

Legislative techniques syllabus

<https://hdl.handle.net/2144/29873>

"Downloaded from OpenBU. Boston University's institutional repository."

ministerial drafters could then formulate appropriate subsidiary regulations adapted to specific locales and time periods. To ensure timely revision as circumstances change, the bill also prescribes ways by which the ministry should involve farmers and other relevant actors in monitoring and evaluating the regulation's implementation.

3. The delegation of legislative powers: Its desirability and its constitutionality. Seemingly by-passing democratically-elected legislatures, in most of the world administrative law-making has a bad name. Because legislatures cannot readily adapt rules to local circumstance and the changes that time erodes in them, however, no alternative lies at hand. The problem becomes how to tame the beast, not how to slay it. We discuss this below, under the heading of "the control of discretion."

The problem becomes one of ensuring that administrative law-making becomes transparent, accountable and participatory -- a matter for an adequate Administrative Procedures Act. The advantages of drafting intransitive bills constituted an important lesson of the project.

The research report for an intransitive bill should describe the complexity of the difficulties addressed, and show that adequate research to provide explanations and adequate solutions for each is beyond the bill's scope.

III. The Research report: Outlines.

A. An outline for a research report for a transitive bill.

1. Note: This outline follows that suggested in "Memorandum of Law" article, appended to the outline.

AN OUTLINE FOR A RESEARCH REPORT

Introduction

The legislative theory that underpins this Outline appears in the Memorandum of Law article. That theory rests on the basis that law addresses behaviors. To write a bill that actually changes problematic behaviors requires a deep knowledge not only of the relevant law, but also of the relevant social facts that condition the choices of the law's addressees (the 'role occupants'). We learn about those facts through research. Without adequate research, a law will succeed in changing behaviors in desirable ways only by accident. That proposition has two corollaries. (1) Drafters need a guide to that research. (2) Those who read the bill must have an understanding of the research on which it rests, or else they cannot assess the quality of the bill. A drafter can

satisfy both of these corollaries by writing a research report that follows the dictates of a soundly-based theory of legislation. The outline that follows, therefore, becomes at once a guide to writing a research report, and a guide to the research on which that report rests; in effect, it constitutes the operational face of the theory of legislation set out in the 'Memorandum of Law' article.

This outline does not constitute a strait-jacket. Some projects do not easily fit its form. Use it not as a rigid command about how to write your Research Report, but only as a possible form. In using this outline, remember that only rarely will a drafter have something to say under every heading. (For example, in explaining bureaucratic misbehavior, frequently it will seem obvious that the bureaucrats knew of the law. That likely leaves the drafter with nothing to say under the heading "communication" in the explanations section). Sometimes the "difficulty" and "explanations" sections dominate the Research Report, with the solution pretty obvious and straightforward; sometimes, the opposite occurs.

Note that the outline includes "mini-introductions" and "mini-conclusions" in a variety of places. This serves to remind you of the importance of signposts in your writing -- that is, indications to the reader of the logic of your argument.

OUTLINE FOR A RESEARCH REPORT: TRANSITIVE BILLS

I. Introduction

- A. Brief statement of the problem and the solution.
- B. Fitting your problem into the larger picture

[Frequently, the problem consists of a small part of a much larger one -- for example, a bill concerning alternative fuel vehicles addresses only a part of the problem of air pollution. The introduction can briefly show that relationship].

- C. A brief statement of the methodology you propose to use
- D. "Table of contents" paragraph, outlining the contents of the memorandum.

II. The difficulty

- A. Mini-introduction, outlining the content of this section, and where the difficulty fits into the problem-solving methodology.
- B. What constitutes the difficulty.

- C. Foreign experience concerning the nature of the difficulty.
- D. The specific behaviors that constitutes the difficulty.
- E. Whose behaviors constitute the difficulty.
- F. Who benefits and who suffers from the present situation.
- G. Mini-conclusion.

III. Explanations

- A. Mini-introduction.
- B. The state of the law as it presently bears on the behaviors identified in the difficulty section.
- C. Foreign experience in explaining the behaviors at issue.
- D. Non-legal factors affecting those behaviors [in almost every case, one or another of these ends up a mere empty box. Do not feel obliged to say something about a factor mentioned here if, after thinking about it, you have nothing to say].
 - 1. Opportunity and capacity
 - 2. Communication of the law
 - 3. The interest of the role-occupants ("incentives").
 - a. How do potential sanctions affect the behavior at issue?
 - 4. How does the process of decision-making by the role-occupants affect decision? [especially important where the role-occupants make their decisions as part of a complex organization].
 - 5. Ideology of the role occupants as that affects behavior.
- E. Sanctioning institutions and their behaviors.

