.

or indirectly participates in the formation and confirmation of the laws that define the political order that rules over them. The fundamental elements of the democratic principle is the sovereign power of the citizenry, direct democracy or indirect democracy through representation, an election system, a party system, and the like. All of these are considered political actions by the members of the community that form and define the political order. A modern democratic state functions through the expressions of intent by its citizens as voters, through party activities, elections, the act of voting, and the laws that are confirmed through these expressions.

As such, citizen participation in the legislative process self-derives from the democratic principle. However, it cannot be thought that a legislative process ruled by the democratic principle will bring about the most sensible results – for example, a law that everyone will be satisfied with.⁹⁾ Instead, it should be thought of as a prerequisite for providing the public forums, which includes an open legislature, where opposing thoughts and intents can be discussed, which is what is required for reaching reasonable results. The idea that laws are an actualization of justice and righteousness, and the enactment of such laws, can come about through democratic procedures, and a legislature that does this can result from a legislature that makes sensible decisions, and this is an ideal that relies upon the representative parliamentary system.¹⁰⁾

3. The Legislative Process for Good Laws

1) Transparency in the Legislative Process.

The more opaque the legislative process is, and the more it is driven by special political interests and social groups, the more chances there are for resulting legislation to have issues with their completeness. Transparency (Transparanz) in the procedural side mainly effect the procedure's clarity (Klarheit) and disclosure (Öffentlichkeit) elements as opposed to truthfulness (Wahrheit). The process of checking and detailing a piece of legislation's motives,

⁹⁾ Detlef Martin, a.a.O., DÖV 2015, S. 350.

¹⁰⁾ Detlef Martin, a.a.O., DÖV 2015, S. 350.

setting the legislation's purpose, the process of detailing the legislative draft and the entity actually doing so, clearly defining the organizations involved, and the process of finalizing the law must be clear and disclosed.

Within the legislative body, regulations must be established that clearly define the decision making process and procedure, in addition to clearly setting forth responsibilities during each step. It must be possible for the steps information for decision making goes through, such as gathering, handling, audience for, and analysis, be consistently carried out. Even setting forth the degree to which the participation of, and ability to give opinions by, the stakeholders during the preparation and decision making steps is possible helps to improve the transparency of the legislative process.

The efficacy of the legislative process is related to transparency. Once a law is enacted and implemented, enforcement related costs are incurred. Legislators must analyze the benefits being sought by enacting the law and their related enforcement costs, and find an effective way to move forward. By opening up the legislative process to the point where professional organizations and affected groups can participate, the possibility increases of preemptively avoiding unnecessary costs that might have been incurred had this participation not been possible. Recent procedures that were introduced and implemented in various countries, such as regulation impact assessments and legislation impact analyses, can be understood from this viewpoint. Deducing bureaucratic costs through calculations utilizing cost benefit analyses and standard cost models helps with improving the efficiency and transparency of the legislative process.

2) Opening up the Legislative Process

The constitutions of most constitutional states acknowledge the practical limitations of direct democracy by accepting a representative system that takes the form of imbuing a representative body called the legislature, formed through indirect democratic methods such as elections, with the right to create laws, and treating the products of this legislature as acts that individuals have done for themselves. The representative system can be understood as an

unavoidable system necessary for the realization of the principle of citizen sovereignty while acknowledging the real impossibility of direct democracy. As the actions, and the subsequent results, of a representative body are treated as the actions of the citizens themselves, their force reaches all the way to the sovereign citizenry. As the formation of a representative body is an action required to realize the self-governance of the citizenry, it is the implementation of the sovereign power of the citizenry. However, in modern countries, representative systems and bodies show content and forms different from those of classical constitutional states.

