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LEGISLATIVE DRAFTING MANUAL

A Practitioner's Guide to Drafting Laws in Kosovo

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Table of Contents

Introduction	
Objective	1
Scope	2
Glossary of Terms	3
List of Acronyms	7
Chapter 1 – Lawmaking Process in Kosovo	
1.1 General Overview	8
1.2 Initiating a Law	9
1.3 Law Drafting Process within the Government	9
1.4 Process within the Assembly.....	13
1.4.1 First Reading.....	14
1.4.2 Committee Process.....	14
1.4.2.1 Committees of the Assembly.....	14
1.4.2.2 Committee Assignments	15
1.4.2.3 Committee Review.....	16
1.4.3 Second Reading.....	16
1.4.4 Third Reading.....	17
1.4.5 Final Approval	17
Chapter 2 – Drafting Legislation	
2.1 Basic Principles.....	21
2.2 The Structure of Legislation	21
2.2.1 The Introductory Provisions of Draft Legislation	22
2.2.1.1 Titles.....	22
2.2.1.2 Enacting Clause.....	23
2.2.1.3 Purpose Statement.....	23
2.3 The Body of the Law	25
2.3.1 Definitions.....	25
2.3.2 Substantive and Regulatory Provisions.....	27
2.4 Final Provisions	28
2.4.1 Implementing Provisions.....	28
2.4.2 Transition Provisions.....	29
2.4.3 Effective Date Provisions.....	31
2.5 Special Final Provisions	31
2.5.1 Repeal Provisions	32
2.5.2 Savings Provisions.....	32
2.5.3 Restrictive Provisions.....	32
2.6 Signing and Promulgation.....	33
Chapter 3 – Order and Language	
3.1 General Overview.....	35
3.2 Structure and Order of Laws.....	36
3.2.1 Books	36
3.2.2 Parts.....	36
3.2.3 Chapters & Subchapters.....	36
3.2.4 Articles, Paragraphs and Subparagraphs	37

3.3 Language and Grammar	39
3.3.1 Language	39
3.3.2 Grammar and Style	39
3.3.2.1 Active Language	40
3.3.2.2 Use of Nouns, Verbs and Adjectives	40
3.4 Special Drafting Problems	41
3.4.1 Wordiness	41
3.4.2 Use of Negative Phrasing	41
3.4.3 Internal Consistency	42
3.4.4 Gender Neutrality	42
Chapter 4 – Hierarchy of Legal Norms	
4.1 Hierarchy of Legal Norms	44
4.2 The Constitution and the CSP	45
4.3 The Constitution and International Laws & Treaties	46
4.4 Laws Adopted by the Assembly	49
4.5 Secondary Legislation adopted by the Executive Branch	49
4.6 Recommended approach for resolving conflicts between different sources of law ...	50
Chapter 5 – Research and Special Provisions	
5.1 Research Methodology	52
5.1.1 Identify key provisions that always must be analyzed (constitution etc.)	52
5.1.2 Key research resources	52
5.2 Special Drafting Challenges	52
5.2.1 Penalties	52
5.2.2 Budget & Tax measures	54
5.2.3 Creating New Agencies and Institutions	55
5.2.4 Transferring Functions from One Institution to Another	56
5.2.5 Amending Existing Laws	57
Chapter 6 – Ethics and the Legislative Drafter	
6.1 Why Ethics are Important to the Drafter	61
6.2 What do we mean by Ethics?	61
6.3 Basic Ethics for the Drafter	61
6.4 How to Apply These Ethical Considerations	62
Appendix I	
Drafter’s Check Lists	66
Elements of a Draft Law	67
Transition Provisions	68
Structure & Order of Draft Laws	69
Grammar	70
Hierarchy of Norms	71
Penalty Provisions	72
Tax Laws	73
Creating a New Government Agency	74
Shifting Competencies between Existing Government Agencies	75
Final Check List	76

Appendix II	
Recommendations and Approaches to Policy Development.....	77
Appendix III	
Outline for Explanatory Memorandum – Form & Structure	84
Appendix IV	
Outline for a Concept Document – Form & Structure	86
Appendix V	
Sample Financial Impact Assessment (FIA)	88
Appendix VI	
Sample Regulatory Impact Assessment (RIA)	90

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Introduction

Legislative drafting is a skill that is primarily acquired through experience. There is no one universally correct way to draft legislation, but there are preferred styles and forms to guide drafters in their work so that the end product addresses the underlying policy matters in a manner that is concise, clear, and effective. The cardinal principle of modern legislative drafting is to write in such a way as to maximize reader comprehension and minimize misunderstanding. Complex or overly legalistic language should be avoided because it is not easily understood by people unfamiliar with such language. The simplest and most direct way to accurately state a proposition is usually the best.

The challenges facing law drafters in Kosovo are unique, particularly in harmonizing various laws, reconciling competing sources of legal authority, and producing legislation that is clear and easily implemented. The ineffectiveness of legislation can frequently be attributed to incomplete policy analysis, flaws in the initial drafting process, or both. Incomplete policy analysis (including inaccurate fiscal analysis) can lead to legislation that, although technically well-crafted, fails to address the underlying issues requiring legislative action. Poor drafting can lead to legislation that cannot be implemented effectively or that fails to address the underlying policy issues no matter how complete the initial analysis. Legislative drafters must be able to engage in thorough policy analysis and produce exceptionally strong legislation. Legislative drafters should recognize that in many respects they set the course for successful or unsuccessful legislation by the quality of their work.

Poor policy analysis and poor drafting produce other unfortunate consequences. Inadequately prepared or unclear legislation becomes unclear law; poor legislation contributes to legal uncertainty and legal instability. Legislation that inadequately addresses the policy concerns or is unclear can lead to multiple interpretations and conflicting outcomes that erode the public's trust and confidence in the rule of law. Furthermore, poor legislation requires courts – the branch of the state most directly responsible for ensuring the uniformity of the rule of law – to guess at the legislature's intent and fashion ad hoc remedies that can erode the notion of fairness and equality. An ad hoc administration of justice undermines not only the public's trust and confidence in the legal system, but also a nation's social stability and economic development. Foreign investors tend to avoid nations whose legal systems are unclear, unstable or whose laws cannot be applied fairly.

The need for solid policy analysis and well-drafted legislation is critical to any nation, and no less so than to Kosovo. Competing legal regimes, conflicting legal mandates, a general absence of legislative direction in key policy areas, confusion regarding controlling authority and the lack of harmony within the overall legal structure of the country all undermine the rule of law. Sound policy analysis and quality legislative drafting can mitigate the impact of this troublesome environment. Inadequate policy analysis and poor drafting will amplify the corrosive effects of a defective system of laws. In short, solid legislative drafting and good policy analysis play an integral role in ensuring the success of legal reform efforts and promoting the rule of law.

Objective

The objective of this Manual is to facilitate uniformity and consistency in the drafting of laws, and the production of high quality legislation. The Manual will guide Kosovo authorities in the process of policy analysis and drafting laws. By providing a broader understanding of how legislation is prepared and adopted in Kosovo, it may also prove useful to the court officials and executive authorities who are responsible for applying laws under specific circumstances.

Legislative work requires the participation of various stakeholders and a diversified knowledge of the Kosovo legal system. For this reason, this Manual is directed at all persons who participate in preparing legislation. The Manual targets both law drafters and those responsible for the technical conception of the law. This Manual is a reference guide to all persons involved in the legislative process, from those responsible for conceptual development, to those engaged in policy analysis, to those who actually bring policy to life through laws.

The Kosovo Government is keen to move forward with the process of European Integration. In this regard, *acquis communautaire* serves as a tool for the law drafters in Kosovo. Therefore, drafting legislation to be coherent and compliant with European Union (EU) law is vitally important.

Scope

This Manual addresses many of the key matters that are relevant to developing and maintaining quality legislation. It provides guidelines concerning law drafting techniques (including style), the process for developing legislation, the organization of work, and the limitations and conditions that law drafters must consider in developing legislation. The Manual is not intended to be a final treatise on legislative drafting in Kosovo. It is a guide that will ease the process, enhance the efforts of law drafters, and improve the quality of legislation. To remain an effective tool, the Manual must be maintained as the legislative drafting process in Kosovo develops and changes over time.

Law drafting is not simply a matter of picking certain words or maintaining a particular style. It is not merely standardizing certain phrases nor is it simply an exercise in word-crafting. Law drafting is more complex for several reasons. First, legislation is typically drafted in response to emerging policy issues or to address or regulate an existing matter under a new set of circumstances. Second, legislative drafting is the vehicle for turning public policy choices and concepts into laws that regulate the functions of a society. Third, the drafting of high quality legislation (and its ultimate adoption) requires the drafter to have a command of the subject matter and a keen sense of expressing policy through the written word. Finally, and most importantly, law drafting requires a wide range of skills including objectivity, creativity, pragmatism and the ability to resolve policy conflicts.

This Manual does not specifically address issues related to the development and drafting of subsidiary legislation or administrative rules. However, many of the principles outlined in this Manual are equally applicable to subsidiary legislation. It is clear that subsidiary legislation must, like primary legislation, be comprehensive and clear. Primary legislation cannot be implemented if the necessary subsidiary legislation is poorly drafted.

This Manual addresses the preparatory work of drafting primary laws that are prepared and submitted to the Assembly by the Government for its consideration. The Manual does not cover the parliamentary process or the drafting of legislation that flows from the right of Assembly members to submit legislation for consideration. However, members of the Assembly who initiate laws will benefit from using this Manual as a resource. To promote a uniform system of laws and a uniform approach to legislative drafting, it would be desirable for all persons involved in legislative drafting to make reference to and follow the principles presented in this Manual.

Glossary of Terms

ACQUIS COMMUNAUTAIRE, as used in European Union (EU) law, means the total body of law accumulated thus far. The term is French: *acquis* means "that which has been acquired", and *communautaire* means "of the community".

ADOPTION OF THE LAW is that point in the legislative process when the Assembly finally approves a law to be sent to the President of Kosovo for signature and promulgation.

AMENDMENT is a revision proposed to a draft law, which includes adding language, substituting language, or deleting material altogether.

ANNUAL LEGISLATIVE STRATEGIC PLAN is a document constructed by the Government once a year based on proposals received from the Ministries and other sources that forms the basic set of initiatives that the Government intends to pursue in the Assembly.

APPROXIMATION OF LAWS is the process of harmonizing the national laws with the *acquis communautaire*.

APPROPRIATION is an amount of money set apart by Assembly act to be expended for a specific purpose within a specific time period.

ARTICLE is the most basic formal partition in a legal act that is as concise as possible and specifically addresses the subject of the title of the article.

BODY OF A DRAFT LAW is the main text that contains the substantive or regulatory provisions.

BOOK is the rarely used partition of legal acts and is the most general partition.

CALENDAR is a list with the numbers and titles of draft laws to be considered under the orders of business for a day that the Assembly is in session.

CERTIFICATE OF PROCEDURAL COMPLIANCE is an official statement issued by the Permanent Secretary in the Office of the Prime Minister and attached to a draft law stating that all reviews, assessments, and approvals have been obtained and that the draft law is ready to be forwarded to the Assembly for its consideration.

CHAPTER is the generally preferred first instance partitioning of a legal act.

COMMITTEE is a sub-body of the Assembly established by rules of procedure or at the direction of the Presidency of the Assembly to address a special purpose to with specific subject matter jurisdiction.

COMMITTEE REPORT is the document or documents prepared by a committee after review of a particular draft law and containing the committee's recommendation to the full Assembly concerning further action on the draft law. The committee report may contain a recommendation to amend the draft law.

CODIFICATION is the process of collecting, compiling and restating the law of a jurisdiction in certain subject areas forming a legal written code.

CONSTITUTION is the fundamental and superior law of the Republic of Kosovo.

DRAFT LAW is the preliminary legislative document prepared for consideration by the Government and the Assembly that is intended for adoption and eventual codification in response to a policy initiative.

DEPUTY is a duly elected member of the Assembly of the Republic of Kosovo. A deputy may also be referred to as a Member of the Assembly.

DEPUTY PRESIDENT is one of the members of the Assembly who has been elected pursuant to Article 67 and is to act in the absence of the President of the Assembly. There are five deputy presidents.

EXPLANATORY MEMORANDUM is a document that accompanies a draft law and sets out a brief statement of the purpose of the draft law, providing information about its policy objectives and policy implications.

FINAL PROVISIONS is the text in the law, usually the two last articles, referring to the specific previous laws that the new law repeals and the exact time the law enters into force.

FINANCIAL IMPACT ASSESSMENT is a statement or document attached to a draft law setting forth an analysis of the budgetary effect of the draft law.

GOVERNMENT is that body established in Chapter VI of the Constitution of the Republic of Kosovo consisting of the Prime Minister and Ministers.

HIERARCHY OF NORMS is a system for ranking legal authorities based on the extent of their controlling weight over other legal acts. The highest ranking in the internal hierarchy is reserved for the Constitution with subordinate authority flowing there from.

INTRODUCTION is a statement at the beginning of a law that sets forth the goal and legal basis of the law.

LEAD COMMITTEE is the subordinate body of the Assembly to which the Presidency of the Assembly assigns a draft law and whose jurisdictional mandate corresponds to the subject matter of the draft law.

NON-ATTACHED MEMBER is a deputy of the Assembly assigned to a functional or permanent committee on a temporary basis and who does not possess voting rights within the committee.

OFFICE FOR LEGAL SUPPORT SERVICES is a body within the office of the Prime Minister responsible for overseeing procedural compliance with the legislative drafting process and coordinating needed services.

OFFICIAL GAZETTE is the approved written compilation of laws adopted by the Assembly and duly promulgated by the President of Kosovo.

PARAGRAPH is a partition of an article within a legal act.

PART is the partition of a legal act within a law.

PARLIAMENTARY GROUP is a distinct political formation based on a common political aim as defined in Rule 11.

PERMANENT COMMITTEE is a committee of the Assembly established either by the Constitution or the Rules of Procedures whose general mandate is not subject to any time limit.

PRESIDENCY is that body established by Article 67 of the Constitution consisting of the President of the Assembly and five Deputy Presidents.

PRESIDENT is the head of state for the Republic of Kosovo exercising those powers provided in Chapter V of the Constitution.

PRESIDENT OF THE ASSEMBLY is a member of the Assembly elected under Article 67(1) of the Constitution and who is primarily responsible for representing the Assembly, determining the agenda of sessions, chairing sessions of the Assembly, signing laws as the last official Assembly act, and exercising other functions and duties assigned by the Constitution or the Assembly.

PRIMARY LEGISLATION is an act of the Assembly that can define principal rights and responsibilities and may delegate authority to a government unit (including a ministry) to execute a particular legal obligation, program or mandate.

PROMULGATED is the final official act taken by the President of the Republic that brings a law into effect, usually the physical signing of the law.

PUBLICATION is the act of printing and distributing an adopted law in the *Official Gazette*.

RATIFIED INTERNATIONAL AGREEMENT is a treaty, convention, policy or other international accord between the Republic of Kosovo and a foreign nation or international body that has received official approval and acceptance by the Republic.

REGULATORY IMPACT ASSESSMENT is a statement or document attached to a draft law that estimates the effect of the proposed law on the regulatory system.

RULE is a mandate contained in the Assembly's Rules of Procedure.

SECONDARY LEGISLATION is an action made by ministers under powers given to them through primary legislation in order to implement and administer the requirements of a parliamentary act.

SUBCHAPTER is the partitioning of the chapter of a legal act that applies only when the legal act has more than 60 articles.

TITLE is a short, concise and comprehensive description of the law and begins with "Law on".

TRANSITION PROVISION is text within a law, generally at the end, that substantively or procedurally addresses changes needed to transfer authority from a prior legal act to a new legal act.

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List of Acronyms

ACDEI	Agency for Coordination of Development and European Integration
CSP	Comprehensive Proposal for the Kosovo Status Settlement (Athasari)
EU	European Union
EULEX	European Union Rule of Law Mission in Kosovo
FIA	Financial Impact Assessment
ICR/ICO	International Civil Representative
MEF	Ministry of Economy and Finance
MOJ	Ministry of Justice
MWG	Ministerial Working Group
GWG	Government Working Group
OLSS	Office of Legal Support Services
OPM	Office of the Prime Minister
OPMPS	Office of the Prime Minister – Permanent Secretary
PISG	Provisional Institutions of Self-Government
RIA	Regulatory Impact Assessment
SRSB	Special Representative to the Secretary General
UNMIK	United Nations Mission in Kosovo

Chapter I

The Lawmaking Process in Kosovo

Note Rule Changes

At the time of this writing, the Kosovo Assembly is considering a number of changes to its Rules of Procedure. Some of these changes are discussed in this Manual. For example, the term “rule” within the Rules of Procedure may be replaced by the term “article”. Drafters should constantly consult the latest edition of the Rules of Procedure to ensure that they have the most update information on Assembly procedures.

I.1 General Overview

The Constitution of Kosovo gives the Assembly the power to “adopt laws, resolutions and other general acts.”¹ Generally, all laws and other acts are adopted by a majority of the members of the Assembly present and voting.² Acts adopted by the Assembly are presented to the President of Kosovo for signature within eight (8) days. The President has three options: (a) sign the law within eight (8) days after its presentation; (b) not sign the law within the time provided at which point the act becomes law without the President’s signature;³ or (c) return the legislation to the Assembly with the stated reasons for its rejection.⁴ The President of Kosovo may return the same law to the Assembly only once. If the Assembly adopts the returned law by a majority of all deputies, the law is adopted⁵ All laws become effective fifteen (15) days after their publication in the *Official Gazette*, although their implementation may be delayed.⁶

Practitioner’s Note Adopting Laws

The Constitution requires that laws be adopted initially by a majority vote of the members of the Assembly *present and voting*, unless provided otherwise. However, a law returned by the President to the Assembly only needs to be adopted by a majority of *all* members.

The Constitution provides that several types of laws must be adopted by more than a simple majority of the members present.⁷ Laws affecting the following matters must be adopted by a majority of the members of the Assembly present and voting *and* a majority of the members present and voting who hold seats reserved or guaranteed for representatives of Communities not in the majority:

¹ Kosovo Const., Art. 65(1).

² Kosovo Const., Art. 80(1).

³ Kosovo Const., Art. 80(5).

⁴ Kosovo Const., Art. 80(3).

⁵ Kosovo Const., Art. 80(4).

⁶ Kosovo Const., Art. 80(6).

⁷ See generally, Kosovo Const., Art. 81.

- Laws changing municipal boundaries, establishing or abolishing municipalities, or defining the scope of municipal powers;
- Laws affecting the participation of municipalities in inter-municipal or cross-border relations;
- Laws implementing the rights of communities and their members, unless otherwise provided in the Constitution,;
- Laws affecting the use of language;
- Laws affecting local elections;
- Laws protecting cultural heritage;
- Laws affecting religious freedom or agreements of religious communities;
- Laws affecting education;
- Laws affecting the use of symbols, including community symbols and on public holidays.

I.2 Initiating a Law

Laws are drafted within Kosovo along one of the following tracks: (a) initiated by the President as to matters within the scope of the President’s office; (b) initiated by the Government; (c) initiated by deputies in the Assembly; and (d) initiated by at least ten thousand (10,000) citizens.⁸ While the vast majority of laws proposed to the Assembly come from the Government, other bodies or individuals can propose laws.⁹

The Assembly may instruct the preparation of a law in one of two ways. First, a Member of the Assembly may submit to the Assembly’s Table Office a motion instructing the Government to draft a law.¹⁰ When received, the Presidency of the Assembly submits the motion to the Government for its opinion. The Government returns its comments on the proposal for a draft law to the Presidency. If the Presidency agrees to make time available to consider the proposal, the Presidency circulates the proposal and the Government’s comments to all members of the Assembly.¹¹ Second, if a motion submitted by a Member of the Assembly is supported by at least five (5) deputies, the Presidency must include the proposal on the calendar for debate no later than three (3) sitting weeks after its submission.¹² If the Assembly adopts the proposal, the Government is instructed to prepare a draft law within three (3) months of receipt of the instruction.¹³

I.3 Law Drafting Process within the Government

Unless otherwise instructed under Rule 34 of the Rules of Procedure of the Assembly of Kosovo, the Government’s law drafting process occurs throughout the year. Prior to December, ministries develop their priorities for the next year’s legislative agenda.¹⁴ The

⁸ Kosovo Const., Art. 79.

⁹ Kosovo Const. art 78(4) provides, “The Committee [on Rights and Interests of Communities] may, on its own initiative, propose laws and such other measures within the responsibilities of the Assembly as it deems appropriate to address the concerns of Communities. Members may issue individual opinions.”

¹⁰ Rules of Procedure of the Assembly of Kosovo, Rule 34(1). **NOTE:** Pending amendments to the Rules of Procedure by change the term “Rule” to the term “Article”.

¹¹ Rules of Procedure of the Assembly of Kosovo, Rule 34(2).

¹² Rules of Procedure of the Assembly of Kosovo, Rule 34(3).

¹³ Rules of Procedure of the Assembly of Kosovo, Rule 34(4).

¹⁴ Persons who can initiate the legislative drafting process include: (a) a Minister, (b) a Permanent Secretary, (c) a Director of the Department, (d) a Director of the Legal Office, and (e) an Executive Chief of the Agency. Administrative Instruction No. 2/2006, Art. 8. Before approving a legislative proposal,

ministries' Legal Office is responsible for coordinating all legislative drafting within a ministry.¹⁵ Ministries forward to the Government their proposed legislative agenda in December, along with a Regulatory Impact Assessment (RIA) and a Financial Impact Assessment (FIA) for each draft law. The proposed legislation and supporting documents are sent to the Office of Legal and Support Services (OLSS)¹⁶ in the Office of the Prime Minister (OPM). The Government reviews the ministries' priorities and develops the Annual Legislative Strategic Plan for Kosovo. The OLSS coordinates the presentation of the strategic plan to the Government for its final approval.

Within one (1) month of approval of the Annual Legislative Strategic Plan, the Ministry must appoint a person to be responsible for the initial draft of the proposed legislation. The Legal Office of the sponsoring Ministry organizes a Ministry Working Group (MWG) under the oversight of the Permanent Secretary.¹⁷ This group is responsible for preparing the initial draft legislation, an explanatory memorandum, evidence of EU legislation references, and the final RIA and FIA.¹⁸ All documents must be prepared in the three working languages of Kosovo: Albanian, English and Serbian.¹⁹ There are no specific time frames within which the MWG is to complete its work. The MWG submits the proposed legislation and supporting documentation to the Minister. Upon ministerial review and approval, the draft law is sent to OLSS for further review and processing. This further review includes examination by a Government Working Group (GWG), and final review and approval by the Government.

the initiating entity must send to the Minister, through the Permanent Secretary, an explanatory note containing the following:

- a) The reason for the proposed legislation;
- b) How the proposed legislation will address the problems;
- c) The framework of the proposed legislation, including the contents of its parts;
- d) The existence of other relevant laws or legal acts and the reason why these laws or acts do not adequately address the problems;
- e) The timeframe for drafting the proposed legislation;
- f) Specific data on the financial cost and the administrative burden that implementing the legislation will have;
- g) Any need for coordination with other ministries;
- h) The need for public discussion on the proposed legislation;
- i) The institutional capacity to draft the proposed legislation and the data for external support for the ministry if such exists or is requested; and
- j) Coordination with UNMIK, notably if the proposed legislation touches upon reserved powers.