[This calls for a ROCIPPI analysis of sanctioning institutions. Because sanctioning institutions always have a complex organization, this requires consideration especially of the process of decision-making by the sanctioning institution].
- F. Mini-conclusion.

IV. Proposal for solution

A. Mini-introduction

B. Alternative proposals for solution, described.

[Note that each solution must address the causers revealed in the explanations].

1. Solutions drawn from the law and experience of other jurisdictions ("comparative law").
2. Solutions drawn from the literature on the subject (e.g. law review articles).
3. Other solutions, that you dream up but reject.

C. Your preferred solution

[Explain how it will address each cause revealed in the explanation. Discuss winners and losers under your solution. Discuss sanctions].

D. Implementing your solution.

E. Costs and benefits of your solution compared with --

1. alternative solutions (or at least the leading candidates); and
2. the status quo.
3. [Include foreign experience with costs and benefits of analogous laws].

F. Monitoring performance: How your solution provide for monitoring the implementation of your bill?

1. [Include foreign experience in monitoring implementation of analogous laws].

G. Mini-conclusion.

V. Conclusion

B. AN OUTLINE FOR THE RESEARCH REPORT: INTRANSITIVE LAWS.

Introduction

I. Demonstrating that this must be an intransitive bill: The complexity of many role occupants and many different sorts of

behaviors, many different sets of explanations, the uncertainty of the explanations and hence the uncertainty of the solution and the consequent need to experiment, and the rapidity of change in the sector, all argue that to include precisely-drawn norms addressed to individual addressees in the bill would make the bill too complex and too difficult to adapt to complex and changing circumstances and to new information and knowledge as the implementation of the bill itself produces them.

A. The difficulty

1. Mini-introduction

2. The difficulty as it appears on the surface (e.g., the extent of pollution arising from mining).

3. Whose behavior, emphasizing the number of role occupants involved.

4. What behavior, emphasizing the complexity of the behaviors involved and their changing character.

5. Mini-conclusion

B. Explanations

1. Mini-introduction

2. Explanations for one set of role occupant behaviors, emphasizing how these differ from region to region, or from circumstance to circumstance, and the uncertainty of the explanations propounded.

3. Mini-conclusion

C. Conclusion: The bill must be an intransitive bill.

II. The problem of the structure of the agency.

A. Difficulty: In most countries, at present the existing structures do not provide for adequate attention to the problem by a responsible organization charged with continually doing the necessary research to generate new rules adapted to changing circumstances, many role occupants, and disparate circumstances across the country.

1. Usually, the only institution charged with having a concern with the sector will be the relevant ministry (i.e., the ministry is the role-occupant).

2. The behavior: the ministry does little or nothing about the sector in question.

B. Explanations:

1. ROCCIPI analysis.
2. Implementing institutions, if any: What is their behavior, and why?

C. Solution: A bill creating an agency with power to promulgate the necessary detailed rules.

1. Alternative solutions
 - a. Comparative law and experience
 - b. Other
2. Implementing agencies, if any, to ensure that the new intransitive agency does its job.
3. Define procedures for new agency in generating rules.
 - a. Require high degree of participation by those affected and citizens generally.
4. State the criteria for substantive rules.
 - a. Power to address issues concerning a specified group of role occupants, with respect to particular behaviors (i.e., the power of the agency always is limited to addressing a defined class of social problems).
 - b. Criteria for rules (usually determined by substantive considerations arising out of the particular discipline involved in defining the substantive problem -- e.g. mining engineering for rules concerning the mining environment; or the economics of pensions, for a pension bill).
 - c. Limits on power to impose solutions (frequently only 'common sense' limits on power to impose a penalty, or to impose a tax or fee).
5. Social cost-benefit analysis of proposed solutions, as compared with doing nothing.
6. How the preferred solution will address the causes of the difficulty revealed in the explanations.
7. Provisions for monitoring the implementation of the proposed bill.