While the principle of representative systems, that the decisions of a representative body directly affect the citizenry, is unchanged even in the modern day, doubt continues to grow as to whether these decisions are what the citizenry intends to happen. Indirect representation being a fundamental limitation of a representative body, representative body decisions that merely assume intentions, and meetings regarding these decisions by the representative body, increase negative opinions about representative systems. In particular, the justifications for voluntary obedience by the citizenry of the laws that a representative body decides upon is weakening. A system that overcomes the fundamental limitation of a representative system, indirect representation, in order to enhance the immediacy and efficacy of a decision is required. Opening up the representative body's decision making process so that more citizens, and affected parties in particular, can participate, should also be contemplated as a supplement to indirect representation.

The Korean Constitution requires National Assembly meetings to be made public (Article 50, Chapter 1). All meetings, including main meetings, of the National Assembly are made public, and by allowing anyone to attend, it allows citizens to examine for themselves the decision making process of their representative body. However, simply making meetings public cannot resolve all the issues with indirect representation by a representative body. Furthermore, it cannot become a reason for justifying voluntary obedience to a representative body's decisions. A policy of allowing anyone to actually participate in a public meeting must be ensured. A policy of giving advance notice about important legislative drafts that the Assembly or government is planning (National Assembly Act, Article 82-2) and holding public hearings, where the opinions of interested parties and average citizens, regarding

legislative plans and legislative drafts that are becoming an issue, are collected, (National Assembly Act, Article 64), are examples of such policies.

3) The Right to Know and the Legislative Process

When a legislative draft is planned, an appropriate and careful deliberation process is required so that the disagreements and conflicts surrounding the legislative draft are resolved and the legislator's purpose can be fulfilled. An appropriate and careful deliberation process is founded on democratic principles. Ensuring that all of the potentially relevant information regarding the legislative draft is adequately, rapidly, effectively, and fairly accessible and distributed to the parties is a prerequisite for conducting the appropriate deliberation required to enact a law. If agreement and deliberation have adequately occurred during the legislative process, then even if the law does not reflect all of the subjective gains wished for by each conflicting party, and so cannot be called a 'good law' according to these parties' potential gains, at a minimum the law can be accepted by these parties.

In order to ensure adequate deliberation between the legislators and the affected parties that are the targets of the law to be enacted, the ability to effectively approach an informational state organ when necessary, by not only legislators but also those who would be affected by the proposed legislation, must be systematized and protected as a constitutional right. Such a right is otherwise known as a constitutional right to know. The right to know is understood to be the right to freely obtain information without interference from the state, in addition to the right to request the disclosure of information from the state, and Korea's Constitutional Court guarantees this as a basic right.¹¹⁾ The right to know has been understood to be a precondition for the freedom of expression and the rights of self-determination and self-characterization.¹²⁾ The right to know is also understood as having the characteristics of both a freedom and a right to request.¹³⁾ The Constitutional Court and constitutional theory considers the right to know as part of the freedom of expression, so they understand its scope as being limited to individuals.

11) Constitutional Court of Korea, October 29, 1998, 89HunMa4; Constitutional Court of Korea, October 28, 2010, 2008HunMa638, etc.

12) Han Suoong, *supra*, pg 775.

13) Han Suoong, *supra*, pg 776 et al.

In particular, the right to know is understood within the context of protesting against the infringement of a particular basic right of an individual, and relief for that right.

The right to know can play an important function in legislation. Depending on how the law is executed, in the case of affected individuals such as those who experience limitations to their basic rights, usually the right to know is exercised towards an effort to obtain relief for a basic right after that basic right has been infringed upon by the implementation of a relevant law. There are probably also examples where knowledge about the legislative process is requested to further basic rights. While there is a relationship between the process and the details of the right to know and the insurance and protection of an individual's basic rights by the right to know, all of these situations only give rise to a secondary meaning, as the right to know in these situations merely rises to the level of protection and actualization of basic rights after the fact. Ensuring in advance that such infringements do not occur, or systematizing the conditions and methods of implementing basic rights so that these rights can be easily enjoyed, is much more meaningful than legal disputes that attempt to obtain relief for infringed rights after the infringement has occurred. If the right to know's content and scope could be expanded to include the legislative process, then the affected parties can obtain, in advance, information such as legislative materials, legislative facts, participants to this legislation, and the legislative intent of the legislators, allowing them to effectively participate in the legislative process. When affected parties can obtain sufficient information about the legislation, and have their opinions heard by participating in the legislative process, the voluntary obedience of affected parties regarding this legislation, and the implementation of this legislation, can be expected to occur easily. However, institutional mechanisms that specifically detail the scope, effect, and limitations of such participation must be implemented in order to prevent the ability of affected parties to alter legislative purposes or details through their participation and exercise of their right to know.