Administrative Instruction No. 2/2006, Art. 9. The requirement of item "j" is unclear with the Declaration of Independence and the withdrawal of the UNMIK.

¹⁵ Administrative Instruction No. 2/2006, Art. 12.

¹⁶ Under Administrative Instruction No. 2/2006 Art. 18, the OLSS is "responsible for reviewing all draft acts that the executive branch submits to the Assembly."

¹⁷ Administrative Instruction No. 2/2006, Art. 13.

¹⁸ The FIA is sent to the MEF for review and confirmation that any expenses are within the budget plan. The MWG must prepare the documents mandated in Administrative Instruction No. 2/2006, Art. 15.

¹⁹ Although Kosovo Const., Art. 5(1) names Albanian and Serbian as the official languages of Kosovo, Rule 33(3) of the Rules of Procedure requires that all draft laws be prepared in Albanian, English and Serbian.

Practitioner's Note
Supporting Documents

Ministries submitting ideas for inclusion in the Annual Legislative Strategic Plan must include supporting documents, including the Regulatory Impact Assessment (RIA) and the Financial Impact Assessment (FIA). Failure to submit the supporting documentation may substantially delay the Government's consideration of the proposal.

OLSS has the authority to make a preliminary revision to the draft legislation.²⁰ If the draft legislation and supporting documents that were drafted by the Ministry's Working Group are accepted by the OLSS, the OLSS notifies the Permanent Secretary in the OPM to establish a GWG of 5 to 15 members, chaired by the Legal Office of the proposing Ministry. The GWG is authorized to recommend changes and to revise the draft law as necessary. The work of the GWG should begin within five (5) working days after its establishment and finish within twenty (20) working days after commencement of its work. Additional time may be given.

When the GWG completes its work, which may include revisions to the proposed legislation, the chair of the group submits the revised draft legislation to both the Ministry of Economy and Finance (MEF) and the Agency for European Integration (AEI) now referred to as ACDEI,²¹ to ensure the continuing accuracy of the FIA and the legislation's compliance with EU compatibility statements, respectively. Both MEF and ACDEI have fifteen (15) days to review the law and respond to the Chair of the GWG. The Chair of the GWG, in consultation with ACDEI and MEF, must incorporate any necessary revisions in the draft law within five (5) days.

When the MEF and ACDEI complete their review of revisions, the Chair of the GWG submits to OLSS the final version of the draft law, the Explanatory Memorandum, the EU Compatibility Statement, the RIA, and the FIA. The OLSS adds a Certificate of Procedural Compliance for the OPM Permanent Secretary's signature and a recommendation for approval by the Government. OLSS forwards the entire package to the Permanent Secretary in the OPM.

When the OPM Permanent Secretary receives the draft law and other documents from OLSS, the draft law is included on the agenda for the next Government meeting. The Government can: (a) approve the draft legislation; (b) approve the draft legislation with amendments; (c) defer consideration of the draft legislation for later; (d) remand the draft legislation to the sponsoring ministry for further review; or (e) reject the draft legislation.

Practitioner's Note
Government Review

The Government may review a draft law in a meeting only if the draft law fully complies with both regulatory criteria and procedures.

²⁰ Administrative Instruction, 2/2006, Art. 18.

²¹ In October 2008, the Government merged the Agency of European Integration (AEI) and the Donor Coordination Center (DCC) into a single body, the Agency for Coordination of Development and European Integration (ACDEI). The decision on the creation of the Agency took effect immediately on the date of its signature by the Prime Minister, 8 October 2008. Therefore the reference as AIE refers to the newly established Agency for Coordination of Development and European Integration (ACDEI).

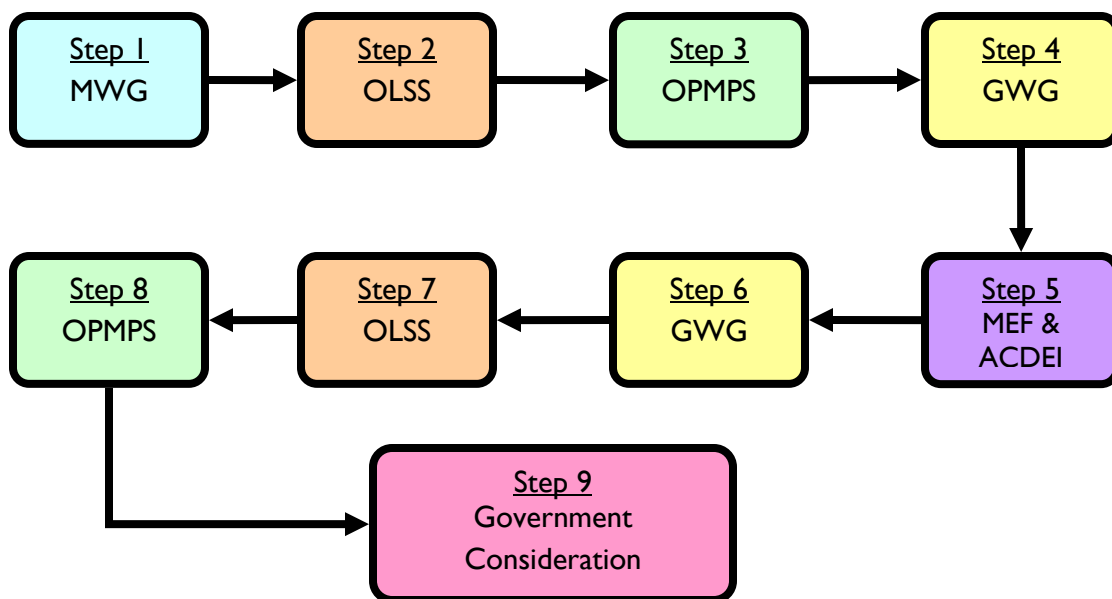
If the draft legislation receives the final approval of the Government, the Permanent Secretary, through the Government Coordination Secretariat, forwards the draft law and related documents to the Assembly. The Rules do not identify a time frame identified for forwarding the draft legislation to the Assembly.

Practitioner's Note
Steps and Deadlines throughout the Drafting Process

The following steps and deadlines apply to the drafting process:

- 1) Ministry's Working Group (MWG) prepares the first draft law. **No firm deadline is foreseen.** The MWG is periodically monitored by the Permanent Secretary of the sponsoring ministry. The MWG must have a minimum 5 and maximum 7 members.
- 2) Preliminary review by the OLSS. **No firm deadline foreseen.**
- 3) OLSS recommends to the Permanent Secretary of the OPM (OPMPS) that it establish the Governmental Working Group (GWG). The OPMPS has **5 days** to decide whether to establish the GWG.
- 4) GWG should start the work within **5 days** from the date of the OPMPS's decision. The GWG must have a minimum 5 and maximum 10 members. In extraordinary cases it can have 15 members, including one representative from:
 - a. OLSS;
 - b. Government Coordinating Secretariat;
 - c. Ministry of Economy and Finance (MEF); and
 - d. Ministry of Justice.The sponsored institution of the draft law may not have more than 2 representatives in the GWG.
- 5) The GWG should finish its work within **20 working days**. Only the Government, upon the request, may give extra time.
- 6) Upon the completion of the draft law, the chair of the Government Working Group sends the draft to MEF and ACDEI. Both have **15 days** to review.
- 7) If amendments are suggested, the chair of the GWG must make the changes in consultation with AIE and MEF. The chair has only **5 days** to make changes.
- 8) Once the changes are incorporated and the draft law is finalized, the chair of the GWG must submit the draft to the OLSS within **5 days**.
- 9) Upon the submission of the draft law and documents to OLSS the GWG *ceases to exist*.
- 10) The OLSS checks the procedural requirements and recommends to OPMPS to put the draft law on the agenda of the Government for decision.

The general flow for moving legislation through the government process can be illustrated by the following diagram.



Note Potential Rule Change

At the time of this writing, the Kosovo Assembly is considering changes to its Rules of Procedure as discussed in this section:

As currently drafted, the new Article 53 envisages that “The proposal for a draft law can be submitted to the Assembly by: (a) The President of the Republic of Kosovo; (b) the Government; (c) Deputies of the Assembly; (d) a Parliamentary Committee; (e) a Parliamentary Group; (f) at least six Deputies of the Assembly; or (g) ten thousands voters.”

Please consult the Assembly’s final rules to ensure consistency with any changes.

1.4 Process within the Assembly

A draft law is introduced by submitting it to the Kosovo Assembly’s Table Office. The draft law must be submitted in both written and electronic form and in the three official languages of Kosovo. A draft law may be submitted by the Government, a committee of the Assembly, a Parliamentary Group,²² a Deputy of the Assembly (supported by five (5) Members that have signed the draft law), or the Government at the Assembly’s direction. The Table Office immediately registers the draft law and distributes it to the members of the Assembly.²³

²² A Parliamentary Group is defined in the Assembly’s Rule 11, in part, as “a political formation that consists of no less than 5%, respectively 6 Members of the Assembly, on account of a common political aim.” Rules of Procedures for the Assembly of Kosovo, Rule 11(1). See Rule 11 for further qualifications or restrictions on the formation and membership of Parliamentary Groups.

²³ Rules of Procedure of the Assembly of Kosovo, Rule 33(4).

1.4.1 First Reading

Rule 35 of the Rules of Procedures controls first reading of proposed draft laws. First reading represents the Assembly's approval, in principle, of a draft law. Rule 35(2). No amendments to a draft law can be proposed after first reading. First reading must occur (a) no earlier than ten (10) working days, and (b) no later than three (3) working weeks *after* distribution of the draft law to the Members.²⁴ The sponsor of a draft law may withdraw it during first reading and before a procedural vote on the law.²⁵

Note Potential Rule Change

At the time of this writing, the Kosovo Assembly is considering changes to its Rules of Procedure as discussed in this section:

Article 56 of the new Rules of Procedures would give the Assembly more time to revise a draft law before a first reading, by expanding the deadline for a first reading from 3 working weeks to 4 working weeks after the distribution of the draft law.

Article 57 of the new Rules of Procedures would change where a draft law goes after it is approved on a first reading. Specifically, the provision envisages that "Upon the approval of the law on the first reading, the Assembly assigns the draft law for further consideration to the Functional Committee, as reporting committee, and to the committee of Legislation Judiciary, Committee on Budget and Finance, the Committee on European Integration and the Committee for Rights and Interests of Communities and Returns, as permanent committees."

Thus, if the new rule is approved, after the first reading there will be five committees tasked with the draft law, one functional committee and four permanent committees having competence according to their subject matter jurisdiction.

Please consult the Assembly's final rules to ensure consistency with any changes.

1.4.2 Committee Process

1.4.2.1 Committees of the Assembly

The Assembly's legislative process relies heavily on the use of committees. The two main committees of the Assembly are (a) the Committee on Budget and Finance (Budget Committee), and (b) the Committee on the Rights and Interests of Communities and Return.²⁶

Other permanent committees include:²⁷

²⁴ Rules of Procedure of the Assembly of Kosovo, Rule 35(1)

²⁵ Rules of Procedure of the Assembly of Kosovo, Rule 35(3).

²⁶ Rules of Procedure of the Assembly of Kosovo, Rule 48(1).

²⁷ Rules of Procedure of the Assembly of Kosovo, Rule 48(2)(b).

- (a) Committee on Judicial, Legislative and Constitutional Framework Matters, Gender Equality, Petitions and Public Claims;
- (b) Committee on International Cooperation and Euro-Atlantic Integration;
- (c) Committee on Education, Science, Technology, Culture, Youth and Sports;
- (d) Committee on Economy, Trade, Industry, Energy, Transport and Telecommunications;
- (e) Committee on Agriculture, Forestry, Rural Development and Spatial Planning;
- (f) Committee on Health, Labor and Social Welfare and Missing Persons;
- (g) Committee on Public Services, Local Administration and Media;
- (h) Committee on Emergency Preparedness;
- (i) Committee for Mandates and Immunities.

These committees constitute the “permanent functional” committees of the Assembly. Additionally, the Assembly must establish an ad hoc Committee on the Rules of Procedure.²⁸ The Assembly shall also determine the number of functional committees and the membership of the committees at the proposal of the Presidency.²⁹ Presumably, therefore, the Assembly may establish additional functional or main committees to those listed in Rule 48(2)(b).

The President of the Assembly may appoint “non-attached Members” as committee members who may participate in committee meetings without the right of vote.³⁰ Furthermore, both main and functional committees shall have two vice-presidents, who must belong to different Parliamentary Groups from that of the President of the Assembly.³¹ Chairs and Vice-Chairs of committees must be distributed among political groups represented in the Assembly. Each committee is authorized to establish subcommittees as necessary to accomplish the work of the committee.³²

1.4.2.2 Committee Assignment

When approved on first reading, the draft law is referred to a lead committee (the committee with subject matter competence), the Budget Committee, and the Committee on Judicial, Legislative and Constitutional Matters (the Judiciary Committee). Additionally, within twenty four (24) hours after the first reading, any member of the Presidency can request that a draft law also be referred to the Committee on Rights and Interests of Communities (Rights Committee) for its opinion.³³ In specific instances, a draft law may be submitted to several committees simultaneously, in which case one of the committees shall be designated the lead committee.

²⁸ Rules of Procedure of the Assembly of Kosovo, Rule 48(2)(a).

²⁹ Rules of Procedure of the Assembly of Kosovo, Rule 48(4).

³⁰ Rules of Procedure of the Assembly of Kosovo, Rule 48(7).

³¹ Rules of Procedure of the Assembly of Kosovo, Rule 48(8).

³² See generally, Rules of Procedure of the Assembly of Kosovo, Rule 49.

³³ Kosovo Const., Art. 78.

Note Potential Rule Change

At the time of this writing, the Kosovo Assembly is considering changes to its Rules of Procedure as discussed in this section:

Article 57 of the new Rules of the Assembly, would require the Functional Committee to submit its report to the Assembly 5 days before the second reading. The report shall include the opinion of the permanent committees as well.

Please consult the Assembly's final rules to ensure consistency with any changes.

1.4.2.3 Committee Review

Within two (2) weeks of adoption of a draft law upon first reading, the lead committees must begin its consideration of the law.³⁴ The committees' review of draft laws must follow the general provisions regarding Assembly committees. Upon completing its review, the lead committee must submit a report. The report must contain: (a) amendments that are considered desirable, if any, and (b) an explanation of whether, subject to the amendments, the law can be recommended for second reading.³⁵ The lead committee must complete its review of the draft law and report its recommendations to the Assembly, along with proposed amendments, within two (2) months after first reading. The Assembly may extend the time for the committee's report on a draft law.

The lead committee must submit its report to the Assembly at least five (5) working days before second reading.³⁶ Proposals for amendment and the budgetary implications of the draft law must be sent to the Committee on Budget and Finance (the Budget Committee) for its opinion. The Budget Committee must submit its opinion to the Assembly at least four (4) working days before the Plenary Session.³⁷

1.4.3 Second Reading

When a draft law is presented for second reading, the Assembly considers any proposed amendments submitted by the lead committee, the Budget Committee and the Committee on Rights and Interests of Communities.³⁸ The Assembly also considers amendments proposed by Parliamentary Groups and the government. Amendments are considered individually and in the

³⁴ Rules of Procedure of the Assembly of Kosovo, Rule 35(6). Under Rule 35(7), the lead or functional committee may begin reviewing a draft law in principle before the first reading of the draft law takes place in plenary session.

³⁵ Rules of Procedure of the Assembly of Kosovo, Rule 36(2).

³⁶ Rules of Procedure of the Assembly of Kosovo, Rule 35(8). Under Rule 36(3), if more than one committee is involved in reviewing a draft law, the committee(s) must submit a report to the lead committee "its emerging conclusions." Additionally, the Budget Committee should be informed of any amendments so that budgetary implications can be considered. Finally, committees considering draft laws must report to the Assembly in writing "setting out in particular the texts of any amendments . . . that are proposed." The chair of the lead committee or the rapporteur is permitted to address the Assembly to "amplify the written report."

³⁷ Rules of Procedure of the Assembly of Kosovo, Rule 35(9). The Annual Budget of the Provisional Institutions of Self-Government (PISG) is reviewed according to Rule 35(10).

³⁸ Rules of Procedure of the Assembly of Kosovo, Rule 37(1).

order in which they arise within the text of the draft law.³⁹ After all amendments selected for consideration are either adopted or rejected, the Assembly considers the full text of the draft law.

1.4.4 Third Reading

If a draft law fails to be adopted by the Assembly during second reading, the law may be reconsidered for adoption on third reading, together with other adopted amendments.⁴⁰ Amendments that were considered and rejected on second reading, or amendments that are substantially similar to those previously rejected, cannot be proposed during third reading. The procedure for considering new amendments during third reading is controlled by Rule 37(1)-(4).⁴¹

1.4.5 Final Approval

Laws that are adopted by the Assembly on second or third reading are presented to the President of the Assembly for signature within ten (10) working days, but not sooner than forty-eight (48) hours, after adoption.⁴² This timeline is set forth in Rule 39.

There is an exception to the general principle stated in Rule 39. Under Rule 40, within forty-eight (48) hours of adoption, any member of the Assembly supported by five (5) other members of the Assembly may present to the Presidency a motion claiming that the law or any part thereof violates the interests of the Community to which he or she belongs.⁴³ The motion must set out specific reasons for the claimed violations.⁴⁴ Upon receipt of the motion, the Presidency shall request the sponsor(s) of the law to respond to the motion within three (3) days.⁴⁵ The Presidency shall attempt to submit a consensus proposal to the Assembly within five (5) days of receiving the sponsor's reply to the motion. If the Presidency is unable to present a consensus proposal within the time provided, the Presidency shall request that the objector and sponsor designate a representative to serve on a special panel consisting of three (3) members as provided in Rule 40(3).⁴⁶ The special panel must within five (5) days issue a report to the

³⁹ Rules of Procedure of the Assembly of Kosovo, Rule 37(2). Under Rule 37(2), a collection or group of amendments are considered where they first arise in the text of the draft law and may be subject to a single vote covering all amendments.

⁴⁰ Rules of Procedure of the Assembly of Kosovo, Rule 38(1).

⁴¹ Rules of Procedure of the Assembly of Kosovo, Rule 38(2).

⁴² Rules of Procedure of the Assembly of Kosovo, Rule 39.

⁴³ Rules of Procedure of the Assembly of Kosovo, Rule 40(1).

⁴⁴ Violations may include claims that a law (a) discriminates against a community, (b) adversely affects the rights of a community as provided in the Constitution, or (c) interferes with the ability of the community to preserve or express its ethnic, cultural, religious or linguistic identity. Rules of Procedure of the Assembly of Kosovo, Rule 40(1).

⁴⁵ Rules of Procedure of the Assembly of Kosovo, Rule 40(2).

⁴⁶ Rule 40(3) provides that the panel consists of three (3) members: (a) a representatives of the objector, (b) a representative of the sponsor, and (c) one (1) member appointed by the SRSG. With the conclusion of the UNMIK mission, it is unclear who will appoint the third member.

Assembly recommending (a) the rejection of the motion, (b) the rejection of the law or the provision at issue, or (c) the adoption of the law with any amendments proposed by the special panel.⁴⁷ No amendments except those proposed by the special panel in its report or those proposed by the Presidency under Rule 40(2) may be considered at this stage.⁴⁸

Note Potential Rule Change

As of this writing, the Kosovo Assembly is considering changes to its Rules of Procedure as discussed in this section. These changes would significantly alter what happens to a draft law that has been approved by the Assembly but which the President elects not to sign.

Under proposed Rules of Procedure, Article 61, once a law is approved by the Assembly, the President of the Assembly must sign it within ten (10) working days and send it to the President of Republic of Kosovo for promulgation. If the President objects to the final version of the law, he must return it to the Presidency of the Assembly with his objections. The Presidency must return the law the appropriate functional committee for reconsideration. The functional committee may only reconsider the issues raised by the President. The functional committee must within two (2) weeks submit to the Assembly a report, along with any recommendations for amendments that would address the President's objections. The Assembly must vote on the proposal submitted by the functional committee. If proposed amendments are approved by the Assembly, the law is considered as promulgated. If the Assembly rejects the proposed amendments the law is deemed promulgated as written when first approved by the Assembly.

Proposed Article 61(5) envisages that a law will be considered promulgated when published in the *Official Gazette* if such law is neither promulgated by the President nor is it sent back by him to the Assembly.

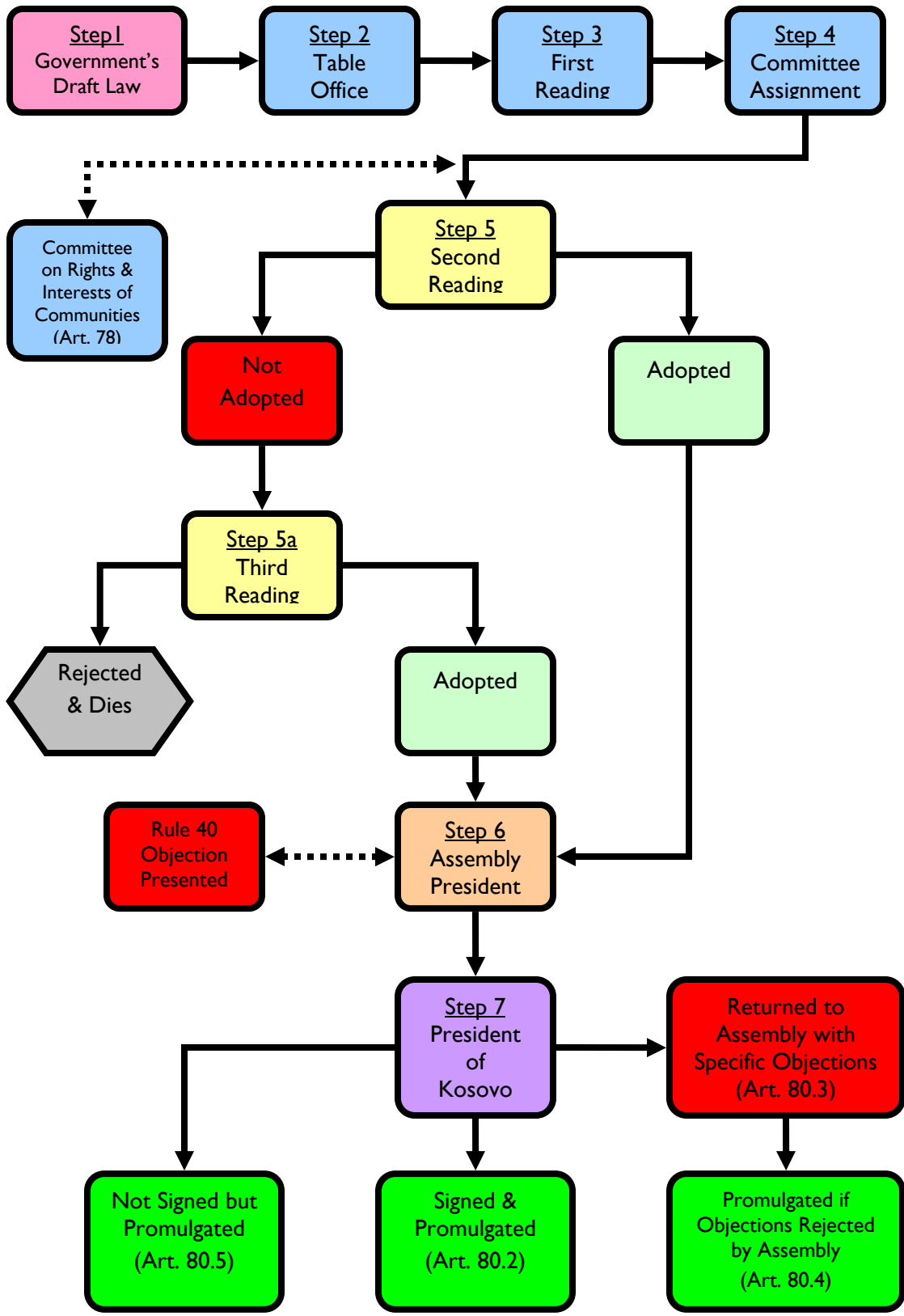
Please consult the Assembly's final rules to ensure consistency with any changes.

