



C) Frequent Problems Related to Different Parts of the Law:

To avoid the worst mistakes every lawmaker who drafts a law but as well any commentator on the draft law should always keep in mind that every part of the law must be compatible with **human rights** and with the principle of the **separation of power**. From these principles derive the four minimum requirements that the law has to

- **be just,**
- **general,**
- **abstract** and
- **precise.**

Finally there are some formal and logical requirements that make sure the law can really rule and fulfill its conflict solving function:

A law itself must be

- **consistent,**
- **free of contradictions** and
- **compatible with other laws.**

The problems and mistakes that severely can flaw any draft law usually arise from disrespect to these principles. For that reason a critical commentator should always focus his/her interest on the question if the draft law violates one of these principles.

Going through the four main parts of a law one will detect the following main problems with these principles:

I) Goals and Definitions:

1) Unconstitutional Purpose of the Law:

The lawmaker can not just follow any purpose but only the purpose to protect the human rights of all persons involved in the conflict that the law shall solve. Already at this early stage of a law the lawmaker must check if the purpose of the law (as it is mostly mentioned in Article 1 of a law) is compatible with the idea of human rights.

Example:

A law that explicitly aims at abolishing free trade unions or at imposing a duty on all associations to register would be incompatible with the related human rights of free association. It is a basic human right to found trade unions and exercise trade union activities and it is also a basic part of the freedom of association that the state has to offer registration mechanism only to ensure associations to gain legal personality but not to use forced registration as a means of state surveillance and control²¹.

²¹ see also KID's Study Text Book Part I "Critical Legal Thinking – Human Rights", pages 72 and 73



2) Unprecise or Missing Definitions:²²

Definitions must be precise if they shall contribute to the purpose of the law to solve a conflict.

If they are worded vaguely they will not solve conflicts but create new conflicts. This again would violate human rights because the conflict between the human rights of the different involved persons is not solved but will be even exacerbated. Moreover unclear terms open the door for arbitrary interpretation by the government or the judiciary which would violate the principle of separation of power as the law shall limit and instruct these two powers about conflict solutions but not to leave it up to them to solve the conflict on their own.

The same is true if necessary definitions are missing at all.

Examples:

- A Street Traffic Law would create trouble if it left it unclear whether the term “traffic participant” only refers to motorized traffic participants or whether it also refers to pedestrians. As a consequence the criminal responsibility and civil liability of pedestrians would be left unclear, too. A car driver, for example, could suffer a financial loss if s/he can not hold a pedestrian responsible for damage to his/her car caused by the pedestrian’s disrespect for traffic rules.
- The Fishery Draft Law in Chapter II. Article 4 does not give a detailed and clear definition what sort of territories shall be included in the term “fisheries domain”.²³

3) The Problem of the Personal Scope of the Law: Equality

The right of equality (Article 31 II CC) is one of the most important human rights. Therefore the lawmakers must make sure that the law treats persons or groups of persons alike as long as there are no differences between them that justify a different treatment. On the one hand this is assured by the general formulation of the law which has to apply to **all** citizens. On the other hand the description of the addressees of the law (=definition of the personal scope of the law) must guarantee that there are no unjustified exceptions of the law for some persons or groups of persons.

Example:

According to the definition given in Article 3 VI Weapon Draft Law “Civilians” are all those citizens who are not “Officials” or “Uniformed members of the armed services”. As the prohibition of the possession and the use of arms (Article 4 Weapon Draft Law) only applies to “civilians” there is a very wide ranging exception from this prohibition for “officials”. This raises the question why officials in general should be able to possess and use firearms. Is there really such a big difference between civilians and officials concerning the use of weapons that such an **unequal treatment** of this group is justified? No, there is no general need for officials to use weapons. They should remain unarmed as anybody else. Only very few officials like for example prison guards or judicial police with a special task to enforce law may need a weapon to conduct their office properly.

²² For a detailed lesson on how to use definitions see: Patricia Baars, “Legislative Drafting” (August 2001), pages 83 – 90

²³ See Oxfam Report (16th December 2002): “Synthesis of Comments received through Consultation Process”, page 3