4) Installation of a Dedicated Legislative Institution

Most modern states legislate through a process prepared and directed by the government, as opposed to legislating in accordance with traditional parliamentary directions and decisions.

There is no big relationship between the form of government and the introduction of legislative drafts. In particular, in the case of modern states where various administrative laws occupy the most space, the importance of laws that establish the scope of authorization for administrative laws does not change the perspective of insuring, protecting, and confirming the citizenry's freedoms and rights, but administrative laws have become important to individuals in actuality, due to matters of expertise and complexity. The establishment of various administrative laws by the executive branch must have a basis in existing law. There are even an increasing number of circumstances where the authorization laws, which relate to the expertise and establishment of administrative laws, are planned out from the beginning by the government. The reality is that eventually, traditional parliaments will simply take government prepared draft legislation and merely deliberate and decide on their constitutionality, as opposed to exerting expert control over government prepared draft legislation. This is why the increase in government legislation and its related control is important. In particular, an independent legislative aid agency is need so that, from the legislation preparation stage to after the implementation of the law, the anticipated effects of a law and the actual impact of the law's execution can be evaluated in a consistent way, and these results can be provided to legislators so that they can modify it or take other related actions.

Professor Silveria proposes various measures to block unnecessary government legislation n.¹⁴⁾ In Korea, the Ministry of Government Legislation was installed as an administrative agency that handles everything to do with the government legislation process. Korea's Constitution assigns to the government the right to introduce legislative drafts. In the case of Korea, when looking at the legislative reality, the proportion of government introduced legislative drafts being approved by the Assembly as law is staggeringly higher than the proportion of legislative drafts introduced by the Assembly itself. This means that the efficiency rate of government introduced legislative drafts becoming law is extremely high. One important reason for this is the unified institution called the Ministry of Government Legislation, which takes legislative drafts prepared by central administrative agencies, controls internal government opinions regarding the draft, then prepares the draft so that it has an

¹⁴⁾ Jia'o Tiago, Silveria, *op. cit.*, IAL International Conference, September 18, 2014, pg 153.

extremely high degree of technical completeness. Besides this, various influence evaluations are conducted, such as regulation evaluations conducted by the Regulations Planning Committee for government introduced legislative drafts, in order to exert control over these drafts, and such efforts contribute to the quality of government introduced legislative drafts.

In Korea, various Assembly groups have been installed to assist Assembly members in their legislative activities. In addition to providing technical details for legislative drafts, groups such as the National Assembly Research Service and the National Assembly Budget Office have been installed that sometimes provide to Assembly members and the Assembly's Legislative Counseling Office materials that can exert direct influence, such as reports that analyze basic legislative facts and materials. Within the Assembly a library has also been installed that only services Assembly members, so the conditions that allow for surveys of legislative facts and theories are being prepared. The Assembly is debating and deciding on not only members' legislations, but also government introduced legislative drafts through relevant standing committees and general meetings. Though limited, the Executive branch has the authorization to legislate, and has control mechanisms regarding the various administrative laws enacted within the scope of that authorization (National Assembly Act, Article 98-2). While efforts to make 'good laws' are something that each legislative organization does, a more important request is that, during legislative fact analyses, evaluations, deliberations, debates, and decisions, the legislative organizations at each step and level organically assist one another.¹⁵⁾

5) Evaluating Legislation through the Legislative Process

(1) The Legislator's Responsibility

Even while a law is being enforced, a legislator must ceaselessly listen to the opinions of the parties, examine whether the law's legislative purpose is being realized, and if necessary, modify the law. The responsibility of a legislator to continuously examine whether an implemented law is showing the effect set forth in the legislative intent is called the legislator's