Once a draft law is finally approved by the Assembly and signed by the President of the Assembly, it is sent to the President of Kosovo for final signature and promulgation. Unless otherwise specified, a law becomes effective fifteen (15) days after publication in the *Official Gazette*.

The general process for moving draft legislation through the Assembly is illustrated by the following diagram:

⁴⁷ Rules of Procedure of the Assembly of Kosovo, Rule 40(3).

⁴⁸ Rules of Procedure of the Assembly of Kosovo, Rule 40(4).



Chapter 2

Drafting Legislation

2.1 Basic Principles

Government regulation No. 01/2007 sets forth the basic principles for drafting primary and secondary legislation in Kosovo. This regulation provides that draft legislation should:

- Be consistent in appearance, structure and organization.
- Be consistent with the Constitution.
- Comply with applicable international standards, treaties, conventions and obligations.
- Conform to mandatory provisions of the EU to the extent reasonably practicable given Kosovo's level of administrative and economic development.
- Promote the overall public interest of the people of Kosovo and is consistent with the policy objectives of the Government.
- Be consistent with the existing legal framework (the law applicable in Kosovo), unless there is a clear and compelling need to alter that framework.
- Take the form of an amendment to the existing law, unless there is a clear, compelling and rational public policy reason for creating a new law.
- Not create unnecessary, redundant, inefficient, wasteful or over-reaching bureaucratic or administrative structures, procedures, provisions, requirements, or barriers.
- Minimize the potential for the abuse of governmental authority, power or discretion.
- Minimize jurisdictional conflict or overlap among public authorities.
- Minimize the negative impact on the public budget and take into consideration the limited budgetary, personnel and administrative resources of the Government.
- Not contain any discriminatory or otherwise prohibited elements.
- Avoid the use of overly general, vague, ambiguous, and imprecise provisions.
- Be written in a highly professional, precise, detailed and well-organized manner that reflects (a) the best legal drafting practices in use by EU member countries, and (b) the ten basic drafting principles contained in the Resolution of the Council of the European Communities of 8 June 1993, *On the Quality of Drafting of Community Legislation*.
- Be prepared and made available in the Albanian, English and Serbian languages before being submitted to the Government, to any ministry or agency of the Government, or to any working group of any of the foregoing.

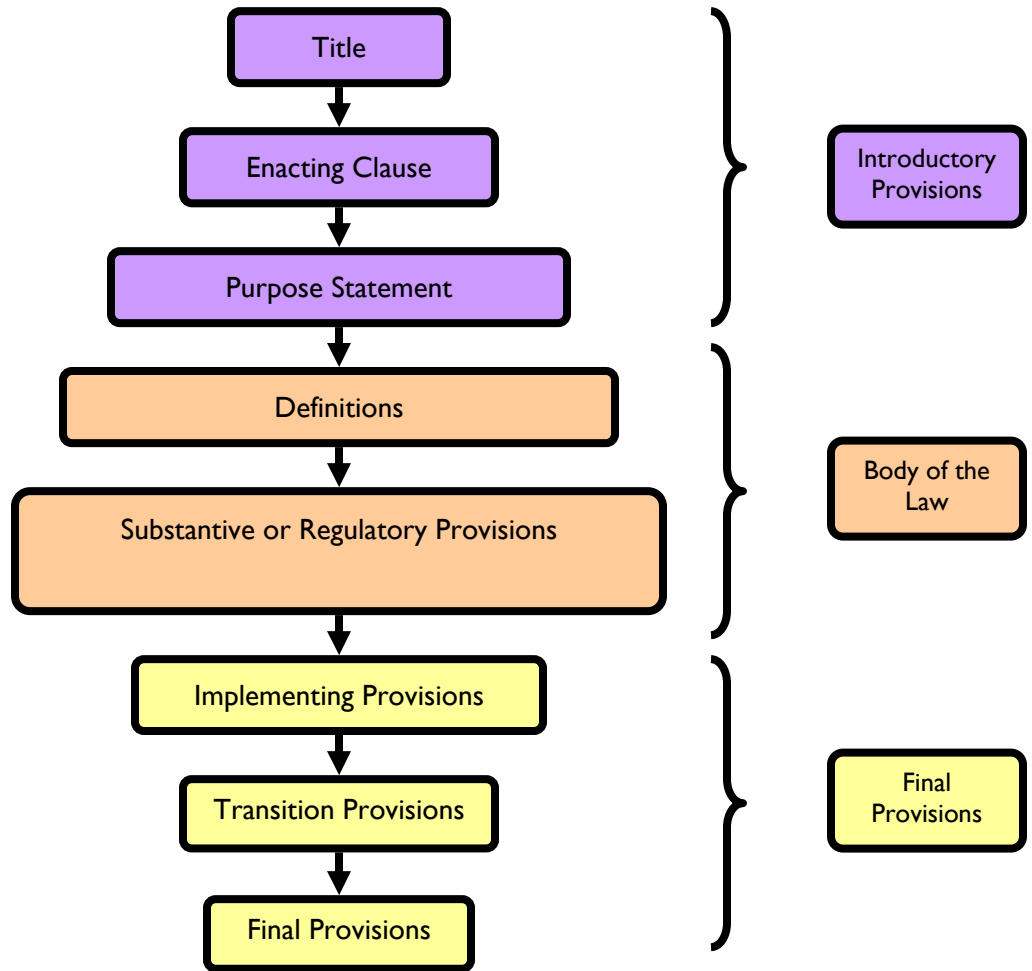
If fundamental policy issues arise during the drafting of legislation, the drafters, together with the Head of the OLSS, should seek policy guidance from the Prime Minister before finalizing the draft and submitting it to the Government. The Prime Minister should obtain direction from the concerned senior members of Government. Additionally, the Prime Minister and senior members of the Government may seek the views and opinions of advisors, outside experts and the affected members of the private sector and Kosovo society.

2.2 The Structure of Legislation

Legislation is generally divided into three components:

- Introductory Provisions;
- The Body of the Law; and
- The Final Provisions.

Each of these components has a series of subparts that becomes more detailed as the process of drafting a law continues. The general components of a law are illustrated in the following diagram:



2.2.1 The Introductory Provisions of Draft Legislation

The general structure for draft laws to be presented to the Assembly is:

- The number and title of the law;
- The enacting clause; and
- A scope or general purpose statement.

2.2.1.1 Titles

The title of the law should be simple and concise, providing the reader with sufficient information to understand the general theme of the law. For example, the title of a law is sufficient when it states “Law on Accommodation Tax in Hotel and Tourist Facilities.” This short statement provides readers with the information necessary to understand the general theme of the law and whether it may be relevant to their inquiry. Titles should not contain abbreviations or multiple conjunctions that seek to tie together multiple concepts.

Practitioner's Note
The Do's and Don'ts of Titles

Do Use simple and concise terms, e.g., Law on Pardons.

Don't Use complex and multiple terms, e.g., Law on the Pardoning of Individuals Convicted of Criminal Offenses in Kosovo.

2.2.1.2 Enacting Clause

Following the title of the law is a statement that references the enacting authority “enacting clause”) of the law. The enacting clause for Kosovo should be uniform and state: “The Assembly of the Republic of Kosovo, Pursuant to article 65(1) of the Constitution, hereby adopts . . .”

2.2.1.3 Purpose Statement

After the enacting clause is a simple and concise statement of the intent or purpose of the law. Unlike the title of a law, the purpose statement seeks to provide the reader with the overall goal of the law or the issues the law is addressing. The language of the purpose statement should not be filled with complex and overly technical terms, nor should it be a mere restatement of the title or filled with ancillary information that details every section in the law. The purpose statement should be in a uniform format and begins with one of the following:

- “This Law establishes the legal basis for . . .” or
- “This Law regulates the . . .” or
- “This Law defines the power and duties of . . .” or
- “This Law amends . . .”

An example of a proper statement is “This Law regulates access to public records and information.” Such a statement is simple and direct. An example of an improper statement is, “The purpose of this Law is to provide the regulatory basis and a scheme for the public’s access to public information and records from the various government agencies subject to its provisions.” By beginning the statement with “the purpose of this Law,” the second statement begins by stating the obvious. Additionally, the second example contains many unnecessary words and in the end conveys no more information than the simpler first example.

Prior to the adoption of a law, the purpose statement should be reviewed and amended if necessary to (a) comply with the purpose expressed in the law, and (b) remove references to material that is “draft” in nature. For example, the purpose statement in the current *Law on Final and State Matura Examines* as published in the *Official Gazette* begins as follows:

This draft law shall regulate the organizing procedure, content, conditions, criteria and procedures of the Final and State Matura Exam in Kosovo.
(Emphasis added)

This statement presents two problems: (a) it uses too many words to describe the purpose, and (b) it is no longer a draft law once it is published in the *Official Gazette*. It is important,

therefore, to review and “clean-up” the purpose statement in the final version of a law to be published. **It is a better practice to delete any reference to “draft law” in the version of the law sent to the Assembly for its consideration.**

Practitioner’s Note

The Do’s and Don’ts of Purpose Statements

Do Use simple and concise terms. For example, “This Law establishes the vocational, rehabilitation and employment rights of individuals with disabilities.”

Don’t Use overly complex terms or attempt long explanations or justifications for the law. For example, “Claiming that universality, inseparability, interdependence and relation of all fundamental human rights and freedoms and the need of persons with disabilities that those rights and freedoms are guaranteed without discrimination; aiming advancement of socio-material position and integration in everyday life of People with Disabilities; Aiming proper implementation of fundamental principles and universal rights from employment relationship.”

Finally, a purpose statement is not a regulatory statement; that is, the purpose statement is part of the introductory material and should have no regulatory impact. The drafters of legislation should not assign to the purpose statement a “legal value” that would require a court or administrative agency to apply its provisions as substantive law. All regulatory provisions should be expressed in the body of the law. For example, the purpose statement in the *Law on Integrated Management and Control of the State Border* has four subsections, three of which are as follows:

- 1.2 This law shall apply without prejudice to the specific mandate of international organizations as provided for in the Constitution of the Republic of Kosovo.
- 1.3 Interagency cooperation shall be carried out by border police, Customs Service, Phyto-Sanitary Service, Veterinary Service and all other relevant agencies as defined in the National Strategy for Integrated Border Management.
- 1.4 Provisions of this law shall be to all persons entering or leaving Kosovo except those who are claiming or might reasonably be expected to claim asylum. In such cases the Law on Asylum shall apply.

Arguably, all three of these subsections state more than the purpose of the law. Subsection 1.2 defines a substantive limitation in the application of the law (“without prejudice to the specific mandate of international organizations . . .”). Section 1.3 mandates the agencies responsible for its implementation and under what circumstances (“as defined in the National Strategy for Integrated Border Management.”). Section 1.4 states to whom the law applies and under what circumstances the law will not apply (“except those who are claiming . . .”). Rather than state the purpose of the law, the above language incorporates into the purpose statement substantive law. These provisions should be left for the body of the law, which will define the rights, duties, obligations, and authorities of the persons subject to it.

2.3 The Body of Legislation

After the introductory material, a draft law should be structured in two parts as follows:

- Definitions; and
- Body of the law containing the substantive provisions and regulations.

2.3.1 Definitions

One of the most critical portions of a law is the definition section. Well-constructed definitions can be very useful in making a bill more precise and reducing repetition within individual sections of a law. However, definitions require great care. If not constructed carefully, a definition may cause – not eliminate – confusion, particularly when a term is used in multiple and disconnected sections of a draft law.

One of the greatest abuses of definitions is overuse. There is no need to define every term in a law or define a term whose meaning is generally understood or is unambiguous. For example, in the *Law on Central Heating*, the term “heat” is defined as “district-heating or district-cooling energy, transported through a heat carrier from the producer to the customers in a fixed network, for maintaining the customers' indoor temperature at a required level, and supplying steam, hot industrial water and/or domestic tap warm water[.]” This definition is problematic for two reasons: (a) it takes a simple and commonly understood term and turns it into such a technical concept as to leave one wondering what is meant by “heat”; and (b) it defines “heat” in unnecessarily complex terms that reference its means of transport and medium. This definition then creates conflicts with how the term “heat” is used in other definitions in the law. For example, the same law defines “heat generation” as “the production of heat by an enterprise licensed to produce this heat.” If one inserts the definition of “heat” in the definition of “heat generation” the definition of “heat generation” reads as follows:

“Heat generation” means the production of [district-heating or district-cooling energy, transported through a heat carrier from the producer to the customers in a fixed network, for maintaining the customers' indoor temperature at a required level, and supplying steam, hot industrial water and/or domestic tap warm water] by an enterprise licensed to produce this [district-heating or district-cooling energy, transported through a heat carrier from the producer to the customers in a fixed network, for maintaining the customers' indoor temperature at a required level, and supplying steam, hot industrial water and/or domestic tap warm water].

Definitions are intended to explain concepts in simple and concise terms. It is also important for the drafter to understand how a definition will be read within the context of a law. Therefore, when creating a definition, the drafter may find it useful to insert the definition in place of the term and then determine whether the definition makes sense within a particular provision.

Definitions are generally used to explain terms that: (a) are technical or scientific in nature; (b) have special meaning within the context of a particular draft law; or (c) are ambiguous.⁴⁹ For

⁴⁹ Note, however, that generally unambiguous terms may have special meaning within the context of a draft law and, therefore, require a special definition to clarify its unique application.

example, the term “dangerous weapon” may have a general meaning that applies to all manner of objects, or a special meaning that encompasses specific types of objects. For example, a gun may constitute a “dangerous weapon” in the context of a specific law and a knife of limited length may not. If the term “dangerous weapon” will be used repeatedly in a law, the term will need to be precisely defined to avoid including objects the law is not intended to regulate.

Scientific or technical terms present a particular challenge to the drafter. Generally, such terms can have very narrow meanings that are unique to a particular field or profession. For example, the term “exothermic chemical reactions” has a very precise meaning within the field of pyrotechnics. Scientific or technical definitions should comport with the general understanding that a field or profession applies to the terms. A drafter should not attempt to “redefine” terms in a manner that alters their generally accepted use within the field or profession. A drafter should not attempt to “clarify” the definition of a scientific or technical term if doing so could materially alter the meaning of the term. In defining such terms, the drafter may want to consult with one or more knowledgeable professionals to ensure the accuracy of the definition.

Equally important, the definition and use of terms should apply uniformly across the legal framework of Kosovo. As a general rule, one law should not define a term differently than another law. An exception can be made if a special meaning is attached to the term within the context of a particular law. For example, if the term “motor vehicle” is intended to embrace all motorized means of land transport, e.g., cars, trucks, motorbikes, etc., the term “motor vehicle” should not be used in an aviation law to define air transport. Giving the same term different definitions across different laws will invariably lead to confusion, an inconsistent application of the term and potentially an inconsistent application of the law. Early in the drafting process, the drafter should verify that a term has not been previously defined in another law, particularly when the laws cover related subjects. When referencing a term used in another law, it is advisable to use “adoption of a definition by reference.”

***Practitioner’s Note
Reconciling Definitions***

Before finalizing the definition, the drafter should examine all adopted laws to be sure that the proposed definition is used consistently with existing law. If a term has a generally accepted definition, that definition is to be used. The drafter may also define a term by making reference to a definition in another law, e.g. “the terms used in this law will have the same meaning as in the Law on the Protection of Plants.”

Generally, defined terms should not contain the same term for which the definition is constructed. For example, it is inappropriate to define the term “motor vehicle” in a traffic law as follows:

“Motor Vehicle” means any motorized vehicle.

This definition is unhelpful. It adds nothing to the law and may in fact create confusion leading to the unsuitable application of the law. As defined above, the term “motor vehicle” could include a boat, an airplane or any other means of transport powered by a “motor”. This definition also raises the question of what the drafter means by “motorized”.

By contrast, it is much clearer to state:

“Motor vehicle” means any mechanically self-propelled device that is used on a public roadway to transport goods, persons or services, but does not include industrial equipment or construction equipment.

This definition describes the meaning of the term “motor vehicle” in more detail and adds further clarity by adding categories of items that are not included in the definition, such as construction equipment, bicycles, and horse-drawn carriages.

Finally, a word should never be given a strained or artificial definition out of keeping with its ordinary usage. Nor should a drafter ever state within a definition an operative provision of law. For example, in the *Law on Qualifications*, the term “Accreditation” is defined as follows:

"Accreditation" refers to the process by which the National Qualifications Authority (NQA) established under this Law defines the institutions which assess candidates and issues certificates and diplomas (assessment bodies) and any body which carries out other functions on behalf of the NQA. Accredited institutions and bodies shall be subject to monitoring and auditing by the NQA.

The last sentence inappropriately injects a regulatory provision into a definition. This hides the substantive provision by burying it in the “Definitions” section of the law, and subverts the purpose of definitions.

Practitioner’s Note
Key Considerations in Definitions

- **Do** use simple and concise terms and avoid overly technical or legalistic definitions.
 - **Do** define technical or scientific terms as they are commonly understood in the applicable field.
 - **Do** reconcile definitions across laws by making sure that terms have common definitions to every extent possible and appropriate.
-
- **Do Not** use the term being defined in the definition of a term itself.
 - **Do Not** define commonly understood terms in complex and technical terms unless the term is being used in an uncommon way that requires a more complex definition.
 - **Do Not** inject substantive provisions in definitions.

2.3.2 Substantive or Regulatory Provisions

The substantive provisions and regulations of a law immediately follow the definition section. Broadly speaking, substantive provisions and regulations express:

- The general regulatory principles the law sets forth;
- The persons or subjects to which the law applies; and
- Any attendant rights and responsibilities of individuals, communities and/or the government.

2.4 Final Provisions

2.4.1 Implementing Provisions

Implementing provisions achieve two objectives: (a) they set out what government institution(s) are responsible for implementing the law, and (b) they define the procedures to be followed in effectuating the purpose of the law. Sometimes implementing provisions can create new institutions. Other times, implementing provisions will assign responsibility to an existing institution.

The decision whether to create a new institution or assign duties to an existing institution is a policy question to be addressed at the government level. Wherever possible, assign implementing responsibilities to existing institutions of government to avoid creating unnecessary and potentially overlapping bureaucracies. Where a new institution is proposed, a complete FIA is particularly important in ensuring that government decision-makers understand the full costs – near, middle and long-term – of establishing a new institution.

If a new institution is required, the implementing provision must:

- Fully and appropriately name the new institution.
- Define its position within the government structure.
- Define the mandate of the institution with precision to avoid overlapping authority with existing institutions.⁵⁰
- Either allocate managerial and legal responsibility within the new institution and set forth the internal structure of the institution, or provide that such issues will be resolved in secondary legislation.⁵¹
- Define the qualifications and employment status of top managers.⁵²

Even in the absence of creating a new institution, the drafter should address the above matters by defining the existing government institution responsible for implementing a law.

Sometimes a drafter is asked to give two institutions shared authority to implement provisions. Although this may reflect a dual interest regarding the law, shared responsibility can create confusion or a stalemate in implementing the law. The better practice is to pick one ministry or institution to have the authority and, if appropriate, direct that it consult with one or more institutions before exercising its authority.

Drafters must craft implementing procedures that are clear, concise, and in accordance with the overall objective of a law. They should also define the timeframe for implementing both primary and secondary legislation. Implementing provisions will be more or less specific depending on what the law aims to achieve. Some implementing provisions may set forth detailed procedures for implementing a law while others may delegate that task to another government institution. The *Law on Agricultural Inspection* clearly provides that the “Ministry [of Agriculture, Forestry and Rural Development] issues sub legal acts for implementation of this law.” Implementing provisions may be nothing more than a delegation of power or they may set out detailed requirements.

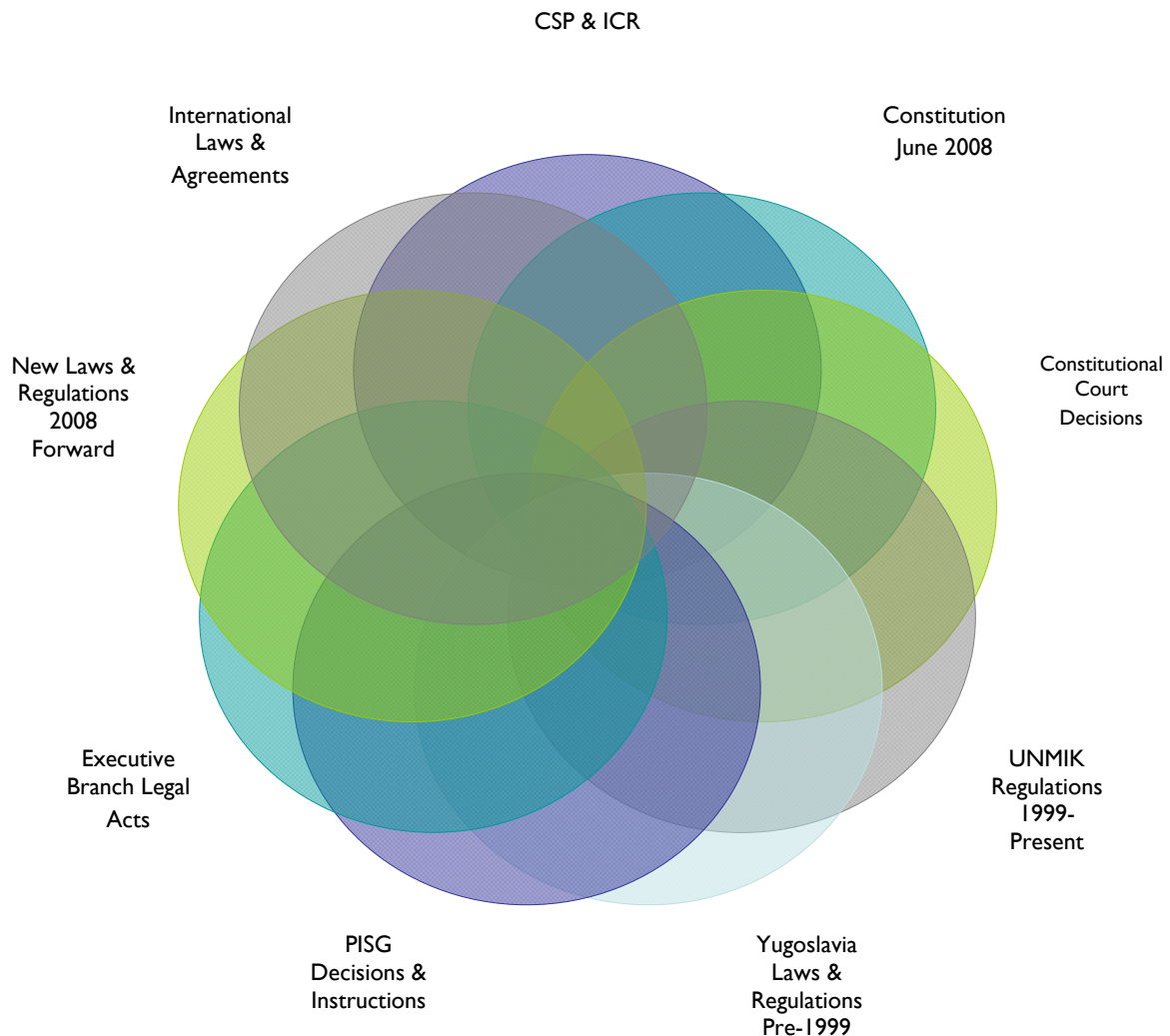
⁵⁰ See, e.g., Law on the Constitutional Court, Art. 6.1.

⁵¹ See, e.g., Law on Notaries, Art. 63.

⁵² See, e.g., Law on Foreign Service, Art. 19.

2.4.2 Transition Provisions (When Applicable)

Transition provisions are similar to implementing provisions but applicable when a law is replacing or repealing an existing legal structure or regulatory regime. It is particularly important in Kosovo to differentiate between transition issues and implementing issues. Because Kosovo is a new state, many laws adopted by the Assembly may be “replacements” for existing legal structures or regulatory regimes. Currently, Kosovo suffers from significant conflicts of law issues – overlapping legal provisions and structures from the former Yugoslavia, administrative directives and regulations promulgated by the UNMIK, requirements of the CSP, regulations or directives from other international actors, laws adopted by the Assembly, and other legal acts. These legal acts may address the same subject matter, but from different perspectives. The complexity of harmonizing the variety of sources for legal acts in Kosovo is apparent in the following illustration:



Consequently, drafters of primary and secondary legislation must be attentive to the possibility of overlapping legal acts. They must draft language that ensures a smooth transition from old structures to new structures. A drafter’s failure to address conflicting legal authorities can be a

key element in hindering Kosovo's progress towards uniformity and the rule of law. A well constructed transition provision achieves several objectives:

- Precisely states how the new law supersedes existing law and sets forth what, if any, portion of the old law is to remain in effect.
- Provides whether governmental action taken under a prior law will remain in effect under the new legal regime or whether the new law acts to repeal such actions.⁵³
- States what prior legal institutions or regulatory regimes are being replaced and by what new institutions or regimes.
- Names the agency or agencies responsible for planning and implementing the transition from the old institutions and/or regimes to the new ones.
- States the length of time and circumstances under which a transition must occur and provide an "end-date" by which the transition will be concluded.

Practitioner's Note
Implementing and Transition Provisions

Prior to drafting an implementing or transition provision, the drafter should ask the following questions:

- Is the subject matter of the draft legislation regulated by a previously promulgated rule, directive, law or regulation?
- If yes, what are the possible conflicts between the draft legislation and existing legal provisions?
- If conflicts exist, how can the drafter resolve the conflicts in the draft law to prevent perpetuating inconsistent laws, rules, regulations or directives?
- Is the draft law intended to modify or replace an existing legal provision?
- If the draft law is intended to repeal an existing legal provision, does the draft law contain the necessary repeal provision?
- If the draft law is intended to supplement or complement an existing legal provision, is the draft law consistent in purpose with the existing provision and does it in fact supplement or complement the provision?
- Are the transition provisions written narrowly enough to impact only the subject matter of the draft law and not inadvertently repeal, modify, nullify or conflict with an existing legal provision?
- Are the agencies responsible for implementing the law or overseeing the transition to the new law clearly named and is their mandate clearly defined?

An example of a transitional provision can be found in the *Law on National Qualifications, No. 03/L-060*, Article 23, which provides:

⁵³ For example, in drafting legislation concerning the judiciary, the drafter must determine whether the proposed law could effectively change any judgments issued under a prior law. Alternatively, the new law could expressly preserve the validity of those previous judgments. In this circumstance, a transition provision in this circumstance might say, "The validity of all court decisions, orders, judgments and other official judicial acts rendered prior to the effective date of this law are not affected by the entry into force of this law. All court decisions, orders, judgments, and other official judicial acts must be recognized and enforced as provided in accordance with the prior law."

1. The transitional period in relation to the NQA shall be a period of 24 months following the coming into force of this law. During this period, MEST, in agreement with the Office of the Prime Minister, relevant ministries, social partners and other stakeholders of the NQA, will establish interim arrangements for the work of the NQA. Working arrangements of NQA will be issued not later than six months after this law becomes effective.
2. The terms of the interim arrangements will be set out in regulations which will be issued no later than six months after the day that the working regulation is issued.
3. The Governing Body of the NQA will be established at the latest one year after the day that this Law enters into force.
4. The office of the NQA shall be established and the permanent director and staff appointed at the latest within twenty-four months of the day that this Law enters into force.
5. All the sub legal acts which implement this law will be issued within a period of 12 months when this law becomes effective.
6. When this law becomes effective all the legal provisions which regulated this qualification field will become invalid, excepting the higher education provisions.

2.4.3 Effective Date

The "Effective Date" (sometimes called the "Entry into Force") is a simple statement that defines the date and circumstance upon which a law becomes effective in Kosovo. Unless otherwise specified, Article 80.6 of the Constitution mandates that a law will become effective fifteen (15) days after its publication in the *Official Gazette*. If a different effective date is desired, the law must specifically state that it is exempt from Article 80.6 and set a different date or set of circumstances. For example, a law to take effect in the future may read as follows: "This law is exempt from the requirements of Article 80.6 of the Constitution and shall enter into force on [insert date]." When a law's effective date is contingent upon a subsequent event or adopting subsequent legislation, the effective date provision should acknowledge so. For example, an effective date provision based on the adoption of subsequent legislation might read as follows: "This law is exempt from the requirements of Article 80.6 of the Constitution and will be effective upon the adoption of the Law on ____."

Additionally, a law may be effective fifteen (15) days after its publication in the *Official Gazette* but its implementation may be delayed. For example, the *Law on Consular Service of Diplomatic and Consular Missions* entered into force fifteen (15) days after its publication. The implementation of the law was, however, delayed by provisions mandating that the Foreign Ministry promulgate within three (3) months the secondary legislation necessary to implement the law. Thus, the effective date and implementation date may be the same or may be different. If a different implementation date is desired, the law must specifically so state. Otherwise, the law becomes effective as provided in Article 80.6.

2.5 Special Final Provisions

Special provisions that may be included at the end of the law address the following:

- Repeal provisions
- Savings provisions
- Restrictive provisions

2.5.1 Repeal Provisions

Repeal provisions rescind the provisions of a prior adopted law. A repeal may be *specific*, *general*, or *partial*. For example, the *Law on the Temporary Composition of Kosovo Judicial Council* contains a general repeal provision: “As of the entry into force of this Law any normative act contrary to its provisions shall be repealed.” Although many drafters tend to use general repeal language because it is easier, the better practice is to use specific repeal language whenever possible. General repeal language leaves open the question of whether a particular law or part of a law is being rescinded. By contrast, *the Law on the Bar, No. 03/L-117*, Article 41 leaves no questions. It provides, “This law supersedes the Law on the Bar and other Legal Assistance, Official Gazette of KSAK, No: 01 I-69/79.” Given the general state of Kosovo law with its many overlapping provisions, administrative regulations and directives, the best practice is to specify what is being repealed by the new law. In the above example concerning the Judicial Council, it is not entirely clear what precise “normative act contrary to its provisions” is being repealed.

Practitioner’s Note
Repeal Provisions

- Do** Upon the effective date of this Law, the following laws are repealed [or superseded]:
- Don’t** As of the entry into force of the Law, all laws and normative acts to the contrary shall be repealed.

Repeal provisions should be specific and comprehensive. This will require the drafter to research existing laws and list the laws or sections of the laws being rescinded. It is rare for one drafter to have a broad enough understanding of existing laws to be able to recognize all the potential conflicts. Therefore, the drafter should consult with a range of legal experts at this point to identify potential conflicts and solutions. Doing so will reduce or eliminate confusion.

2.5.2 Savings Provisions

Savings provisions can be of two very different characters: (a) a partial repeal of existing laws by reference to what provisions are not affected, and (b) recognition that prior government actions are to be preserved even after enactment of a new law. An example of the first type of savings provision could read as follows: “Law A is repealed in full except for Article X, which shall remain in effect.” An example of second type of savings provision could read as follows: “Notwithstanding any provision of this law, all court decisions rendered prior to the effective date of this Law shall remain in full force and effect and their validity shall not be affected.”

2.5.3 Restrictive Provisions

Generally, restrictive provisions are intended to impose a limit on the application of the law. Such limits can be substantive, procedural, or time-oriented. An example of both a substantive

and time-oriented restriction can be found in the *Law on Pardons, No. 03/L-101*, Article 9, which provides, “This law applies only to requests for pardon submitted after this law enters into force.” This provision restricts not only the time application of the law (“after this law enters into force”) but also substantively affects the application process and the persons who can take advantage of the law. This law would have no effect on persons whose requests for pardons were filed before the effective date.

The most frequent use of restrictive provisions relates to imposing a self-executing time limit on the law. Although law is intended to be semi-permanent and only subject to change or elimination by subsequent legislative act, there may be circumstances in which a law should contain a self-executing time limit, as in the case of a temporary law. It is generally good practice to state the specific time limit rather than provide a general statement that cannot be self-executing. These self-executing provisions are often called "sunset provisions" because, like the setting sun, at a certain point in time the law or provision "disappears" without any further action by the Assembly. Sunset provisions often reflect a compromise between factions for or against a particular proposal. Although the concept of "sun-setting" or eliminating a provision on a certain date may seem simple, such provisions are often very complicated to draft correctly. The drafter must specify how the restrictive provisions will end and what will happen to people and actions that are part way through a procedure when the time limit is reached.

2.6 Signing And Promulgation

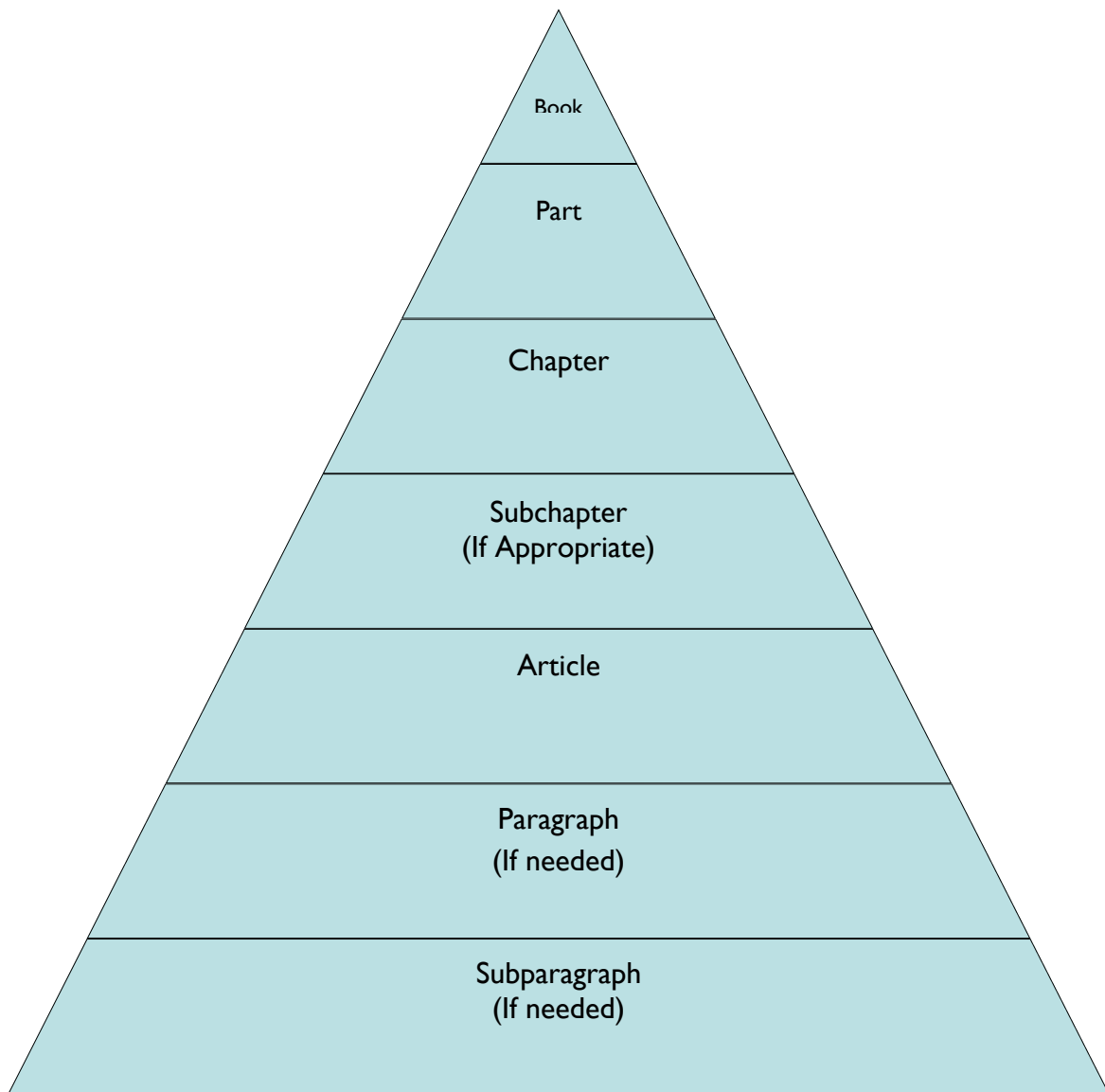
As discussed in Chapter 1, a law does not become effective until either (a) the law is signed by the President, promulgated and published, or (b) the President fails to sign or return a law within eight (8) days after it was delivered to the President. In the latter case, the law is deemed automatically promulgated without the President’s signature and should be forwarded to the *Official Gazette* for publication.

Chapter 3

Order and Language

3.1 General Overview

Laws in Kosovo are divided into various components. More complex laws will also have sub-components. The components of a law should be uniform for all legislation to ensure uniformity and ease of use. The following diagram illustrates a uniform hierarchy for the internal structure of laws.



In general, drafters should group similar subjects within the same component. Before preparing draft legislation, the drafter should create an outline of the proposed law. Most laws will consist of “Chapters”, “Articles”, “Paragraphs” and “Subparagraphs”. Lengthy or more complex laws may be part of a Book composed of Parts, followed by Chapters, followed by Articles and so forth. The internal structure of the law is dictated by its complexity. Drafters should try to make the internal structure of a law as simple as possible by (a) minimizing complex structures unless the law actually dictates such a need, and (b) keeping like subjects together. For example, all Articles within a Chapter should be relevant to the subject matter of the Chapter; all Paragraphs within an Article should be relevant to the subject matter of the Article.

Chapters are designated by Roman numerals. Subchapters are likewise designated by Roman numerals. Articles are designated by arithmetic numbers (Article 1, Article 2 and so forth). Sub-articles or sections are also designated by arithmetic numbers with decimal points (Article 1.1, Article 1.2 and so forth). Articles are numbered consecutively without regard to their placement within chapters or subchapters. Thus, in citing to a particular provision in a law, one would cite to, for example, “Law on _____, No. _____, Article 71.2” even if Article 71.2 occurs in Chapter III of the law.

3.2 The Structure and Order of Laws

3.2.1 Book

The use of a “Book” in a draft law will be extremely rare. The designation of a book is reserved for use with an entire code.⁵⁴ Currently, no laws in Kosovo are broken into books.

3.2.2 Part

A “Part” is a subdivision of a Book.⁵⁵ Technically, under the administrative instruction for composing draft laws, a “Part” is only used if a law is sufficiently long and complex to constitute a Book. Therefore, a drafter would, theoretically, never draft a law where the initial subdivision is a “Part.”

However, several laws in Kosovo are broken down into “Parts” even though they are not subdivisions of Books. . For example, the Family Law of Kosovo, No. 2004/32, contains eight (8) parts even though it does not constitute a “Book”. Many of these laws were written and adopted prior to 2008. Future laws must comply with the partition requirements set forth in Administrative Instruction No. 14/2008.

If a drafter is working on an amendment to a law that was written prior to Administrative Instruction No. 14/2008, the drafter should take the opportunity to reformat that law, in order to promote uniformity and consistency in the form and style of laws.

3.2.3 Chapters & Subchapters

In general, the Chapter is the highest and most common component of a law. It is the preferred partition scheme.⁵⁶ It designates a general theme to which all other provisions in the chapter

⁵⁴ Administrative Instruction No. 14/2008 for Composing Draft Laws and Sub-Legislative Acts, Art. 1.1.

⁵⁵ Administrative Instruction No. 14/2008 for Composing Draft Laws and Sub-Legislative Acts, Art. 1.2.

⁵⁶ Administrative Instruction No. 14/2008 for Composing Draft Laws and Sub-Legislative Acts, Art. 1.3. It is recommended that the standard division of legal acts begin with Chapters.

may relate. Generally, Chapter I of every law contains the General Provisions of the law. For example, in the *Law on the President of Kosovo, No. 03/L-094*, Chapter I is entitled “General Provisions” and Chapter II is entitled “The Rights of the President of the Republic of Kosovo After the End of Mandate”. All articles within these chapters should relate to the general theme of the respective chapter.

Chapter I, “General Provisions” should contain only provisions applicable to the entire subject of the law. Chapter I should, therefore, contain such items as the statement of purpose and the definition section. An example of a law that fails to follow this principle is the *Law on Consular Service of Diplomatic and Consular Missions of the Republic of Kosovo, No. 03/L-125*, where the drafters used a series of subchapters to divide Chapter I. The form of the published law is as follows:

- Chapter I “General Provisions”
 - Subchapter I “Consular Activity of Diplomatic and Consular Missions”
 - Subchapter II “Appointment and Commissioning”
 - Subchapter III “Exercise of the Competencies”
 - Subchapter IV “Competencies and Consular Duties”
 - Subchapter V “Other Administrative Duties”
 - Subchapter VI “Honorary Consular Officer”
 - Subchapter VII “Fees”
- Chapter VIII “Final Provisions”

It is important to note several problems with the structure of this law. First, many of the subchapters are not “general provisions” but rather specific substantive matters. Each of these subchapters is arguably a chapter in its own right. Second, the order of the subchapters could be improved to ensure a more consistent flow to the topics. Finally, note the placement of Chapter VIII “Final Provisions” in the above outline. The numbering of Chapter VIII suggests that the subchapters are not components of Chapter I but instead are stand-alone chapters. A better structure for this law would have been:

- Chapter I “General Provisions”
- Chapter II “Consular Activity of Diplomatic and Consular Missions.
- Chapter III “Appointment and Commissioning”
- Chapter IV “Competencies and Consular Duties”
 - Subchapter I “Exercise of Competencies”
 - Subchapter II “Other Administrative Duties”
- Chapter V “Honorary Consular Officer”
- Chapter VI “Fees”
- Chapter VII “Final Provisions”

While structure may at times be the furthest issue from the drafter’s mind, the organization and flow of a law can mean the difference between a well-reasoned and logical law that is easy to read and understand or a law whose very structure is illogical and creates confusion. It is vitally important for the structure of final laws to follow a uniform approach.

3.2.4 Articles, Paragraphs, & Subparagraphs

The Article is the main component of any law in Kosovo. Each article has a title, and all parts of the Article should relate to the title of the Article. Each Article represents a conceptual unit within the law. It would be inappropriate to draft an Article on an accommodation tax for

persons staying in a hotel and include within the Article a tax on beverages. The two taxes are unrelated unless there is a specific connection (for example, accommodation tax on beverages served in a hotel room).

An Article can consist of a single conceptual unit or several related conceptual units. If an Article consists of two or more related conceptual units, those units should be stated as paragraphs within the Article. Each paragraph of an Article articulates a single conceptual thought that is related to the title of the article. Thus, for example, Article 7 of the *Law on Foreigners* is a stand-alone Article with no paragraph numbering because the Article is the only conceptual unit. It provides:

Article 7
Adherence to law

A foreigner shall adhere to the laws and regulations, including subsidiary legal acts, and to the decisions of state bodies during his/her stay and movement in the Republic of Kosovo.

By contrast, Article 8 of the same law contains two paragraphs, each having a paragraph number and articulating a policy or principle related to the title of the Article:

Article 8
Right to Association

1. A foreigner may create associations in accordance with the law.
2. A foreigner is not permitted to create a political party.

It is possible for complex Articles with multiple related concepts to have subparagraphs such as the case with Article 9 in the *Law on Food*, which contains paragraph 3, subparagraphs 3.1 through 3.5.

To illustrate the division of Articles into paragraphs and subparagraphs, a person citing to an Article would cite the above examples as follows:

- *Law on Foreigners, No. 03/L-126, Article 7* (article)
- *Law on Foreigners, No. 03/L-126, Article 8.1* (article with paragraph)
- *Law on Food, No. 03/L-016, Article 9.3.1-9.3.5* (article with paragraph and subparagraph)

NOTE: One does not cite to Chapters or Subchapters, because Articles in Kosovo laws are numbered consecutively and without regard for Chapter or Subchapter headings.

Practitioner's Note
Limit the Sections within Articles

As a general principle, an Article that contains more than ten sections likely contains unrelated concepts. The drafter should examine the relationship between the sections to ensure a logical connection, both to other sections and to the titled purpose of the Article.

3.3 Language & Grammar

3.3.1 Language

Legislation should be concise, clear, consistent, and as precise as possible. Remember, law is the expression of public policy. It must be written not only to capture the essence of a policy but also in a manner that communicates that policy, even the most complicated policy, in terms most people can understand. The drafter should, therefore, avoid the use of “legalese” or complex terms when simpler (and therefore) more precise language would suffice.

Every word the drafter uses in a law should serve some purpose. If the drafter includes unnecessary or superfluous words, readers often become confused and reach different conclusions as to the meaning or application of a law. Words should be used in a manner consistent with their general and ordinary meaning. If a word in a law can have multiple meanings within a sentence, the drafter should choose a different word or create a clear definition.