¹⁵⁾ Georg Müller/Felix Uhlmann, a.a.O., S. 253ff.

law observation duty (die Beobachtungspflicht).¹⁶⁾ Whether or not this law observation duty is a constitutional obligation has been the subject of much debate,¹⁷⁾ but despite such debate, legislators should shoulder limitless responsibility with regard to their work product (laws). But this responsibility is only effective when a legislator's examination of a law results in specific legislative action. When a legislator, at the end of a long term investigation, determines that the relevant law requires some specific action, the legislator creates an duty for himself to reform this law. The specific ways in which the legislator's law observation duty should be executed, and the tools that are needed, are greatly discussed during the evaluation of a law.

The discussions regarding the constitutionally binding force of the law reform duty borne by the legislator is less than those of the law observation duty, but is still being debated.¹⁸⁾ The view that finds the law reform duty to arise from a legislator's control over himself¹⁹⁾ may find it hard to acknowledge any particular legally binding force. From the viewpoint that the law reform duty arises from the Constitutional Court's control of norms,²⁰⁾ the Constitutional Court's ruling binds the legislator, and from this binding force comes the legislator's specific active duty regarding the law in question.²¹⁾ However, the method for carrying out this particular active duty is up to the legislator, so the legislator may choose by himself any means of fulfilling his duty, such as reform, abolishment, or replacement of the relevant law.

A legislator's law observation duty and law reform duty is focused on examination and evaluation, and the results, of currently enforced law. While the observation duty originates from the legislator's control over himself, the reform duty appears through the legislator's own

¹⁶⁾ Choi YoonCheol, *Laws and Time*, Land and Public Law Research Vol. 35 (2007), pg 409.

¹⁷⁾ BVerfGE, 83, 203; BVerfGE 125, 175(255ff.); Choi Yoon Cheul, *work cited above*, pg ; Wolfram Höfling/Andreas Engels, *Parlamentarische Eigenkontrolle als Ausdruck von Beobachtungs- und Nachbesserungspflichten*, in: Winfried Kluth/Günter Krings(Hrsg), *Gesetzgebung*, München 2014, S. 851FF.

¹⁸⁾ Choi YoonCheol, *Discussions in Germany Regarding a Legislator's Law Reform Duty*, Public Law Research Vol. 31 Issue 3 (2003), pg 366 et al.

¹⁹⁾ Wolfram Höfling/Andreas Engels, a.a.O., S. 860.

²⁰⁾ Choi YoonCheol, *Die Pflicht des Gesetzgebers zur Beseitigung von Gesetzesmängeln*, Hamburg 2002, S. 152f. – In the middle of the Constitutional Court's decision was the view that, during the reform decision, excepting questions of unconstitutionality or constitutionality, the need to effect reform arose, so binding force exists as a law reform duty.

²¹⁾ Choi YoonCheol, a.a.O., S. 153.

decisions, or from an outside decision backed by binding force. In order for a legislator to carry out these duties, he must have the ability to closely observe and analyze the relevant law. However, modern legislators, and parliamentary legislators in particular, cannot be aware of all of the specific and professional issues that exist in modern countries. The ordinary nature of a legislator cannot be a substitute for expertise regarding specific laws. In order to overcome such problems, there must be the installation and expansion of well formed and organized expert legislative support groups. In the case of Korea, the Assembly has within it a variety of legislative support groups, and the government established and operates a central administrative agency-level government legislation central authority called the Ministry of Government Legislation. Legislative support groups must only conduct neutral and factual support activities, and carry them out with professionalism and independence, all in response to legislative needs.