Practitioner’s Notes General Guidance on the Use of Language	
Brevity	If a single word has the same meaning as an entire phrase, use the word instead of the phrase.
Simplicity	As much as possible, use familiar words and phrases according to common usage.
Precision	The drafter’s goal is to write a law that accurately expresses the intent of the person or agency requesting the law.
Technical	Do not substitute a familiar term that may have more than one common meaning when the situation requires more technical terms to make the intended meaning absolutely clear. Conversely, do not substitute a technical term where a common, everyday term could suffice.

The following are ancient words of wisdom from the Roman rhetorician Quintillion, equally true for drafters today:

- Write quickly and you will never write well; write well and you will learn to write quickly.
- Correct your drafts repeatedly. A first draft is NEVER a final draft!
- Erasing and deleting is as important as writing.
- The best method of correcting is to set a draft aside so that when you take it up again you can look at it through fresh eyes.

3.3.2 Grammar & style

Laws are public documents written not only for lawyers and government officials but also for use by the general public. Because laws often address very complicated policy matters, it is important that a law be grammatically correct. This poses a particular problem for Kosovo because of the requirement that all laws be published in Albanian, Serbian and English. Each

language may have a different set of grammatical rules that must be correctly applied to each law. There are, however, some general grammatical themes that the drafter must consider.

3.3.2.1 Active Language

The drafter should typically write using the active voice. For example, use the active voice to say "the minister shall appoint three deputy ministers" rather than using the passive voice to say "three deputy ministers shall be appointed." Using the active voice requires the drafter to name the actor, making clear who is the person or entity that has the responsibility or restriction under the new law. Readers generally prefer the active voice, finding it to be more readable, interesting and concise than the passive voice.

Practitioner's Notes General Guidance on the Active Voice	
Good	The judge may sentence the convicted defendant for a prison term of two years.
Bad	The convicted defendant may be imprisoned for a term of two years.
Good	The Chief Justice must provide an annual report of the court's activities to the Assembly on or before January 15 of each year.
Bad	An annual report of the court's activities must be provided to the Assembly on or before January 15 of each year.

The rule concerning the use of active voice is not absolute. You may use the passive voice if the resulting language is clear. However, the active voice is almost always better and the drafter should get into the habit of using it. Once this becomes normal practice, the drafter tends to be consistently clear about whom the actor is and what the action is in every sentence.

3.3.2.2 Use of Nouns, Verbs & Adjectives

While there are few absolute rules about nouns, verbs and adjectives, drafters should follow some important guidelines:

- Use nouns in the singular rather than the plural.
- Avoid pronouns, as it may not be clear which noun the pronoun refers to. The drafter often has to repeat the original noun throughout the draft. While this might make the language sound a bit awkward, it usually makes it clearer.
- Use active verbs.
- Use "must" to require something and "may" to permit something.
- Avoid using "should." Laws are not meant to "encourage" people to take action; laws typically require, permit or prohibit something.
- Use finite verbs. For example, use "consider" rather than "give consideration to."
- Adjectives in ordinary language are often imprecise. Drafters need to examine adjectives (such as "substantial, quick or early") to see if they will make a sentence unclear, or if the adjectives can be replaced with more precise requirements – e.g., a statutorily prescribed deadline of X number of days. Often, the drafter will decide that to rewrite the sentence without the adjective.

These guidelines are meant to assist the drafter in being clear, precise, consistent and concise.

3.4 Special Drafting Problems

3.4.1 Wordiness

“Wordiness”, or the use of excess words, is a common problem in drafting legislation. It traditionally leads to laws that are unreadable, indefinite, confusing and misleading. The length of sentences and sections can contribute to difficulty in understanding the intent of the law and its application to particular situations. Drafters, particularly legally-trained drafters, have a tendency to want to portray their “craft” even at the expense of simplicity.

Practitioner’s Note Avoid Excessive Wordiness	
Good	This law will be effective beginning January 1, 2010.
Bad	This law will enter into force and effect within a period of six months beginning January 1, 2010.
<hr/>	
Good	Subject to Article 12.1, . . .
Bad	Subject to the provisions stated in Article 12.1 of this Law, . . .
<hr/>	
Good	. . . is void.
Bad	. . . is absolutely null and void and of no force or effect
<hr/>	
Good	During. . .
Bad	During the course of . . .
<hr/>	
Good	. . . means . . .
Bad	. . . shall be construed to mean . . .

3.4.2 Use of Negative Phrasing

As a general proposition, drafters should avoid the use of negative phrases to express the conduct or policy the law is requiring. Wherever possible, the terms “not” and “do not” should be used to prohibit conduct, rather than to create exceptions to the provisions of the law.

Practitioner's Note
Example of Using Improper Negative Phrasing

The Law on Final Exam and State Matura Exam, No. 03/L-018, Article 16.1 states, "The final exam shall be organized at the end of the academic year prior to the Matura Exam; the candidate who did not pass the final exam is not allowed to enter into the Matura Exam." A better construction is, "The final exam shall be organized at the end of the academic year prior to the Matura Exam. Only candidates who have passed the final exam may take the Matura Exam."

3.4.3 Internal Consistency (Or Inconsistency)

A drafter should always strive for consistency within the draft law, particularly when referencing other provisions in the law. Articles that make reference to other Articles or sections in a law must be accurately checked and verified. A drafter's failure to ensure internal consistency can result in a law that is not only confusing but possibly inapplicable.

Practitioner's Note
Example of Internal Inconsistency

The Law on Identity Cards, No. 03/L-099, Article 12.1 states "The person who is prohibited to leave the country can not use the Identity Card for this purpose during the prohibition time." Article 12.4 states, "After the reasons for prohibition of use of Identity Card for state crossing border have ceased to exist, court from paragraph I of this article, should immediately inform the Ministry." Note: there is no court referenced in paragraph I. A court is only referenced in Article 12.2.

3.4.4 Gender Neutrality

Discrimination is prohibited by the Constitution. Article 7.2 states, "The Republic of Kosovo ensures gender equality as a fundamental value for the democratic development of the society, providing equal opportunities for both female and male participation in the political, economic, social, cultural and other areas of societal life." As a result, the drafters of law must generally use either gender neutral language or gender inclusive language. Unless a provision is intended to be limited to a specific gender, the provision should express its application in a neutral or inclusive manner.

Preserving gender neutrality need not result in the use of bizarre language. The drafter should craft sentences to promote readability. Therefore, the use of bizarre formations such as "he/she" or "she-minister/he-minister" or "his/her" should be avoided.

Practitioner's Note
Gender Neutrality

- | | |
|--------------|---|
| Do | The service provider is obligated to maintain accurate records of its business activities. The provider shall report income to the appropriate tax officials. |
| Don't | The service provider is obligated to maintain accurate records of his business activities. He shall report income to the appropriate tax officials. |

Chapter 4

Hierarchy of Legal Norms

4.1 Hierarchy of Legal Norms

Not all law is created equal. Kosovo, like all countries, has a hierarchy of importance assigned to various legal acts of the government. A constitution is not the same as a statute, which is not the same as a regulation. Each particular type of legal act has its own characteristics, and it is important for legislative drafters to understand the legal system as an integration of various legal acts. Constitutions, statutes, regulations and rules do not exist in isolation from each other; they combine to form the legal infrastructure of a country. Understanding where and how various legal actions integrate or diverge is critical to harmonizing any system of laws and drafting sound legislation.

While applying a hierarchy of norms in drafting legislation can be complicated, it is more complicated in Kosovo because of its history over the last ten (10) years. For example, while the Constitution is the superior law, the Constitution itself recognizes the CSP as law superior to the Constitution, at least during the period of international supervision. Additionally, various UNMIK directives and regulations remain in effect until replaced by the Assembly or rescinded by other lawful acts. Various “hold-over” laws from the former Yugoslavia still control many processes, particularly in reference to the judiciary.⁵⁷ Consequently, the legislative drafter in Kosovo must be aware of a complex series of hierarchies, some of which may present contradictions and conflicts in determining the appropriate and applicable law.

Legislative drafting requires special techniques and skills not only in drafting legislation but also in deciding which type of legislation is most appropriate to a specific issue. Can the issue only be addressed through a constitutional change? Can the matter be handled by an act of the Assembly? Can the problem be resolved by a ministry adopting secondary legislation such as rules or regulations? Part of policy analysis, as explained in the previous chapters, is to identify the type of legal act that best addresses the policy issue presented.

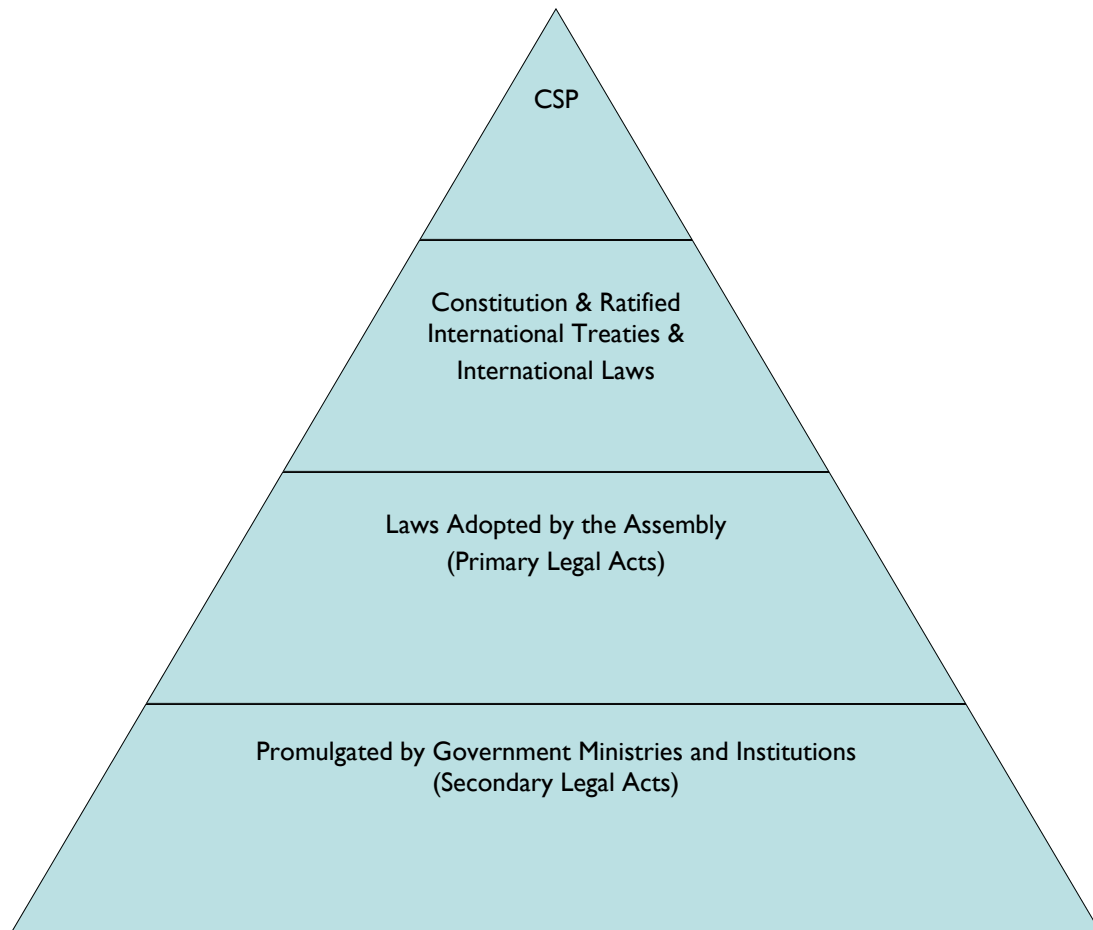
Practitioner’s Note
Deciding What Level of Law to Draft

As a general principle, adopting laws to address a policy matter should be handled at the lowest level of the hierarchy. Thus, if secondary legislation is authorized by law and capable of addressing the policy issue, the drafter **SHOULD NOT** write an entirely new law but rather should draft secondary legislation. If a policy matter can be addressed by writing a new law, the drafter **SHOULD NOT** propose amending the Constitution.

The Constitution is, of course, considered fundamental and superior law. But in Kosovo it is subject to the provisions of the CSP. Thus, the CSP is at the apex of the hierarchy to the extent of its application to a specific policy area. Additionally, the Constitution itself references different legal acts such as international treaties and other instruments, legislation of vital

⁵⁷ The Law on Regular Courts of the former Yugoslavia still controls much of the judiciary’s structure and its judicial processes and procedures.

interest and so forth. The hierarchy of legal norms in Kosovo is represented in the following illustration.



4.2 The Constitution & the CSP

Even more than the Constitution, the CSP is the super-superior law of Kosovo to the extent of its application to a policy area. Article 143 of the Constitution states:

Notwithstanding any provision of this Constitution:

1. All authorities in the Republic of Kosovo shall abide by all of the Republic of Kosovo's obligations under the Comprehensive Proposal for the Kosovo Status Settlement dated 26 March 2007. They shall take all necessary actions for their implementation.
2. The provisions of the Comprehensive Proposal for the Kosovo Status Settlement dated 26 March 2007 shall take precedence over all other legal provisions in Kosovo.

3. The Constitution, laws and other legal acts of the Republic of Kosovo shall be interpreted in compliance with the Comprehensive Proposal for the Kosovo Status Settlement dated 26 March 2007. If there are inconsistencies between the provisions of this Constitution, laws or other legal acts of the Republic of Kosovo and the provisions of the said Settlement, the latter shall prevail. (Emphasis added)

Thus, because the CSP supersedes the Constitution, a legislative drafter should always look to the CSP and the International Civilian Representative's (ICR's) interpretation of the CSP before drafting legislation.⁵⁸ For example, on first consideration the CSP may appear totally irrelevant to the *Law on Crafts*. However, that law must be written in a manner that is compatible with the CSP's overall mandate requiring the government of Kosovo to respect ethnic communities. It is important to note that the ICR's interpretation of a provision in the CSP is final; no government official or government employee can apply the CSP in a manner inconsistent with the ICR's interpretation.

4.3 The Constitution and International Law & Treaties

There are no strict international standards regarding the relationship between a country's Constitution and international law. Different states apply different approaches in reconciling domestic and international obligations. Some countries consider international treaties and laws as superseding domestic national law,⁵⁹ while other countries consider international treaties and laws to be on equal standing with domestic national law.⁶⁰ Still other countries consider their domestic legal systems as superseding international law and treaties in the event of any conflict.⁶¹ Some countries take a hybrid approach.⁶²

⁵⁸ Article 147 of the Constitution provides:

Notwithstanding any provision of this Constitution, the International Civil Representative shall, in accordance with the Comprehensive Proposal for the Kosovo Status Settlement dated 26 March 2007, be the final authority in Kosovo regarding interpretation of the civilian aspects of the said Comprehensive Proposal. No Republic of Kosovo authority shall have jurisdiction to review, diminish or otherwise restrict the mandate, powers and obligations referred to in Article 146 and this Article.

⁵⁹ For example, Article 25 of the Constitution of the Federal Republic of Germany provides that "The general rules of public international law are an integral part of federal law. They take precedence over the laws and shall directly create rights and duties for the inhabitants of the federal territory."

⁶⁰ For example, Article 39(1) of the South Africa Constitution provides, "When interpreting the Bill of Rights, a court, tribunal or forum (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom; (b) must consider international law; and (c) may consider foreign law." Article 232 provides, "Customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament." Article 233 provides, "When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law."

⁶¹ A number of countries support very narrow interpretations of international law, including the People's Republic of China, the military junta in Burma, and the Russian Federation. These countries maintain that sovereignty is the only true international law, and consequently maintain strong control over their domestic affairs and their affairs in the larger world.

⁶² For example, the US Supreme Court held in 2006 that rights granted in the Vienna Convention are to be exercised in conformity with the laws and regulations of the receiving US state: "It is well established that a self-executing treaty binds the states pursuant to the Supremacy Clause, and that the states therefore must recognize the force of the treaty in the course of adjudicating the rights of litigants. And where a treaty provides for a particular judicial remedy * * * courts must apply the remedy as a requirement of federal law. But where a treaty does not provide a particular remedy, either expressly or implicitly, it is not for the federal courts to impose one on the states through lawmaking of their own."

The Kosovo Constitution is the highest *internal* legal authority of the country. Article 16 provides:

The Constitution is the highest legal act of the Republic of Kosovo. Laws and other legal acts shall be in accordance with this Constitution. (Par.1)

The Republic of Kosovo shall respect international law. (Par. 3)

However, Article 16 must be read in harmony with Article 19 of the Constitution. This provision states:

International agreements ratified by the Republic of Kosovo become part of the internal legal system after their publication in the Official Gazette of the Republic of Kosovo. They are directly applied except for cases when they are not self-applicable and the application requires the promulgation of a law.

Ratified international agreements and legally binding norms of international law *have superiority* over the laws of the Republic of Kosovo.

Article 19 is the most important provision in understanding the interplay between the Constitution and international laws⁶³ and treaties. Article 19 specifically recognizes that international laws and treaties supersede the laws of Kosovo, but not necessarily the Constitution of Kosovo. The Constitution provides (a) that all international laws and agreements become part of the fabric of Kosovo's domestic laws, and (b) that in any dispute between domestic law and international obligation, the international obligation will be superior. For example, the Assembly could not adopt a law requiring nationals of the Republic of Turkey to obtain a visa to enter, transit, or stay in Kosovo if such is not to exceed ninety (90) days in any six (6)-month period. Such a law would be in conflict with Article 3 of the "Agreement Between the Government of the Republic of Turkey and the Government of the Republic of Kosovo on the Mutual Abolition of Visas" and therefore invalid.

Practitioner's Note

Relationship between International Law and Kosovo's Domestic Law

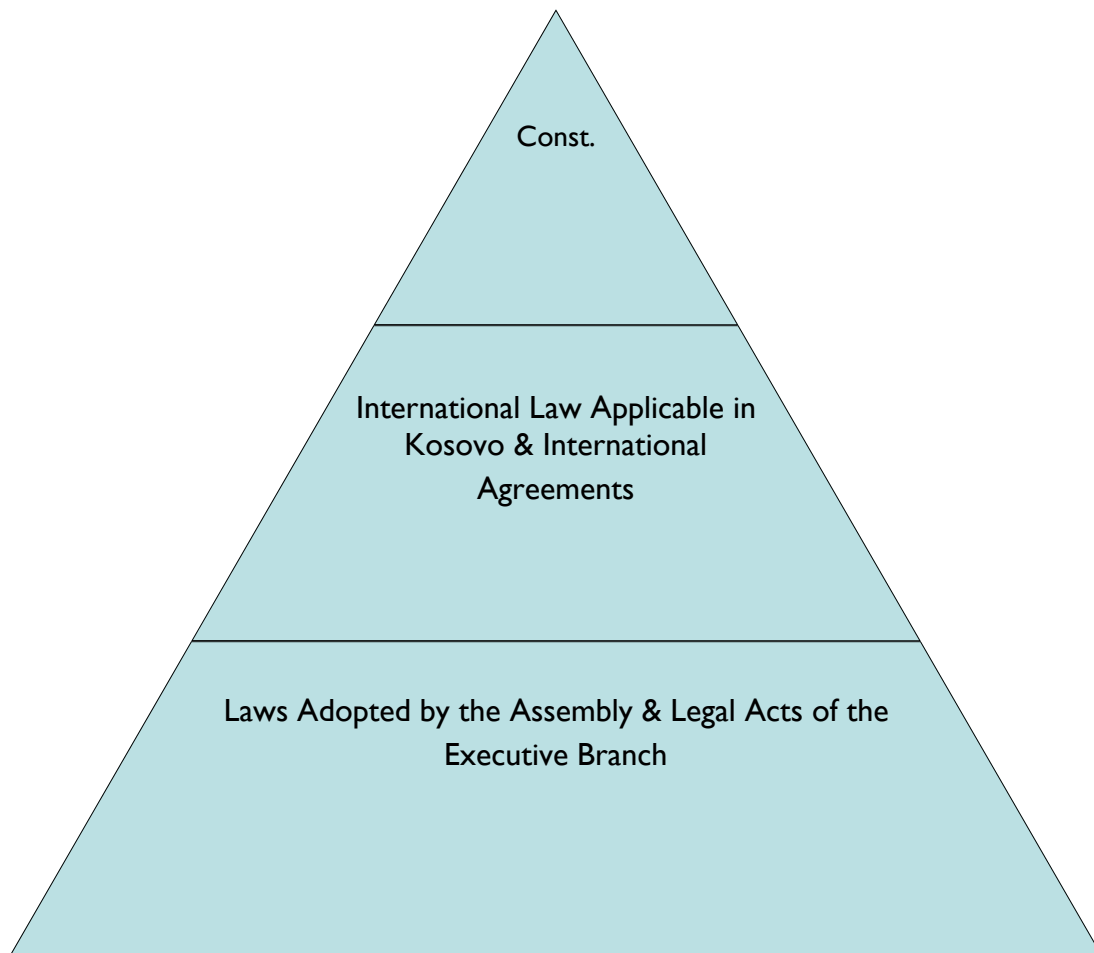
Reading Articles 16 and 19 together, one can conclude the following: (a) the superior law of the Republic of Kosovo is the Constitution; (b) the next superior law is international agreements and treaties; and (c) the next superior law is acts of the Assembly. Consequently, in case of conflicts between legislative acts (both primary and secondary) and international law, the international law prevails.

Moreover the following international instruments and agreements are directly applicable in Kosovo through the Article 22 of the Constitution, which states:

⁶³ It is important to distinguish between international laws directly applicable to Kosovo through the Constitution and subsequent international laws adopted by Kosovo. It is inaccurate for a drafter to assume that because an international law is not mentioned in the Constitution, it is not applicable.

Human rights and fundamental freedoms guaranteed by the following international agreements and instruments are guaranteed by this Constitution, are directly applicable in the Republic of Kosovo and, in the case of conflict, have priority over provisions of laws and other acts of public institutions:

- (1) Universal Declaration of Human Rights;
- (2) European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols;
- (3) International Covenant on Civil and Political Rights and its Protocols;
- (4) Council of Europe Framework Convention for the Protection of National Minorities;
- (5) Convention on the Elimination of All Forms of Racial Discrimination;
- (6) Convention on the Elimination of All Forms of Discrimination Against Women;
- (7) Convention on the Rights of the Child;
- (8) Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment.



A drafter's understanding of this hierarchy is important for a number of reasons. First, all legislation must be written in harmony with the hierarchy. A drafter cannot simply ignore a constitutional mandate or an international obligation when drafting legislation. Second, the drafter must be able to recognize the extent of any potential conflict between the draft legislation and other legal acts, in order to eliminate such conflicts in accordance with the hierarchy. Ignorance of the hierarchy, disregard for the hierarchy, or simply failing to pay attention to the hierarchy will waste time and produce laws that are fundamentally flawed.

4.4 Laws Adopted By the Assembly

Most of the work of the legislative drafters is focused on drafting laws that will be considered and perhaps adopted by the Assembly. Only the Assembly of the Republic has the authority to adopt primary laws. (The procedures for proposing, adopting and promulgating the laws are discussed in Chapter II.) Laws adopted by the Assembly set the general legal framework subject to their implementation by the Executive through secondary legislation.

4.5 Secondary Legislation Adopted By the Executive Branch

The Government, as the Executive Branch, has the primary authority to implement the law adopted by the Assembly. In so doing, the government has the authority to draft and adopt secondary legislation, which themselves constitute legal acts and laws.⁶⁴ This competence is further envisaged and explained by the Rules of Procedure of the Government which state that the Government can issue:

- **Regulations** are based on explicit authority in a law and in accordance with the purpose and aim of the respective law by which the Government regulates in more detail the matters covered by the respective law.
- **Decisions** are Government actions that approve strategies and policies and establish organizations. They may also be used to effectuate appointments, nominations, dismissals and other administrative issues.
- **Orders** are sub-normative acts that have an internal character for the determination of rules of conduct and general rules or for the settlement of a particular relationship. Orders may be issued by either the Prime Minister, the ministerial head of a central institution subordinate to the Prime Minister, or an individual Minister.
- **Administrative instructions** are sub-normative acts that regulate issues of limited scope within the Executive. Administrative instructions may be issued by either the Prime Minister, the ministerial head of a central institution subordinate to the Prime Minister, or an individual Minister.

In exceptional cases, the Government, on its own, may issue normative acts that have the effect of law and are for taking temporary actions. Such normative acts must immediately be sent to the Assembly, which must convene within five (5) days, if not already convened. Such normative acts shall not have any legal effect from the date of issuance, unless approved by the Assembly within forty five (45) days of being issued.

⁶⁴ Kosovo Const., Art. 93(4) empowers the Government to *make decisions and issue legal acts or regulations necessary for the implementation of laws*. The Constitution does not empower the Government to issue legal acts equal to laws adopted by the Assembly.

4.6 Recommended Approach for Resolving Conflicts between Different Sources of Law

As discussed in section 3.4.2, Kosovo faces significant challenges regarding the harmonization of laws given the variety of institutions and sources for legal acts, both past and present. Although not firmly established in Kosovo, the general principles for resolving conflicts between competing legal acts are the following:

- A normative instrument with lower-ranking legal force may not contradict a normative instrument with higher-ranking legal force.
- A normative instrument may be repealed or amended only by a normative instrument of equal or higher legal force.
- Where there is a conflict between legal provisions of equal force, the legal practice is to apply the principle that a more recent provision repeals or amends an older provision.
- A more specific or special rule repeals or amends a general rule, regardless of the date of adoption.
- A decision of the Constitutional Court on a matter within its competency is binding on all persons and authorities in Kosovo.⁶⁵

⁶⁵ Kosovo Const., Art. 116(1). The Constitutional Court may suspend enforcement of a law until the Court issues its decisions. Kosovo Const., Art. 116(2). The repeal of a law, if not provided in the Court's decision, is effective the date of the Court's decision. Kosovo Const., Art. 116(3).

Chapter 5

Research & Special Provisions

5.1 Research Methodology

5.1.1 Identify Key Provisions That Must Always Be Analyzed (e.g., Constitution, etc.)

As noted in Chapter 6, a drafter should always start legal research by looking first to the CSP and then to the Constitution. These two documents will create the frame within which the drafter must work. The drafter must also research a number of other sources before preparing legislation.

5.1.2 Key Research Sources

The following additional research sources will assist the drafter in preparing legislation:

- Constitution of the Republic of Kosovo, <http://www.kushtetutakosoves.info/?cid=2,1>
- Comprehensive Proposal for the Status Settlement for Kosovo, <http://www.icoskos.org/?id=4>
- Official Gazette of Kosovo, <http://www.gazetazyrtare.com/>
- UNMIK Official Gazette, <http://www.unmikonline.org/regulations/unmikgazette/02english/Econtents.htm>
- Assembly of the Republic of Kosovo, <http://www.assembly-kosova.org/?cid=2,1>
- European Commission – Legal Services, http://ec.europa.eu/dgs/legal_service/index_en.htm
- Administrative Instruction No. 14/2008 for the Compose of Draft Laws and Sublegislative Acts
- Constitution Finder (Constitutions of the World), <http://confinder.richmond.edu/>
- Governments on the World Wide Web (WWW), <http://www.gksoft.com/govt/en/>
- United Nations Treaty Collection, <http://treaties.un.org/Pages/Home.aspx?lang=en> & United Nations Treaty Series, <http://treaties.un.org/Pages/UNTSONline.aspx>
- Online Legislative Drafting Resources, http://www.ili.org/ld/online_resources.htm
- EURLEX <http://eur-lex.europa.eu/>
- EUROPA <http://europa.eu/>
- European Court of Human Rights <http://www.echr.coe.int/echr/>
- Council of Europe <http://www.coe.int/>
- World Legal Information Institute <http://www.worldlii.org/> .

5.2 Special Drafting Challenges

5.2.1 Penalties

Some laws prohibit or encourage certain conduct through the use of penalties. Because penalty provisions enable the state to deprive a person of property, liberty, rights, or all three, they must be drafted with great care and precision. An imprecise penalty provision may punish conduct that was not intended to be covered by the law or may not, in application, prohibit or punish the conduct that the law sought to restrain. Competent drafting of penalty provisions requires a working knowledge of substantive criminal law and, particularly, familiarity with the

criminal code and the criminal procedure code.⁶⁶ Penalty provisions state a punishment for violating a law. Penalties in Kosovo can be criminal or administrative in nature.

Criminal penalties should be used cautiously. Before writing a penalty provision, a drafter must check whether another law already prohibits or penalizes the same conduct at issue. This is vitally important. Otherwise, the law may end up containing multiple contradictory penalties for the same behavior, which will not only confuse people, but also make it difficult to enforce the law.

Additionally, the drafter must understand and be able to distinguish criminal penalties from other types of penalties. In some circumstances, it may be necessary for a drafter to mention all of the penalties associated with particular conduct, and include the appropriate cross references. For example, the *Law on Narcotic Mediaments, Psychotropes and Precursors, No. 02/128*, contains specific administrative penalties but also states the general principle that proscribed conduct may result in criminal penalties.⁶⁷ Criminal violations of the law are punished as provided in the penal code; there is no need to list the penalties separately unless they do not already exist.

If no applicable penal provisions are found,, the drafter must consider whether penal provisions should be put in the new law. An alternative option is to amend the criminal code to include relevant penal provisions, referencing the new law. As a general rule, it is better practice to amend the criminal code itself rather than set out separate penalties in a new law. Having penal provisions spread over a number of different laws can lead to confusion, conflicting penalties and possibly uneven consequences for similar conduct.

Practitioner's Note
Drafting Penalty Provisions

When drafting substantive criminal laws, the drafter must ask a series of questions:

- Am I inserting an addition or change into an existing criminal code or series of crimes or am I creating a new crime?
- Exactly what behavior or act is being prohibited?
- What penalties may be imposed for violation of the criminal law?
- Who decides what penalty should be imposed?
- What defenses may apply?

The drafter should follow the Kosovo general style for drafting criminal laws, but be clear about the intent standard and action requirements. For example, a typical criminal statute might read: "Whoever recklessly endangers another by discharging a firearm may be fined not more than \$1,000 euros or imprisoned not more than two years or both." The statute in this case involves a mental state of recklessness. Other possible standards could be intentional or negligent actions. The key is that most criminal laws involve some kind of intentional or improper mind-set by the violator.

⁶⁶ The Provisional Penal Code of Kosovo has been replaced by the Criminal Code of Kosovo. Law on Supplementation and Amendment of the Provisional Criminal Code of Kosovo, No. 03/L-002, Art. 1. Likewise, the Kosovo Provisional Code of Criminal Procedure has been replaced by the Kosovo Code of Criminal Procedure. Law on Amendment and Supplementation of the Kosovo Provisional Code of Criminal Procedure, No. 03/L-003, Art. 1.

⁶⁷ "Violation of the provisions of this Law in case it is a crime is sentenced based on the Provisional Penal Code of Kosovo according to Chapter XXI for Crimes against public health."

The action part of the statute addresses what behavior actually constitutes a violation. This might involve rape, robbery, burglary or any number of things, but the drafter must be explicit about what action has to be proven to meet the standard of a criminal violation.

Typical penalties involve a fine or period of imprisonment or both. Usually the law prescribes a maximum penalty or a range of penalties, and the judge has discretion to determine the appropriate sentence after considering all the circumstances of the case, as well as the offender's criminal history and personal circumstances. Other potential penalties that a drafter may consider are restitution, community service or probation.

Practitioner's Note
Elements of a Criminal Law

Most criminal laws contain three critical elements as follows:

- The level of the violator's intent (e.g., reckless, intentional, etc.).
- The act or action that constitutes a crime (e.g. assault, murder, robbery).
- The penalty associated with the level of intent and the act or action (e.g., a fine, imprisonment, etc.).

In Kosovo, the penalty can be prescribed by reference to the penal code.

5.2.2 Budget & Tax Laws

Budget and tax laws enable the Government to obtain and spend revenues for public purposes. Kosovo operates under the Kosovo Consolidated Budget (KCB). The Budget Law contains the expenses for the central government and the municipalities. In drafting a budget law, drafters must be absolutely clear on three points: (a) what expenses may be covered from the KCB; (b) what is the maximum amount of money for the authorized expense; and (c) what is the time period in which the money must be spent. In Kosovo, the Budget Law itself generally contains the substantive instructions for spending public money. For example, it may contain provisions addressing how a public authority is to handle contingent expenses and revenues, limits on commitments and expenditures, limits and uses of municipal revenues, use of donor money during the fiscal year, and so forth. The main challenge for the drafters of the Budget Law is to state the spending instructions with precision and clarity. Additionally, the *Law on Public Financial Management and Accountability* may impact the drafting of a Budget Law, given the significant directions, reporting requirements, and restrictions contained in that law.

The Budget Law is supplemented by tables that set out the actual amount of money dedicated to each public authority and the general purposes for which the money may be used (e.g., wages and salaries, goods and services, utilities, subsidies and transfers, capital outlays, reserve).

Practitioners Note
Drafting a Budget Law

In preparing the budget law, the drafter should address the following questions:

- How much money will or may be appropriated, e.g., "20,000€"?
- From what source will the money come, e.g., the "Kosovo Consolidated Budget"?
- To whom is the money appropriated, e.g., the "Ministry of Justice"?
- For what purpose is the money appropriated, e.g., "capital projects"?
- What is the time frame for spending the money, e.g., "for fiscal year 2009"?
- What are the substantive limitations on expenditures, e.g., "shall only be expended for" or "expended according to"?

Tax laws must be equally clear and precise. Any failure to be clear or precise may result in one or more of the following: (a) exempting persons, institutions or activities from taxation that were intended to be subject to the tax; (b) allowing for its unequal application; or (c) subjecting persons, institutions, or activities to taxation that were intended to be exempt from the tax.

Practitioner's Note
Drafting Tax Laws

A tax law should identify the following:

- The person, persons, institutions or other entities subject to the tax, e.g., “this tax shall apply to all resident and non-resident natural persons”.
- The nature of the tax, e.g., “personal income tax”, “business income tax”, “value added tax”.
- The activities subject to the tax, e.g., “rent”, “wages”, “business income”.
- Limitations, deductions, exemptions or exceptions to the tax, e.g., “exempt income is”.
- How the tax is calculated, e.g., “taxable income is the difference between”.
- The rate of taxation, e.g., “for taxable income of ___ to ___, 4%”.
- Who must pay the tax, e.g., “Each employer shall . . .”
- How the tax is to be paid, e.g., “remit the tax amount to the Central Bank”.
- The public authority or agency responsible for administering and overseeing the tax.

5.2.3 Creating a New Agency or Institution

When drafting legislation to create a new agency or institution, the draft must be precise in defining the purpose of the new entity, the scope of its competencies, and the scope of its powers. To avoid duplication, the drafter must assess whether the subject matter of the law is being handled by an existing agency, before going forward with creating a new agency.

In creating a new agency, the drafter must not only consider issues related to the agency's competence and authority, but also the costs associated with its creation. Remember, every new government entity comes with costs. Therefore, whenever creating a new agency, a drafter must consider how the agency will be funded.

The *Law on Notary*, No. 03/L-10 provides a good example of creating a new entity. Article 63 creates the Chamber of Notaries, defines its membership, and defines its structure. Article 64 defines the functions and activities of the Chamber. Article 65 defines to whom the Chamber is accountable within the Government. Article 67 defines the competencies of the Chamber. Article 68 defines how the leadership of the Chamber is selected and by whom. Articles 69 and 70 further refine the internal structure of the Chamber.

Practitioner's Note
Creating a New Government Entity

The following questions should guide the drafter's analysis:

- Does an entity currently exist that already has the competence to handle the subject matter of the legislation?
- If not, can the subject matter be assigned to an existing entity whose competence aligns with the subject matter?
- Can the authority of an existing entity be expanded to accommodate the subject matter of the law without exceeding constitutional or other restrictions?
- If a new entity is required, what type of entity should be created? Is a new type of ministry required? A sub-ministry agency? A regulatory agency?
- Is the new entity permanent, temporary or intended to exist for a specific time period?
- What will be the scope of its competency and authority?
- Where in the government structure will the new entity be located and to whom is it accountable?
- What will be the management structure of the new agency? Headed by a director? Overseen by a board?
- Who will appoint the leadership of the new agency and under what terms? Is the leadership civil service or political appointees?
- What will be the status of the new entity's employees?
- If the competency and authority of a new agency overlap with that of an existing agency, which agency will have final authority and in what areas?

5.2.4 Transferring Functions from One Institution to another (New or Existing)

On some occasions, the Government or the Assembly may wish to reorganize the competencies of existing institutions to more closely align similar functions and promote efficiency. Legislation that transfers competencies between existing government entities can be particularly challenging. The failure to “get it right” can result in disorganization in the Government structure and, potentially, a misdistribution of competencies that creates confusion and conflict concerning who has authority and over what. As with any legislation, precision is the key.

In transferring competencies between two existing agencies, make sure that the transferred competencies align with the receiving entity's duties and purpose. For example, it would be inappropriate to transfer responsibility of the budget away from the MEF to the Interior Ministry. To do so would fundamentally distort the mission of both entities, taking a fundamental competency away from the one to whom it legitimately belongs and giving it to one that clearly is not structured to absorb it. Therefore, in transferring competencies, it is not only the drafter must not only draft with precision, but must also make sure that the transfer itself makes sense, in terms of the substance and functions of the receiving agency.

Practitioner's Note
Transferring Competencies between Agencies

The following questions should guide the drafter's analysis in transferring competencies:

- Is the transfer of competencies absolutely necessary, or can the issue be addressed by improving the agency currently responsible for the subject?
- Does the transfer of competencies fit within the overall structure and mission of the entity that will absorb the transferred competencies? Is the agency absorbing the competencies really the right agency?
- If competency is to be transferred, what are the precise competencies to be transferred?
- How will the draft legislation adjust the internal structures of the entities to account for the transfer of competencies away from one and to the other?
- Does the draft legislation need to address a transfer of resources?
- How will the draft legislation address the issue of the validity of acts taken prior to the transfer of competencies?
- What will be the period of transition and what will be the effective date of the *transfer* (as opposed to the effective date of the law)?
- How will the draft legislation address the issue of secondary legislation that may have been issued by the prior agency? Is secondary legislation also transferred or will the entity absorbing the competencies have to promulgate new secondary legislation?
- If the transfer of competency is directly related to public services, how will the public be informed of the transfer and how will the service be maintained during the transition?
- What will happen to the leadership and employees who historically have handled the competency that is now being transferred?

5.2.5 Amending Existing Laws

Laws in Kosovo can be amended in one of two ways: (a) adoption of a law that amends specific sections within an existing law, or (b) adoption of an entirely new law that replaces an existing law. The first approach is the preferred method.

The first approach is governed by Administrative Instruction No. 14/2008, Art. 5(13), which provides that a law amending an existing law address only the provision of the existing law that is being changed. An example is *Law No. 03/L-131 on Amendment and Supplementation of the Law No. 2004/17 on Consumer Protection*. This law specifies the particular sections of the existing law that are being replaced or amended. Article 2 of this law starts with "In Article 7 after the paragraph 7.5, is added four new paragraphs with the following text:[.]"

The second approach is to repeal the existing law and replace it in full with a new law. Under Administrative Instruction No. 14/2008, this approach is used ONLY if the new law is amending more than forty-percent (40%) of an existing law. The instruction does not, however, state how to calculate the threshold of forty-percent (40%) in deciding whether to write an amending law or an entirely new law. Consequently, the drafter has some discretion. Given the general preference for an amending law, this second approach should be used rarely.

Practitioner's Note
Amending an Existing Law

A drafter should only draft a new law *if* the new law substantially changes forty-percent (40%) or more of an existing law.

The title of an amending law should clearly state that it is an amending law, and should identify the *original* law being amended with reference to its number. The appropriate title for an amending law is as follows: "Law No. _____ on Amending [and/or Supplementing] the Law on _____, No. _____." Subsequent amendments to the original law should make reference to the original law and not to prior amending laws. It is generally good practice for an amending law to contain a purpose statement, for example, "This Law amends various provisions of the Law on _____, No. _____."

Practitioner's Note
Titles for Amending Laws

- The title of an amending law must clearly state in its title that it is amending a law, and also identify the law that is being amended.
- As with the title of any law, the title of an amending law should not contain substantive provisions.

Do: Law No. _____ on Amending the Law on _____, No. _____.

Don't: Law No. _____ on Amending the Law No. _____ Amending the Law on _____, No. _____

Following the title and purpose statement, an amending law immediately proceeds to the changes in the existing law. For example, Article 1 in the *Law No. 03/L-003 on Amendment and Supplementation of the Kosovo Provisional Code of Criminal Procedure, No. 2003/26* contains an amending provision. All proceeding Articles likewise contain amending provisions. Thus, an amending law does not restate existing law but, as required in the Administrative Instruction, contains only those provisions of the existing law that are being changed. The Articles within the amending law proceed in sequence not in parallel to the existing law. Thus, Article 1 of the amending law contains the first provision in the existing law that is being changed. Article 2 of the amending law addresses the second provision of the existing law that is being changed and so on. Consequently, Article 1 of an amending law does not necessarily correspond to article 1 of an existing law but rather corresponds to the first provision in the existing law that is being amended. For example, in the above law, Article 1 amends the title of the criminal code while Article 2 changes article 62 of the code.

The nature of the amendment dictates the language the drafter will use in designating the change. For example, there is a difference between supplementation, total repeal and replacement, and partial repeal and replacement. The following are examples of language that should be used in the articles of an amending law:

- *Supplementation*: “Article ____ will be supplemented with a new paragraph as follows:”
- *Total repeal & replacement*: “Article ____ will be deleted in full and replaced by the following:”
- *Partial repeal & replacement*: “In article _____, paragraph _____, the words ‘seventy-two (72)’ are deleted and placed by the words ‘forty-eight (48)’”.

Practitioner’s Note

Reordering Chapters, Articles, Paragraphs and Subparagraphs

In drafting an amending law, the drafter must pay particular attention to any changes to the arrangement of chapters, articles, paragraphs and subparagraphs within an existing law. Supplementing an existing law by adding entirely new chapters, articles, paragraphs, or subparagraphs will change the order of all following portions in the existing law. The drafter must provide for this reordering and renumbering of the provisions.

As an alternative, some legislative drafting experts suggest that rather than reorder existing provisions, the approach of designating new provisions as “Article XA” or “Article Xbis” be used. This approach leaves existing provisions in tact. At this time, Kosovo has not standardized its practice and further direction should be sought.

Chapter 6

Ethics and the Legislative Drafter

6.1 Why Ethics are important to the Drafter

Drafting legislation can be a technically complex activity but drafters are not merely “technicians.” Skilled drafters develop the ability to foresee complex problems, address policy questions and eliminate ambiguity in the laws that they write. To draft laws properly, the drafter must have an extraordinary understanding of the policy issues a law seeks to address and the interaction among complimentary and sometimes competing public policies.

One of the great misconceptions about legal drafting is that one must have highly developed technical writing skills but can “get by” with a general ignorance of public policy. In fact, legislative drafting is all about converting complex public policies into words that are understandable, give direction, and resolve problems. *Drafters are, therefore, in positions of great responsibility.* They interact with a variety of public and private individuals and usually have direct and substantial influence over those individuals, shaping not only the language of the law *but also the underlying thinking of policymakers.* This influence can be as subtle as choosing particular words for a law, or as direct as arguing for or against a particular policy option directly to the policymakers.

Drafters must, therefore, recognize that they, perhaps more than the policymakers themselves, must possess the greatest command of the issues. In a very real sense, drafters become “experts” not only in the technical skills of drafting but also in the very policies of government. Their expertise and influence can be used for great good, or it can be misdirected, producing public policy that is at odds with the general welfare of the citizens of a country. *Being ethical is at the heart of being a skilled and respected drafter.*

6.2 What do we mean by Ethics?

Drafters are in a “client relationship” with the person or persons they work for in preparing a law. Like attorneys, a basic set of norms, both stated and unstated, should guide the drafter. Ethics in the legislative drafting context, address the issues that arise because of the special relationship the drafter has with a client; it is all about the manner in which the drafter uses their skills, knowledge and relationships to affect public policy. Thus, a legislative drafter’s ethical responsibility runs to two separate groups: (a) the immediate individual or individuals for whom the drafter is working at any one moment, and (b) the larger public to whom the drafter owes ultimate loyalty. The legislative drafter must always be mindful of this twofold obligation.

6.3 Basic Ethics of the Drafter

When drafting legislation, the drafter should be guided by the following ethical principles:

- **Honesty** – The drafter acts with due regard for the facts and truth, conveying them faithfully in all communications with clients and stakeholders.
- **Discretion** – The drafter acts with prudence in actions and speech, and maintains the confidences of others unless information is public.
- **Candor** – The drafter is forthright, open, and sincere in interactions with the client and other stakeholders.

- **Objectivity** – The drafter is impartial and fair in analyzing, drafting and advising clients and other stakeholders, never giving preference to a policy, group, or individual so as to favor one over the other.
- **Competence** – The drafter constantly acquires, maintains and uses a high degree of skill in analyzing, drafting and advising clients and stakeholders.
- **Diligence** – The drafter works with commitment and dependability to accomplish the assigned work and acts with the degree of care necessary to do the work.
- **Fairness** – The drafter works without bias and dishonesty towards the objective outcome of a project and treats clients and stakeholders with a high degree of regard.
- **Respect** – The drafter affords clients, policymakers, and the public with a high degree of courtesy and acknowledges that all people have a basic right to considerate conduct.
- **Support and teamwork** – The drafter works in cooperation with other members of the legislative drafting unit and the working group.
- **Law-abiding** – The drafter works with attention to existing laws and regulations.
- **Deference** – The drafter recognizes that public policy decisions rest with the client and ultimately defers to this authority, striving always to avoid undermining policymakers with whom the drafter might disagree.

6.4 How to apply these ethical considerations

Drafters must make sure they are being ethical in their work. First, they must check in with their clients and maintain regular communications. Second, they must seek the guidance of their supervisors and colleagues. When drafters are in the middle of demanding drafting projects, it is easy to lose sight of ethical considerations. Drafters must build procedures into their work to make sure these considerations are being followed.