2) Evaluation of Laws

Most developed countries worry about the ‘flood of laws’. Almost all governmental activities must be based in law, and as the modern state’s functions become ever more complicated and specialized, laws are requested from more and more areas. The request for laws to allow the functions of a modern state leads to a flood of laws, as these laws are required for role functions to exist in a modern state. Finding unnecessary regulations and restrictions, and organizing the laws that underlie them, has become an important task for a modern state. Also, while the organization of existing laws is important, something considered even more important is only enacting necessary laws, or in other words, shutting out unnecessary legislation.

In addition to investigation and ex post facto reforms by legislators in response to the results of a law’s enactment, it is just as important to predict in advance (ex ante), before the law is enacted, whether or not a legislator’s legislative plan and purpose is actually possible, and to find possible alternatives. As parliamentary legislators have practical limits (expertise based on field, etc.), these tasks are given to legislative support groups and legislative experts. Advance predictions and evaluations of laws, and the analysis and evaluation of legislation

execution results, are extremely technical and specialized. Evaluations and analyses conducted by expert groups must, as scientifically and reasonably possible, predict and evaluate the results (net effects, reverse effects, collateral effects) that would occur if problematic legislative drafts were enacted and enforced, and these results must be presented to legislators. Analysis and evaluation results conducted by expert groups should be distributed to parliamentary legislators while they are setting up the most appropriate advance (legislative drafts) or ex post facto (law reform) legislative alternatives, and doing so will provide important help to legislators as they make their decisions. While evaluations of law do not legally restrict parliamentary legislators, the results of these evaluations do act as major burdens on legislators.

Law evaluation systems are most actively conducted in Switzerland and Germany. In particular, they are implemented during the government legislation process, involve the government's legislative drafts, and are focused on efficacy to improve the legislative drafts' qualitative levels. In the case of Germany, the National Regulatory Control Council (Nationaler Normenkontrollrat) was established under the German Federal Chancellery, and is ultimately responsible for maintaining and overseeing legislative evaluations. Even in Korea, discussions are currently underway about the need for evaluating legislative drafts and the systematization of such evaluations. In particular, discussions continue regarding recognizing the importance of advance evaluation systems that will block unnecessary legislation, in addition to the need for discussions, and the systemization of these discussions, which will allow for a legislator's legislative intent and the end result to match.²²⁾ However, discussions regarding the nature and effectiveness of legislative evaluations are treated as more important than discussions regarding the actual need for these legislative evaluations, so the systematization of legislative evaluations is currently in a difficult place.

²²⁾ Choi YoonCheol, 'Research Regarding the Systemization of Legislative Evaluations', Ministry of Government Legislation, 2005.

IV Final Words

Bismarck once said, “Laws are like sausages, it is better not to see them being made.” However, Bismarck’s words are no longer valid. The modern sausage making process occurs through the synthesis of an effective manufacturing system, sanitary procedures, consumer evaluations, and other elements that maintain quality and the manufacturing process itself.

Similarly, the legislative process must no longer be thought of as a subject of disgust due to it being a ‘dirty’ process ruled by veiled enmity, conspiracies, and greed. The legislative process is one where different and diverse political viewpoints regarding the need and potential of the legislation in question are presented and put in conflict with each other. There was a need for this legislation, so arguments during the legislative process regarding this need means that a problem was exposed in a public forum and a resolution to this problem was sought. Mutual opposition in the legislative process is the method by which solutions are found, and as such, represents the true nature of the legislative process. The fruit of the legislative process, laws, are also not the final resolutions to the problems that gave rise to its legislative motive. The execution of laws, examination of the results, and the process of making improvements must be continuous. As such, the legislative process takes on a circulating structure. And governing over the entire legislative process, which is structured in a circular fashion, are the principles of democracy. By following the principles of democracy and a constitutional state, the legislative process can become transparent and the rationality of the legislative process can be secured; if the participants in the legislative process, both legislators and related parties, respect legislative principles (such as constitutional principles) and follow them, ‘good laws’ can be made that allow affected parties to voluntarily obey and accept these laws.

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Innovation of Legislative Process

2018년 11월 14일 인쇄

2018년 11월 15일 발행

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등록번호 : 1981.8.11. 제2014-000009호

<http://www.klri.re.kr>