Practitioner’s Note
Applying Ethics

At each significant point in the drafting process, such as completion of research or creation of the first draft, the drafter should focus on these questions:

- Who is my client? Who am I writing this draft for?
- What new or substantive information have I learned from the drafting process so far, and what needs to be shared with the client?
- What decisions am I making in the drafting process, and what decisions should be deferred to my client?

Applying ethical considerations can be hard. Finding the right balance between honesty, candor, and respect is challenging, especially when dealing with a demanding or misinformed client. Also, when the client is a working group, the wishes of different members of the group can seem unclear or conflicting. This is the perfect time to talk through your decisions and drafting

work with your supervisor and colleagues. They may have experience balancing these ethical considerations and working with these or similar clients. They can help make sure that you are meeting your ethical responsibilities and making the right drafting decisions.

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Appendix I Drafter's Check Lists

The checklists in Appendix I are intended to help the drafter consider a variety of issues. Some of these issues relate to law drafting in general. Others offer guidance on drafting particular types of legislation. The drafter is encouraged to copy these checklists and to use them repeatedly when drafting legislation.

Drafter's Checklist

Elements of a Draft Law

(Chapter 2)

Yes	No	
<input type="checkbox"/>	<input type="checkbox"/>	Does the draft law contain an ENACTING CLAUSE?
<input type="checkbox"/>	<input type="checkbox"/>	Does the draft law have a PURPOSE STATEMENT?
<input type="checkbox"/>	<input type="checkbox"/>	Have you defined special or technical terms and are the DEFINITIONS clear?
<input type="checkbox"/>	<input type="checkbox"/>	Did you review the definitions to make sure there are no substantive or regulatory provisions in this section of the draft law?
<input type="checkbox"/>	<input type="checkbox"/>	Have you addressed in the FINAL PROVISIONS how the law is to be implemented?
<input type="checkbox"/>	<input type="checkbox"/>	Did you give a TIMEFRAME for implementation or promulgation of secondary legislation?
<input type="checkbox"/>	<input type="checkbox"/>	Have you determined whether there are any TRANSITION issues between the draft law and existing laws or institutions? (See Transition Check List)
<input type="checkbox"/>	<input type="checkbox"/>	Have you included an effective date?
<input type="checkbox"/>	<input type="checkbox"/>	If the IMPLEMENTING DATE is different from the EFFECTIVE DATE, have you stated so in the draft law and identified the appropriate dates?
<input type="checkbox"/>	<input type="checkbox"/>	If appropriate, does the draft law contain a provision REPEALING an existing law?
<input type="checkbox"/>	<input type="checkbox"/>	Does the draft law impact any prior government act? If so, have you included a provision either repealing that action or "SAVING" the prior acts?
<input type="checkbox"/>	<input type="checkbox"/>	Is the application of the draft law intended to be RESTRICTED in any way? If so, have you addressed this issue?

Drafter's Checklist

Transition Provisions

(Chapter 2)

- | Yes | No | |
|--------------------------|--------------------------|---|
| <input type="checkbox"/> | <input type="checkbox"/> | If needed, did you address transition issues either (a) between existing institutions or (b) between old law(s) and the new draft law? |
| <input type="checkbox"/> | <input type="checkbox"/> | Does the draft law replace an existing law? If YES, have you addressed the issue of repealing the old law? |
| <input type="checkbox"/> | <input type="checkbox"/> | If the draft law is intended to specifically repeal an existing legal provision, have you included a provision repealing the old law? |
| <input type="checkbox"/> | <input type="checkbox"/> | If the draft law complements an existing law, have you analyzed the two laws to make sure they are complementary and not contradictory? |
| <input type="checkbox"/> | <input type="checkbox"/> | If the draft law complements a portion of an existing law, have you analyzed the two laws together to make sure that the draft law is not broader than necessary? |
| <input type="checkbox"/> | <input type="checkbox"/> | Have you written the transition provisions narrowly enough to impact only the subject matter of the draft law and not inadvertently repeal, modify, nullify, or conflict with an existing legal provision you want to leave in place? |
| <input type="checkbox"/> | <input type="checkbox"/> | Did you clearly name the agency responsible for implementing the law and clearly state its authority and mandate? |

Drafter's Checklist

Structure & Order of Draft Laws

(Chapter 3)

- | Yes | No | |
|--------------------------|--------------------------|---|
| <input type="checkbox"/> | <input type="checkbox"/> | Have you reviewed ADMINISTRATIVE INSTRUCTION NO. 14/2008 for Composing Draft Laws and Sub-Legislative Acts? |
| <input type="checkbox"/> | <input type="checkbox"/> | Does this draft law require the creation of a BOOK? |
| <input type="checkbox"/> | <input type="checkbox"/> | If the draft law is large enough to justify a book, have you divided it into PARTS? |
| <input type="checkbox"/> | <input type="checkbox"/> | Have you divided the draft law into CHAPTERS and grouped relevant articles under Chapter headings? |
| <input type="checkbox"/> | <input type="checkbox"/> | Do you need to divide the Chapters into SUBCHAPTERS? |
| <input type="checkbox"/> | <input type="checkbox"/> | Have you consecutively numbered the ARTICLES regardless of Chapter numbers? |
| <input type="checkbox"/> | <input type="checkbox"/> | Is an Article complex enough to justify it being further divided into PARAGRAPHS and SUBPARAGRAPHS? |
| <input type="checkbox"/> | <input type="checkbox"/> | Have you numbered all the paragraphs and subparagraphs correctly? |
| <input type="checkbox"/> | <input type="checkbox"/> | Did you review the final draft law to ensure that it complies with all numbering and structural requirements? |

Drafter's Checklist

Grammar

(Chapter 3)

Yes **No**

- | | | |
|--------------------------|--------------------------|--|
| <input type="checkbox"/> | <input type="checkbox"/> | Did you use SIMPLE, BRIEF, CLEAR, AND PRECISE terms in the draft law? |
| <input type="checkbox"/> | <input type="checkbox"/> | Did you use ACTIVE VOICE instead of passive voice? |
| <input type="checkbox"/> | <input type="checkbox"/> | Did you use NOUNS in the singular? |
| <input type="checkbox"/> | <input type="checkbox"/> | Did you avoid PRONOUNS? |
| <input type="checkbox"/> | <input type="checkbox"/> | Did you distinguish between and properly use "MUST" (mandatory) and "MAY" (permissive)? |
| <input type="checkbox"/> | <input type="checkbox"/> | Did you use FINITE VERBS? |
| <input type="checkbox"/> | <input type="checkbox"/> | Did you avoid using NEGATIVE PHRASING? |
| <input type="checkbox"/> | <input type="checkbox"/> | Did you use GENDER NEUTRAL LANGUAGE? |
| <input type="checkbox"/> | <input type="checkbox"/> | Did you use ETHNIC NEUTRAL LANGUAGE if the law is intended to apply equally to all people? |
| <input type="checkbox"/> | <input type="checkbox"/> | Did you avoid EXCESSIVE WORDINESS in the language of the draft law? |

Drafter's Checklist

Hierarchy of Norms

(Chapter 5)

Yes **No**

- | | | |
|--------------------------|--------------------------|---|
| <input type="checkbox"/> | <input type="checkbox"/> | Have you reviewed the COMPREHENSIVE SETTLEMENT PROPOSAL to determine if any of its provisions control a provision in the draft law? |
| <input type="checkbox"/> | <input type="checkbox"/> | Have you reviewed the CONSTITUTION to determine if a specific provision will control how you must draft the law or any specific portion of the draft law? |
| <input type="checkbox"/> | <input type="checkbox"/> | Have you reviewed any applicable INTERNATIONAL agreements, laws, conventions or treaties to determine if they will control how you write the draft law? |
| <input type="checkbox"/> | <input type="checkbox"/> | Do any of the following specifically apply to the subject matter of the draft law? |
| | <input type="checkbox"/> | Universal Declaration of Human Rights? |
| | <input type="checkbox"/> | European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols? |
| | <input type="checkbox"/> | International Covenant on Civil and Political Rights and its Protocols? |
| | <input type="checkbox"/> | Council of Europe Framework Convention for the Protection of National Minorities? |
| | <input type="checkbox"/> | Convention on the Elimination of All Forms of Racial Discrimination? |
| | <input type="checkbox"/> | Convention on the Elimination of All Forms of Discrimination Against Women? |
| | <input type="checkbox"/> | Convention on the Rights of the Child? |
| | <input type="checkbox"/> | Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment? |
| <input type="checkbox"/> | <input type="checkbox"/> | Have you reviewed CONSTITUTIONAL COURT decisions to determine whether any of them may control how you draft the law? |

Drafter's Checklist

Penalty Provisions

(Chapter 6)

- | Yes | No | |
|--------------------------|--------------------------|---|
| <input type="checkbox"/> | <input type="checkbox"/> | Is the specific intent of the draft legislation to create a NEW CRIME or penalty? |
| <input type="checkbox"/> | <input type="checkbox"/> | Have you defined the criminal conduct with PRECISION AND CLARITY? |
| <input type="checkbox"/> | <input type="checkbox"/> | Do you think an ORDINARY PERSON will understand what act or acts are prohibited? |
| <input type="checkbox"/> | <input type="checkbox"/> | Have you specifically identified the ACT OR ACTS that constitute the criminal conduct? |
| <input type="checkbox"/> | <input type="checkbox"/> | Have you specifically defined the PENALTY OR PENALTIES that may be imposed for violating the criminal law? |
| <input type="checkbox"/> | <input type="checkbox"/> | Do you believe the penalty or penalties are reasonably related to the prohibited conduct? If YES, why? If NO, why? Explain. |
| <input type="checkbox"/> | <input type="checkbox"/> | Have you defined the NATURE OF THE PENALTY OR PENALTIES, e.g., criminal, administrative? |
| <input type="checkbox"/> | <input type="checkbox"/> | Have you AVOIDED GENERAL LANGUAGE that might make certain conduct a crime when the Assembly does not intend such conduct to be covered by the law? |
| <input type="checkbox"/> | <input type="checkbox"/> | If there are DEGREES OF SEVERITY in the criminal conduct and the penalties, have you designated the degrees? |
| <input type="checkbox"/> | <input type="checkbox"/> | Have you identified and defined who makes the decision concerning what penalty should be imposed? |
| <input type="checkbox"/> | <input type="checkbox"/> | Have you considered whether there are or should be any defenses to otherwise criminal conduct, e.g., self-defense? If so, have you defined and listed the defenses? |

Drafter's Checklist

Tax Law (Chapter 6)

- | Yes | No | |
|--------------------------|--------------------------|---|
| <input type="checkbox"/> | <input type="checkbox"/> | Have you clearly defined in the draft law the PERSON, PERSONS, INSTITUTIONS, OR OTHER ENTITIES subject to the tax? |
| <input type="checkbox"/> | <input type="checkbox"/> | Have you clearly defined in the draft law THE NATURE OF THE TAX? |
| <input type="checkbox"/> | <input type="checkbox"/> | Have you clearly defined in the draft law the ACTIVITY OR ACTIVITIES that will be subject to the tax? |
| <input type="checkbox"/> | <input type="checkbox"/> | Have you clearly defined in the draft law any LIMITATIONS, DEDUCTIONS, EXEMPTIONS, OR EXCEPTIONS to the tax? |
| <input type="checkbox"/> | <input type="checkbox"/> | Have you clearly defined in the draft law the precise manner in which the TAX WILL BE CALCULATED? |
| <input type="checkbox"/> | <input type="checkbox"/> | If appropriate, have you clearly defined in the draft LAW THE RATE OF TAXATION? |
| <input type="checkbox"/> | <input type="checkbox"/> | Have you clearly defined in the draft law the persons or entities that must REMIT THE TAX to the government? |
| <input type="checkbox"/> | <input type="checkbox"/> | Have you clearly defined in the draft law HOW AND TO WHOM THE TAX IS TO BE REMITTED? |
| <input type="checkbox"/> | <input type="checkbox"/> | Have you clearly defined in the draft law the PUBLIC AUTHORITY OR AGENCY that will be responsible for administering and overseeing the tax? |

Drafter's Checklist

Creating a New Government Agency

(Chapter 6)

- | Yes | No | |
|--------------------------|--------------------------|---|
| <input type="checkbox"/> | <input type="checkbox"/> | Can implementation of the law be assigned to an EXISTING GOVERNMENT AGENCY or can the authority of an existing agency be expanded to accommodate the law? |
| <input type="checkbox"/> | <input type="checkbox"/> | Does the transfer of competencies fit within the OVERALL STRUCTURE AND MISSION of the existing entity that will absorb the competencies? |
| <input type="checkbox"/> | <input type="checkbox"/> | If a new agency is required, have you defined in the draft law WHAT TYPE OF AGENCY SHOULD BE CREATED, e.g., ministry, sub-ministry, regulatory agency? |
| <input type="checkbox"/> | <input type="checkbox"/> | Have you considered whether the new agency is to be PERMANENT or TEMPORARY? |
| <input type="checkbox"/> | <input type="checkbox"/> | Have you clearly defined in the draft law the SCOPE, COMPETENCY, AND AUTHORITY OF THE NEW AGENCY? |
| <input type="checkbox"/> | <input type="checkbox"/> | Have you determined where in the government structure the NEW AGENCY WILL BE LOCATED AND TO WHOM IS IT ACCOUNTABLE? |
| <input type="checkbox"/> | <input type="checkbox"/> | Have you defined in the draft law the MANAGEMENT STRUCTURE of the new agency? |
| <input type="checkbox"/> | <input type="checkbox"/> | Have you defined in the draft law who will appoint THE LEADERSHIP OF THE NEW AGENCY and what type of position will head the agency? |
| <input type="checkbox"/> | <input type="checkbox"/> | Have you defined in the draft law whether the leadership and employees will be CIVIL SERVANTS OR POLITICAL APPOINTEES? |
| <input type="checkbox"/> | <input type="checkbox"/> | Have you determined whether there will be any CONFLICTS BETWEEN THE NEW AGENCY AND ANY EXISTING SIMILAR AGENCIES and how such conflicts will be addressed in the draft law? |
| <input type="checkbox"/> | <input type="checkbox"/> | Have you defined in the draft law the SECONDARY LEGISLATIVE AUTHORITY of the new agency? |
| <input type="checkbox"/> | <input type="checkbox"/> | Have you defined in the draft law the date and circumstances under which this new agency will actually BECOME EFFECTIVE? |

Drafter's Checklist

Shifting Competencies between Existing Government Agencies

(Chapter 6)

- | Yes | No | |
|--------------------------|--------------------------|--|
| <input type="checkbox"/> | <input type="checkbox"/> | Does your draft law MOVE A COMPETENCY from one existing agency to another? |
| <input type="checkbox"/> | <input type="checkbox"/> | Is the shift of competencies ABSOLUTELY NECESSARY? |
| <input type="checkbox"/> | <input type="checkbox"/> | Does the competency that is being reassigned FIT WITH THE EXISTING PURPOSE of the agency receiving the competency? |
| <input type="checkbox"/> | <input type="checkbox"/> | If the competency does not fit within the purpose of the receiving agency, have you EXPANDED ITS MANDATE to accommodate the shift? |
| <input type="checkbox"/> | <input type="checkbox"/> | Have you DEFINED IN THE DRAFT LAW THE PRECISE COMPETENCY OR COMPETENCIES that will be moved? |
| <input type="checkbox"/> | <input type="checkbox"/> | Have you addressed in the draft legislation ADJUSTING THE INTERNAL STRUCTURES of the respective entities to account for the transfer of competencies away from one and to the other? |
| <input type="checkbox"/> | <input type="checkbox"/> | Does your draft legislation need to address a TRANSFER OF RESOURCES (personnel or otherwise) between the affected agencies? |
| <input type="checkbox"/> | <input type="checkbox"/> | Does your draft legislation address the issue of the VALIDITY OF ACTS TAKEN PRIOR to the transfer of competencies? |
| <input type="checkbox"/> | <input type="checkbox"/> | Have you addressed in the draft legislation the TRANSITION PERIOD and the effective date of the transfer (not the effective date of the law)? |
| <input type="checkbox"/> | <input type="checkbox"/> | Have you addressed in the draft legislation the issue of SECONDARY LEGISLATION that may have been issued by the prior agency? Is secondary legislation transferred or will the entity absorbing the competencies have to promulgate new secondary legislation? |
| <input type="checkbox"/> | <input type="checkbox"/> | If the transfer of competency is directly related to public services, have you considered how to MAINTAIN PUBLIC SERVICES during the transition and how the public will be informed? |

Drafter's Checklist

Final Checklist

- | Yes | No | |
|--------------------------|--------------------------|---|
| <input type="checkbox"/> | <input type="checkbox"/> | Did you use the APPROPRIATE type of legislation? |
| <input type="checkbox"/> | <input type="checkbox"/> | If enacted, do you think the draft law will ACCOMPLISH ITS PURPOSE? |
| <input type="checkbox"/> | <input type="checkbox"/> | Did you REVIEW AND OBSERVE any CSP, Constitutional or International Agreements the limit the draft law? |
| <input type="checkbox"/> | <input type="checkbox"/> | Does the TITLE express the subject of the draft law adequately? |
| <input type="checkbox"/> | <input type="checkbox"/> | Did you put the ENACTING CLAUSE in proper form? |
| <input type="checkbox"/> | <input type="checkbox"/> | Did you make the PURPOSE STATEMENT simple and clear? |
| <input type="checkbox"/> | <input type="checkbox"/> | Are the Chapters, Articles, Paragraphs and Subparagraphs LOGICALLY ORGANIZED? |
| <input type="checkbox"/> | <input type="checkbox"/> | If used, did you review the CROSS-REFERENCES to other laws to make sure they are accurate? |
| <input type="checkbox"/> | <input type="checkbox"/> | If necessary, did you REPEAL conflicting laws or conflicting provisions in the laws? |
| <input type="checkbox"/> | <input type="checkbox"/> | Did you make PROPER REFERENCE TO EXISTING Kosovo laws, etc.? |
| <input type="checkbox"/> | <input type="checkbox"/> | Did you use the CORRECT TITLES for public officials, ministries, agencies, etc. responsible for implementing the draft law or likely to be impacted by the draft law? |
| <input type="checkbox"/> | <input type="checkbox"/> | Did you REMOVE "DRAFT" LANGUAGE from the law so that its final publication will not appear to be in draft form? |
| <input type="checkbox"/> | <input type="checkbox"/> | Did you SPELL-CHECK the draft law in Albanian, Serbian and English? |
| <input type="checkbox"/> | <input type="checkbox"/> | Did you GRAMMAR CHECK the draft law in Albanian, Serbian and English? |
| <input type="checkbox"/> | <input type="checkbox"/> | Did you give the draft law to a colleague or superior to REVIEW FOR ANY ERRORS? |

Appendix II

Recommendations and Approaches to Policy Development

Tulane University Public Law Center

Policy development is an important but elusive part of the legislative drafting process. Suggested strategies for policy development often advise drafters to digest documents and discuss matters thoroughly—accurate enough advice, but arguably not that useful in helping drafters bridge the gap between a perceived problem and a proposed legislative solution. This chapter adopts a different strategy, attempting to lend concreteness to the policy development process by describing specific structures, concepts, mechanisms, and procedures that facilitate the drafter’s movement from an “idea” to an “instrument.”

Steps in Drafting

We start with an overview of the drafting process as described by Reed Dickerson in Chapter IV of his book, *The Fundamentals of Legal Drafting: “Steps in Drafting.”*⁶⁸ Dickerson breaks the drafting process down into several discrete tasks that are diagrammed in Illustration #1. Dickerson readily acknowledges at the outset that “these elements cannot be separated functionally,”⁶⁹ but he nonetheless promises value in considering them as separate steps in the drafting process, and that is how we will discuss them.

Dickerson describes the first part of the legislative drafting process as the “substantive” or “thinking” part of the process; we might also identify this as the “policy development” phase that is the subject of this Chapter. Illustration #1 diagrams this part of the process as Steps 1-4. Dickerson describes the second part of the process as the “compositional” or “drafting” part of the process. In Dickerson’s view of drafting, first we think; then we write. Steps 5-9 in Illustration #1 diagram the “writing” part of the process. Our focus in this Chapter will be on Steps 1-4.

Dickerson’s “Substantive Step One” involves “Finding Out What the Client Wants,” which is diagrammed in Illustration #1 as gathering factual information and objectives from the client. The drafter should approach this part of the process with an open mind, absorbing information like a sponge and suspending judgment for the moment on the merits or demerits of any ideas put forward. The drafter can and should ask questions to gather more information and enhance understanding of the drafting project, but it’s a good idea at the outset to let the client speak freely about the perceived problem and suggest any possible solutions. The drafter could make notes about follow-up questions to be asked later, in order not to interrupt the flow of the client’s thoughts. The interview process might thus resemble a funnel, characterized at the outset by a free-ranging discussion and rather general questions, but increasingly narrowing its focus and raising more detailed questions to gather in-depth information. Drafters may find it helpful to develop and use a checklist of questions in their client interviews. It’s also best if drafters are involved at the earliest possible stage of the policy development process, but that decision often lies beyond the drafter’s control.

Dickerson incorporates in his description of “Substantive Step One” a task that has been separately identified and diagrammed as Step 2, “Analysis.” As the drafter gathers factual information about the project, the drafter’s analytical faculties will begin to identify relevant

⁶⁸ Reed Dickerson, *The Fundamentals of Legal Drafting* (2nd Ed.: Little, Brown and Company, 1986) (hereinafter, “Dickerson”). See Appendix ___ for a copy of Chapter IV, “Steps in Drafting.”

⁶⁹ Dickerson at 51.

areas of the law that must be researched and practical questions that must be answered. The drafter’s “analysis” might begin during the client interview, continue in a post-interview phase of quiet contemplation, and benefit at some point from a “brainstorming” session with colleagues in the drafting office. Gathering the facts is just the first step; analyzing them to identify relevant legal and practical research is an essential second step in the drafting process.

Dickerson’s next “Substantive Step” (diagrammed as Step 3 in Illustration #1) is “Exploring the Legal Framework” through “Legal Research.” The drafter must develop a good understanding of existing law before revising it or proposing an entirely new body of law to replace it. The drafter must not only look “inward” at existing laws but must also look “outward” at other related laws that may be affected by the new legislation. For example, a drafter who has been asked to prepare legislation that defines and restricts “usury” as practiced by banks might also need to review laws that govern the financing of automobile purchases or real estate transactions by other types of lenders; the drafter should consider whether a definition of usury drafted for “inward” application to banking law might have any unintended consequences or create inconsistencies with regard to its “outward” application in other bodies of law. Thorough legal research will enable drafters to avoid implied repeals, overlaps, or inconsistent terminology.⁷⁰

The fourth and final step in the policy development process is “Synthesis” leading to an outline—what Dickerson calls “Developing a Plan of Organization.” Almost every drafter would prefer to draft from a good structural outline, but developing one is a major challenge, because our minds do not generally think in such orderly terms as Roman Numerals I-II-III, Paragraphs A-B-C, Subsections 1-2-3, Subdivisions a-b-c, and so forth and so on.⁷¹ We’ll consider below how the “Whirlybird” Exercise can assist drafters in producing such an orderly structural outline, but suffice it to say for the moment that the “thinking” part of the legislative drafting process concludes and the “writing” part begins when the drafter has embodied the products of the policy development phase in a good outline.

Once produced, an outline is not “sacred text” forever thereafter unchangeable. A drafter should instead regard the outline as a working document, a tentative draft or a work in process that remains open to change as new facts, new research, new analysis and new insights may require. This observation acknowledges the “feedback loop” shown in Illustration #1. As noted at the outset, the discrete components of the drafting process “cannot be separated functionally.” Drafters do not neatly and eternally conclude their fact gathering and move on to analysis, which they then conclude and move on to legal research. Each of these separately described “steps” bleed over into one another, constantly inviting more fact gathering, more analysis, more legal research—all informed by fact gathering, analysis, and research that have gone before and all of them ongoing tasks. The “feedback loop” recognizes this reality.

With that general overview and framework for the legislative drafting process in mind, let’s next turn our attentions to the challenge of “getting started.” How might the drafter facing a blank page (or the blinking cursor on a blank computer screen) begin to convert a “concept” into concrete language?

Getting Started

The Journalist’s Questions provide a good vehicle for “getting started” on a drafting project. The questions are not just about “gathering facts,” though that’s frequently how journalists use them.

⁷⁰ Dickerson at 58.

⁷¹ “Although most lawyers are familiar with the functions of an outline, in practice they underestimate its concrete utility and, especially, how hard it is to make.” Dickerson at 60.

“Who, what, when, where, why, how, and how many” are also a powerful analytical tool, allowing the drafter to understand the project better and gain perspective by answering those questions.

Professor Richard Wydick puts it this way in his wonderful little book entitled *Plain English for Lawyers*:

Every legal problem involves people. Without people, there would be no legal problems. Yet legal writing too often ignores people and addresses itself to some bloodless, timeless cosmic void. . . .

When you find yourself struggling to express a complex legal idea, remember to ask yourself . . . “Who is doing what to whom?”⁷²

Asking the Journalist’s Questions is a good way to lend concreteness to a drafting project and good way to begin writing.

The “Whirlybird” is another good way to begin the drafting process by first preparing a structural outline of the draft. American drafting expert Bryan Garner calls this exercise the “Whirlybird” because the resulting diagram looks like the rotors of a helicopter (or “whirlybird”) as viewed from above. See Illustration #2.

The Whirlybird is a useful device for “brainstorming” on paper. Here’s a brief description of how it works. Let’s start with a legislative drafting project: Assume we are drafting legislation to establish a law school. The words “law school” are encircled at the center of the page, describing the main topic of the drafting exercise. We then begin to brainstorm “branches” (or “rotors”) emanating from that central circle and signifying major items for consideration in the proposed legislation. For example, the proposed law school will need to address such major topics as Administration, Faculty, Facilities, Students (and perhaps many other topics not shown in Illustration #2). Branching out further from each of these major topics are more specific and related items (e.g., the “Administration” may consist of Deans, Financial Services, Computer Services, Building Management; “Faculty” concerns might include Tenure, Research Assistance, Hiring and Advancement Policies; “Facilities” might address the Library, Wireless Internet, Classrooms, Faculty Offices; “Students” might require Admissions Policies, Counseling Services, Extracurricular Activities, Graduation Requirements). Still further branches (or “twigs”) might provide details about the number and role of Deans (e.g., Dean of the Law School, Vice-Dean for Academic Affairs, Dean of Admissions) or the particular Extracurricular Activities available to students (e.g., Law Review, Moot Court, Community Service Programs).

The Whirlybird as presented in Illustration #2 looks like an orderly representation of the “brainstorming” process, but we must recognize the disorderly process by which it may have been assembled. We cannot know by viewing the final product when each “branch” or “twig” entered the picture. In most Whirlybird exercises they’re written down as random thoughts arise, in no particular order. Sometimes a major topic branch may lead immediately to the flood of related thoughts that produce all of the detailed “twigs” on that branch. More often, however, the Whirlybird grows by adding “twigs” here and there, moving back and forth among the major topics and adding specifics without following any coherent plan of organization. Only in retrospect does the Whirlybird enable drafters to produce a coherent plan of organization in the form of a detailed structural outline, as demonstrated in Illustration #3.

⁷² Richard C. Wydick, *Plain English for Lawyers* 76-77 (4th ed.: Carolina Academic Press, 1998) (hereinafter “Wydick”).

The Whirlybird frees drafters from the constraints of a linear thought process and enables them to capture the products of a creative and chaotic thought process. The Whirlybird can also be a collaborative enterprise, enabling groups of drafters, experts, clients, and others to share their thoughts across divisions of professionalism or technical skills. It's been said of "brainstorming" that it's best done with a group, because otherwise, you run the risk of just getting a "drizzle." The Whirlybird invites group participation in the brainstorming phase of a policy development process.

The whole point of the Whirlybird is to capture randomness on paper, so in performing this exercise, be careful to observe the cardinal rule of brainstorming: Accept all ideas as worthy and suspend critical judgments until after the brainstorming process has been concluded.

One final device for "getting started" involves posing the question, "How can I avoid drafting this project?" The drafter doesn't actually expect to escape responsibility for producing the draft, but posing the question helps the drafter gain a more informed perspective on the proposed legislation. The drafter might ask, for example, "Is the legislation prohibited by our constitution?" The answer could suggest constitutional problems to be avoided through careful research and drafting. Could the need for new legislation be eliminated by a ministry's promulgation of subordinate legislation? Perhaps not, but again, the answer may suggest that primary legislation must be drafted to authorize the promulgation of subordinate legislation and may also identify which ministry or ministries are relevant to implementation of the new legislation.

Fiscal and Economic Impact Statements

Cost is almost always an issue. Understanding the legislation with an eye toward its financial implications should inform the legislative drafting process. Preparing a fiscal and economic impact statement gives drafters another useful perspective on the policy development process.

The "fiscal" analysis examines legislation's impact on public revenues. What will it cost the government to implement the proposed new legislation? Will new employees need to be hired or can demands be met by existing staff? Will the new legislation involve new leasing expenses or capital construction costs? What new furnishings, equipment, software programs, computers, vehicles, or other movables may be required in order to implement the new legislation? When will new revenues be needed—all at once when the new legislation becomes effective or over some longer period of time when new revenues can be phased into the budgeting process?

The "economic" analysis examines "external" financial impacts—as, for example, on private businesses or individuals. Will the new program be supported by new taxes? Will the new legislation create a competitive advantage (or disadvantage) for different actors in the marketplace? How might the legislation be drafted differently to diminish economic impacts?

Even if drafters do not actually complete final fiscal and economic impact statements, they will benefit from asking and answering these types of questions during the policy development process.

Getting the Answers

Drafting projects often originate as a problem among "clients" or "stakeholders" whose interests are directly and adversely affected. Their acute interest in a problem does not, however, necessarily make them the best source of guidance in moving toward a solution. Drafters may often be better served by identifying a "resource person" whose expertise in the

problem area can help the drafter identify appropriate legislative or other responses. One of the drafter's most useful strategies in the policy development process will be to identify an expert or experts that the drafter can consult in getting the right answers and developing workable solutions to the vexing problems that give rise to proposed legislation.

Drafters must be cautious in selecting an expert, because the selection can have a significant (and often unintended) impact on the policy development process. In drafting child custody legislation, for example, a drafter might be guided to different "answers" depending on whether the expert consulted was (1) an educator; (2) a banker; (3) a psychiatrist; (4) a juvenile rights lawyer; (5) a religious leader; (6) an organization of divorced fathers; or (7) a representative of single mothers.⁷³ Consider these observations from an article on "The Ethics and Politics of Legislative Drafting":

Which expert or point of view a drafter consults can determine the drafter's perspective on the bill draft.
. . . The choice of an "expert" is not an innocuous or value-neutral decision; on the contrary, it is value-loaded.⁷⁴

Drafters might adopt any of several different approaches in response to the challenge of selecting an expert. A drafter might consult the client and let the client choose an expert. The drafter might consult several different experts to obtain a more balanced view of the matter. The drafter might avoid expert consultation altogether by conducting independent research. Underlying each of these responses is the drafter's recognition that choosing an expert is a meaningful decision—a decision that may have serious implications in the policy development process.

Madman-Architect-Carpenter-Judge

American drafting expert Bryan Garner offers the "Flowers Paradigm"⁷⁵ to describe the sequence of "personalities" exhibited by legislative drafters as they develop a drafting project from its earliest conceptual stages into a final, polished product. The Flowers Paradigm characterizes those personalities as Madman, Architect, Carpenter, and Judge.

The "Madman" describes the earliest "brainstorming" stage in the evolution of a drafting project and is best illustrated by the Whirlybird exercise. The drafter's thoughts come randomly and chaotically in a free flow of ideas. Critical judgment is suspended in favor of an uninhibited creative process that can appear messy and haphazard.

The "Architect" arranges those haphazard ideas into a more coherent organized form, as exemplified by the structural outline produced after the Whirlybird exercise. The Architect is concerned about orderliness but not with details.

The "Carpenter" begins "construction" by choosing words, writing sentences, and crafting the initial draft of a proposed instrument. The draft embodies ideas and the organizational scheme that were produced by the Madman and the Architect.

⁷³ Adapted from Roger Fisher & William Ury, *Getting to Yes: Negotiating Agreement Without Giving In* 69 (2nd ed. 1991).

⁷⁴ David A. Marcello, "The Ethics and Politics of Legislative Drafting," 70 *Tulane L. Rev.* 2437, 2447-2448 (1996).

⁷⁵ Named after Beverly Flowers, a colleague of Garner's at the University of Texas.

The “Judge” brings critical review to the document, focusing on such details as grammar and punctuation, the accuracy of citations, proper format, and the elimination of surplus words. The Judge polishes and revises the preliminary draft into its final, finished form, appropriate for introduction as proposed legislation.

The policy development process that is the focus of this Chapter resides mostly in steps 1 and 2, the Madman and Architect phases, but policy considerations are also addressed in the actual drafting process (#3: the Carpenter) and still to some extent in the evaluation and revision process (#4: the Judge). Here’s how one commentator on the legislative drafting process characterized the relationship between “drafting” and “policy development”: “Only in the drafting is the proponent’s intent developed. At this stage of the legislative or rule making process, almost every word chosen by the drafter reflects a policy choice.”⁷⁶

Devil’s Advocate

Drafters can improve the quality of a draft and advance the policy development process by playing “devil’s advocate” with their own work. If time permits, drafters would do well to put aside their initial draft for a while, returning to it a day or two later with the critical eye of a potential opponent or other interested party. View the draft from the perspective of a person or entity regulated by the proposed new legislation or financially impacted by its requirements. Consider how those responsible for enforcement might regard it. Ask if the public will understand the legislation and what it requires of them. This process of playing “devil’s advocate” with the draft will likely lead to revisions of language and may well lead to some reconsideration of policy choices.

First Principles and Concluding Observations

All drafters should accept as a “first principle” of legislative drafting that “The client makes the policy decisions.”

This relatively simple proposition can be quite a bit more complicated in practice. As noted earlier, “Only in the drafting is the proponent’s intent [the policy] developed.”⁷⁷ Some of those policy choices may be made by drafters if the client is unavailable for consultation.

In addition, drafters may not always have a clear understanding of precisely who is “the client.” At some point in the policy development process, drafters may need to provoke a question-and-answer session regarding approval procedures among the “players” or “stakeholders” if the drafter does not already possess a good understanding of who will evaluate the adequacy or inadequacy of the drafting product. For example, in drafting legislation to establish a framework for “child support” payments, will the drafter be accountable primarily to the interests of state child welfare agencies that may have to dig into their budgets to pay for child care expenses if those costs are avoided by a delinquent parent? Will the drafter’s work be evaluated by a predominantly male legislative body that could prove resistant to child support enforcement devices? Is the draft being prepared at the request of an elected official who ran on a platform of supporting divorced women and their children? The answers to these questions may dictate policy directions as a draft is being developed.

⁷⁶ Robert J. Martineau, *Drafting Legislation and Rules in Plain English* 65 (West Publishing 1991), quoted in Marcello at 2440-2441.

⁷⁷ Robert Martineau, *Drafting Legislation and Rules in Plain English*, quoted in Marcello at 2440-2441.

Whatever complications may arise, the “first principle” of legislative drafting is a sound one: Drafters should let clients make policy decisions and may not usurp that power themselves. Drafters are intimately involved in the policy development process, but they do not “own” it. Clients should make the policy choices, and drafters should then embody those choices in well-drafted legislative instruments.

Appendix III

Outline for Explanatory Memorandum – Form & Structure

Draft legislation rarely informs all readers of all the possible issues it seeks to address. Therefore, drafters are encouraged to prepare Explanatory Memorandum to accompany the draft law. Below is an outline for preparing an Explanatory Memorandum.

Explanatory Memorandum **Draft Law on _____**

I. Scope of the Draft-law

This section is a general overview of what the draft law will regulate. It should address the following matters: (a) the purpose of the law; (b) the objectives the law seeks to achieve or the problem the law seeks to resolve; and (c) how the law will achieve the objective or resolve the problem.

II. Need for the Draft-law

The explanation of the need for the draft law is very important for the decision makers to understand the importance of such draft law for the legal system. The possible gaps in the legal system or the need for amending the existing legislation by identifying and explaining the difficulties in its implementation are very important to be explained in this section.

III. Addressed issues at this Draft-law

This section outlines a series of policy considerations or choices that should be addressed prior to finalizing the law. Many laws that are drafted present policy considerations that may not have been fully understood when the initial draft was prepared or were understood but not fully addressed in the draft law. This section is reserved to raising these issues and, if appropriate, presenting lawmakers with policy choices.

IV. Aim of the Draft-law

The aim of the draft law is very important for policy makers. Therefore this section shall present as clearly as possible what the law will achieve. This would include references to the needs of the law and how the law will address those needs once adopted.

V. Content of the Draft-law

This section is the heart of the memorandum. Its purpose is to provide the reader with information related to the principal sections of the draft law. Note this is not a section-by-section analysis nor is it simply a restatement of the law. The purpose is to brief the reader on the most critical portions of the law and, in particular, how those portions will achieve the objectives of the law or solve the problem the law is addressing. For example, the drafter might write as follows: “Chapter 3 is the critical portion of the draft law. The provisions in this chapter seek to achieve the following . . . Key elements of this chapter include the following . . .”

VI. Importance of the Draft-law

This section should present the policymakers a clear picture regarding the importance of the proposed draft law. The government and other institutions have their own priorities. Therefore it has to be made clear as to why it is important and how urgent the adoption of such draft law is.

VII. Novelties and enhancement of the Draft-law

This section is reserved for the novelties the proposed draft law will bring once is adopted and promulgated. Therefore, if you want the policymakers to endorse your initiative this is the best part of explaining the benefits of having such new law in force. Special attention must be paid to the targeted group(s) the new law is addressed to. The section helps the institutions proposing the new law in convincing the decision-makers.

VIII. Reviewing of Draft-law in Ministerial level

The section is reserved for the preliminary outcomes of the research done at the Ministerial level, including an expected timeline of the drafting process of the draft law. This section should be linked with the alternative proposed by simply concluding that all the analyzes done at the ministerial level lead to the conclusion that the suggested alternative is the most appropriate for improving the legal framework of that particular field, including a better implementation of the other related laws.

IX. Drafting the draft-law in compliance with article 36 of the Rules of Procedures of the Kosovo Government.

This is a sort of general statement for the process of the draft law, which shall include the reference to the relevant rules of procedure for completing the draft law. Thus this section has to include a statement of whether such law is or is going to be drafted in compliance with those rules.

Appendix IV

Sample of Concept Document – Form & Structure

I. Required decision

This section of the Concept Document involves a general explanation regarding the decision to be taken, such as amending an existing legislation or drafting a new law, including a short explanation.

II. Reviewed alternative

There are a number of alternatives to be considered before suggesting adoption of a policy decision. Therefore this section should include an explanation of the alternatives considered, such as drafting secondary legislation, the *status quo*, improving or amending the existing primary legislation.

III. Recommended alternative and reasoning

Each alternative suggested in the above section should be explained by presenting the advantages and disadvantages thereof.

IV. The cost of the recommended alternative

Under this section at least the approximate financial implications, if there are any, for the suggested alternative should be presented, including the possible financial resources.

V. Expected impacts

There are a number of the impacts the new law will have. Nevertheless, this section should present the most important impacts the suggested alternative will have in the legal system and in the implementation of the law.

VI. Harmonization with EU legislation

Each law, or other legal act, suggested by the concept document should include the main references to the *acquis communautaire* and the way the new legislative act will be harmonized.

VII. Main result of consultations

This section shall include the opinions of the main stakeholders consulted during the research phase of the proposal. If there have been other opinions against the alternative proposed in the proposal they should be presented as well. Therefore a comprehensive overview of the opinions collected shall be presented herein.

VIII. Implementation plan

Depending on the circumstances and on the suggested alternative a number of follow up activities for the implementation of the newly proposed legislation shall be presented in this section.

IX. Note for communication

It is very important to draft legislation in cooperation with other stakeholders expected to be influenced by the new legal act. Therefore herein a communication can be

addressed to those institutions and stakeholders that need to be involved in drafting the legal act itself.

Appendix V

Sample Financial Impact Assessment (FIA)

1. Title of proposal	2. Budgetary organisation:			
3. Name of the contact and position	4. Details of contact			
5. Purpose of application/action which is proposed (which is the recommendation):				
6. Describe how these recommendations will support the Priorities of the Government and Ministry				
7. Financial Implications:	(000 euro)			
	Current year	Year 2	Year 3	Year 4
A. Total costs of the proposal				
Wages & Per diems				
Goods & Services				
Subventions & Transfers				
Capital				
Total:	0.00	0.00	0.00	0.00
B. Approved budgetary allocation linked with the proposal	0.00	0.00	0.00	0.00
Wages & Per diems				
Goods & Services				
Subventions & Transfers				
Capital				
Total:				
C. Deviation from the approved budgetary allocation (A-B)	0.00	0.00	0.00	0.00
Wages & Per diems				
Goods & Services				
Subventions & Transfers				
Capital				
Total:				
D. Increase/ Decrease of generation of incomes (+/-)	0.00	0.00	0.00	0.00
E. Part of increase/decrease which is proposed to be kept by budgetary organisation	0.00	0.00	0.00	0.00
F. Does there exist potential resources of support by donators?	0.00			
Resource: _____		No		
8. Net increase/decrease of the number of staff		Will be the same structure		
9. Which guarantees, loans, or other actual obligations or or occasional one will be created for the government?				
10. Is proposal in accordance with the Memorandum of Economic and Fiscal Policies, signed in November 2005? If no, provide an explanation.				
11. Describe if this form is associated with the narrative description of the base for calculations of costs/ incomes presented above:				
YES ___ ; (If Yes, then attach it to the form) YES NO ____.				

12. Approval/Date:

Signature of the Permanent
Secretary or Chief of Budgetary
organisation

Day / Month /Year

Day / Month /
Year

13. Certificate by the Ministry of Finance that above provided assessments are accurate.

Signature

____/____/____
Day / Month / Year

14. Additional comments by the Ministry of Economy & Finance:

Appendix VI Regulatory Impact Assessment

I. What is RIA?

RIA is a procedure for recognizing and carrying out a comparative evaluation of the impact of regulations that are either planned, or that have already entered into force. RIA is designed to

- Promote export-aided development of alternative regulations and a comparative assessment of their impact;
- Examine draft legislation in accordance with defined criteria such as cost-effectiveness and transparency; and
- Allow an ongoing or a restricted point-in-time evaluation of the tangible impacts of regulations that have entered into force (probationary testing).

II. Where to apply?

Three RIA modules have been derived from the requirements specific to differing stages of the legislative process:

- Prospective RIA (pRIA) is a future-oriented impact assessment procedure based on alternative regulations.
- Concurrent RIA (cRIA) is a future-oriented procedure based on drafted legislation.
- Retrospective RIA (rRIA) is a backward-looking procedure based on a legal provision that has already entered into force.

These three modules can be used as a continuous, uninterrupted procedure or applied individually.

Form of Regulatory Impact Assessment (RIA)	
1. Initial phase for the RIA:	
	a. From a department in the Ministry: Name of the department:
	Others: Government Legal Strategy Plan dated:
	Others:
2. Analysis of the Regulatory Area:	
a.	description of the Regulatory Area
b.	analysis of the problem: <div style="margin-left: 200px;">aa. current situation:</div> <div style="margin-left: 200px;">aa. current Legal Situation:</div>
c.	Analysis of the system Interdependencies
d.	analysis of goals to be achieved measures: or, no measures identified
3. Development of Regulatory Alternatives (In Compliance with the Acquis Communautaire):	
4. Development of Possible Scenarios (Regarding Regulatory Area):	
a.	Scenario: <i>Status Quo</i>
b.	Scenario: Improvement of the status quo
c.	Scenario: Impairment of the status quo
5. Selection and preparation of appropriate instruments:	
a.	Experts and norm-addressees discussion:
Name of the Experts:	

<p>d. analysis of goals to be achieved</p>	<p>Which measures might advance the attainment of these defined goals</p>
<p>3. Development of Regulatory Alternatives</p>	
<p>(In Compliance with the Acquis Communautaire)</p>	<p>Example:</p>
<p>Regulatory Alternative: Status Quo</p>	
<p><i>Regulatory Alternative:</i></p>	
<p><i>Regulatory Alternative:</i></p>	
<p><i>Regulatory Alternative:</i></p>	
<p>4. Development of possible Scenarios (Regarding the Regulatory Area)</p> <p>a. <i>Scenario: Status Quo</i></p>	<p>Example:</p>
<p>b. <i>Scenario: Improvement of the Status Quo</i></p>	
<p>c. <i>Scenario: Deterioration of the Status Quo</i></p>	
<p>5. Selection and preparation of appropriate Instruments (For the assessment of the Regulatory Alternatives mentioned in No.3)</p> <p>a. Experts and norm-addressees discussion:</p>	

<i>Name of the Experts:</i>	
<i>Name of the norm-addressees:</i>	
<i>Date of discussion:</i>	
<p>a. <i>Cost-effectiveness estimation</i> (Necessary for all Regulatory Alternatives)</p> <p>Indicate the value of the Regulatory Alternative on a scale of 1 to 5 1- excellent and 5-poor and the cost- Estimation with an amount in Euro</p>	.
Example:	
<p>aa. <i>Regulatory Alternative:</i> Status Quo</p> <p>Effectiveness: 5 Cost-Estimation: 0</p>	
<p>bb. <i>Regulatory Alternative:</i></p> <p>Effectiveness: 5 Cost-Estimation: 0</p>	
<p>cc. <i>Regulatory Alternative:</i></p> <p>Effectiveness: 3 Cost-Estimation: 50</p>	
<p>dd. <i>Regulatory Alternative:</i></p> <p>Effectiveness: 1 Cost-Estimation: 35</p>	
<p>6. Result of the Ministerial Working Group:</p> <p>Draft Law.....</p>	Example: